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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America	)	
	)	
Plaintiff,	)	No. CR 05-0170-PHX-FJM
vs.	)	CV 07-1645-PHX-FJM (BPV)
	)	
Joel Pulido-Trujillo,	)	<b>REPORT AND</b>
	)	<b>RECOMMENDATION</b>
Defendant/Movant.	)	

On August 27, 2007, Joel Pulido-Trujillo, (“Movant”), presently confined in the Rivers Correctional Institution, Winton, North Carolina, filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 U.S.C. § 2255 ("Motion") (Doc. #150). The Magistrate Judge recommends that the District Court enter an order denying the Motion.

Ordinarily, a court must conduct a hearing on a motion unless it "and the files and records of the case conclusively show that the petitioner is entitled to no relief ...." 28 U.S.C. § 2255. The Motion, as well as the files and records, do conclusively establish that Miranda-Martinez is not entitled to relief. *See Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989). Hence, no hearing is required.

**I. PROCEDURAL BACKGROUND.**

On December 22, 2005, Pulido-Trujillo pled guilty to Count 1 of the Indictment, Conspiracy to Possess with Intent to Distribute Five Kilograms or more of Cocaine. (Doc. No. 92.)

1           The plea agreement contained a waiver of Pulido-Trujillo's appeal rights: The  
2 defendant ...waives: (1) any right to appeal the Court's entry of judgment against  
3 defendant; (2) any right to appeal the imposition of sentence upon defendant under Title  
4 18, United States Code, Section 3742 (sentence appeals); and (3) any right to  
5 collaterally attack defendant's conviction and sentence under Title 28, United States  
6 Code, Section 2255, or any other collateral attack." (Doc. No. 157, Ex. A, Plea  
7 Agreement, at 4.)

8           On May 1, 2006, Pulido-Trujillo was sentenced to 120 months imprisonment,  
9 followed by five years of supervised release. (Doc. No. 115.)

10           On May 9, 2006, Pulido-Trujillo filed a Notice of Appeal. (Doc. No. 117.) The  
11 Ninth Circuit Court of Appeals granted the Government's motion to dismiss the appeal  
12 in light of the valid appeal waiver. (Doc. No. 147.)

13           Pulido-Trujillo next filed the present § 2255 action. (Doc. No. 150.) He raises  
14 four grounds for relief: First, he alleges that he received ineffective assistance in  
15 connection with plea agreement based on counsel's failure to adequately investigate the  
16 underlying facts and law and at sentencing by wrongly conceding Movant was  
17 ineligible for the safety valve. Second, he alleges that his guilty plea was not voluntary  
18 and intelligent. Third, he alleges that he was actually innocent of the crime to which he  
19 pleaded guilty. Lastly, he alleges that the government breached the terms of the plea  
20 agreement by opposing application of the safety valve to his sentence. (*Id.*)

21           On December 18, 2007 the District Court called for an answer from the United  
22 States Attorney. (Doc. No. 153.) The Government filed a Response to Defendant's  
23 Motion to Vacate, Set Aside or Correct Sentence on April 16, 2008, with exhibits A  
24 through F attached. (Doc. No. 157.) Movant filed his reply on May 7, 2008.

1 **DISCUSSION**

2 **A. Timeliness**

3 Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a one  
4 year period of limitations from the date on which the judgement of conviction becomes  
5 final has been imposed on the filing of motions for collateral relief by prisoners in  
6 federal custody. 28 U.S.C. § 2255. The Magistrate Judge finds the Motion timely filed.

7 **B. Waiver**

8 The Government asserts that the Court should deny the Motion because Movant  
9 expressly waived his right to collaterally attack his sentence. Additionally, the  
10 Government argues that Pulido-Trujillo's claims that his plea was not knowing and  
11 voluntary or that the United States breached the plea agreement are meritless and should  
12 be denied.

13 Movant has waived challenges to collaterally attack his conviction and sentence.  
14 The Ninth Circuit Court of Appeals has found that there are "strict standards for waiver  
15 of constitutional rights." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102 (9th  
16 Cir. 2005). It is impermissible to presume waiver from a silent record, and the Court  
17 must indulge every reasonable presumption against waiver of fundamental  
18 constitutional rights. *Id.* In this action, Movant's waiver was clear, express, and  
19 unequivocal.

20 Plea agreements are contractual in nature, and their plain language will generally  
21 be enforced if the agreement is clear and unambiguous on its face. *United States v.*  
22 *Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005). A defendant may waive the statutory  
23 right to bring a § 2255 action challenging the length of his sentence. *United States v.*  
24 *Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994). The only claims that cannot be waived are  
25 claims that the plea or waiver itself was involuntary or that ineffective assistance of  
26 counsel rendered the plea or waiver involuntary. *See Washington v. Lampert*, 422 F.3d  
27 864, 871 (9<sup>th</sup> Cir. 2005) (holding that a plea agreement that waives the right to file a  
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1 federal habeas petition pursuant to § 2254 is unenforceable with respect to an  
2 ineffective assistance of counsel claim that challenges the voluntariness of the waiver);  
3 *Pruitt*, 32 F.3d at 433 (expressing doubt that a plea agreement could waive a claim that  
4 counsel erroneously induced a defendant to plead guilty or accept a particular plea  
5 bargain); *see also Jeronimo*, 398 F.3d at 1156 n.4 (declining to decide whether waiver  
6 of all § 2255 rights included ineffective assistance of counsel claims implicating the  
7 voluntariness of the waiver).

8 “Collateral attacks based on ineffective assistance of counsel claims that are  
9 characterized as falling outside [the category of ineffective assistance of counsel claims  
10 challenging the validity of the plea or the waiver] are waivable.” *United States v.*  
11 *Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001). *See also Williams v. United States*,  
12 396 F.3d 1340, 1342 (11th Cir. 2005) (joining the Second, Fifth, Sixth, Seventh, and  
13 Tenth Circuits in holding that “a valid sentence-appeal waiver, entered into voluntarily  
14 and knowingly, pursuant to a plea agreement, precludes the defendant from attempting  
15 to attack, in a collateral proceeding, the sentence through a claim of ineffective  
16 assistance of counsel during sentencing.”).

17 “Generally, courts will enforce a defendant's waiver of his right to appeal if 1)  
18 the language of the waiver encompasses the defendant's right to appeal on the grounds  
19 claimed on appeal, and 2) the waiver is knowingly and voluntarily made.” *United*  
20 *States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998) (citations and quotation  
21 omitted). Although waiver of the right to appeal would not prevent an appeal where the  
22 sentence imposed is not in accordance with the negotiated agreement, a waiver is valid  
23 even if a defendant does not know the exact nature of what appellate issues might later  
24 arise at the time the defendant enters the waiver. *Navarro-Botello*, 912 F.2d at 321.

25 The Plea Agreement expressly waived Movant's right to collaterally attack the  
26 conviction or sentence. (Doc. No. 157, Ex. A, at 4.) The Plea Agreement further stated  
27 that Pulido-Trujillo agreed that his attorney had fully advised him of the nature of the  
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1 charges to which he was entering a plea, that the guilty plea was not the result of force,  
2 threats, assurances or promises, that his acceptance of the plea was voluntary, and that  
3 he agreed to be bound by its provisions. (*Id.*, at 8.)

4 At Pulido-Trujillo's' change of plea hearing, he was placed under oath and the  
5 Court informed him of the importance of understanding the proceedings, and that at any  
6 time if he didn't understand or had a question about anything in the case, he was to  
7 interrupt, and let the Magistrate Judge know. (Doc. No. 157, Ex. B., Change of Plea  
8 Hearing, R/T 12/22/05, at 2.) Pulido-Trujillo responded that this was "fine." (*Id.*) The  
9 Court asked Pulido-Trujillo if someone had read the plea agreement to him in Spanish,  
10 and if he had understood it. (*Id.* at 5.) Pulido responded affirmatively to both  
11 questions. (*Id.*) Pulido-Trujillo signed the plea agreement, with his true name, in court.  
12 (*Id.* at 4-5.)

13 The Court informed Pulido-Trujillo that if the District Court accepted the plea  
14 agreement, then his conviction and sentence would be final, not appealable or subject  
15 to attack. (*Id.* at 17.) The Court further informed Pulido-Trujillo of the constitutional  
16 rights he would forfeit by pleading guilty. (*Id.* at 17-19.) The Court specifically  
17 directed Pulido-Trujillo's attention to the waiver of appeal rights. (*Id.* at 19-20). Pulido-  
18 Trujillo acknowledged that he understood all of the rights he was giving up by pleading  
19 by pleading guilty. (*Id.* at 19-20) The plea colloquy indicates Pulido-Trujillo was  
20 aware of the waiver provision in the plea agreement. *See Blackledge v. Allison*, 431  
21 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of  
22 verity.").

23 Counsel for Movant has executed an affidavit in this case, avowing to the  
24 following: 1) counsel discussed the case and nature of the charges, potential sentence,  
25 applicability of the Sentencing Guidelines, the possibility of mandatory minimum  
26 sentences, and issues related to the possession of a firearm in relation to narcotics  
27 activity; 2) with the help of a Spanish interpreter counsel ensured that each and every  
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1 provision of the plea agreement was read to Pulido-Trujillo; 3) counsel explained each  
2 provision of the plea agreement to Pulido-Trujillo and obtained acknowledgment that  
3 Pulido-Trujillo understood the plea agreement; 4) counsel did not instruct Pulido-  
4 Trujillo to answer the Court's questions untruthfully during the change of plea  
5 proceedings, nor did he fool or trick Pulido-Trujillo into pleading guilty; and 5) counsel  
6 discussed the factual basis for the plea with Pulido-Trujillo, and he indicated that he  
7 understood and agreed with the facts to which he would plead guilty. (Doc. No. 157,  
8 Ex. C.)

9       The court concludes Pulido-Trujillo was aware of the waiver provision in the  
10 plea agreement when he pleaded guilty. The Plea Agreement signed by the Movant  
11 demonstrates that Movant entered a knowing, intelligent and voluntary waiver of his  
12 right to appeal or collaterally attack any matter pertaining to the prosecution or  
13 sentence. The Magistrate Judge finds that the Movant knowingly, intelligently, and  
14 voluntarily waived his right to collaterally attack his conviction or sentence. The  
15 allegations in grounds one, three and four of Movant's § 2255 motion to vacate do not  
16 pertain to the voluntariness of the plea agreement or the waiver. Movant's plea  
17 agreement expressly waived his right to raise these issues by way of a direct appeal or  
18 collateral attack and his guilty plea pursuant to the agreement was accepted as  
19 knowingly, intelligently and voluntarily made. Consequently, the court finds that  
20 Movant waived the claims in grounds one, three and four of his § 2255 motion and  
21 recommends that they be denied.

22       Out of an abundance of caution, to the extent that ground one raises an issue that  
23 Pulido-Trujillo's plea was not knowing and voluntary because of counsel's ineffective  
24 representation, the merits of ground one will be addressed alternatively as a claim that  
25 Pulido-Trujillo's plea was not knowing and voluntary due to the ineffective assistance  
26 of counsel.

1           **C.     Ineffective Assistance of Counsel**

2           The two-prong test for establishing ineffective assistance of counsel was set  
3 forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To  
4 prevail on an ineffective assistance claim, a convicted defendant must show (1) that  
5 counsel's representation fell below an objective standard of reasonableness, and (2) that  
6 there is a reasonable probability that, but for counsel's unprofessional errors, the result  
7 of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88. There is  
8 a strong presumption that counsel's conduct falls within the wide range of reasonable  
9 assistance. *Strickland*, 466 U.S. at 689-90. The *Strickland* test also applies to  
10 challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*,  
11 474 U.S. 52, 58 (1985). A defendant who pleads guilty based on the advice of counsel  
12 may attack the voluntary and intelligent character of the guilty plea by showing that the  
13 advice he received from counsel fell below the level of competence demanded of  
14 attorneys in criminal cases. *Id.* at 56. To satisfy the second prong of the *Strickland* test,  
15 "the defendant must show that there is a reasonable probability that, but for counsel's  
16 errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*  
17 at 59.

18           In ground one, Movant contends that his attorney was uninterested in advocating  
19 for his cause, as evidenced by his acquiescence in the Government's interpretation of  
20 the discussion of the safety valve language in the plea agreement. Movant claims that  
21 defense counsel took "no steps to ensure that the Government had a clear contractual  
22 obligation to recommend the safety valve in petitioner's case." (Doc. No. 150, at 7.)  
23 Movant further alleges that the "true facts to this case were never known to the court  
24 because petitioner had been coerced into pleading guilty by his attorney by stating if  
25 petitioner didn't plead guilty that he would receive a lot of time, never once did counsel  
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1 entertain the fact that petitioner was innocence [sp] of these charges and that petitioner  
2 was pleading to a charge he didn't know anything about.” (*Id.*)

3 In ground two, Movant further alleges that he does not speak English, and is  
4 quite limited in his ability to read and write Spanish, and did not understand what he  
5 was pleading guilty to, but only followed the instructions of his retained counsel to  
6 make the necessary recitations to the court in order for the court to accept his guilty  
7 plea, “otherwise, as petitioner’s trial counsel had stated, the court would not accept the  
8 guilty plea and petitioner would be found guilty and face a lot of time.” (Doc. No. 150  
9 at 20.) Pulido-Trujillo further asserts that counsel never attempted to discuss the case  
10 with him, nor did counsel make any attempts to explain the nature of the charges  
11 against him, and that he went into the proceedings “deaf-dumb and blind.” (*Id.*)  
12 Pulido-Trujillo further argues that the government violated the terms of the plea  
13 agreement by actively opposing application of the “safety valve” despite Pulido-  
14 Trujillo’s eligibility for application of the “safety valve.”

15 Movant's claims are undermined by the change of plea hearing transcript.  
16 Movant was asked if his lawyer went through the plea agreement and explained it to  
17 him, and he responded "yes." (Doc. No. 157, Ex. B., Change of Plea Hearing, R/T  
18 12/22/05, at 5.) The court asked Movant if his lawyer had answered all of his questions  
19 about the plea agreement, and he responded “yes.” (*Id.* at 5-6.) The Court further  
20 asked Movant if he believed that he understood the plea agreement, and he responded,  
21 “yes.” (*Id.* at 6.) The Court asked Movant if he had been satisfied with his  
22 representation so far; if Movant’s counsel had “done the things in [his] case that [he’s]  
23 asked him to do”; and if he had enough time to talk with his lawyer about whether he  
24 should plead guilty - Movant responded “yes” to each question (*Id.* at 7-8.) Movant  
25 acknowledged that he understood the charges. (*Id.* at 8.) The Court further explained  
26 to Movant that “If you have no convictions or a very insignificant conviction, if you did  
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1 not use violence or threats of violence or possess a firearm or dangerous weapon during  
2 this offense, if no one was injured during this offense, and if you were not an organizer  
3 or leader in this crime, then you have an opportunity to get less than ten years.  
4 Otherwise, the least you can get is ten years. Do you have any questions?” Movant  
5 replied: “No. Everything’s fine.” (*Id.* at 13-14.) The Court asked counsel if he had  
6 explained to his client that “unless he qualifies for the safety valve, he’s going to get the  
7 ten years?” (*Id.* at 14.) Counsel responded “yes.” (*Id.*)

8       Regarding the safety valve language placed into the plea agreement, which the  
9 Court considered “superfluous,” the Court asked the Government if Movant qualified  
10 for safety valve, “then you’re going to recommend the low sentence in the guideline  
11 range?” (*Id.*) The Government responded “That’s correct.” (*Id.*) The Court asked  
12 counsel if that was how he had explained it to his client, and counsel explained “yes”  
13 because, that was how he understood the language, as did the Government, because it  
14 was a recommendation, and not a stipulation. The Court responded “Okay. I guess I  
15 would have written it differently, but that’s okay, as long as everybody understands.”  
16 (*Id.* at 15.) The Court asked counsel if he understood; counsel responded “yes.” (*Id.*)  
17 The Court asked counsel if his client understood, and counsel responded that “That’s  
18 how I explained it to him.” (*Id.*) The Court explained to Movant that if he qualified for  
19 safety valve, the government would recommend to the Court that he get the low number  
20 in the sentencing range. (*Id.* at 15-16.)

21       As to Movant’s claim that his counsel stated if he did not make the necessary  
22 recitation, the Court would not accept the guilty plea, and he would be found guilty and  
23 face a lot of time; even if his lawyer said this, it does not show that Movant was  
24 intimidated into accepting the plea. When asked directly if anyone threatened him or  
25 in any way forced him to enter the plea agreement, Movant answered “no.” (Doc. No.  
26 157, Ex. B. at 20.) Additionally, Movant fails to even allege that he would not have  
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1 entered the plea agreement if his lawyer had not advised him that way. For these  
2 reasons, Movant has failed to show that his lawyer provided ineffective assistance of  
3 counsel by “coercing, tricking, or inducing him to plead guilty,” and has failed to  
4 establish prejudice.

5 At the time of sentencing, Pulido-Trujillo did not raise any claim of  
6 involuntariness of his plea, neither did he raise any factual objection to the presentence  
7 report’s recommendation that he was ineligible for the “safety valve” provision based  
8 upon the presence of a firearm at the drug stash house for which he possessed house  
9 keys at the time of his arrest. (See Doc. No. 157, Ex. D., Sentencing Transcript, R/T  
10 5/1/2006)

11 Thus, the evidence fails to support Movant's claim that counsel was ineffective  
12 by “acquiescing” in the Government’s interpretation of the discussion of the safety  
13 valve language in the plea agreement. It is clear from the record that the agreement was  
14 that the Government would recommend the low end of the range if Movant were  
15 “safety valve” eligible. The transcript indicates that all parties, including Movant  
16 understood this.

17 The plea agreement also belies that fact that Movant claims he was pleading to  
18 a charge he did not know anything about. It is clear from the transcript that Pulido-  
19 Trujillo understood the charges, and intended to plead guilty. (Doc. No. 157, Ex. B. at  
20 8.)

21 Movant’s claim that his inability to speak English, or read and write Spanish, and  
22 that he only followed the instructions of his counsel is also not supported by the  
23 evidence. Both his lawyer and the court advised Movant of the potential consequences  
24 of his guilty plea. The Court adequately ascertained that Movant’s plea was knowingly,  
25 voluntarily, and intelligently made. Movant has failed to demonstrate that his attorney  
26 provided ineffective assistance in this regard.

1 For the above reasons, the court finds that Movant's allegations of ineffective  
2 assistance of counsel are unsupported by the record. Accordingly, the court will  
3 recommend that Movant's allegations in grounds one and two of his motion to vacate  
4 be denied.

5 **RECOMMENDATION**

6 After careful consideration of the Motion to Vacate, Set Aside, or Correct  
7 Sentence and all papers filed in this action, the Magistrate Judge recommends that the  
8 District Court deny Movant's motion.

9 Pursuant to Title 28 U.S.C. § 636(b), any party may serve and file written  
10 objections within 10 days of being served with a copy of this Report and  
11 Recommendation. If objections are not timely filed, they may be deemed waived.

12 If objections are filed, the parties should use the following case numbers: CR 05-  
13 170-PHX-FJM and CV 07-1645-PHX-FJM.

14 DATED this 21<sup>st</sup> day of September, 2009.

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18 Bernardo P. Velasco  
19 United States Magistrate Judge  
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