UNITED STATES OF AMERICA COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	No. 06 CR 243-1
	]	
JORGE TORRES,	]	Honorable Ronald A. Guzman
	]	
Defendant.	]	

DEFENDANT'S CONSOLIDATED MOTION TO RECONSIDER BOTH HIS SENTENCE AND THE CONVICTION BY WAY OF MOTION TO WITHDRAW HIS GUILTY PLEA

COMES NOW the defendant, JORGE TORRES, by and through one of his attorneys, GERARDO S. GUTIERREZ, submits the following motion to reconsider both his sentence and the conviction in the above referenced case, and moves this Honorable Court Withdraw his Guilty Plea. In support of these consolidated motions the defendant states as follows:

Procedural Posture:

This matter is before the Court on additional counsel s Motion to Reconsider both the imposition of his Sentence and the Conviction itself. On April 26, 2006, the Court took the Defendant s guilty plea pursuant to a negotiated plea agreement and following a plea colloquy in open court. On July 25th, 2006 the Court sentenced Mr. Torres to 6 months incarceration. That sentence, however, has not been entered and/or docketed as of this writing.[1] Nevertheless, this

[1]It is hard to tell from the docket sheet alone and from counsel s conversation with opposing counsel for the government whether the actual judgement of guilty was entered back on 4/26/06 or whether, as is this Court s custom, the entry of judgement was deferred until the actual date of sentencing on 7/25/06.

Motion and attached pleadings are timely filed within the 10 day statutory period immediately following said judgement and sentencing order.

Background:

On 4/26/06, Jorge Torres pled guilty to a one count Complaint which charged him with a wire fraud in violation of 18 U.S.C.§§ 1343 and 2. He pled guilty to a negotiated plea which, provided for a Cooperation and/or Substantial Assistance Agreement, vis, motion to be made by the government pursuant to U.S.S.G. Section 5K1.1. Further, the parties agreed to a sentence within the advisory guideline range, and called for an appellate waiver as to both his conviction and the sentenced imposed, so long as it fell somewhere up to and including the statutory maximum of 5 years.[2] The waiver did not apply to a claim of involuntariness, or ineffective assistance of counsel. *Id. at p. 9*

Mr. Torres challenges both the guilty plea and the sentence imposed as falling within the narrow conditions to the waiver exception rule stated above: namely, that his attorney, Ihor Alexander Woloshansky, provided ineffective assistance of counsel during both plea negotiations and at sentencing for reasons discussed below. This Motion and supporting Memorandum follow:

Argument and Analysis:

[A]n unconditional guilty plea waives all non-jurisdictional defects occurring prior to the plea, including Fourth Amendment claims. United States v. Elizalde-Adame, Slip Op 01-1058 (7th Cir. 8/13/01); See United States v. Galbraith, 200 F.3d 1006, 1010 (7th Cir. 2000); United States v. Cain, 155 F.3d 840, 842 (7th Cir. 1998). Fed. R. Crim. P. 11(a)(2) provides that a

[2]See attached Plea Agreement.

defendant may enter a conditional plea of guilty "with the approval of the court and the consent of the government, . . . reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion." Elizalde-Adame, Slip Op 01-1058 at 2. However, in order to preserve an issue for appeal by means of a conditional plea, "the plea must precisely identify the pretrial issues which the defendant wishes to preserve for review," Id.; Cain, 155 F.3d at 842, and the defendant must obtain both the approval of the district court and the "unequivocal acquiescence" of the government. Id.; See United States v. Markling, 7 F.3d 1309, 1312 (7th Cir. 1993); United States v. Yasak, 884 F.2d 996, 999 (7th Cir. 1989).

Elizalde-Adame, is a case where the defendant, through counsel, filed a motion to suppress which was denied during a pre-trial hearing, and which counsel failed to preserve it during an unconditional plea. The Court of Appeals was without jurisdiction to hear her appeal since no one bothered to preserve her right to appeal the sentence imposed. Even though in the unconditional plea contained no explicit language barring her from appealing her sentence or the manner in which it was imposed, Elizalde-Andame was barred from raising the issue of her Fourth Amendment right to privacy.

Here we have a case of an unconditional plea that was entered into between the United States Government through its attorney, the Attorney for the Defendant, Mr. Woloshansky, and the defendant himself, Jose Torres. Here there was an appellate waiver, a waiver of the Statute of Limitations and a Waiver of the defendant s right to a Grand Jury. Conspicuously missing from all of this was Mr. Torres Waiver to be represented by a competent attorney who was familiar not only with federal criminal defense, but a federal criminal defense in light of the voluminous new contours of post Booker legal practice. Counsel failed to file even a cursory Section 3553(a)

analysis prior to his sentence, as we submit, is required under post Booker jurisprudence. Even before Booker, our Seventh circuit has suggested that it is per se ineffective assistance of counsel not to file a verified motion to suppress in instances where there is a colorable argument, as here, where Mr. Torres statements to authorities should have been suppressed. More on this in a minute. But even before we get to the Strickland v. Washington, 466 U.S. 668 (1984) test for ineffective assistance, even before this Court need address the voluntariness or knowing prong of his plea agreement, before the issue of Mr. Woloshansky s level of representation is brought to bear on these proceedings, the issue of withdrawing his plea agreement needs to be reined in for a closer examination.

In the four corners of Mr. Torres plea agreement, the government and the defendant, through his attorney, Mr. Woloshansky, agreed that At the time of sentencing . . . the government will make known to the sentencing judge the extent of the defendant s cooperation, and, . . . shall move the Court to consult the Sentencing Guideline §5K1.1 and to depart from the applicable **advisory** Sentencing Guideline range.(Emphasis added). [See, Plea Agreement at p.10, par. 18] Thus, the plea agreement contemplates that the whatever sentence is imposed, it is the Court that will make the final Sentencing Guideline calculations, which in and of themselves are advisory and not binding upon the Court or on the parties that entered into the agreement. [Id. at p. 5, par. 6(g). And, as the Court was not bound by the advisory nature of the Sentencing Guidelines, the Court could have independently taken into consideration the extent and nature of the defendant s cooperation, outside of the Section 5K1.1 motion. However, because it was theoretically part and parcel to the plea agreement, the government was bound to declare the full extent and nature of the defendant s entire cooperation. Thus, for all its waivers and extensions

of time for the return of an indictment, for his waiver of the statute of limitations, and even for the waiver of the indictment by grand jury itself, the defendant essentially bought himself a pig in a poke. For these same cooperation and nature of timely cooperation arguments could just as well have been made by adequate defense counsel himself, as compared to the actual in-court level of information provided by the government in its assessment and address to the Court of Mr. Torres assistance to the United States and potential for future cooperation. Which takes us back to the question of effective assistance of counsel.

Under Strickland, 466 U.S. 668, in order for the defendant to prevail, he must demonstrate that he was actually prejudiced by his attorney s representation. Not only did counsel fail to raise the issue of suppression of his client s statements,[3] failed to underscore the seven essential elements of a section 3553(a) factors, or which the advisory guidelines is only one, but Mr. Woloshansky failed to address the most important issue of all, the gross versus net amount of the loss. This argument is critical because the amount in question here was a gross amount of the overall loans paid out both to the schools and to the students themselves. Since these students presumably went on to attain their vocational education and training, and by the very terms of their agreement with the PELL Grants had to pay some of the money back in the

[3]The issues surrounding the Motion to Suppress have not been included in an affidavit, signed by the defendant, due the timing constraints of having this motion on file within the statutory time constraints on filing this motion. Counsel will detail those issues summarily and the defendant will verify them to the Court as he has raised these important issues by oral recitation of facts during an initial interview conducted on the very date of filing this consolidated motion. Had Mr. Woloshansky taken the time to learn about his client s initial interview by the government agents, he would have made the Court aware that (a) the agents at the initial hearing failed to advise him that he was the target of their investigation, (b) failed to read him his Miranda warnings, (c) did not stop their interview when he asked to speak with an attorney, and (d) told him and his wife during the interview that his continued cooperation was essential to keeping him out of jail because they had all of the information they needed to convict him of wire fraud.

ordinary course of their education, those sums should not and indeed cannot be counted against Mr. Torres or the school which benefitted from these alleged wire transfers. Because the full amount or gross was charged against the defendant, 7 points were added to his advisory guideline calculations. And even though they were purely advisory, the Court found that the offense level fell into Zone D by one point, and as such, the Court felt bound to sentence Mr. Torres to a term of incarceration. Had his level been appropriately adjusted, he could have fallen into Zone C, which would have permitted the Court to grant Mr. Torres a split term of custody at a half-way residence facility and a period home confinement. This fact alone is key and points the way clearly towards ineffective assistance of counsel. For even though the Court departed from the actual sentence called for by that particular guideline due to the Section 5K1.1 motion made by the government, it believed itself compelled to stay within the parameters and constraints of Zone D, which called for mandatory incarceration. This is a huge oversight on the part of defense counsel and is not an acceptable practice by the federal defense bar. Mr. Woloshansky argued instead for the removal of the defendant s one criminal history point because the Probation Officer could not obtain a certified copy of the conviction. But as anyone familiar with the old guidelines is aware, it makes not one wit of difference if a defendant has a criminal history point assessment of zero or one, it is still construed as a Level I criminal history for purposes of calculating the guideline range. Most importantly, however, all of this points its way towards ineffectiveness of counsel during the plea negotiations which lasted a total of 19 days, to wit: from 4/07/06 when the initial information was filed, until 4/26/06 when the waivers were entered and the plea colloquy took place. There was hardly any time during that period to review the complex legal arguments and evidence adduced by same during that period of time. No motions at all were filed

on Mr. Torres behalf. The defendant could have fallen down a flight of stairs on his way to the courtroom and received more effective representation. And this is no slam against Mr. Woloshansky, but federal court is a very technical fiction of art, especially following the complex nature of post Booker litigation. Members of the federal defense bar and the federal defender panel have had to undergo extensive training and attend various seminars to effectively deal with not only the complicated issues of exactly what an advisory Sentencing Guidelines means, but have had to pay meticulous attention to the six remaining issues that are now a mandatory part of Section 3553(a) sentencing. Since this was not in technical terms an 11(c)(1)(c) plea agreement, or even a conditional 11(c)(1)(b) agreement, but an unconditional 11(c)(1)(a) plea agreement, it was incumbent upon counsel to remain vigilant to these issues raised above. Because he was not, Mr. Torres is not only facing a certain jail term, but also the loss of his avocation as a printer, for which he too took technical training some 28 years ago, and which he has been performing to the best of his abilities ever since. It is these very skills which he must now surrender at the door step of the MCC, skills which have permitted him, along with his wife of 30 years, to raise and nurture his 4 year old grandson, and which has allowed him to support his two daughters, one of whom he now subsidizes her housing while she too attends vocational schooling. If ever there was an instance to reconsider both the sentence imposed and the very nature of the conviction, vis withdrawing his plea agreement, then this is that unique case.

WHEREFORE the reasons stated above, the defendant through one of his attorneys, prays this Honorable Court grant him the relief requested herein.

Respectfully submitted,

/S/ Gerardo S. Gutierrez

By: Gerardo S. Gutierrez, Esq.

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