

**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 10th day of August, two thousand eighteen.

United States of America,

Appellee,

v.

Brandon Lisi,

Defendant - Appellant.

ORDER

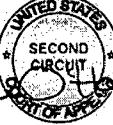
Docket Nos: 14-1976, 14-2164

Appellant, Brandon Lisi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

14-1976-cr (L)
United States v. Lisi

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second
2 Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley
3 Square, in the City of New York, on the 20th day of December, two thousand
4 seventeen.

5
6 PRESENT: GERARD E. LYNCH,
7 RAYMOND J. LOHIER, JR.,
8 *Circuit Judges,*
9 CHRISTINA REISS,
10 *Chief District Judge.**

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12 UNITED STATES OF AMERICA,

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14 *Appellee,*
15
16 v. Nos. 14-1976-cr, 14-2164-cr
17
18 BRANDON LISI,
19
20 *Defendant-Appellant.***
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* Chief Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

** The Clerk of Court is directed to amend the official caption as set forth above.

1 FOR APPELLANT:

BRUCE ROBERT BRYAN, Syracuse, NY.

2 FOR APPELLEE:

3 ANNA M. SKOTKO (Michael D.
4 Lockard, *on the brief*), Assistant
5 United States Attorneys, *for* Joon H.
6 Kim, Acting United States Attorney
7 for the Southern District of New
8 York, New York, NY.

9

10 Appeal from a judgment of the United States District Court for the

11 Southern District of New York (Naomi Reice Buchwald, *Judge*).

12 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,

13 AND DECREED that the judgment of the District Court is AFFIRMED in part and

14 the appeal is DISMISSED in part.

15 Brandon Lisi appeals from a judgment of the District Court (Buchwald, L.)

16 sentencing him principally to a term of 78 months' imprisonment after denying

17 his motion to vacate his guilty plea. We assume the parties' familiarity with the

18 facts and record of the prior proceedings, to which we refer only as necessary to

19 explain our decision to affirm in part and dismiss in part.

20 We affirm the District Court's holding that Lisi failed to raise a significant

21 question as to "the voluntary and intelligent nature of [his] decision to plead

22 guilty." United States v. Arteca, 411 F.3d 315, 320 (2d Cir. 2015). The unsworn

23 statement of David Touger, Esq., who replaced Randy Zelin, Esq. as Lisi's counsel

1 after the guilty plea, fails to show that Zelin had an actual or per se conflict of
2 interest that rendered the guilty plea involuntary. Even after the Government
3 stressed that Touger had not provided an affidavit to support his vague
4 allegations of conflict of interest, Touger failed to address the deficiency.
5 Second, our review of the record, including the Government's explicit
6 representation prior to Lisi's plea that its "commitment" to meet with Lisi's
7 counsel in advance of any new charging decisions was not part of Lisi's
8 agreement to plead guilty, persuades us that the Government's expression of such
9 a commitment did not "induce" Lisi's guilty plea. Finally, we conclude that
10 Zelin's Sentencing Guidelines advice to Lisi was not incorrect, see U.S.S.G.
11 § 2B1.1, cmt. n.3(E), and that in any event Lisi has not demonstrated that Zelin's
12 advice, even if inaccurate, affected his decision to plead guilty.¹ Although the
13 better practice may be to hold a hearing, the District Court acted within its
14 discretion in denying Lisi's motion to withdraw his guilty plea and his request for

¹ Lisi also argues that he received ineffective assistance of counsel from Touger in connection with the motion to withdraw his guilty plea, because Touger failed to submit evidence that he was prejudiced by ineffective assistance on the part of Zelin. But any such claim would depend on the existence of such evidence, none of which appears in the present record. Accordingly, any such claim would have to be made by a petition pursuant to 28 U.S.C. § 2255. See *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) (holding that "ineffective assistance claims are appropriately brought in § 2255 petitions . . . because resolution of such claims often requires consideration of matters outside the record on direct appeal").

1 an evidentiary hearing on the ground that "counsel's contentions conflict with the
2 history of this case," and were in part conclusory. Special App'x 28; see id. at 26;
3 United States v. Gonzalez, 647 F.3d 41, 57 (2d Cir. 2011).

4 With respect to Lisi's challenges to his sentence, we dismiss that portion of
5 his appeal as barred by a valid appellate waiver. See United States v. Arevalo,
6 628 F.3d 93, 98 (2d Cir. 2010). In his plea agreement, Lisi agreed in writing not to
7 challenge any term of imprisonment less than 97 months or any forfeiture or
8 restitution order of \$7 million or less. At his plea hearing, Lisi acknowledged
9 that he understood the terms of the plea agreement, including the appellate
10 waiver. Lisi's term of imprisonment, amount of restitution, and amount of
11 forfeiture are within the range that he agreed not to challenge on appeal. As for
12 Lisi's argument that the appeal waiver is unenforceable, we review this
13 unpreserved challenge for plain error, see United States v. Cook, 722 F.3d 477, 479
14 (2d Cir. 2013), and conclude that none of the "very circumscribed" exceptions to
15 the validity of an appeal waiver applies, see United States v. Gomez-Perez, 215
16 F.3d 315, 319 (2d Cir. 2000).

17 We have considered Lisi's remaining arguments and conclude that they are
18 without merit. For the foregoing reasons, the judgment of the District Court is

1 AFFIRMED in part and the appeal is DISMISSED in part.

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

Catherine O'Hagan Wolfe



**Additional material
from this filing is
available in the
Clerk's Office.**