W.D.N.Y.
97-cv-336
92-cr-159
Arcara, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of February, two thousand eighteen.

Present:

John M. Walker, Jr.,
Gerard E. Lynch,
Denny Chin,
Circuit Judges.

Darryl Johnson, AKA Reese,

Petitioner-Appellant,

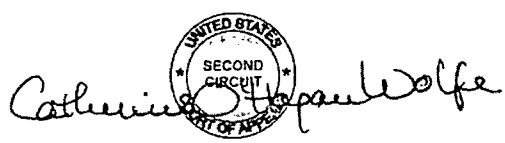
v. 17-2424

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habcas [motion], in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

-vs-

92-CR-159C
97-CV-336C

DARRYL JOHNSON,

Defendant-Petitioner.

INTRODUCTION

Presently before the court is petitioner Darryl Johnson's application for writ of habeas corpus, which he has brought pursuant to 28 U.S.C. § 2255. Item 1022. On March 2, 1998, the court granted the Government's motion to dismiss Johnson's petition as untimely under § 2255, as that section was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Item 1051. Johnson appealed (Item 1053) and the Second Circuit subsequently remanded the petition for further proceedings. Item 1054 (citing Mickens v. United States, 148 F.3d 145 (2d Cir. 1998)).

BACKGROUND

Johnson's underlying criminal conviction and sentence came as a result of proceedings held before this court in the mid-1990s. In January 1995, Johnson–on advice of counsel–executed a plea agreement in which he admitted to many serious crimes, including: organizing and participating in the murder of three (3) persons, attempting to murder seventeen (17) other persons, kidnaping one (1) person, and distributing between

50 and 150 kilograms of cocaine. See Item 902, pp. 24-31. As part of his plea, Johnson also agreed that he would serve multiple, consecutive life sentences. See id. at 19-22. As a result, in late March 1995 this court sentenced Johnson to eight life sentences, five of which were to run consecutively and three of which were to run concurrently. See Item 1078, Exh. D.

FACTS

Before entering into the plea agreement, Johnson appeared before the court with his attorneys and participated in a colloquy on January 9, 1995. See Item 918; see also Fed. R. Crim. P. 11. At the hearing, Johnson, his attorneys and the court listened to the Government's detailed recitation of the underlying facts supporting each count and a careful explanation of all counts to which Johnson was pleading guilty. See Item 918, pp. 3-40. When counsel for the Government concluded his recitation, the court addressed Johnson in order to verify that he understood that he was waiving several Constitutional rights and that he would serve several life sentences without the chance of parole. See id. at 44. The court asked Johnson more than once whether he held any lingering doubts or concerns about the Government's recitation or the consequences of the plea agreement.

> The Court: Now, we are here this afternoon to make a decision and the decision is – it's certainly an important one for you, and I don't want to go about this in any hurried fashion. I know that we have been at it for some time, but I again stress that if there [sic] [are] any questions that you want to put to any of your attorneys, if you want to take a break here this afternoon and discuss it with them, that's fine as far as I'm concerned. Is there anything further you want to talk to them about?
>
> Johnson: No.

. . .

The Court: . . . [F]rom what you know about all of this case and from your conversations with your lawyers, what [the government] said here . . ., is that substantially what occurred?

Johnson: Generally, yes.

Item 918, pp. 44-46. Johnson went on to admit that any reasonable jury would have convicted him on the counts set forth in the indictment. Id. at 46. Next, the court advised Johnson that he was waiving his Sixth Amendment right to a jury trial. The court explained:

> Now, if you waive jury trial here and plead guilty that will be the end of the matter. [T]oday is the day to make up your mind . . . . [F]rom now on I will not consider any application for withdrawal of plea. That is why I said to you several times that if you have any questions, . . . now is the time to bring up the questions and talk it over with your attorneys . . . . If you plead guilty and you are sentenced within the terms of the plea agreement there is no appeal to any higher court.

Item 918, p. 47. At that point, the Government pointed out that Johnson's rights at trial would have included "the right to examine witnesses, cross-examine witnesses, . . . [the right to assistance of counsel] . . ., and also the right against self-incrimination which Mr. Johnson is also waiving by his plea." Item 918, pp. 48-49. The court confirmed for Johnson that the Government had accurately described the rights he would have had at trial: "Right. Well, certainly [the Government] is right, that during the course of trial your attorneys would have the right to cross-examine the witnesses, make argument to the Court and to the jury about your innocence, and those things if [sic] [you] plead guilty will not be heard . . . ." Item 918, p. 49.

The court then recited each count of the indictment, and Johnson entered a guilty plea on each count. See Item 918, pp. 49-53. After the hearing, Johnson and his attorneys formally executed the plea agreement. Item 902. Among other things, the plea

agreement provided that Johnson "voluntarily and knowingly waived . . . his right to bring any collateral attack against his conviction or sentence, except for a claim of ineffective assistance of counsel." Id. at 34-35.

DISCUSSION

First and foremost, the court takes note of the fact that Johnson has waived his right to bring a collateral attack of his conviction and sentence. See Item 902, p. 35. This court's research revealed no Second Circuit decision explicitly addressing whether a petitioner may waive the right to pursue § 2255 relief in a plea agreement.[1] The Second Circuit did shed light on this issue, however, when it held that a petitioner's ability to bring a § 2255 petition should be considered in light of a waiver of the right to appeal a sentence. In United States v. Pipitone, 67 F.3d 34 (2d Cir.1995), the Court of Appeals held that a habeas petitioner is procedurally barred from using a § 2255 motion to sidestep a plea agreement that stipulates that he will waive his right to appeal a sentence falling within (or below) the agreement's stipulated range. See id. at 39; see also Trujillo v. United States, 1993 WL 227701, at *3 (S.D.N.Y. June 21, 1993) ("[I]t is an anathema to allow one who has voluntarily waived his right to appeal to attack the sentence collaterally.").

In this case, there is no dispute that Johnson waived his right to seek post-conviction relief under § 2255 when he executed the plea agreement. Moreover,

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[1]The Fifth, Sixth, and Ninth Circuits have held that a defendant's knowing and voluntary waiver of § 2255 relief is enforceable. See Watson v. United States, 165 F.3d 486, 489 (6th Cir.1999); United States v. Wilkes, 20 F.3d 651, 653 (5th Cir.1994); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.1993). In Wilkes, the Fifth Circuit found "no principled means of distinguishing such a waiver from the waiver of a right to appeal." 20 F.3d at 653.

Johnson entered into that agreement on the advice of three experienced criminal defense attorneys. Based on the previously cited authority, Johnson's waiver of his right to bring a collateral attack on his conviction and sentence is enforceable. See Pipitone, 67 F.3d 34; Watson, 165 F.3d at 489; Wilkes, 20 F.3d at 653; Abarca, 985 F.2d at 1014. As a result of this waiver, Johnson is foreclosed from bringing the present § 2255 petition, except to the extent that he claims ineffective assistance of counsel. See Item 902, p. 35.

However, even assuming *arguendo* that Johnson did not effectively waive his right to bring a collateral attack on his conviction and sentence, his petition fails on its merits.

I. The Rule 11 Claim

By his supporting papers, Johnson has focused most intently on his Rule 11 claim. See Item 1080 (arguing only the Rule 11 claim).[2] Johnson claims that his conviction and sentence are constitutionally defective because this court failed to observe the procedural requirements of Rule 11 of the Federal Rules of Criminal Procedure during the previously described plea colloquy of January 9, 1995. Indeed, Rule 11(c) requires courts to render certain advice to a defendant before accepting a guilty plea.

> [T]he court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, . . . (3) that the defendant has the right to plead not guilty . . . , the right to be tried by a jury and that at trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination . . . .

Fed.R.Crim.Pro. 11(c) (emphasis added).

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[2]Johnson also raised several other theories of relief in his initial memorandum of law. Item 1025. Each of these arguments will be addressed in turn. See infra.

Rule 11 also provides that courts may depart from the Rule's prescribed procedures. Consequently, "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h). Such insubstantial variances from the formal requirements of Rule 11 are generally deemed to be harmless error. See Fed. R. Crim. P. 52(a) (defining harmless error as "[a]ny error, defect, irregularity or variance which does not affect substantial rights"). Furthermore, such formal or technical violations of Rule 11 are cognizable on collateral attack only if they create: (1) an error which is jurisdictional or constitutional; (2) a defect which results in a "miscarriage of justice;" (3) an omission inconsistent with the "rudimentary demands of fair procedure;" or (4) "extraordinary circumstances where the need for the remedy afforded the writ of habeas corpus is apparent." United States v. Timmreck, 441 U.S. 780, 783-84 (1979).

Johnson's claim falls far short of the standards set forth in Timmreck. While the court did depart from Rule 11(c)(3)'s formal requirement of explicitly informing the defendant of his right against compelled self-incrimination, see Item 1025, pp. 3-4, the court expressly endorsed the Government's description of the right against compelled self-incrimination. See Item 918, p. 49. Therefore, Johnson was certainly made aware of the fact that he was waiving his right against compelled self-incrimination. The fact that the court itself did not recite the precise language of Rule 11(c)(3) represents harmless error. During the colloquy, all of the rights enumerated in Rule 11 were discussed substantially. There was no substantial impairment of Johnson's rights as a result of how he learned of his right against compelled self-incrimination. Moreover, Johnson has failed to allege or

prove any specific prejudice resulting from the technical non-compliance with Rule 11–i.e., that he would not have accepted the plea had the significance of the waiver been more explicitly explained to him. See, e.g., United States v. Laura, 667 F.2d 365, 372 (3d Cir. 1981). For these reasons, collateral relief is not available to Johnson based on his Rule 11 claim. See Timmreck, 441 U.S. at 785 (quoting Hill, 368 U.S. at 429).

II. Double Jeopardy Claim

Next, Johnson appears to argue that his sentence violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. See Item 1025, p.7. Johnson states that the court "impermissibly sentenced him on both the [RICO-continuing criminal enterprise charge] and the Conspiracy charge. . . . [Since Johnson] was indicted for conspiracy first and the conspiracy was used to establish the C.C.E.[,] the Court was . . . barred under the double jeopardy clause from sentencing the Movant as such." Id. p. 7.

The court rejects Johnson's claim that his sentence violates the Double Jeopardy Clause. The plea agreement reveals that, through his attorneys, Johnson bargained for, agreed to, and received the very sentence that he is now serving. Compare Item 902, pp. 19-21 with Item 1078, Exh. A, pp. 5-33 (Third Superseding Indictment).

III. Ineffective Assistance of Counsel Claim

The court rejects Johnson's argument that his conviction and sentence are constitutionally defective because he received ineffective assistance of counsel. This court is certainly aware that Johnson was represented by three capable and experienced

criminal defense attorneys throughout the underlying proceedings: Alan Goldstein, Daniel Griebel, and Ken Murray. Further, Johnson expressed no concern with the quality of his legal representation when the court gave him several opportunities to do so during the plea colloquy of January 1995. See Item 918, pp. 46-49. Finally, Johnson himself acknowledged in the plea agreement that he was "fully satisfied" with the representation that his attorneys had provided him. Item 902, p. 37. For these reasons, Johnson's claim to ineffective assistance of counsel is rejected.

IV. Prosecutorial Misconduct

Johnson also claims that his pretrial detention amounted to an intentional and unconstitutional interference with his Sixth Amendment right to counsel. See Item 1025, pp. 11-12. Johnson's claim is without merit. Indeed, it was the court that ordered his pretrial detention after hearing detailed evidence regarding the serious threat he continued to pose to the public.

CONCLUSION

For the reasons stated above, petitioner's § 2255 petition is dismissed. In addition, for the reasons stated above, the Court concludes that petitioner has failed to make a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), and accordingly denies a certificate of appealability.

The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. Coppedge v. United States, 369 U.S. 438 (1962).

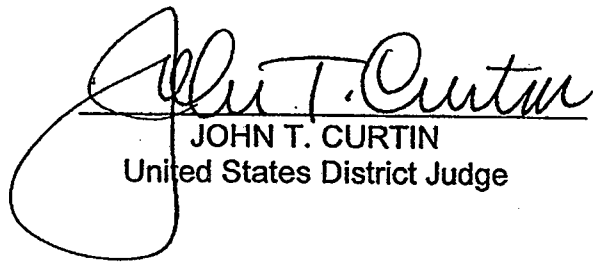
Petitioner must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within thirty (30) days of the date of judgment in this action. Requests to proceed on appeal as a poor person must be filed with the United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

IT HEREBY IS ORDERED, that petitioner's § 2255 motion is dismissed;

FURTHER, that a certificate of appealability is denied; and

FURTHER, that leave to appeal as a poor person is denied.

So ordered.



JOHN T. CURTIN
United States District Judge

Dated: April 12, 2001
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