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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America)	
)	
Plaintiff/Respondent,)	No. CR 06-736-PHX DGC
vs.)	
)	No. CV 07-2585-PHX-DGC (BPV)
Reynaldo Moreno-Andrade,)	
)	
Defendant/Movant.)	REPORT AND RECOMMENDATION

On December 19, 2007, Reynaldo Moreno-Andrade, (“Movant”), presently confined in the Federal Correctional Institution in Pecos, Texas, 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 (Doc. #215). The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order granting Movant’s motion in part as to Grounds One and Two, vacate and reenter the Movant’s Judgment, and appoint new counsel to represent Movant for the purposes of his direct appeal. In the alternative, the Magistrate Judge recommends that the District Court enter an order granting an evidentiary hearing as to Grounds One and Two of the Motion. The Magistrate Judge also recommends that the District Court enter an order dismissing Grounds Three and Four.

Ordinarily, a court must conduct a hearing on a motion unless it “and the files and the 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 Movant is not entitled to relief as to the last two grounds of the motion. *See Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989). Hence, no

1 hearing is required to rule on the last two grounds of the present Motion. The necessity
2 of a hearing as to Grounds One and Two is addressed below.

3 **I. PROCEDURAL BACKGROUND**

4 On August 27, 2007, Movant Reynaldo Moreno-Andrade plead guilty to Count
5 1 of the Second Superseding Indictment (Doc. #90), Conspiracy to Possess with the
6 Intent to Distribute 5 Kilograms more of Cocaine, in violation of 21 U.S.C. § 846,
7 841(a)(1) and 841(b)(1)(A)(ii), in CR-06-0736-PHX-DGC.

8 The plea agreement set out that the maximum penalties punishable was a term
9 of imprisonment of life and a maximum fine of \$4,000,000.00, and a minimum term of
10 imprisonment of 10 years, along with a term of supervised release of at least 5 years.
11 (Doc. #208, p. 2).

12 The parties stipulated that the quantity of cocaine Moreno-Andrade possessed
13 was at least 50 kilograms, but less than 150 kilograms, and that, therefore, the offense
14 level of the guidelines should be determined based only as to the agreed upon amount.
15 (Doc. #208, p. 2).

16 In the plea agreement, the parties stipulated to a reduction in the Adjusted
17 Offense Level by three levels if Moreno-Andrade made a full and complete disclosure
18 to the Probation Officer of the circumstances surrounding the offense and if Moreno-
19 Andrade demonstrated acceptance of responsibility. (Doc. #208, p. 3). The parties also
20 agreed to a two level reduction in the offense level computation for Movant's minor
21 role participation in the offense. (*Id.*) Additionally, the Government agreed to
22 recommend the "Safety Value" provision, subject to verification that Moreno-Andrade
23 did not have more than one criminal history point.

24 The United States agreed to bring no further charges against Moreno-Andrade
25 arising from information learned during the investigation, as well as dismiss Count 2.
26 (Doc. #208, p. 4).

1 The plea agreement provided the following factual basis: “On or about July 23,
2 2006, I, Reynaldo Moreno-Andrade, delivered 50 kilograms of cocaine to co-defendant
3 Lopez-Anaya at his residence located at 8329 W. Pierson Street, Phoenix, Arizona. Law
4 Enforcement subsequently executed a search warrant at the residence of co-defendant
5 Lopez-Anaya and seized an additional 87 kilograms of cocaine.” (Doc. 208, p. 7).

6 On August 24, 2007, the Findings and Recommendations of Magistrate Judge
7 Edward Voss were filed. (Doc. #179). District Court Judge David Campbell
8 subsequently entered an order on October 25, 2007, accepting Moreno-Andrade’s guilty
9 plea, and ordering the Probation Department to prepare a Presentence report.

10 Defense counsel, Rafael Gallego, submitted sealed objections to the Pre-
11 Sentence Investigation Report (“PSR”). (Doc. #202). Specifically, counsel argued for
12 a minimal role reduction of an additional two points, based on Moreno-Andrade’s
13 participation in the offense. At sentencing, the Government informed the court that they
14 did not receive a copy of the objections until that morning, and that was the reason why
15 the Government did not file a response. (Reporter’s Transcript, Sentencing Hearing,
16 p. 6). The Government agreed, as stipulated in the plea agreement, that the case was a
17 minor role case, but stated they did not believe it was a minimal role case. (*Id.*)

18 Moreno-Andrade was sentenced on November 19, 2007. The court found that
19 because Moreno-Andrade did not have a criminal history, the court was not required
20 to impose the minimum sentence of 10 years. (Reporter’s Transcript, Sentencing Hearing,
21 pp. 14-15). The court found that because Moreno-Andrade had no criminal history,
22 under the Sentencing Guidelines, the range of sentences was between 63 and 78
23 months. (*Id.*, at p. 15). The court sentenced him to a prison term of 63 months, and a
24 upon his release, supervised release for 3 years. (Doc. #207).

25 On December 19, 2007, Movant Moreno-Andrade filed the present “Motion to
26 Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (28 U.S.C. §
27 2255).” (Doc. #215). He raises four grounds for relief: (1) Ineffective Counsel for
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1 failure to follow his express instructions to file a Notice of Appeal because he received
2 a harsher sentence than he thought he would; (2) counsel was ineffective for failure to
3 file an appeal; (3) counsel was constitutionally ineffective by failing to argue for
4 mitigation because he only had a minor role in the offense; and (4) counsel was
5 ineffective by failing to object at sentencing. (Doc. #215).

6 On January 15, 2008, District Court Judge David Campbell ordered the United
7 States Attorney to respond. (Doc. #224). The order also referred this matter to this
8 Magistrate Judge for further proceedings and a report and recommendation. (*Id.*) The
9 Government filed a Response in Opposition to Motion to Vacate, Set Aside or Correct
10 Sentenced Pursuant to 28 U.S.C. § 2255 on March 24, 2008, with exhibits 1-4 attached.
11 (Doc. #262).

12 **II. DISCUSSION**

13 a. Timeliness

14 Under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), a one
15 year period of limitations from the date on which the judgment of conviction becomes
16 final has been imposed on the filing of motions for collateral relief by prisoners in
17 federal custody. 28 U.S.C. § 2255. The Magistrate Judge finds that the Motion was
18 timely filed.

19 b. Waiver

20 The Government asserts that the Court should deny the Motion because Movant
21 knowingly, intelligently, and voluntarily waived his right to collaterally attack his
22 sentences.

23 The right to petition for relief under 28 U.S.C. § 2255 is statutory. *United States*
24 *v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993)(*citing See Abney v. United States*, 431
25 U.S. 651, 656 (1977) (“The right of appeal, as we presently know it in criminal cases,
26 is purely a creature of statute....”). A knowing and voluntary waiver of statutory rights
27 under 28 U.S.C. § 2255 is enforceable, *id.* (*citing United States v. Navarro-Botello*, 912
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1 F.2d 318, 321 (9th Cir. 1990)), as long as the plea agreement expressly makes the
2 waiver, *United States v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000); *United States v.*
3 *Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994).

4 Generally, courts will enforce a defendant’s waiver of his right to appeal if the
5 language of the waiver encompasses the defendant’s right to appeal on the grounds
6 claimed on appeal, and 2) the waiver is knowingly and voluntarily made.” *United States*
7 *v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998) (citations and quotations
8 omitted). Although waiver of the right to appeal would not prevent an appeal where the
9 sentence imposed is not in accordance with the negotiated agreement, a waiver is valid
10 even if a defendant does not know the exact nature of what appellate issues might later
11 arise at the time the defendant enters the waiver. *Navarro-Botello*, 912 F.2d at 321.

12 The plea agreement expressly waived Movant’s right to collaterally attack the
13 sentence (Doc. 208, p. 4). The plea agreement states that “Defendant further waives: (1)
14 any right to appeal the Court’s entry of judgment against defendant; (2) any right to
15 appeal the imposition of sentence upon defendant under Title 18, United States Code,
16 Section 3742 (sentence appeals); and (3) any right to collaterally attack defendant’s
17 conviction and sentence under Title 28, United States Code, Section 2255, or any other
18 collateral attack.” (*Id.*) The plea agreement further stated that Movant agreed that his
19 attorney had fully advised him of the nature of the charges to which he was entering a
20 plea, that the guilty plea was not the result of force, threats, assurances or promises, that
21 his acceptance of the plea was voluntary, and that he agreed to it. (Doc. 208, p. 8).
22 Movant also signed acknowledging that the agreement had been read to him in Spanish
23 and that he carefully reviewed all of it with his attorney. (Doc. 208, p. 9). Additionally,
24 at Movant’s Change of Plea hearing, defense counsel told the court he was a fluent
25 Spanish speaker and had gone over the plea agreement with Movant at length.
26 (Reporter’s Transcript, Change of Plea Hearing, pp. 5-6). The Court confirmed with
27 Movant that his attorney had gone over the plea agreement in Spanish and asked
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1 Movant if he had any difficulty understanding the translation and the discussions, to
2 which Movant answered, “No, I understood them well.” (*Id.*) Movant acknowledged
3 that he signed the plea agreement. (Reporter’s Transcript, Change of Plea Hearing, p.
4 9).

5 The Court informed Movant of the constitutional rights he would forfeit by
6 pleading guilty. (Reporter’s Transcript, Change of Plea Hearing, pp. 7-8). The court
7 specifically directed Movant’s attention to the waiver of appeal rights. (*Id.* at 8)
8 Movant said he understood those rights and was willing to give them up by pleading
9 guilty. (*Id.*) The plea colloquy indicates Movant was aware of the waiver provision
10 in the plea agreement. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (“Solemn
11 declarations in open court carry a strong presumption of verity.”)

12 The Court concludes Movant was aware of the waiver provision in the plea
13 agreement when he pleaded guilty. The plea agreement signed by Movant demonstrates
14 that Movant entered a knowing, intelligent and voluntary waiver of his right to appeal
15 or collaterally attack any matter pertaining to the judgment or sentence. The Magistrate
16 Judge further finds that Movant knowingly, intelligently, and voluntarily waived his
17 right to collaterally attack his sentence. However, the nature of Movant’s claims are
18 such that his waiver does not require a dismissal because Movant purported to waive
19 the right to raise the issues presented.

20 c. Grounds One and Two

21 Movant argues that his counsel was ineffective when he failed to file a notice of
22 appeal at his instruction because he had received a harsher sentence than he thought he
23 would under the plea. This argument is not forfeited by the waiver provision in the plea
24 agreement. *See Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005).

25 “The Sixth Amendment guarantees criminal defendants the right to effective
26 assistance of counsel.” *Luna v. Cambra*, 306 F.3d 954, 961 (9th Cir. 2002), *amended at*,
27 311 F.3d 928 (9th Cir. 2002). (Quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

1 To establish a violation of this right, the defendant must prove ‘counsel’s performance
2 was deficient” and the “deficient performance prejudiced the defense.” *Id.* To prove
3 deficient performance, a defendant can rely on evidence that he sufficiently
4 demonstrated his interest in an appeal. *See Sandoval-Lopez*, 409 F.3d at 1198. Prejudice
5 exists if, but for the lawyer’s refusal, a defendant would have appealed.

6 Under Movant’s second claim, defense counsel would not be *per se* ineffective
7 for failing to failing to file a notice of appeal without defendant’s consent. *See Roe v.*
8 *Flores-Ortega*, 528 U.S. 470 (2000). However, if the allegations in Movant’s first claim
9 are found to be true, that Movant had directed defense counsel to file a notice of appeal,
10 then his failure to do so would constitute ineffective assistance of counsel.

11 Section 2255 requires that district court hold an evidentiary hearing “[u]nless the
12 motions and files and record of the case conclusively show that the prisoner is entitled
13 to no relief.’ 28 U.S.C. § 2255. An evidentiary hearing is usually required if the motion
14 states a claim based on matters outside the record or events outside the courtroom.
15 *United States v. Burrows*, 872 F.2d 915 (9th Cir. 1989) (*citations omitted*). The district
16 court may deny a section 2255 motion without an evidentiary hearing only if the
17 movant’s allegations, viewed against the record, either do not state a claim for relief or
18 are so palpably incredible or patently frivolous as to warrant summary dismissal. *Id.*

19 The government admits that it is still unclear in the 9th Circuit whether a
20 defendant may raise an ineffective challenge despite his plea agreement waiver of his
21 right to appeal or file habeas petitions. Movant alleges that he instructed defense
22 counsel to file a notice of appeal because defense counsel had failed to provide Movant
23 with the deal defense counsel had told him (Movant) he was to get, specifically that
24 Movant would receive less time as a minor role participant. (Doc. #251, p. 4). While
25 Movant did receive a stipulated two level reduction for minor role, he did not receive
26 an additional reduction for minimal role. It is possible that Movant meant “minimal
27 role” participant, as opposed to “minor role” participant. His *pro se* motion has other
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1 spelling and grammar errors, as Movant’s first language is not English. *Pro se*
2 defendants are not held to same pleading standards as those assisted by counsel. *See*
3 *Sanders v. U.S.*, 373 U.S. 1, 22 (1963) (“An applicant for such relief ought not to be
4 held to the niceties of lawyers’ pleadings....”)

5 While defense counsel’s affidavit did state, “I did not promise him that the court
6 would sentence him to any specific sentence, and I did not promise him that the court
7 would grant him a lesser sentence for “minor role.”” (Doc. 256, Exhibit 4, p. 2), it did
8 not have any mention of whether defense counsel had discussed with Movant the
9 difference between the agreed upon “minor role” reduction and the additional, desired
10 “minimal role” reduction, whether they discussed the issue of an appeal, or whether
11 Movant had indeed asked defense counsel to file an appeal. While the parties stipulated
12 in the plea agreement that Movant was entitled to a “minor role” reduction, defense
13 counsel did argue on behalf of Movant, in both writing and orally, that Movant was
14 entitled to a further reduction for a “minimal role.” While this fact makes Movant fail
15 on his claims in Ground Three of his Motion, as counsel did seek mitigation on behalf
16 of Movant, it also lends credibility to Movant’s assertion that he did not receive the
17 sentence that he alleges that he was told by defense counsel he would receive, and that
18 in light of that, he wished to file an appeal. In this respect, the allegations as viewed
19 against the record are not palpably incredible.

20 In *Sandoval-Lopez*, the 9th Circuit discussed the “troubling” and essentially
21 nonsensical result in allowing a defendant to appeal when their plea agreement
22 specifically purports to waive the right to appeal, defendant had been specifically
23 advised of his waiver of appeal rights, and had waived those rights in open court. Such
24 is the case at bar. However, as stated by the court:

25 This proposition may amount to saying “it is ineffective assistance of
26 counsel to refuse to file a notice of appeal when your client tells you to,
27 even if doing so would be contrary to the plea agreement and harmful to
28 your client,” but that is the law on filing a notice of appeal.

27 *Id.*

1 at 1198. Movant may be very foolish to risk losing the advantage of his sentence of
2 63 months, the lowest possible sentence under the guidelines, on an appeal almost sure
3 to go nowhere in light of his express waiver of his appellate rights under the plea
4 agreement. "Nevertheless the client has the constitutional right, under *Flores-Ortega*
5 and *Peguero*, to bet on the possibility of winning the appeal and then winning an
6 acquittal, just as a poker player has the right to hold the ten and queen of hearts, discard
7 three aces, and pray that when he draws three cards, he gets a royal flush." *Id.* at 1199.

8 In *Sandoval-Lopez*, the court suggested that when a defendant makes an
9 allegation that counsel has been ineffective by failing to file a requested appeal, "two
10 things can happen: 1) the district court can hold an evidentiary hearing to decide
11 whether petitioner's allegation is true, and if it is, vacate and reenter the judgment,
12 allowing the appeal to proceed; or 2) if the state does not object, the district court can
13 vacate and reenter the judgment without a hearing and allow the appeal to proceed,
14 assuming without deciding that the petitioner's claim is true." *Id.* at 1198. The
15 government might choose to not object to free itself from the restraint of the agreement
16 or because getting the appeal dismissed based on Defendant's waiver of this right would
17 be less work than an evidentiary hearing. *Id.*

18 This Court recommends that the most expeditious course of action would be to
19 allow the Movant to proceed with his appeal. This Court notes, however, that Movant
20 is *pro se* and filed this Motion wherein he stated his intent to file an appeal, without
21 advice of counsel. Given the possible extreme consequence that the Government may
22 seek to withdraw from the negotiated plea agreement if Movant files a Notice of
23 Appeal, this Court recommends giving him one last chance to reconsider this intended
24 course of action.

25 "Assuming without deciding that the Petitioner's claim is true," *id.*, the
26 Magistrate Judge recommends that the District Judge, after its independent review of
27 the record, vacate and reenter the Judgment of Conviction, allowing Movant an
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1 opportunity to file an appeal and appoint counsel for purposes of proceeding with his
2 appeal. In the alternative, the Magistrate Judge recommends that the District Judge
3 enter an order granting an evidentiary hearing as to Grounds One and Two.

4 d. Ground Three

5 Movant alleges that defense counsel was constitutionally ineffective for failing
6 to seek a mitigating role of defendant in the offense.

7 Movant again contends that defense counsel promised him a downward
8 departure for minor role participation. In the plea agreement, the parties did stipulate
9 that Movant would receive a two point departure for minor role participation. At the
10 Change of Plea hearing the judge went through a series of questions to establish that
11 Movant understood the guidelines, and that they were only advisory.

12 Additionally, the judge asked Movant:

13 ...do you understand that whatever he [defense counsel] told you, that that
14 is just his estimate of what the sentence will be in the case; it is not a
15 promise in any way and it does not bind the Court in any fashion. Do you
16 understand that?

17 Defendant: Yes

18 (Reporter's Transcript, Change of Plea Hearing, p. 11)

19 Contrary to Movant's assertions, at sentencing, defense counsel did argue for
20 both the stipulated minor role reduction, and also argued for a minimal role reduction
21 as opposed to a minor role reduction. Counsel argued that Movant was entitled to a
22 minimal role reduction because his only involvement in the case was the actual delivery
23 of the drugs.

24 Movant's claim that counsel was ineffective for not getting him a minor role
25 reduction fails because counsel did secure a minor role reduction for Movant, which
26 was stipulated in the plea agreement. Assuming, *arguendo*, that Movant meant
27 "minimal role" reduction, Movant also fails on this as counsel did in fact argue, in both
28 writing and orally, for a minimal role reduction and it was rejected by the judge. In his

1 affidavit, defense counsel states he did not promise Movant he would receive a
2 particular sentence. Whether Movant believed that counsel had promised him a
3 different sentence is not the standard for which to prove that counsel was
4 constitutionally ineffective under the Sixth Amendment. If Movant is arguing that
5 counsel had promised him a downward departure and that is the sole reason he entered
6 into the plea agreement, perhaps it could be found that counsel was constitutionally
7 ineffective. However, that contention is not supported by Movant's own statements in
8 his Motion or in the record.

9 Movant signed a plea agreement which stipulated to a reduction for minor role
10 participation, yet was advised that he was not entitled to any specific sentencing
11 guidelines. In open court, Movant acknowledged he was not guaranteed any particular
12 sentence. Defense counsel did argue for a minimal role reduction, which was denied
13 and Movant was sentenced in accordance with the plea agreement, with Movant
14 receiving a two point departure for minor role.

15 Therefore, the record does not support Movant's contention that he is entitled
16 to relief as counsel's performance, as viewed by the record, did not prejudice Movant
17 in any way.

18 e. Ground Four

19 Movant alleges that defense counsel was ineffective for failing to challenge the
20 factual allegations used to arrive at the sentence. He also alleges that defense counsel
21 failed to review the presentence report with defendant. Movant fails on this claim as
22 defense counsel stated on the record during sentencing that he had discussed the
23 presentence report with defendant. (Reporter's Transcript, Sentencing Hearing, p. 4).
24 Defense counsel also states in his affidavit that he reviewed the presentence report with
25 Movant. (Exhibit 4, p. 2). Movant claims that he was not privy to the facts that the
26 probation officer relied on in calculating the recommended sentence. However, the
27 record clearly supports that Movant is not entitled to relief on these grounds.

1 Defense counsel's affidavit states that he spent a good deal of time reviewing the
2 disclosure with Movant, and that Movant never intended to go to trial but simply
3 wanted the best deal possible. (Exhibit 4, pp. 1-2). Movant acknowledged at the change
4 of plea the factual basis for the plea, and signed a plea agreement that acknowledged
5 that the government would be able to prove the amount of at least 50 kilograms of
6 cocaine.

7 At the Change of Plea hearing, the court went through the facts, and asked
8 Movant if he understood the facts, and if they were true and Movant answered, "yes."
9 (Reporter's Transcript, Change of Plea Hearing, pp. 13-14) Additionally, defense
10 counsel did argue for a downward departure based on minimal role reduction which was
11 denied by the judge. Therefore, Movant's claim that he would have gotten less time but
12 for counsel's deficiencies, is simply not supported by the record.

13 **III. RECOMMENDATION**

14 After careful consideration of the Motion to Vacate, Set Aside, or Correct
15 Sentence and all papers filed in this action, the Magistrate Judge recommends that the
16 District Court enter an order partially granting Movant's motion, vacate and reenter the
17 Movant's Judgment, and appoint new counsel to represent Movant for the purposes of
18 his direct appeal.

19 In the alternative, the Magistrate Judge recommends that the District Court enter
20 an order granting an evidentiary hearing as to Grounds One and Two of the Motion.

21 The Magistrate Judge also recommends that the District Court enter an order
22 denying Movant's Motion as to Grounds Three and Four.

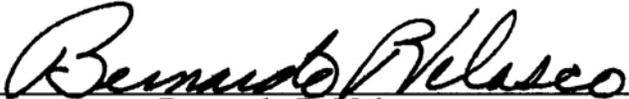
23 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections
24 within ten days after being served with a copy of this Report and Recommendation. A
25 party may respond to another party's objections within ten days after being served with
26 a copy thereof. Fed.R.Civ.P. 72(b).

1 If objections are not timely filed, then the parties' right to *de novo* review by the
2 District Court may be deemed waived. *See United States v. Reyna-Tapia*, 328 F.3d
3 1114, 1121 (9th Cir) (*en banc*), *cert. denied*, 540 U.S. 900 (2003).

4 If objections are filed, the parties should use the following case numbers: **CV 07-**
5 **2585-PHX-DGC and CR 06-736-PHX-DGC.**

6 DATED this 28th day of July, 2009.

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Bernardo P. Velasco
United States Magistrate Judge