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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GURINDER GILL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Case No. CV-10-3786 CAS
CR-07-1382 CAS
**ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

I. BACKGROUND

On January 26, 2009, pursuant to a plea agreement, petitioner pleaded guilty to count eleven of a fourteen-count indictment. Count eleven charged petitioner with possession with intent to distribute more than 5 kilograms, specifically approximately 33 kilograms, of a mixture or substance containing a detectable amount of cocaine, a schedule II narcotic drug controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii).

On April 1, 2009, the respondent filed its sentencing position, stating its agreement with the facts and guidelines calculations set forth in the pre-sentence report. Respondent also stated that petitioner met the criteria for application of the

1 “safety valve” provisions of United States Sentencing Commission, Guidelines
2 Manual, § 5C1.2 (Nov. 2008).¹ The safety valve provision allows a sentencing court to
3 determine a sentence in accord with the sentencing guidelines without regard to any
4 statutory minimum sentence. Based on petitioner’s total offense level and criminal
5 history category, petitioner’s appropriate sentencing range was 51 to 63 months, and
6 respondent recommended that petitioner be sentenced at the low-end of that range.

7 On June 18, 2009, petitioner argued for a sentence of 27 months’ imprisonment,
8 citing the nature of petitioner’s offense, and arguing for a lower sentence than a co-
9 defendant to avoid unwarranted sentencing disparity. In response, on June 25, 2009,
10 respondent argued that petitioner’s first-time offender status was already reflected in his
11 sentencing due to the eligibility of the safety valve provisions, allowing his sentence to
12 be considerably less than the 120-month statutory mandatory minimum sentence.

13 On August 5, 2009, the Court sentenced defendant to a 51-month term of
14 imprisonment and a five year period of supervised release. There was no appeal from
15 this sentence.

16 On May 19, 2010, petitioner filed the instant motion under 28 U.S.C. § 2255 to
17 Vacate, Set Aside, or Correct Sentence by a person in federal custody. Petitioner seeks
18 that his sentence be set aside or be reduced due to ineffective assistance of counsel at
19 the plea stage and the sentencing stage. On August 16, 2010, respondent filed its
20 opposition. A reply was filed on September 17, 2010. After carefully considering the
21 arguments raised by the petitioner, the Court hereby finds and concludes as follows.

22 **II. LEGAL STANDARD**

23 A motion pursuant to 28 U.S.C. § 2255 challenges a federal conviction and/or
24 sentence to confinement where a prisoner claims “that the sentence was imposed in
25 violation of the Constitution or laws of the United States, or that the court was without
26 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
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28 ¹This was the appropriate version of the sentencing guidelines at the time of
petitioner’s sentencing.

1 authorized by law, or is otherwise subject to collateral attack.” Sanders v. United
2 States, 373 U.S. 1, 2 (1963).

3 Section 2255 provides that the Court shall conduct a hearing on a motion filed
4 thereunder “[u]nless the motion and files and records of the case conclusively show that
5 the [petitioner] is entitled to no relief.” Rule 8 of the Rules Governing § 2255
6 Proceedings provides that:

7 [i]f the motion has not been dismissed at a previous stage in the
8 proceeding, the judge, after the answer is filed and any transcripts or
9 records of prior court actions in the matter are in his possession, shall,
10 upon a review of those proceedings and of the expanded record, if any,
determine whether an evidentiary hearing is required. If it appears that an
evidentiary hearing is not required, the judge shall make such disposition
of the motion as justice dictates.

11 The decision whether to hold a hearing is “committed to the court’s discretion,”
12 and § 2255 “requires only that the judge give the prisoner’s claim careful consideration
13 and plenary processing, including a full opportunity for presentation of the relevant
14 facts.” Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988) (citation and internal
15 quotation marks omitted).

16 A petitioner arguing ineffective assistance of counsel under the Sixth
17 Amendment must show (1) that counsel’s representation fell below an objective
18 standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the
19 petitioner. Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000) (citing Strickland v.
20 Washington, 466 U.S. 668, 688, 695 (1984)). To meet the first requirement, a
21 defendant “must show that counsel's representation fell below an objective standard of
22 reasonableness.” Strickland, 466 U.S. at 688. There is a heavy burden associated with
23 this requirement, as there is “a strong presumption that counsel’s conduct falls within
24 the wide range of reasonable professional assistance.” Id. at 689. To meet the second
25 requirement, a defendant “must show that there is a reasonable probability that, but for
26 counsel's unprofessional errors, the result of the proceeding would have been different.”
27 Id. at 694. Essentially, the result of the proceeding must have been more
28 favorable to the petitioning defendant had counsel acted differently. Id. at 694-94; see
also Syers v. Schriro, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008) (“Generally, a defendant

1 claiming ineffective assistance of counsel for failure to file a particular motion must not
2 only demonstrate a likelihood of prevailing on the motion, but also a reasonable
3 probability that the granting of the motion would have resulted in a more favorable
4 outcome in the entire case.”).

5 **III. DISCUSSION**

6 Petitioner states that he received ineffective assistance of counsel during both the
7 plea stage and the sentencing stage of the proceedings. Petitioner’s arguments at each
8 stage are discussed below.

9 **A. The Plea Stage**

10 Petitioner argues that respondent interviewed him regarding the benefit of USSG
11 § 5K1.1. U.S.S.G. § 5K1.1 allows a court to depart from the sentencing guidelines and
12 reduce a sentence upon motion by the government that states that a defendant “has
13 provided substantial assistance in the investigation or prosecution of another person
14 who has committed an offense.” Petitioner argues that counsel was ineffective by not
15 obtaining such a reduction in his sentence. Petitioner further argues that there was “a
16 high probability that this Court would impose a lower sentence provided it was
17 informed that [petitioner’s] sentence was higher when compared with his codefendant.”
18 Mot. 4. Petitioner further argues that counsel failed to inform him of the consequences
19 of accepting the plea agreement, especially with regard to his inability to return to
20 Canada. *Id.* (citing *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

21 Respondent states that petitioner is mistaken regarding the reason for his
22 interview, and that he was interviewed for the purpose of determining eligibility for the
23 safety valve of U.S.S.G. § 5C1.2. Opp’n 5. Respondent submits the declaration of
24 William Crowfoot, an Assistant United States Attorney and one of the prosecutors
25 assigned to petitioner’s case, to support this statement. Respondent further states that
26 petitioner’s attorney inquired about any further sentence reduction under U.S.S.G.
27 § 5K1.1, but was told that there was no basis for such a reduction. *Id.* Furthermore, a
28 reduction in sentence based on USSG § 5K1.1 can only occur after motion from the

1 government. Respondent notes that petitioner’s counsel argued for a reduced sentence
2 on June 18, 2009, pointing out a possible sentencing disparity between petitioner and a
3 co-defendant. Id. at 2. Respondent further argues that any reliance by petitioner on
4 Padilla is misplaced because the rule announced in Padilla can not be applied
5 retroactively to cases on collateral review. Id. at 6 (citing Schiro v. Summerlin, 542
6 U.S. 348, 351-52 (2004) and Teague v. Lane, 489 U.S. 288 (1989)). Respondent also
7 notes that the plea agreement signed by petitioner indicated that conviction in the case
8 could subject him to deportation. Id. at 7.

9 It is clear that petitioner’s version of the facts is supported by the record.
10 Defendant’s counsel filed the sentencing position on June 18, 2009. Docket No. 156.
11 The filing indicates that the purpose of the March 12, 2009 meeting was to discuss
12 applicability of the safety valve of U.S.S.G. § 5C1.2. Given the facts, it seems clear
13 that petitioner’s counsel acted reasonably with respect to the § 5K1.1 motion.
14 Regardless of the retroactivity of Padilla, the case does not suggest that a reasonable
15 attorney must understand the immigration laws of a foreign country and all possible
16 consequences to a given defendant because of those laws. Padilla states that “a criminal
17 defense attorney need do no more than advise a noncitizen client that pending criminal
18 charges may carry a risk of adverse immigration consequences.” Padilla, 130 S. Ct. at
19 1483. Thus, petitioner has not satisfied the first requirement of the Strickland inquiry
20 with regard to counsel’s effectiveness at the plea stage.

21 **B. The Sentencing Stage**

22 At the sentencing stage, petitioner argues that his counsel was ineffective because
23 he was unprepared to answer the government’s rationale for comparison of petitioner’s
24 sentence with that of a codefendant, he failed to raise the § 5K1.1 issue, and made no
25 arguments in mitigation of the sentence, such as the singularity of petitioner’s offense
26 and his limited connection to the unlawful activities. Mot. 6.

27 Respondent indicates that, as discussed above, the § 5K1.1 argument fails
28 because petitioner’s counsel could not make such a motion. Opp’n 7. Additionally,

1 respondent points out that petitioner's counsel did seek a substantial reduction of
2 petitioner's sentence based on a disparity argument, as well as other facts and
3 circumstances of the case. Id.

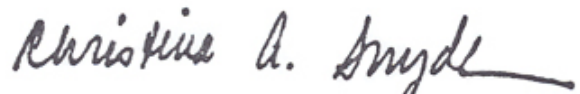
4 Again, the sentencing position filed by petitioner's counsel of June 18, 2009
5 addresses the arguments that petitioner claims were not raised during sentencing.
6 Docket No. 156. The filing specifically requests a lighter sentence in light of the
7 circumstances and nature of petitioner's offense, petitioner's history and characteristics,
8 the seriousness of petitioner's offense, the public interest, and the sentencing disparity
9 concern. Id. And as discussed above, the § 5K1.1 argument fails because petitioner's
10 counsel had no ability to make such a motion, as that is at the discretion of the
11 prosecution. Thus, petitioner has not satisfied the first requirement of the Strickland
12 inquiry with regard to counsel's effectiveness at the sentencing stage.

13 **IV. CONCLUSION**

14 Having duly considered petitioner's arguments, the Court finds that the record
15 shows conclusively that petitioner is not entitled to the requested relief. The Court
16 concludes that an evidentiary hearing is not required to adjudicate this matter. In
17 accordance with the foregoing, petitioner's motion is hereby DISMISSED.

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19 IT IS SO ORDERED.

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21 Dated: November 30, 2010

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24 CHRISTINA A. SNYDER
25 United States District Judge
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