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## H Motions, Pleadings and Filings

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United States District Court,  
S.D. New York.

James BAEZ, Petitioner,  
v.

UNITED STATES OF AMERICA, Respondent.

**No. 02 Civ. 8703(DAB), 96 CR. 257(DAB).**

Jan. 19, 2005.

### MEMORANDUM & ORDER

BATTS, J.

\*1 Petitioner James Baez ("Baez"), proceeding *pro se*, moves to vacate his sentence pursuant to 28 U.S.C. § 2255 ("Section 2255"). For the following reasons, the Court hereby DENIES Petitioner's motion in all respects.

#### I. BACKGROUND

Petitioner Baez was arrested on December 27, 1995 following a narcotics investigation. An Information was filed on April 11, 1996, charging Baez with narcotics conspiracy and the use of a firearm during a crime of violence. Baez entered into a cooperation agreement ("Cooperation Agreement") with the Government on April 11, 1996, in which he agreed to plead guilty to the two-count Information. On April 22, 1996, Petitioner Baez entered a plea of guilty before Magistrate Judge Francis. The plea was accepted by this Court.

The Court received an *ex parte* letter from the Government, dated June 10, 1997, where the Government advised the Court that it would not be

filing a sentencing departure motion, pursuant to 5K1.1 of the Sentencing Guidelines. Upon the Government's request, the Court issued a warrant for Baez's arrest; Baez was arrested and remanded on June 13, 1997.

In preparation for sentencing, the Probation Office issued an initial Presentence Investigation Report ("PSR") on August 22, 1997. The Probation Office recommended a sentence of 147 months' imprisonment, the bottom of the guideline range for a Criminal History Category of 1 and an offense level of 29. The Probation Office reached the offense level by reducing the base offense level by 3 levels for acceptance of responsibility and an additional 2 levels for "safety valve" eligibility.

By an Order, dated October 3, 1997, the Court directed the parties to appear on October 22, 1997 to address concerns it had with respect to the initial PSR. At the conference, defense counsel, Elizabeth Fink ("Fink") stated that she intended to hire a forensic psychiatrist for the purpose of preparing a downward departure motion. At the end of the conference, the Court ordered the Probation Office to amend the initial PSR to provide more information on the offense conduct.

Baez filed a motion for downward departure on July 19, 1999, on grounds of aberrant behavior, extraordinary acceptance of responsibility and efforts at rehabilitation and substantial assistance to the authorities. The Government did not take a position with respect to the motion but noted that because of the offense charged and pled to by Baez, he was ineligible for "safety valve" consideration. The Probation Office submitted a second PSR taking into account this information and deleted all references to "safety valve" eligibility. The revision resulted in a guideline range of 120 to 135 months' imprisonment, followed by 60 months' imprisonment, reflecting the statutory mandatory minimum sentence of 180 months.

Baez filed a second downward departure motion on December 7, 1999, which contained essentially the

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same grounds for departure as the first motion. Defense counsel also attached an affirmation where she stated that "During the negotiations preceding his guilty plea, Mr. Baez was assured that, if his attempts at obtaining a 5K1.1 letter were unsuccessful, he would be able to file a motion for downward departure because the mandatory minimum would be waived by 'safety valve' treatment." (Fink Aff. of Dec. 7, 1999 ¶ 3.) Baez requested the Court to consider a downward departure based upon the Government's alleged waiver of "safety valve" ineligibility, or in the alternative, grant an evidentiary hearing to determine the validity of his plea. Defense counsel repeated these requests in a letter dated January 28, 2000.

\*2 In an Opinion, dated February 15, 2000, the Court denied Baez's downward departure motion for a sentence below the statutory minimum, and denied the motion to withdraw his plea. The Court stated that it did not have the power to depart below the statutory mandatory minimum. The Court found that Baez was not misled to believe that he was safety valve eligible, and further found that nothing in the record demonstrated that the Government had stated Baez would be eligible for the safety valve.

Baez's sentencing was adjourned due to the reassignment of defense counsel. [FN1] Daniel Meyers was appointed by the Court and sentencing proceeded on April 17, 2000. At sentencing, the Court considered another affirmation submitted by Elizabeth Fink, in which she stated that "At the time of Mr. Baez's guilty plea in 1996, there was no mention of the safety valve because it was assumed by all that Mr. Baez ... would not be subject to the guidelines pursuant to § 5K1.1 U.S.S.G." (Fink Aff. of Apr. 14, 2000 ¶ 2.) According to Fink, safety valve was first mentioned in the initial PSR; she and the Assistant United States Attorney, Bennett Capers, then discussed a motion for downward departure based upon safety valve. "At no time during this conversation or any other did Mr. Capers assert that the mandatory minimum applied in this case, making a downward departure motion inapplicable." (Id. ¶ 3.)

FN1. Elizabeth Fink informed the Court that she would no longer be able to represent Mr. Baez due to her involvement

in other litigation.

At the sentencing, Baez moved again for reconsideration of the safety valve eligibility, an evidentiary hearing on the same issue, or withdrawal of his plea. The Court denied these requests and sentenced Baez to the mandatory minimum sentence of 180 months, to be followed by five years on supervised release.

Baez filed a notice of appeal. Glenn Garber represented Baez on the appeal, raising three arguments: (1) that Baez's plea was involuntary, (2) that Elizabeth Fink was ineffective as counsel, and (3) that the District Court erred in denying his request for a hearing. The Second Circuit affirmed Baez's conviction. *See United States v. Baez*, 2001 WL 327062 (2d Cir. Apr. 3, 2001). Baez petitioned the Supreme Court for writ of certiorari, which was denied on October 1, 2001. *See Baez v. United States*, 534 U.S. 905 (2001).

Baez filed this Section 2255 Petition to vacate his judgment and sentence on October 31, 2002. The Government submitted an opposition to the Petition by a letter, dated January 21, 2003. Elizabeth Fink submitted an affidavit, dated September 28, 2002, in this matter.

## II. DISCUSSION

### A. Relief Under Section 2255

To vacate or set aside a conviction under Section 2255, a petitioner must demonstrate a "constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a 'fundamental defect which inherently results in complete miscarriage of justice.'" *Graziano v. United States*, 83 F.3d 587, 590 (2d Cir.1996) (quoting *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir.1995)).

\*3 The Second Circuit has made it clear that "[s]ection 2255 may not be employed to relitigate questions which were raised and considered on direct appeal." *Riascos-Prado v. United States*, 66 F.3d 30, 33 (2d Cir.1995) (quoting *Cabrera v. United States*, 972 F.2d 23, 25 (2d Cir.1992)). A Section 2255 petition containing new factual premises than those offered in the direct appeal may still be considered as requesting the same "ground"

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for relief, and thus, to have been thoroughly litigated on direct appeal. *See Riascos*, 66 F.3d at 33-34. *See also Sanders v. United States*, 373 U.S. 1, 16 (1963) ("[I]dential grounds may often be proved by different factual allegations."). "Petitioner is also procedurally barred from raising new claims in his 2255 petition that were not raised at trial or on direct appeal." *Muyet v. United States*, No. 03 Civ. 4247, 2004 WL 2997866, at \*2 (S.D.N.Y. Dec. 27, 2004).

Such procedural bars may only be overcome by a showing of cause and prejudice, *see Schlup v. Delo*, 513, U.S. 298, 318 (1995), or where petitioner alleges ineffective assistance of counsel. *See Massaro v. United States*, 538 U.S. 500, 503-04 (2003).

Petitioner asserts an ineffective assistance of counsel claim and also argues that he should be allowed to withdraw his guilty plea because he did not understand the nature and consequence of his plea.

#### B. Ineffective Assistance of Counsel Claim

Where a petitioner has raised an ineffective assistance of counsel claim on direct appeal, the Second Circuit has concluded that such claims asserted in a Section 2255 petition must be treated as separate claims, constituting separate "grounds" for purposes of the *Williams* rule. *See Riasco*, 66 F.3d at 35 (stating that in *Williams v. United States*, 731 F.2d 138 (2d Cir.1984), the Second Circuit held that the same claim cannot be raised again in a successive petition). The Second Circuit has made this exception because an ineffective assistance of counsel claim often "requires consideration of matters outside the record on direct appeal." *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir.1993); *Abbamonte v. United State*, 160 F.3d 922, 925 (2d Cir.1998) (court found that ineffective assistance of counsel claim constituted separate ground as it was based on information not in the trial record).

If the claim was not raised on direct appeal, "failure to [do so] ... does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massero*, 538 U.S. at 509 (2003).

An alleged violation of the right to effective assistance of counsel under the Sixth Amendment, arising from deficient or incompetence of a defendant's counsel, is evaluated under the demanding standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Id.* at 689. Under the *Strickland* test, Petitioner must demonstrate that (1) his "representation fell below an objective standard of reasonableness," 466 U.S. at 688, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Unless Petitioner shows both these elements, it cannot be said that his conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" in violation of the Sixth Amendment. *Id.* at 687; *see also Bell v. Cone*, 122 S.Ct. 1843 (2002) (Petitioner's claim of ineffective assistance at sentencing failed the *Strickland* test where petitioner did not assert counsel had failed to subject prosecution's case to adversarial testing.).

\*4 In general, a court determines whether the prejudice suffered by a petitioner as a result of a lawyer's allegedly deficient performance has "reached the constitutional threshold" by examining the "cumulative weight of error." *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir.2001). Regardless of the accused's relationship with his lawyer, "[i]f counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance." *United States v. Cronin*, 466 U.S. 648, 657 (1984). "There is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

In his ineffective assistance of counsel claim, Petitioner claims that his counsel, Elizabeth Fink was ineffective because: (a) she objected to the original sentence of 147 months recommended in

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the initial PSR filed by the Probation Office and caused a great deal of delay in his case; (b) she misinformed Baez that he was eligible for safety valve consideration; (c) she did not memorialize any agreements she made with the government regarding Baez's sentence; and (d) she did not include information regarding safety valve eligibility in the agreement she encouraged Baez to sign.

In his direct appeal, Baez made only one of the above arguments, namely, that his attorney failed to inform him prior to the plea that he was not eligible for the safety valve and would be subject to the mandatory minimum sentence. The Second Circuit found that

While it is unclear exactly what Baez's attorney told him and when, both the plea agreement and the magistrate judge correctly informed Baez of the actual sentencing consequences of his pleading guilty. In light of the plea allocution and the plea agreement signed by Baez, there is no basis for his claim that he was not aware of the statutory mandatory minimum and its applicability to him or that but for his counsel's alleged errors, he would not have pleaded guilty.

*Baez v. United States*, 2001 WL 327062 (2d Cir. Apr. 3, 2001).

The other grounds Baez asserts in support of his ineffective assistance of counsel claim are merely more detailed alleged errors committed by defense counsel in connection with his safety valve eligibility and the statutory mandatory minimum sentence, arising out of information in the trial record. The affidavit submitted by Elizabeth Fink does not provide any new information that would alter this Court's numerous decisions regarding the safety valve issue, or the Second Circuit's affirmation of Petitioner's conviction. In this latest affidavit, Fink states that at the time he pleaded guilty, Petitioner believed he was safety valve eligible based on conversations she had with Petitioner and conversations with the government. This is virtually the same statement she made in the first affirmation she submitted to the Court, dated December 7, 1999.

\*5 The Second Circuit found that despite Elizabeth Fink's representations concerning Petitioner's understanding of his safety valve eligibility, the plea

allocution and plea agreement show that Petitioner was informed of his sentencing exposure. Petitioner raises no new factual premises that would lead to a different result than that reached by the Second Circuit. The Court finds that Petitioner's ineffective assistance of counsel claim is procedurally barred.

Even if the claim were not procedurally barred, the claim fails because Petitioner has not made a sufficient showing that Elizabeth Fink's representation of him fell below an objective standard of reasonableness, or that the alleged wrongs committed by Elizabeth Fink would have altered the outcome in his case. Petitioner states that "it is clear that but for the defense counsel's ineffectiveness the defendant would have been sentenced to 147 months [recommended in the initial PSR] and not for 180 months." (Pet.'s Mem. of Law at 4.) Petitioner is mistaken; the Report issued by Probation is never binding on the Court, especially when the Report has incorrectly stated the applicable sentence. As this Court stated in its Opinion, dated February 15, 2000, it did not have the authority to depart below the statutory mandatory minimum where Petitioner was found to be ineligible for safety valve consideration.

### C. Involuntary Plea Claim

Petitioner argues that he should be allowed to withdraw his guilty plea because his plea was induced by promises of his attorney and the Government's representation that he would not be subject to the mandatory minimum sentence of 180 months. In addition, he asserts that he was "instructed by his attorney to answer the Court's questions so that the Court could accept his guilty plea." (Pet.'s Mem. of Law at 3-5.)

In his direct appeal, Petitioner sought to withdraw his guilty plea, on the basis that the district court failed "to ask him if his willingness to plead guilty was predicated on discussions with the prosecutor and defense counsel." 2001 WL 327062, at \*1. The Second Circuit found that the district court adequately questioned Baez under Rule 11(d) of the Federal Rules of Criminal Procedure: "The district court complied with Rule 11(d) by determining that Baez's plea was made on the basis of a plea agreement, reviewing the terms of that agreement, and ascertaining that the agreement was not induced

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by threats or inappropriate promises." *Id.*

Petitioner's first argument in support of his request to withdraw his plea, that the plea was induced on promises and representations by the Government, was clearly litigated on direct appeal and is procedurally barred. Petitioner has not submitted any new facts that would justify reexamining this issue.

Petitioner's second claim that his attorney instructed him to answer all the Court's questions is procedurally defaulted because he failed to raise this argument on direct appeal. Alternatively, reading the petitioner liberally, *see Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) ("[T]he pleadings of a *pro se* plaintiff must be read liberally and should be interpreted to raise the strongest arguments that they suggest." ) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)), Petitioner's claim may also be construed as an ineffective assistance of counsel claim. Even so construed, however, Petitioner's claim fails. In his plea colloquy before Magistrate Judge Francis, Petitioner stated that he was making the plea voluntarily and of his own free will. Petitioner submits no factual bases to support this new assertion. The law's strong presumption in favor of finding that counsel's conduct "fell within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and the lack of any facts to support this new claim, leads the Court to conclude that there was no constitutional violation.

#### D. *United States v. Booker*

\*6 On January 12, 2005, the Supreme Court announced its decision in *United States v. Booker*, 534 U.S. \_\_\_, 2005 WL 50108 (2005). In its decision, the Supreme Court held that the Sentencing Guidelines are no longer mandatory, and that "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 2005 WL 50108, at \*15. Though it is not yet clear what effect *Booker* will have on habeas petitions, the Court nevertheless will consider possible issues raised by *Booker* in the Petitioner's case.

During his plea, Petitioner allocated to kilograms of cocaine and heroin. After further inquiry, Petitioner acknowledged that at least 5 kilograms of unspecified drugs were involved. (Trans. dated Apr. 22, 1996.) Because Petitioner did not specify an amount of either drug, despite what the Government claims in Paragraph 32 of the PSR, the Court will use 5 kilograms of cocaine to determine the proper Offense Level.

According to the Sentencing Guidelines, 5 kilograms of cocaine places Petitioner at an Offense Level of 32. Subtracting 3 levels for acceptance of responsibility brings Petitioner to a final Offense Level of 29. With a Criminal History Category of I and an Offense Level of 29, the appropriate sentence under the Sentencing Guidelines would be within the guideline range of 87-108 months. However, because Petitioner did not qualify for the safety valve, that amount of cocaine, by statute, imposes on him a mandatory minimum sentence of 10 years for the drug conspiracy charge. 21 U.S.C. § 841(b)(1)(A). In addition, the firearm charge carries a statutory requirement of five years, consecutive to any other term of custody. 18 U.S.C. § 924(c)(1).

Accordingly, because Petitioner's sentence was imposed based on statutory mandates, and not Sentencing Guideline enhancements, the holdings of *Booker* are of no avail to Petitioner.

### III. CONCLUSION

For the foregoing reasons, Petitioner's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 based on claims of ineffective assistance of counsel and involuntary plea is DENIED.

The Clerk of the Court is DIRECTED to close this case and remove it from the docket.

SO ORDERED.

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