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3 **UNITED STATES COURT OF APPEALS**
4 **FOR THE SECOND CIRCUIT**

5
6 August Term, 2010

7
8 (Submitted: November 17, 2010

9 Decided: December 21, 2010)

10 Docket No. 09-0576-cr

11
12 UNITED STATES OF AMERICA,

13
14
15 *Appellee,*

16
17 —v.—

18
19 JOSE LOPEZ AREVALO, also known as PAYASO, JAVIER IRHETA, also known as JUAN CAMPOS,
20 also known as SPEEDY, HECTOR PORTILLO, also known as CHUCKY, also known as ANGEL, LUIS
21 BONILLA, also known as CHOFRE, LUIS VALLE BLANCO, also known as ANVIL, FRANCISCO
22 VALLE BLANCO, also known as WARDEN HUNTER, also known as SILENT, NELSON MAURICIO
23 PORTILLO ALAS, also known as SNACK, WILMER VINDELL BETANCO, also known as DAFFY, also
24 known as NICA, VICTOR MEJIA,

25
26 *Defendants,*

27
28 MANUEL VIGIL, also known as JUNIOR,

29
30 *Defendant-Appellant.*

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32
33 Before: JACOBS, *Chief Judge*, KEARSE and STRAUB, *Circuit Judges*.

34
35 Defendant-Appellant Manuel Vigil appeals from a judgment of the United States District
36 Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*) convicting him of
37 conspiracy to commit murder in aid of racketeering and of using a firearm during a crime of

1 violence. The government argues that Vigil’s appeal should be dismissed in light of his waiver
2 of the right to appeal his sentence. Because we conclude that Vigil’s waiver of the right to
3 appeal precludes his claim of Federal Rule of Criminal Procedure 32 error and his claim based on
4 the absence of a Spanish interpreter during a portion of his sentencing proceeding, we dismiss the
5 appeal.

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7 _____
8 JASON A. JONES, Assistant United States Attorney (Susan Corkery,
9 Assistant United States Attorney, *on the brief*), for Loretta E.
10 Lynch, United States Attorney, Eastern District of New York,
11 Brooklyn, NY, *for Appellee*.

12 LAURIE S. HERSHEY, Manhasset, NY, *for Defendant-Appellant*.
13 _____
14

15 STRAUB, *Circuit Judge*:

16 Defendant-Appellant Manuel Vigil appeals from a judgment of the United States District
17 Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*) convicting him,
18 following a guilty plea, of conspiracy to commit murder in aid of racketeering, in violation of 18
19 U.S.C. § 1959(a)(5), and of using a firearm during a crime of violence, in violation of 18 U.S.C.
20 § 924(c)(1)(A)(i). The government argues that Vigil’s appeal should be dismissed on the ground
21 that Vigil’s waiver of the right to appeal his sentence forecloses his claims on appeal. Because
22 we conclude that Vigil’s claim of Federal Rule of Criminal Procedure 32 error and his claim
23 based on the absence of a Spanish interpreter during a portion of his sentencing proceeding are
24 foreclosed by Vigil’s appeal waiver, we dismiss the appeal.
25

1 **BACKGROUND**

2 On March 14, 2008, Manuel Vigil was charged in a superseding indictment that alleged
3 that Vigil, as a member of La Mara Salvatrucha, a gang also known as “MS-13,” conspired to
4 murder unspecified members of the Bloods gang. The indictment also charged two of Vigil’s co-
5 defendants, who were also alleged MS-13 members, with murdering Pashad Gray, a member of
6 the Bloods gang, on or about December 24, 2006.

7 Vigil entered into a plea agreement with the government on May 8, 2008. The agreement
8 stated that Vigil would plead guilty to counts seven and eight of the superseding indictment,
9 which charged Vigil with conspiracy to commit murder in aid of racketeering, in violation of 18
10 U.S.C. § 1959(a)(5), and with using a firearm in connection with a crime of violence, in violation
11 of 18 U.S.C. § 924(c)(1)(A)(i). The agreement included an appeal-waiver provision that
12 provided that Vigil “agrees not to file an appeal or otherwise challenge . . . the conviction or
13 sentence in the event that the Court imposes a term of imprisonment of 195 months or below.”

14 On May 8, 2008, Vigil pleaded guilty to counts seven and eight of the superseding
15 indictment before a magistrate judge in the District Court. A Spanish interpreter was present for
16 the entirety of the plea proceeding. Using the interpreter, Vigil confirmed that the plea
17 agreement had been translated into Spanish and that he had carefully reviewed the agreement
18 with his lawyer before signing it. Vigil also stated that he understood that he was waiving his
19 right to appeal any sentence of 195 months’ incarceration or below. During his plea allocution,
20 Vigil testified that the factual basis for his guilty plea was that, sometime in the summer of 2006,
21 he rode in a car with other MS-13 members, one of whom Vigil knew was carrying a gun, while

1 looking for a member of the Bloods gang to kill. Vigil did not admit to actually killing a member
2 of the Bloods gang, nor to killing Pashad Gray.

3 Vigil's presentence report, prepared on October 24, 2008, calculated Vigil's Federal
4 Sentencing Guidelines range as 240 months. The report stated that Vigil fired a weapon during
5 the conspiracy in question and that he also should be held accountable for the murder of Pashad
6 Gray. Both Vigil and the government objected to the presentence report's Guidelines-range
7 calculation. By letter dated February 4, 2009, the government informed the Court that the
8 presentence report was "factually incorrect" because the government had no evidence either that
9 Vigil, or anyone else, fired a weapon during the charged conspiracy, or that Vigil was in any way
10 involved in Pashad Gray's murder. Accordingly, the government informed the Court that the
11 government and Vigil agreed that the proper total Guidelines range was 157 to 181 months'
12 incarceration.

13 Vigil was sentenced by the District Court on February 5, 2009. At the beginning of the
14 sentencing proceeding, no Spanish interpreter was present. During this portion of the
15 proceeding, the government again informed the District Court that both the government and Vigil
16 disagreed with the presentence report's Guidelines-range calculation. The Court responded:
17 "Okay. All right." The Court then discussed the proper Guidelines range with the parties and
18 briefly discussed whether Vigil was seeking a below-Guidelines sentence. The Court then asked
19 Vigil if he had read the presentence report and if he was ready for sentencing. Vigil responded
20 "[y]es" to both questions, without the aid of an interpreter. At that point, Vigil's counsel told the
21 Court that he believed that Vigil had used a Spanish interpreter in the past and stated that: "I

1 think it might be a little bit better under the circumstances, this is a contested situation, it might
2 be best if we had an interpreter.” The District Court then paused the proceedings until a Spanish
3 interpreter was present. After resuming, the Court repeated its two questions with the aid of the
4 interpreter and ultimately sentenced Vigil to a total of 157 months’ incarceration. The District
5 Court made no determinations or findings of fact concerning the disputed portions of the
6 presentence report and did not append any determinations to the presentence report, as required
7 by Rule 32(i)(3)(B) and (C).

8 Vigil filed a pro se notice of appeal on February 10, 2009. On March 9, 2009, the
9 government moved to dismiss Vigil’s appeal in light of the appeal waiver contained in Vigil’s
10 plea agreement. In response, Vigil’s trial counsel sought to be relieved by filing a brief
11 purportedly in accordance with *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000), and
12 *Anders v. California*, 386 U.S. 738 (1967), but we deemed that brief deficient. After Vigil’s
13 counsel failed to comply with our subsequent orders to cure the flawed *Anders* brief, we directed
14 the Clerk to appoint new appellate counsel. We also denied the government’s motion to dismiss
15 without prejudice to renewal upon the appointment of new counsel. Vigil’s new appellate
16 counsel then filed a brief on appeal asking that the case be remanded either for resentencing or
17 for the issuance of a new or amended presentence report.

18 On appeal, Vigil argues that the District Court violated Rule 32(i)(3) by not making a
19 determination on the disputed portions of the presentence report. Further, he argues that his
20 claim of Rule 32 error should not be foreclosed by his waiver of the right to appeal. Vigil also
21 argues that he is entitled to resentencing because there was no Spanish interpreter present at the

1 beginning of his sentencing proceeding. In response, the government argues that Vigil’s appeal
2 should be dismissed in light of Vigil’s appeal waiver, or alternatively, that the District Court’s
3 judgment should be affirmed. Because we conclude that Vigil’s appeal waiver forecloses his
4 claim of Rule 32 error and his claim regarding the absence of a Spanish interpreter, we dismiss
5 the appeal.

6
7 **DISCUSSION**

8 I

9 Rule 32(i)(3) of the Federal Rules of Criminal Procedure provides that

10 [a]t sentencing, the court:

11

12 (B) must—for any disputed portion of the presentence report or
13 other controverted matter—rule on the dispute or determine that a ruling is
14 unnecessary either because the matter will not affect sentencing, or
15 because the court will not consider the matter in sentencing; and

16 (C) must append a copy of the court’s determinations under this
17 rule to any copy of the presentence report made available to the Bureau of
18 Prisons.

19
20 Generally, if a district court fails to strictly comply with Rule 32’s requirements, the case must be
21 remanded and resentencing may be required. *See, e.g., United States v. Williamsburg Check*
22 *Cashing Corp.*, 905 F.2d 25, 29 (2d Cir. 1990); *United States v. Bradley*, 812 F.2d 774, 782 (2d
23 Cir.), *cert. denied*, 484 U.S. 832 (1987).

24 In this case, the government does not contend that the District Court complied with Rule
25 32(i)(3) with regard to the disputed portions of the presentence report. Rather, the government
26 argues that Vigil’s appeal based on the alleged Rule 32 error is foreclosed by the appeal-waiver

1 provision in Vigil's plea agreement. Vigil responds that his appeal waiver only prevents him
2 from attacking the merits or length of his sentence, not from raising a claim that the District
3 Court committed an error in violation of Rule 32(i)(3). Alternatively, Vigil argues that the
4 alleged errors contained in the presentence report will negatively affect the terms of his
5 imprisonment and, therefore, the District Court's procedure constituted a violation of his due
6 process rights. As a result, Vigil argues that we should at least remand this case for the limited
7 purpose of the issuance of a new or amended presentence report.

8 We have not yet decided whether a defendant's waiver of the right to appeal a sentence
9 includes a waiver of the right to appeal alleged Rule 32 errors. There are very few published
10 decisions from our sister circuits addressing the issue. In *United States v. Petty*, 80 F.3d 1384,
11 1387–89 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit held that the defendant's
12 appeal waiver did not preclude his claim that he and his counsel did not have enough time to
13 review his presentence report before sentencing, in violation of the predecessor to Rule
14 32(i)(1)(A). On the other hand, at least two courts of appeals for other circuits have found it
15 sufficiently obvious that appeal waivers do apply to Rule 32 errors to dispose of cases that raised
16 the issue by unpublished opinions.

17 The Court of Appeals for the Sixth Circuit was faced with a similar claim to the one
18 raised here in *United States v. Washington*, 83 F. App'x 110, 111 (6th Cir. 2003) (unpublished
19 decision). In that case, the defendant argued that he was entitled to a resentencing because the
20 district court noted the defendant's objections to the presentence report but failed to make
21 findings on the disputed facts or to remove the contested information from the presentence

1 report. The court rejected the defendant’s argument that his appeal waiver did not apply to Rule
2 32 errors, because the defendant’s “objections were clearly part of the sentencing phase of [the]
3 case” and he “clearly waived any right to appeal his sentence, which includes issues relating to
4 the [district] court’s compliance with Rule 32 in fashioning his sentence.” *Id.*; accord
5 *Chaleunsak v. United States*, Nos. 3:07-0416, 3:05-00096, 2008 WL 2697551, at *6 (M.D. Tenn.
6 July 1, 2008). Similarly, the Court of Appeals for the Seventh Circuit suggested in an
7 unpublished decision that a defendant’s claim on appeal that the district court violated her rights
8 under Rule 32(e)(2) by scheduling the sentencing hearing only 29 days after she received the
9 presentence report was foreclosed by the defendant’s waiver of the right to appeal any sentence
10 within the statutory maximum. *United States v. Moore*, 97 F. App’x 674, 675 (7th Cir. 2004)
11 (unpublished decision); cf. *United States v. Borders*, 243 F. App’x 182, 183–84 (7th Cir. 2007)
12 (unpublished decision) (ruling that claim of Rule 32(h) error was foreclosed by defendant’s
13 appeal waiver).

14 We hold as a matter of first impression that Vigil’s waiver of the right to appeal his
15 sentence applies to his claim of Rule 32(i)(3) error on appeal. In this case, Vigil’s appeal waiver
16 provides that he “agrees not to file an appeal or otherwise challenge . . . the conviction or
17 sentence in the event that the Court imposes a term of imprisonment of 195 months or below.”
18 Vigil’s waiver of his right to “challenge . . . [his] . . . sentence” plainly includes a waiver of his
19 right to claim errors arising out of the District Court’s crafting of Vigil’s sentence. Because the
20 conduct Vigil challenges—the District Court’s alleged failure to make findings regarding the
21 disputed portions of the presentence report at sentencing—was clearly part of the sentencing

1 phase of Vigil’s case, Vigil’s challenge is within the scope of his appeal waiver and is foreclosed.

2 To the extent our decision differs from the published decision of the Court of Appeals for
3 the Ninth Circuit in *Petty*, we find that case unpersuasive and inapposite. In that case, the court
4 found that the district court’s Rule 32 error was “a substantial violation which arose only after
5 the [appeal waiver] was signed and which could not have been anticipated.” *Petty*, 80 F.3d at
6 1387. The fact that the alleged error in this case occurred after Vigil’s appeal waiver was signed
7 does not render Vigil’s waiver void. There is no evidence that the parties here intended Vigil’s
8 waiver to apply only to events or errors that occurred before it was signed. Moreover, while we
9 find no need to determine whether the alleged error in this case could have been anticipated at the
10 time Vigil signed the plea agreement, we note that claims of Rule 32(i)(3) error such as the one
11 alleged here are hardly rare. *See, e.g., United States v. Kee*, 29 F. App’x 625, 627 (2d Cir.)
12 (summary order) (remanding because of error under the predecessor to Rule 32(i)(3)), *cert.*
13 *denied*, 537 U.S. 871 (2002); *see also United States v. Williams*, 612 F.3d 500, 515–17 (6th Cir.
14 2010) (remanding because of Rule 32(i)(3) error); *United States v. Ross*, 502 F.3d 521, 531 (6th
15 Cir. 2007) (same), *cert. denied*, 552 U.S. 1281 (2008).

16 Vigil argues that even if his claim of Rule 32 error is included within the scope of his
17 appeal waiver, we should nevertheless remand the case for the limited purpose of the issuance of
18 a new or amended presentence report. Vigil claims that the existing presentence report violates
19 his rights under the Due Process Clause of the Fifth Amendment because the disputed portions of
20 the presentence report will negatively impact the terms and conditions of his imprisonment,
21 resulting in the imposition of additional penalties without due process of law. As a result, Vigil

1 urges us to find his appeal waiver unenforceable, at least for the purposes of a remand for an
2 amended presentence report.

3 Waivers of the right to appeal a sentence are presumptively enforceable. *United States v.*
4 *Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000). “Knowing and voluntary appellate waivers
5 included in plea agreements must be enforced because, if they are not, the covenant not to appeal
6 becomes meaningless and would cease to have value as a bargaining chip in the hands of
7 defendants.” *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004) (internal quotation marks
8 omitted). As a result, we find waivers unenforceable only in very limited situations, “such as
9 when the waiver was not made knowingly, voluntarily, and competently, when the sentence was
10 imposed based on constitutionally impermissible factors, such as ethnic, racial or other
11 prohibited biases, when the government breached the plea agreement, or when the sentencing
12 court failed to enunciate any rationale for the defendant’s sentence.” *Gomez-Perez*, 215 F.3d at
13 319 (internal citations omitted).

14 We conclude that the alleged error here does not render Vigil’s appeal waiver void.
15 There is no question that defendants’ interest in the accuracy of presentence reports continues
16 even after sentence is imposed. *See United States v. Ursillo*, 786 F.2d 66, 68–69, 69 n.3 (2d Cir.
17 1986) (discussing the importance of the presentence report to the Bureau of Prisons). Indeed,
18 this post-sentencing interest motivated the enactment of the predecessor to Rule 32(i)(3) in 1983.
19 The Advisory Committee Notes to the 1983 amendments to Rule 32 point out that if district
20 courts fail to rule on disputed portions of presentence reports, “it is possible that the Bureau [of
21 Prisons] . . . , in the course of reaching a decision on such matters as institution assignment,

1 eligibility for programs, or computation of salient factors, will place great reliance upon factual
2 assertions in the report which are in fact untrue.” That is precisely the harm that Vigil alleges
3 will occur here.

4 Nevertheless, Vigil provides no basis for his claim that such a harm rises to the level of
5 the deprivation of liberty without due process of law. It is clear that a district court’s failure to
6 follow the procedural requirements of Rule 32(i)(3) alone does not give rise to a due process
7 violation. *Cf. United States v. Timmreck*, 441 U.S. 780, 783–84 (1979) (noting that technical
8 violations of the Rules of Criminal Procedure do not give rise to habeas corpus relief); *Poor*
9 *Thunder v. United States*, 810 F.2d 817, 822 n.5 (8th Cir. 1987); *Johnson v. United States*, 805
10 F.2d 1284, 1287 (7th Cir. 1986). This is not a case where the defendant was denied due process
11 because he was not given any opportunity to contest the presentence report at his sentencing
12 proceeding. *See United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996) (noting that the Due
13 Process Clause requires that the defendant be afforded some opportunity to rebut the
14 government’s allegations concerning sentencing disputes). Nor is there any basis for Vigil to
15 claim that the District Court relied on inaccurate information in determining his sentence. *See*
16 *generally United States v. Tucker*, 404 U.S. 443, 447 (1972). Rather, the Court heard the parties’
17 objection to the alleged misinformation and ultimately agreed with the parties that the lower
18 Guidelines range should apply, albeit without making an explicit determination that the disputed
19 information would not affect sentencing or that the information was inaccurate.

20 We are aware of no case that has held that the mere existence of inaccurate information in
21 a presentence report, rather than a district court’s reliance on such information in sentencing,

1 constitutes a due process violation or is an error sufficient to void an appeal waiver. As noted
2 above, at least one court that has considered whether an appeal waiver is effective in the face of
3 such an alleged error has upheld the waiver in an unpublished opinion. *See Washington*, 83 F.
4 App'x at 111. While Vigil could potentially suffer adverse consequences related to his treatment
5 in prison as a result of the existence of the information in the presentence report, he has not
6 shown, at this stage, that the potential harm rises to the level of a due process violation.¹
7 Moreover, any potential harm to Vigil is outweighed by the interests underlying the
8 enforceability of appeal waivers. This conclusion is underlined by the ability of the defendant,
9 and arguably the obligation of the government, to bring to the Bureau of Prisons' attention the
10 fact that the government agrees that the disputed information in Vigil's presentence report is
11 inaccurate. Furthermore, to the extent the information in the presentence report causes Vigil
12 problems with the Bureau of Prisons, he can seek to address any issues through the Bureau of
13 Prisons' administrative remedy program. *See* 28 C.F.R. §§ 542.10–.19; *Johnson v. Testman*, 380
14 F.3d 691, 693 (2d Cir. 2004) (describing the administrative remedy program).²

15 For all of these reasons, we hold that Vigil's claim of Rule 32 error is included within the
16 scope of his waiver of the right to appeal his sentence and that the waiver precludes Vigil's

¹ At least one district court in this Circuit has addressed a similar claim and determined that there was no due process violation. *See, Kee v. United States*, Nos. 03 Civ. 9067, 98 Crim. 778, 2004 WL 1542233, at *3 (S.D.N.Y. July 8, 2004) (rejecting defendant's habeas due process claim based on the trial court's failure to rule on disputed portions of the presentence report).

² The Court of Appeals for the Seventh Circuit noted in an unpublished decision that a defendant can seek to correct problems caused by an erroneous presentence report through this administrative remedy program. *United States v. White*, 309 F. App'x 38, 40 (7th Cir. 2009) (unpublished decision).

1 claims on appeal.

2 II

3 In addition to his claim of Rule 32 error, Vigil argues that he is entitled to a remand for
4 resentencing because there was no Spanish interpreter present at the beginning of his sentencing
5 proceeding. This period covered fewer than three pages of substantive discussion in the
6 sentencing transcript. Vigil argues that “he could not understand what was transpiring and could
7 not assist his counsel in any manner” during this time. Vigil argues that the absence of a Spanish
8 interpreter rendered him effectively absent at his sentencing, in violation of Federal Rule of
9 Criminal Procedure 43(a)(3) and the Due Process Clause of the Fifth Amendment. *See generally*
10 *United States v. Agard*, 77 F.3d 22, 24–25 (2d Cir. 1996) (discussing a defendant’s right to be
11 present at sentencing).

12 This claim is also precluded by Vigil’s waiver of the right to appeal. As discussed above,
13 appeal waivers are presumptively enforceable and the exceptions to this rule “occupy a very
14 circumscribed area of our jurisprudence.” *Gomez-Perez*, 215 F.3d at 319. None of the
15 exceptions to this rule applies to the claim here. First, Vigil does not argue, nor could he based
16 on the facts of this case, that his waiver of his right to appeal was unknowingly, involuntarily, or
17 incompetently made. There is no question that a Spanish interpreter was present for the entirety
18 of Vigil’s plea proceeding, during which Vigil confirmed that his plea agreement was translated
19 into Spanish, that he had reviewed the agreement with his lawyer, and that he understood the
20 appeal-waiver provision.

21 Second, there was no constitutional violation that could potentially serve as the basis for

1 an exception to Vigil’s appeal waiver. The extent to which Vigil required an interpreter in the
2 first instance is not clear. Neither Vigil nor his counsel raised any objection to the fact that no
3 interpreter was present at the beginning of his proceeding. Rather, it was only when Vigil’s
4 sentencing colloquy began that Vigil’s counsel stated that he thought “it might be a little bit
5 better under the circumstances” to have an interpreter present for the remainder of the sentencing
6 proceeding. Moreover, Vigil listened and responded to two questions from the Court in English,
7 displaying at least some ability to understand and speak the language. Furthermore, Vigil points
8 to no prejudice that resulted from the absence of the interpreter. During the time the interpreter
9 was absent, the District Court only confirmed with counsel for both parties that the Guidelines
10 range should be lower and that Vigil was in fact seeking a below-Guidelines sentence.³ When
11 the interpreter arrived, the District Court repeated the two questions it had asked Vigil in order to
12 ensure that Vigil had understood. Vigil argues that if an interpreter had been present, he might
13 have asked his lawyer if his presentence report would be amended and, presumably, his lawyer
14 would have sought its amendment. This argument layers speculation upon speculation and is not
15 sufficient to show that any Due Process Clause violation occurred.

16 For all of these reasons, Vigil’s claim based on the absence of a Spanish interpreter is
17 precluded by his appeal waiver.

³ We express no opinion whether, had the interpreter been absent when Vigil’s sentence was orally imposed, *see Agard*, 77 F.3d at 24–25, Vigil’s appeal would be foreclosed by his appeal waiver.

1 **CONCLUSION**

2 For all of the reasons explained above, we conclude that Vigil's waiver of the right to
3 appeal his sentence forecloses his claim of Rule 32 error and his claim based on the absence of
4 an interpreter at his sentencing proceeding. Therefore, we **DISMISS** the appeal.