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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTELMO ONTIVERAS,

Defendant - Appellant.

No. 10-16433

D.C. Nos. 2:09-cv-00739-GEB-
GGH2:02-cr-00418-GEB-
GGH-3

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted November 5, 2012**
San Francisco, California

Before: FARRIS, NOONAN, and BYBEE, Circuit Judges.

Antelmo Ontiveras appeals the denial of his 28 U.S.C. § 2255 motion to vacate his conviction and sentence for conspiracy to possess and possession of, with intent to distribute, methamphetamine in violation of 21 U.S.C. §§ 846 and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

841(a)(1). He alleges that his trial counsel rendered ineffective assistance by (1) failing to make a motion for acquittal based on insufficiency of the evidence pursuant to FED. R. CRIM. P. 29 and (2) not advising Ontiveras of his option to plead guilty without a plea.

There is no basis for a conclusion that trial counsel rendered ineffective assistance. We have reviewed the record, and it leaves no doubt that Ontiveras committed sufficient acts to be charged as a part of the conspiracy to possess and possession of, with intent to distribute methamphetamine under 21 U.S.C. §§ 846 and 841(a)(1). *See United States v. Herrera-Gonzalez*, 263 F.3d 1095 (9th Cir. 2001). Counsel's failure to make a Rule 29 motion therefore was neither deficient nor prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

On this record, it is clear that Ontiveras would not have entered a guilty plea. Therefore counsel did not prejudice Ontiveras' trial by failing to discuss various pleading possibilities. *Id.*

The magistrate judge issued findings and recommendations to deny the § 2255 motion in its entirety. The District Court adopted that position in full on March 26, 2010.

We find nothing in the record to justify reversal.

AFFIRMED.