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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERTO GARCIA, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. CV 12-10661 DDP ✓ [CR 11-00214 DDP] ORDER DENYING HABEAS RELIEF PURSUANT TO 28 U.S.C. § 2255 [Docket No. 1]

I. Background

Petitioner Roberto Garcia has filed for habeas relief pursuant to 28 U.S.C. § 2255. (Docket No. 1.) In August 2010, Petitioner was sentenced in state court for sale or transportation of methamphetamine. (United States Probation Office Presentence Report ("PSR") ¶ 52, Government's Opposition ("Opp'n") Ex. I (under seal).) In December 2011, this Court sentenced Defendant to 46 months imprisonment for being an illegal alien who entered the United States following deportation, in violation of 8 U.S.C. § 1326(a). Petitioner states that at the time he was arraigned for his federal charge, April 2011, he had nine months remaining on his August 2010 state court sentencing. (Mot. attachment at 1.)

Petitioner seeks habeas relief because his counsel failed to request that his federal sentence run concurrently with his state sentence.

II. Legal Standard

A petitioner may move to vacate, set aside, or correct his/her sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). If any of these grounds exist, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

Under section 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section, '[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting 28 U.S.C. § 2255) (emphasis and alternation in original). "The district court may deny a section 2255 motion without an evidentiary hearing only if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." United States v. Mejia-Mesa, 153 F.3d 925, 931 (9th Cir. 1998) (quoting United States v. Burrows, 872 F.2d 915, 917 (9th Cir.1989)).

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III. Analysis

Sentencing Guideline § 5G1.3(c) states:

> (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

The amended application notes for § 5G1.3(c) state that "the court should consider the following" in determining whether to order concurrent or consecutive sentences:

> (I) The factors set forth in 18 U.S.C. 3584 (referencing 18 U.S.C. 3553(a)); (ii) The type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence; (iii) The time served on the undischarged sentence and the time likely to be served before release; (iv) The fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and (v) Any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

Because this Court did not address the issue, Petitioner's federal sentence runs consecutive to his state court sentence. 18 U.S.C. § 3584. Petitioner asks for habeas relief on grounds that this Court committed plain error by not considering his prior sentence and his counsel provided ineffective assistance by not alerting this court to the prior sentence, and, thus, the possibility of concurrent sentencing.

A. Plain Error

To show plain error, Petitioner must show that:

> (1) there was 'error'; (2) it was 'plain'; and (3) that the error affected 'substantial rights.' If these conditions are met, [this court] may exercise [its] discretion to notice the forfeited error only if the error (4) seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.

United States v. Nordby, 225 F.3d 1053, 1060 (9th Cir.2000) (internal quotation marks and citations omitted) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

Petitioner cites the Ninth Circuit decision of United States v. Chea, for the proposition that it was plain error not to consider running his sentences concurrently. He is right. See United States v. Chea, 231 F.3d 531, 533 (9th Cir. 2000) (explaining how a court's "failure to consider a defendant's undischarged term of imprisonment and Sentencing Guideline Section 5G1.3(c)" in imposing a sentence was plain error and required resentencing). However, the plain error standard, which is required under rule 52, is not applicable in the § 2255 context. "Because it was intended for use on direct appeal, . . . the 'plain error' standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of time allowed for direct review or by the affirmance of conviction on appeal." United States v. Frady, 456 U.S. 152, 164 (1982).

Additionally, Petitioner did not appeal his sentence. (§ 2255 motion at 3.) "Nonconstitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C. § 2255." United States v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1994). However, ineffective assistance of counsel is a "constitutional violation" that is "treated differently." Id. If counsel was ineffective in not bringing Petitioner's state sentence to the Court's attention, and the petitioner suffered prejudice as a result, then Petitioner

will be entitled to § 2255 relief. United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996) (declining to analyze a sentencing-based claim for relief because it was not raised on direct appeal, but analyzing a claim that counsel was ineffective for failing to make the sentencing argument to the court); United States v. Whitefield, 1:95-CR-5111 OWW, 2006 WL 2472773 (E.D. Cal. Aug. 23, 2006) (refusing to analyze a Chea claim on habeas because Petitioner did not claim ineffective assistance of counsel).

Thus, there is no § 2255 relief for petitioner independent of his claim that counsel's failure to make a concurrent sentencing argument constituted ineffective assistance.

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a convicted defendant must show both (1) that counsel's performance was deficient; and (2) that "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant bears the burden of establishing both prongs of the claim of ineffective assistance of counsel. United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995). If the defendant fails to satisfy either prong, the claim of ineffective assistance of counsel must fails. Strickland, 466 U.S. at 687. In order to show prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998). A reasonable probability is less than a preponderance of the evidence and is a probability sufficient to undermine confidence in the outcome. See Kyles v. Whitley, 514 U.S. 419, 434 (1995);

Strickland, 466 U.S. at 694. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697.

"[I]neffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because 'any amount of [additional] jail time has Sixth Amendment significance.'" Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012). A petitioner must have a basis to claim that a difference in the outcome would be reasonably probable; mere speculation of a different sentence is insufficient. See, e.g., Prewitt v. United States, 83 F.3d 812, 819 (7th Cir. 1996) (denying an ineffective-assistance claim where "only the possibility existed that [a defendant] would receive a concurrent sentence" if his counsel raised the issue); Welker v. United States, No. 06–48, 2009 WL 57139, at *4 (E.D.Mo. Jan.9, 2009) ("Because such a decision is discretionary, there is only a possibility, not a reasonable probability, that a court would impose a concurrent rather than consecutive sentence if a motion under § 5G1.3(c) is properly raised.").

Here, Defendant provides no evidence indicating that a concurrent sentence would have been appropriate, nor does he claim that the Court would have ordered one had counsel requested it. Under § 5G1.3(c), this Court had discretion to run Petitioner's sentence concurrently, so it is possible that, absent counsel's purported error, this Court would have done so. But possibility is insufficient because Petitioner is required to show the reasonable probability of a different outcome. Prewitt, 83 F.3d at 819; United States v. Law, CRIM.A. 08-77, 2012 WL 1671289, at *3-4 (E.D.

Pa. May 14, 2012) (rejecting a similar § 5G1.3(c) habeas petition for similar reasons). Petitioner's ineffective assistance of counsel claim fails for this reason alone.

Regardless, the amended application notes for § 5G1.3(c) indicate that a consecutive sentence was appropriate for Petitioner. For instance, although there were some mitigating factors, Petitioner has a serious criminal record, which bears on the 18 U.S.C. § 3553(a) factors. (See generally PSR, Opp'n Ex. I (under seal).) In part because of his criminal history, this Court imposed a sentence at the upper end of the Guidelines. (Opp'n Ex. J (advising a sentence of 37 to 46 months; Ex. H (sentencing Petitioner to 46 months). Additionally, "concurrent sentences are more likely to be appropriate" when they are for "unrelated behavior." Setser v. United States, 132 S. Ct. 1463, 1476 (2012). Here, Petitioner has presented the Court with nothing that indicates his methamphetamine-related sentence in state court was related to his illegal entry sentence in federal court. Thus, a consecutive sentence would generally be appropriate in his case. See id. Hence, Petitioner cannot show prejudice.[1]

[1]Petitioner's remaining ineffective assistance of counsel claims also fail. Because the Bureau of Prisons, not the district court, determines credit for time served, counsel did not prejudice Petitioner by failing to inform this Court of Petitioner's request for such credit. See United States v. Wilson, 503 U.S. 329, 333-36 (1992). Additionally, Petitioner's claim that counsel had insufficient communication with him may be inaccurate. (Opp'n Ex. N at 122-24 (declaration of counsel).) Regardless, Petitioner does not explain how any purported lack of communication prejudiced him.

IV. Conclusion

For the reasons stated herein, the Petition is DENIED.

IT IS SO ORDERED.

Dated: September 3, 2013

DEAN D. PREGERSON
United States District Judge