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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,  
Plaintiff-Respondent  
vs.  
Osvaldo Pozo-Parra,  
Defendant-Movant.

) CR 05-00217-PHX-DGC  
) CV 08-1569-PHX-DGC (ECV)

**REPORT AND RECOMMENDATION**

TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

**BACKGROUND**

Osvaldo Pozo-Parra (“Movant”), has filed a *pro se* Motion to Modify and Correct Sentence pursuant to 28 U.S.C. § 2255. Doc. #1.<sup>1</sup> On February 5, 2007, Movant pleaded guilty to Count One of the Indictment, conspiracy to possess with the intent to distribute more than 50 grams of methamphetamine, a class B felony in violation of 21 U.S.C. § 846, § 841(a)(1), (b)(1)(B)(viii). Doc. #92 in CR 05-217. On August 27, 2007, Movant was sentenced to the custody of the Bureau of Prisons for 70 months followed by supervised release for four years. *Id.* Movant filed his motion to vacate on August 25, 2008. Doc. #1. The District Court screened the motion in an order filed on September 4, 2008, and ordered

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<sup>1</sup> Unless otherwise indicated, the referenced docket numbers are from the civil case docket, CV 08-1569.

1 the motion to be served upon Respondent. Doc. #4. On March 12, 2009, Movant filed an  
2 Amendment in which he asserts two claims in addition to those alleged in his original  
3 motion. Doc. #14.

4 Movant alleges four grounds for relief in his original motion. Doc. #1. First, Movant  
5 alleges that his counsel misrepresented that Movant would receive a sentence of 36 months.  
6 Second, Movant alleges that his attorney “deserted” his case, requiring Movant to hire a new  
7 attorney. Third, Movant alleges that his attorney enticed him to sign the plea agreement  
8 without explaining that he could get a longer sentence than what was promised, and that his  
9 lawyer failed to advise him of a possible obstruction of justice enhancement. Fourth, Movant  
10 alleges that his attorney wrongly told him that he waived his right to appeal despite a clause  
11 in the plea agreement stating his sentence would not exceed 57 months.

12 In the amendment to his motion to vacate, Movant alleges in ground five that did his  
13 lawyer not discuss with him the concept of ineffective assistance of counsel or the right to  
14 bring such a claim under section 2255. Doc. #14. In ground six, Movant alleges that his  
15 lawyer misadvised him regarding his eligibility for safety valve relief. Movant contends that  
16 he was misled to believe he qualified for safety valve relief and would receive a sentence of  
17 no more than 57 months.

18 On April 1, 2009, Respondent filed a Response to Motion to Vacate, Set Aside or  
19 Correct Sentence under 28 U.S.C. § 2255. Doc. #15. Movant has not filed a reply.

## 20 DISCUSSION

21 The government contends that of the six grounds for relief, only one, ground four, is  
22 not covered by the waiver of collateral review contained in the plea agreement. They argue,  
23 however, that ground four should be denied on the merits. The government further contends  
24 that the remaining five grounds for relief are foreclosed by the waiver and should be denied  
25 on that basis.

### 26 27 28 **A. Ground Four**

1           Movant alleges in ground four that his lawyer misadvised him about his right to  
2 appeal. Doc. #1 at 8. He states that his lawyer told him that by signing the plea agreement  
3 he was giving up his right to appeal. Movant asserts that his lawyer also told him there was  
4 a clause in the agreement that prevented his sentence from exceeding 57 months. Movant  
5 contends that he did not appeal his 70-month sentence because of his lawyer's advice  
6 regarding the waiver of appeal. Although Movant does not expressly assert ineffective  
7 assistance of counsel or the Sixth Amendment as the basis for this claim, the government,  
8 like this court, interprets it as an ineffective assistance claim and analyzes it as such.

9           The two-prong test for establishing ineffective assistance of counsel was set forth by  
10 the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an  
11 ineffective assistance claim, a convicted defendant must show (1) that counsel's  
12 representation fell below an objective standard of reasonableness, and (2) that there is a  
13 reasonable probability that, but for counsel's unprofessional errors, the result of the  
14 proceeding would have been different. Strickland, 466 U.S. at 687-88. There is a strong  
15 presumption that counsel's conduct falls within the wide range of reasonable assistance.  
16 Strickland, 466 U.S. at 689-90. The Strickland test also applies to challenges to guilty pleas  
17 based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985). A  
18 defendant who pleads guilty based on the advice of counsel may attack the voluntary and  
19 intelligent character of the guilty plea by showing that the advice he received from counsel  
20 fell below the level of competence demanded of attorneys in criminal cases. Id. at 56.

21           Here, the government concedes that “[t]his claim is colorable because, as discussed  
22 above, Pozo-Parra’s plea agreement provided that his sentence was not to exceed 57 months  
23 if he was eligible for safety-valve relief.” Doc. #15 at 6. The government further concedes  
24 that “[o]nce the Court found Pozo-Parra eligible for safety-valve relief, the sentence imposed  
25 could not exceed 57 months without giving Pozo-Parra an opportunity to withdraw from his  
26 plea.” As the government further concedes, Movant was not provided the opportunity to  
27 withdraw from his plea and “the sentence imposed was inconsistent with the plea  
28

1 agreement.” Movant’s counsel at sentencing did not object to the sentence nor did he file a  
2 direct appeal on Movant’s behalf. Doc. #15, Exh. B.<sup>2</sup>

3 During the change of plea proceeding, the District Court went through the plea  
4 agreement with Movant. Doc. #15, Exh. A. Movant answered “yes” when the Court asked  
5 him if he understood that if he qualified for the safety valve, the parties agreed the sentence  
6 would be no greater than 57 months. Doc. #15, Exh. A at 15-16. That provision of the plea  
7 agreement is contained in paragraph 2(d). Doc. #79 in CR 05-217. Rule 11(c)(1)(C) of the  
8 Federal Rules of Criminal Procedure is cited in that paragraph, which provides that an  
9 agreement by the parties to a specific sentence binds the court once the court accepts the plea  
10 agreement. Id.

11 The Court also covered the waiver of appeal rights. Doc. #15, Exh. A at 12-13. The  
12 Court explained that if it accepted the plea agreement and the sentence was consistent with  
13 the agreement, Movant would not be able seek relief from another court to get his sentence  
14 changed. Id. At the end of the change of plea proceeding, the Court found that the guilty  
15 plea was knowingly, voluntarily and intelligently made. Doc. #15, Exh. A at 20. The Court  
16 accepted the guilty plea but deferred acceptance of the plea agreement until the sentencing.  
17 Id.

18 At the sentencing hearing on August 27, 2007, the District Court again referred to the  
19 provision in the plea agreement whereby “the parties stipulate that the U.S. would  
20 recommend a safety valve reduction if the defendant was eligible, and would stipulate to a  
21 57-month sentence if the defendant was eligible.” Doc. #15, Exh. B at 3. The Court further  
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24 <sup>2</sup> It’s important to note that Movant’s claim in ground four specifically alleges that his  
25 first lawyer, Magnus Eriksson, misadvised him about his right to appeal. Movant does not  
26 mention his second lawyer, Jose Montano, who represented him at the sentencing. Mr.  
27 Eriksson left the law firm of Phillips and Associates before Movant’s sentencing and Mr.  
28 Montano of that firm took over. Doc. #14, Exh. C. The court interprets Movant’s claim in  
ground four broadly to include not only the alleged inaccurate advice about the right to  
appeal but also the failure to object to or appeal the sentence. Likewise, the government’s  
analysis reflects this broad interpretation of the claim.

1 noted that it accepted the guilty plea, but the Court did not expressly accept the plea  
2 agreement. Id. The Court ruled during the sentencing hearing that Movant was eligible for  
3 safety valve treatment. Doc. #15, Exh. B at 15-16. However, because the Court also applied  
4 a two-level upward adjustment for obstruction of justice<sup>3</sup> among other adjustments, it  
5 determined that the appropriate sentencing range was 70 to 87 months. Doc. #15, Exh. B at  
6 15-16. When asked by the Court, Movant’s counsel agreed that this was the relevant range.  
7 Doc. #15, Exh. B at 16. The Court subsequently sentenced Movant to 70 months in prison.  
8 Doc. #15, Exh. B at 17. At the end of the sentencing hearing, the Court informed Movant  
9 that because the sentence “is consistent with the plea agreement, you’ve waived your right  
10 to appeal.” Doc. #15, Exh. B at 19. The Court explained, however, that Movant’s lawyer  
11 could explain how to file an appeal if Movant wanted to pursue it. Id. Despite the provision  
12 in the plea agreement that capped the sentence at 57 months upon application of the safety  
13 valve, Movant’s counsel did not object to the sentence, nor did counsel subsequently appeal  
14 the sentence.

15       The government argues that counsel’s failure to object to or appeal the sentence did  
16 not constitute ineffective assistance of counsel even though it concedes the sentence was not  
17 consistent with the plea agreement. The government contends that if counsel had raised an  
18 objection or appealed the sentence, the result would likely have been a much harsher  
19 sentence that was consistent with the plea agreement. Specifically, the government contends  
20 that the District Court did not have the authority to adjust Movant’s criminal history points  
21 in determining his eligibility for safety valve relief. The government claims this was an  
22 error. It contends that had counsel objected to or appealed the sentence, the Court would  
23 have determined that Movant was not eligible for safety valve relief, thus nullifying the  
24 provisions in the plea agreement that applied only if he was eligible for such relief. The

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26       <sup>3</sup> This adjustment was based on the Court’s finding that while under indictment,  
27 Movant left the country once and maybe twice without permission and remained out of the  
28 country for 11 months, obstructing prosecution of the case for that time. Doc. #15, Exh. B  
at 14-15.

1 government suggests that upon making that determination, the Court likely would have  
2 imposed a sentence within the range of 97-121 months, as recommended in the presentence  
3 report. The government therefore argues that counsel's failure to object or appeal helped  
4 Movant and caused no prejudice.

5 This court disagrees. In United States v. Booker, 543 U.S. 220 (2005), the Supreme  
6 Court held that the Federal Sentencing Guidelines are merely advisory, not mandatory, and  
7 that courts of appeal should review sentences for "reasonableness." It's not at all clear that  
8 the District Court would have imposed a harsher sentence against Movant if his counsel had  
9 objected to or appealed the sentence. It certainly was not required to do so as the government  
10 suggests. Had Movant's counsel objected to the sentence because it failed to account for the  
11 57-month cap or advised Movant to appeal on that basis, the result may well have been a  
12 reduction of the sentence to be consistent with the cap. The court therefore finds that the  
13 performance of Movant's sentencing counsel was deficient in that he failed to object to a  
14 sentence that exceeded the applicable cap set forth in the plea agreement. Moreover, he  
15 failed to file an appeal or advise Movant of the right to appeal on that basis. The court  
16 further finds that Movant has made a sufficient showing of prejudice in that the result of the  
17 proceeding would likely have been different. Movant's sentence would likely have been  
18 consistent with the terms of the plea agreement had counsel raised the issue.

19 **B. Remaining Grounds for Relief**

20 Because the court will recommend that Movant's motion be granted based on the  
21 claim in ground four, the court need not address the remaining grounds for relief. The court  
22 notes, however, the inconsistency in the government's contention that the remaining claims  
23 are barred by the waiver in the plea agreement. Despite conceding its argument on ground  
24 four that "the sentence was inconsistent with the plea agreement," the government claims that  
25 the waiver of collateral review rights is enforceable as to the remaining claims. The waiver  
26 provision of the agreement specifically requires that the sentence be consistent with the plea  
27 agreement for the waivers to apply. The government's argument that the remaining claims  
28 are barred by the waiver is inconsistent with its own concessions.

1 **IT IS THEREFORE RECOMMENDED:**

2 That the Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal  
3 Custody pursuant to 28 U.S.C. § 2255 (Doc. #1) be **GRANTED**;

4 This recommendation is not an order that is immediately appealable to the Ninth  
5 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
6 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
7 parties shall have ten days from the date of service of a copy of this recommendation within  
8 which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1); Fed. R.  
9 Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have ten days within which to file a  
10 response to the objections. Failure to timely file objections to the Magistrate Judge's Report  
11 and Recommendation may result in the acceptance of the Report and Recommendation by  
12 the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,  
13 1121 (9<sup>th</sup> Cir. 2003). Failure to timely file objections to any factual determinations of the  
14 Magistrate Judge will be considered a waiver of a party's right to appellate review of the  
15 findings of fact in an order of judgement entered pursuant to the Magistrate Judge's  
16 recommendation. See Fed. R. Civ. P. 72.

17 DATED this 2<sup>nd</sup> day of November, 2009.

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24 Edward C. Voss  
25 United States Magistrate Judge  
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