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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
TIMOTHY GOMEZ;
Defendant.

Case No. CV 12-5178 CAS
CR 10-1234 CAS

**ORDER DENYING PETITIONER'S
REQUEST FOR A HABEAS
PETITION (Docket # 10 , filed on
Nov. 2, 2012)**

I. INTRODUCTION AND BACKGROUND

On March 11, 2011, a jury found petitioner Timothy Gomez guilty of possession with intent to distribute at least five grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B(ii)). United States v. Timothy Gomez, CR No. 10-1234 CAS, Dkt. No. 107. On December 1, 2011, petitioner and the government executed a Post-Trial Agreement setting out various terms regarding defendant's sentencing. CR No. 10-1234 CAS, Dkt. No. 111. Pursuant to this agreement, petitioner agreed to admit to a violation of his supervised release in CR No. 06-101, and the parties agreed to recommend to the Court a total sentence of 78-months imprisonment. CR No. 10-1234 CAS, Dkt. No. 111. The government also agreed to dismiss a supplemental

1 information, CR No. 10-1234 CAS, Dkt. No. 18, that sought to increase petitioner’s
2 mandatory minimum punishment to 10 years imprisonment, based on defendant’s prior
3 felony drug conviction, pursuant to 21 U.S.C. § 851. Post-Trial Agreement ¶ 4(a).
4 Additionally, petitioner gave up his right to appeal either of his convictions or sentence.
5 Id. Petitioner also agreed not to bring a post-conviction collateral attack on the
6 conviction or sentence, except those based on a claim of ineffective assistance of
7 counsel. Id. On December 5, 2011, the Court sentenced petitioner to 78 months of
8 imprisonment. Dkt. No. 111.

9 On May 2, 2012, petitioner filed an initial motion to vacate, set aside or correct
10 his sentence pursuant to 28 U.S.C. § 2255. Dkt. No. 113. On July 25, 2012, the
11 government filed its initial opposition. Dkt. No. 116. On November 1, 2012, petitioner
12 filed an amended motion to vacate, set aside or correct his sentence. Dkt. No. 119. His
13 amended petition asserts that: (1) it was a violation of the Ninth and Tenth Amendments
14 to the United States Constitution to indict him under U.S.C. §§ 841(a)(1) and
15 841(b)(1)(B(ii)), (2) he was entitled to a “pre-indictment hearing” to address his Ninth
16 and Tenth Amendments claims, (3) his attorneys were ineffective because they did not
17 challenge his indictment based on the Ninth and Tenth Amendments, and (4) his
18 conviction violated the Due Process clause because the jury was not properly instructed
19 at his trial.

20 On December 3, 2012, the government filed its amended opposition, and on
21 January 10, 2013, petitioner filed a reply. Dkt. No. 124. After considering the parties’
22 arguments, the Court finds and concludes as follows.

23 **II. LEGAL STANDARD**

24 A petition pursuant to 28 U.S.C. § 2255 challenges a federal conviction and/or
25 sentence to confinement where a prisoner claims “that the sentence was imposed in
26 violation of the Constitution or laws of the United States, or that the court was without
27 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
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1 authorized by law, or is otherwise subject to collateral attack.” Sanders v. United States,
2 373 U.S. 1, 2 (1963).

3 Ineffective assistance of counsel constitutes a violation of the Sixth Amendment
4 right to counsel, and thus, if established, is grounds for relief under section 2255. To
5 establish ineffective assistance of counsel, a petitioner must prove by a preponderance of
6 the evidence: (1) the assistance provided by counsel fell below an objective standard of
7 reasonableness; and (2) there is a reasonable probability that, but for counsel’s errors,
8 the result of the proceeding would have been different. Strickland v. Washington, 466
9 U.S. 668, 688, 694 (1984). A claim of ineffective assistance of counsel fails if either
10 prong of the test is not satisfied and petitioner has the burden of establishing both
11 prongs. Id. at 697; United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir.
12 1995).

13 With respect to the first prong, the court’s review of the reasonableness of
14 counsel’s performance is “highly deferential,” and there is a “strong presumption” that
15 counsel exercised reasonable professional judgment. Id. The petitioner must “surmount
16 the presumption that, under the circumstances, the challenged action might be
17 considered sound trial strategy.” Id.

18 After establishing an error by counsel and thus satisfying the first prong, a
19 petitioner must satisfy the second prong by demonstrating that his counsel’s error
20 rendered the result unreliable or the trial fundamentally unfair. Lockhart v. Fretwell,
21 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability
22 that, but for his counsel’s error, the result of the proceeding would have been different.
23 Strickland, 466 U.S. at 694. A “reasonable probability” is a probability sufficient to
24 undermine confidence in the outcome. Id.

25 The Court need not necessarily determine whether petitioner has satisfied the first
26 prong before considering the second. The Supreme Court has held that “[i]f it is easier
27 to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that
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1 course should be followed.” Id. at 670. Indeed, a petitioner’s failure to allege the kind
2 of prejudice necessary to satisfy the second prong is sufficient by itself to justify a denial
3 of a petitioner’s section 2255 motion without hearing. Hill v. Lockhart, 474 U.S. 52, 60
4 (1985).

5 **III. DISCUSSION**

6 **A. Ineffective Assistance of Counsel**

7 Petitioner argues that the deputy federal public defenders (“petitioner’s counsel”)
8 who represented him at trial rendered ineffective assistance by failing to challenge his
9 indictment on the basis that it violated the Ninth and Tenth Amendments. In response,
10 the government contends that petitioner’s indictment does not violate the Ninth and
11 Tenth Amendments because the federal narcotics statutes, including those underlying
12 petitioner’s convictions, were constitutionally enacted pursuant to Congress’s authority
13 under the Commerce Clause. Accordingly, the government concludes that petitioner has
14 shown neither error nor prejudice by reason of his counsel’s failure to raise Ninth and
15 Tenth Amendment claims.

16 The Court finds that petitioner’s Ninth and Tenth Amendment arguments fail as a
17 matter of law. “[W]hen objection is made that the exercise of a federal power infringes
18 upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed
19 toward the granted power under which the action of the Union was taken. If granted
20 power is found, necessarily the objection of invasion of those rights, reserved by the
21 Ninth and Tenth Amendments, must fail.” United Pub. Workers of Am. v. Mitchell, 330
22 U.S. 75, 96 (1947). Both the Supreme Court and the Ninth Circuit have held that 21
23 U.S.C. § 841, the statute underlying petitioner’s convictions, is a valid exercise of
24 Congress’s Commerce Clause power, and therefore the federal government did not
25 violate the Ninth and Tenth Amendments by prosecuting defendant under this statute.
26 See Gonzales v. Raich, 545 U.S. 1 (2005); see also Raich v. Gonzales, 500 F.3d 850,
27 869 (9th Cir. 2007).

1 Petitioner argues that Bond v. United States, 131 S.Ct. 2355 (2011), stands for the
2 proposition that the federal government exceeded its constitutional authority, but this
3 argument rests on a misreading of this case. In Bond, the Supreme Court held that a
4 defendant has standing to challenge a federal statute on grounds that it violated the Tenth
5 Amendment. Id. at 2358. Because petitioner’s standing is not at issue in this case,
6 however, Bond does not support petitioner’s position.

7 Because petitioner’s constitutional claims both fail as a matter of law, petitioner
8 cannot demonstrate that challenging his indictment based on the Ninth and Tenth
9 Amendments would have created a “reasonable probability that . . . the result of the
10 proceedings would have been different.” Strickland, 466 U.S. at 694. Petitioner has
11 therefore failed to allege the kind of prejudice necessary to succeed on a claim of
12 ineffective assistance of counsel, so the Court finds that petitioner’s motion should be
13 denied. Hill v. Lockhart, 474 U.S. 52, 60 (1985).

14 **B. Due Process Violation**

15 Petitioner asserts two violations of due process as grounds for granting his motion.
16 As an initial matter, the Court notes that petitioner waived his right to collaterally attack
17 his sentence based on any claim other than ineffective assistance of counsel. The Ninth
18 Circuit has held that if a waiver in a negotiated plea agreement “is made voluntarily and
19 knowingly, then it is enforceable and does not violate due process or public policy.”
20 United States v. Navarro-Botello, 912 F.2d 318, 321. Here, petitioner does not contest
21 that he voluntarily and knowingly entered into the plea agreement. Accordingly,
22 petitioner’s waiver bars him from raising his due process claims.

23 Even if petitioner’s due process arguments were not waived, they would provide
24 no grounds for reducing or vacating his sentence because they fail on the merits.
25 Petitioner’s first due process argument asserts that he was entitled to a pre-indictment
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1 hearing to challenge his federal prosecution based on the Ninth and Tenth Amendment.¹
2 As explained above, petitioner cannot show that any prejudice resulted from the failure
3 to hold such a hearing because his argument based on the Ninth and Tenth Amendments
4 fails as a matter of law. The Court therefore rejects this argument.

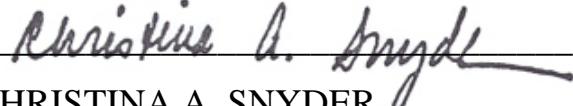
5 Petitioner’s second argument asserts that “scienter” was never applied as an
6 element of the offenses for which he was convicted. The Court finds that this argument
7 is contrary to the record. As the government rightly points out, the Ninth Circuit Model
8 Jury Instructions for 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(viii) as charged in
9 petitioner’s indictment and used by the Court, explicitly include a “scienter” element.
10 CR No. 10-1234 CAS Dkt. No. 77. The Court instructed the jury that a violation of 21
11 U.S.C. §§ 841(a)(1) and 841(b)(1)(viii) requires a finding that “the defendant
12 knowingly possessed methamphetamine; [and] . . . the defendant possessed it with the
13 intent to distribute it to another person. . . .” Id. Therefore, the Court properly
14 instructed the jury regarding the subjective offense elements of the crimes for which
15 petitioner was convicted.

16 **IV. CONCLUSION**

17 In accordance with the foregoing, the Court DENIES petitioner’s motion to
18 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

19 IT IS SO ORDERED.

20 Dated: February 6, 2013

21 
22 CHRISTINA A. SNYDER
23 United States District Judge

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26 _____
27 ¹ The Court construes petitioner’s request for a “pre-indictment hearing” to
28 encompass a request for a pre-trial hearing “alleging a defect in instituting the prosecution”
pursuant to Federal Rule of Criminal Procedure 12(b)(3)(A).