IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-2746
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK NOVOSELSKY,

Defendant-Appellant.

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Appeal from the United States District Court for the
Southern District of Texas
(CR H 91 59-25)

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(August 25, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

Defendant-appellant Jack Novoselsky (Novoselsky), pursuant to a plea agreement in February 1993, pleaded guilty to one count of conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marihuana and one count of aiding and abetting money

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

laundering. Both counts were contained in a third superseding indictment. The indictment alleged a conspiracy that took place between 1986 and the time the indictment was filed in 1991.

In exchange for his guilty plea, the government moved to dismiss twenty-three other counts against Novoselsky. The district court sentenced Novoselsky to concurrent prison terms of 288 and 240 months, concurrent supervised release terms of 5 and 3 years, and ordered him to pay a special assessment of $100. No fine was imposed.

The government summarized Novoselsky's criminal activity at his rearraignment.

According to the terms of the plea agreement, the government accepted Novoselsky's plea "in consideration of the defendant's agreement to 'cooperate fully.'" "Cooperate fully" was defined, in part, as Novoselsky's agreement "to make a full, honest and truthful disclosure to the United States . . . concerning his knowledge of all persons, and aspects of trafficking in controlled dangerous substances including any and all information crimes, or offenses (including state or federal) related thereto or arising therefrom." Novoselsky also agreed to testify in any judicial proceeding "whenever the United States deems his testimony desirable," and to waive his Fifth Amendment privileges against self-incrimination.

The agreement specified that Novoselsky "agrees and understands that the United States has the sole discretion" to determine whether Novoselsky's cooperation satisfied the terms of the agreement. Novoselsky waived his right to appeal his "sentence

or the manner in which it was determined . . . on any ground whatsoever." The government agreed to file a U.S.S.G. § 5K1.1 motion for departure asking for a sentence of fifteen years if it determined that Novoselsky's cooperation amounted to substantial assistance.

At sentencing, which took place in September 1993, Novoselsky objected to the government's failure to file a section 5K1.1 motion on his behalf. The government argued that a motion for a downward departure was not warranted. The court instructed the government to interview Novoselsky after sentencing to determine whether a Fed. R. Crim. P. 35 motion for reduction of sentence would be appropriate on the ground that Novoselsky might have had useful information.

Novoselsky brings this appeal.

Novoselsky argues that the government breached the plea agreement by failing to file a section 5K1.1 motion for downward departure after he had provided the government with substantial assistance.

When a defendant grants the government discretion to make a motion for a downward departure, the defendant is not entitled to a downward departure "unless the prosecution relied on an unconstitutional motive in refusing to file a [section] 5K1.1 motion." *United States v. Garcia-Bonilla*, 11 F.3d 45, 46 (5th Cir. 1993). Novoselsky asserts neither that the government bargained away its discretion to make the downward departure motion, nor that the prosecution relied on an unconstitutional motive in refusing to file a motion for a downward departure. Although *Garcia-Bonilla*

forecloses Novoselsky from successfully arguing that the government broke the plea bargain,[1] a review of the record also indicates that Novoselsky did not provide the government with substantial assistance.

Novoselsky next argues that his counsel's assistance was ineffective because, "to a large extent, [he] based his decision to enter into the plea agreement on counsel's representation" that he had already rendered substantial assistance to the government through his three debriefings and offer to testify at trial or

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[1] Novoselsky's plea agreement, which he signed in open court and which was also signed by his counsel, provided that the "defendant agrees and understands that the United States has the sole discretion to determine whether or not the defendant's disclosure and testimony amount to full cooperation within the terms of this Agreement." It also provided:

> "If *in the judgment and sole discretion* of the United States, the defendant's cooperation amounts to "substantial assistance," the United States will file a motion for departure pursuant to Section 5K1.1 of the *Sentencing Guidelines and Policy Statements . . . .*
>
> Additionally, *the defendant understands and agrees that the decision to file a motion for substantial assistance pursuant to 5K1.1 rests entirely with the United States.* The defendant acknowledges that the refusal to file such a motion is not grounds for withdrawal of his guilty plea. Defendant acknowledges that without such a motion, the court must impose a sentence with a mandatory minimum of 20 years to a maximum of life imprisonment, if the court finds a prior felony drug conviction and a mandatory life sentence if the court finds two prior felony drug convictions.
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> . . . If the defendant does comply with the obligations set forth herein, *and if in the judgment of the United States, the defendant has rendered substantial assistance*, the United States either before or at the time of sentencing will inform the District Court for the Southern District of Texas of the nature, value, timeliness and extent of such cooperation. . . ." (Emphasis added).

further debrief the government.

Ordinarily a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been before the district court. *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988). If the claim is raised for the first time on appeal, the Court will reach the merits of the claim only "in rare cases where the record [allows the court] to evaluate fairly the merits of the claim." *Id*. at 314. This claim was not before the district court, and it is not appropriate to consider the ineffective assistance argument on this direct appeal.

In his final two arguments, Novoselsky asserts that his sentence was based on a factually inaccurate quantity of drugs and that his sentence was improperly higher than that of one of his co-defendants. The sentence on each count does not exceed the statutory maximum, and Novoselsky does not contend otherwise. Novoselsky waived his right to appeal his sentence or the manner in which it was determined on any grounds.[2]

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[2] The plea agreement provides in relevant part:

> "7. The defendant understands that the sentence to be imposed is within the discretion of the sentencing judge. *If the Court should impose any sentence from the minimum mandatory up to and including the maximum established by statute, the defendant* agrees that he *will not, for that reason alone*, seek to withdraw his guilty plea or *pursue an appeal* and will remain bound to fulfill all of the obligations under this plea agreement.
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> 8. The defendant understand that the defendant's sentence will be imposed in accordance with the *Sentencing Guidelines and Policy Statements*. The defendant nonetheless acknowledges and agrees that the Court has jurisdiction and authority to impose any

A defendant may waive his right to appeal as part of a plea agreement if that waiver is informed and voluntary. *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992).

In *United States v. Portillo*, 18 F.3d 290, 293 (5th Cir. 1994), this Court held that:

> ". . . when the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal."

At Novoselsky's rearraignment, he, along with five of his co-conspirators, was asked if "other than the plea agreement with the government, has anybody made you any promises, other than the plea

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> sentence within the statutory minimum or maximum set for the offense to which the defendant pleads guilty. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Knowing that, the *defendant waives the right to appeal the sentence or the manner in which it was determined or on any ground whatsoever*. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(B).
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> 9. In agreeing to this waiver, the defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate of the probable sentencing range under the sentencing guidelines that the defendant may have received from the defendant's counsel, the United States or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office or the Court. The United States has not and does not make any promise or representation as to what sentence the Court will impose. The Defendant *having been advised of the uncertainty in estimating the sentence to be imposed, knowingly waives the right to appeal that sentence* in exchange for the concessions made by the United States in this plea agreement. Defendant agrees that paragraphs 7 and 8 are applicable to this paragraph." (Emphasis added).

agreement?" Novoselsky, forty-five years old and a high school graduate, responded in the negative. The court then addressed one of his co-conspirators and the following exchange took place:

> "THE COURT: Now, Ms. Sanchez, as I understand your agreement with the government, you are going to plead to Counts 49 and 64. You have a right to appeal the sentence -- no. You're agreeing --
>
> [AUSA]: All of them, Your Honor.
>
> THE COURT: All of you are agreeing not to appeal the sentence; is that right?
>
> [] SANCHEZ: Yes, sir.
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> [NOVOSELSKY'S ATTORNEY]: Part of the plea agreement, Your Honor.
>
> THE COURT: You understand it?
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> [] SANCHEZ: Yes, sir.
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> THE COURT: Otherwise, if you're found guilty, you would have a right to appeal whatever sentence I give you, but as part of your agreement, you are agreeing not to appeal that."

The court asked Novoselsky whether the plea bargain was the only promise made to him. Novoselsky, who questioned other aspects of the proceedings, indicated that no other promises were made to him. Also, Novoselsky's attorney confirmed that Novoselsky had agreed, through his plea agreement, not to appeal his sentence. Novoselsky was present while the court explained what it meant to waive the right of appeal. The sentence appeal waiver provision is entirely clear. On appeal, Novoselsky does not challenge the appeal waiver provision of his plea agreement or claim he did not fully understand it.

Because of the clear and unchallenged sentence appeal waiver provisions, we decline to consider Novoselsky's above-referenced

complaints as to his sentence.

Novoselsky has demonstrated no reversible error in the proceedings below. His conviction and sentence are accordingly

AFFIRMED.