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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	CR 07-01135 PHX NVW
)	CIV 09-00312 PHX NVW (MEA)
v.)	
)	REPORT AND RECOMMENDATION
RIGOBERTO MENDOZA GUESAR,)	
)	
Defendant/Movant.)	
)	
_____)	

TO THE HONORABLE NEIL V. WAKE:

Mr. Rigoberto Mendoza Guesar ("Movant") filed a motion to correct, vacate, or set aside his criminal convictions and sentences, pursuant to 28 U.S.C. § 2255, on February 13, 2009. Respondent filed a response opposing the motion ("Response") (Docket No. 9) on May 14, 2009. The time allowed for filing a reply or traverse to the response expired on or about June 14, 2009.

I. Procedural History

A criminal complaint filed October 12, 2007, charged Movant and four co-defendants with one count of conspiracy to cultivate marijuana and one count of cultivation of more than 1000 marijuana plants. The complaint also charged three of the co-defendants, but not Movant, with one count of possession of a firearm during and in furtherance of a drug crime.

1 On May 28, 2008, Movant entered into a written plea
2 agreement which provided he would plead guilty to one count of
3 conspiracy to cultivate more than 1000 marijuana plants on
4 federal lands. See Response, Exh. A. The plea agreement
5 provided that, in return for Movant's guilty plea, the
6 government would recommend a sentence at the lower end of the
7 guidelines range, assuming Movant was determined to be "safety
8 valve eligible." Id., Exh. A. Movant acknowledged in the plea
9 agreement that two weapons were found at the location of the
10 marijuana cultivation. Id., Exh. A.

11 In the plea agreement Movant waived any right to appeal
12 or collaterally attack his conviction and sentence if the
13 sentence was in accordance with the plea agreement. Id., Exh.
14 A at 4. The signed plea agreement states the agreement was read
15 to Movant in Spanish and that Movant had discussed the plea
16 agreement and its terms with his counsel. Id., Exh. A.

17 Movant entered his guilty plea on May 28, 2008. See
18 Criminal Docket No. 76. An interpreter was present at the
19 hearing conducted by the Court regarding Movant's guilty plea
20 and the plea agreement. See Response, Exh. D.

21 At the plea hearing Movant's counsel averred to the
22 Court that he had spent more time than usual with Movant because
23 of Movant's limited education, but that he was certain Movant
24 understood the plea agreement. Id., Exh. D. Counsel further
25 averred to the Court that counsel was "fluent" in Spanish, but
26 that he had also used an interpreter when speaking with Movant.
27 Id., Exh. D at 5. Movant indicated he was satisfied with his
28 counsel's representation. Id., Exh. D at 5-6.

1 At the plea hearing Movant allowed twice that someone
2 had read the plea agreement, in Spanish, to Movant, and that he
3 understood the plea agreement. Movant stated that no threats or
4 force were used to induce him to enter into the plea agreement
5 and that he understood he did not have to sign the plea
6 agreement. Id., Exh. D at 7-8. Movant stated he understood he
7 was giving up his right to appeal and to collaterally attack his
8 conviction and sentence. Id., Exh. D at 10.

9 Additionally, at the hearing Movant's counsel indicated
10 that he had discussed the defense of duress with his client.
11 Counsel stated he believed the defense would not support
12 acquittal, because Movant "was never actually threatened by
13 anyone." Id., Exh. D at 23-24. Counsel averred to the Court
14 that there was an "imperfect duress" defense which he believed
15 weighed in favor of a downward departure from the relevant
16 guidelines range regarding Movant's sentence. Both defense
17 counsel and Movant acknowledged that Movant's teen-aged son was
18 also working in the marijuana patch at the time Movant was
19 apprehended.

20 At the plea hearing, the Court advised Movant that the
21 minimum sentence for the crime of conspiracy to cultivate
22 marijuana was ten years imprisonment, and that the maximum
23 penalty for this crime was life in prison. Id., Exh. D at 11.
24 At the plea hearing the Court and counsel for Movant and the
25 government discussed whether the plea agreement allowed for
26 Movant's guideline sentencing range to be adjusted pursuant to
27 the "safety valve" provisions. Id., Exh. D at 13-14.

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1 The relevant sentencing guidelines range was determined
2 to be 57 to 71 months imprisonment, based on an offense level of
3 25 and a criminal history category of 1 and Movant's entitlement
4 to the "safety valve" provisions of the guidelines. Id., Exh.
5 B. At the sentencing hearing Movant's counsel argued that
6 Movant had a minimal role in the conspiracy, i.e., that Movant
7 was hired by others to "take care of" the marijuana plants.
8 Id., Exh. F at 6-7. At the sentencing hearing the Court
9 concluded that there was no evidence that Movant's role in the
10 conspiracy was the result of any duress. Id., Exh. F at 8. On
11 September 2, 2008, Movant was sentenced to 57 months
12 imprisonment. See Criminal Docket No. 101 & Response, Exh. F.

13 In his *pro se* section 2255 action Movant contends a
14 confession was coerced and that he did not receive the effective
15 assistance of counsel.¹ See Civil Docket No. 1. Movant alleges
16 his counsel did not spend sufficient time with Movant to prepare
17 an adequate defense. Movant further asserts his counsel's
18 performance was ineffective because a Spanish-language
19 translator was present at only one of an alleged six meetings
20 between Movant and his counsel. Movant also contends his
21 counsel did not submit evidence Movant believed should have been
22 submitted and that his counsel gave conflicting opinions as to
23 the sentence faced by Movant. Movant also asserts his
24 confession was not voluntary because he was threatened into
25 confessing by a co-defendant during a time when they were

26
27 ¹ Movant was evidently interviewed several times by the FBI prior to
28 his trial. On one occasion Movant told the FBI he had crossed the border
in order to work in a marijuana cultivation enterprise, tending the plants.

1 incarcerated at the same federal facility. Movant also alleges
2 in his section 2255 petition that he was in the United States at
3 the marijuana farm under false pretenses.

4 II. Discussion

5 **A. Respondent contends the section 2255 motion must be**
6 **denied because Movant waived his right to collaterally attack**
7 **his conviction and sentence.**

8 The plea agreement signed by Movant expressly waived
9 his right to collaterally attack any matter pertaining to
10 Movant's conviction and sentence if the sentence imposed was
11 consistent with the written terms of the agreement. See
12 Response, Exh. A. The sentence imposed on Movant was consistent
13 with the terms of the plea agreement, i.e., the sentence was at
14 the lower end of the guidelines sentencing range. Because the
15 sentence imposed was in accordance with the plea agreement, the
16 plea agreement is valid. Therefore, Movant is bound by the plea
17 agreement's waiver of his right to collaterally attack his
18 conviction and sentence.

19 Because Movant legitimately waived his right to bring
20 this action challenging his sentence the section 2255 motion may
21 be summarily denied. See Mabry v. Johnson, 467 U.S. 504,
22 508-09, 104 S. Ct. 2543, 2546-47 (1984) ("It is well settled
23 that a voluntary and intelligent plea of guilty made by an
24 accused person, who has been advised by competent counsel, may
25 not be collaterally attacked."); United States v. Jeronimo, 398
26 F.3d 1149, 1157 (9th Cir. 2005) (reaching this conclusion in the
27 context of a direct appeal wherein the defendant waived his
28 right to directly appeal or collaterally attack his conviction
and sentence in a plea agreement); United States v. Bolinger,

1 940 F.2d 478, 480-81 (9th Cir. 1991).

2 A plea agreement which waives the defendant's right to
3 collaterally attack their sentence is not enforceable if the
4 waiver was involuntary. See, e.g., Jeronimo, 398 F.3d at 1156
5 (concluding the court did not have jurisdiction to consider the
6 appeal of a defendant who had waived this right in a plea
7 agreement because the agreement was knowing and voluntary on its
8 face, stating: "A defendant's waiver of his appellate rights is
9 enforceable if (1) the language of the waiver encompasses his
10 right to appeal on the grounds raised, and (2) the waiver is
11 knowingly and voluntarily made"); United States v. White, 307
12 F.3d 336, 343 (5th Cir. 2002).

13 A collateral attack alleging ineffective assistance of
14 counsel in negotiating a plea agreement may be brought
15 notwithstanding a waiver of this right in the agreement, but
16 only if the agreement was involuntary or unknowing, or if the
17 court relied on an impermissible factor such as race, or where
18 the agreement is otherwise unlawful. See United States v.
19 Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001); Bridgeman v.
20 United States, 229 F.3d 589, 591 (7th Cir. 2000).

21 Movant's contemporaneous statements regarding his
22 understanding of the plea agreement carry substantial weight in
23 determining if his entry of a guilty plea was knowing and
24 voluntary. Cf. United States v. Mims, 928 F.2d 310, 313 (9th
25 Cir. 1991) (reaching this holding in a section 2255 case);
26 United States v. Walker, 160 F.3d 1078, 1096 (6th Cir. 1998)
27 (holding, in a section 2255 case, that "a straightforward and
28 simple 'Yes, your Honor' is sufficient to bind a defendant to

1 [the] consequences [of a plea agreement]."). Because he was
2 adequately informed of the consequences of his plea, Movant's
3 guilty plea can be considered voluntary and knowing. See Boykin
4 v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969).
5 The undersigned concludes Movant's guilty plea was voluntary and
6 made intelligently. See Chizen v. Hunter, 809 F.2d 560, 562
7 (9th Cir. 1986); United States v. Kamer, 781 F.2d 1380, 1383
8 (9th Cir. 1986).

9 Because Movant does not produce any evidence indicating
10 he did not knowingly and voluntarily enter into the agreement,
11 the undersigned concludes the plea agreement was valid, as was
12 Movant's voluntary waiver of his right to collaterally attack
13 his sentence. Accordingly, the section 2255 petition should be
14 denied and dismissed. Compare United States v. Pruitt, 32 F.3d
15 431, 433 (9th Cir. 1994) ("we doubt that a plea agreement could
16 waive a claim of ineffective of assistance of counsel based on
17 counsel's erroneously unprofessional inducement of the defendant
18 to plead guilty or accept a particular plea bargain.").

19 **B. Movant's ineffective assistance of counsel claims**
20 **are without merit.**

21 Furthermore, to the extent that the Court might
22 conclude Movant is not bound by his waiver of his right to this
23 action, his ineffective assistance of counsel claims may be
24 denied on the merits.

25 To prevail on a claim of ineffective
26 assistance of counsel, Movant must show 1)
27 his attorney's performance was unreasonable
28 under prevailing professional standards; and
2) there is a reasonable probability that but
for counsel's unprofessional errors, the
results would have been different. United
States v. Blaylock, 20 F.3d 1458, 1465 (9th
Cir. 1994) (quoting Strickland, 466 U.S. at

1 687, 104 S. Ct. at 2064). "Strickland
2 defines a reasonable probability as 'a
3 probability sufficient to undermine
4 confidence in the outcome.'" Id.

5 United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996),
6 citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
7 80 L. Ed. 2d 674 (1984).

8 To establish that his counsel's conduct was
9 unconstitutionally substandard, a section 2255 petitioner must
10 establish that no competent counsel would have acted as his
11 counsel acted, i.e., that his counsel's acts were unreasonable.
12 United States v. Fredman, 390 F.3d 1153, 1156 (9th Cir. 2004);
13 Johnson v. Alabama, 256 F.3d 1156, 1176-77 (11th Cir. 2001).
14 Movant must overcome a strong presumption that his counsel's
15 representation was within a wide range of reasonable
16 professional assistance. See United States v. Molina, 934 F.2d
17 1440, 1447 (9th Cir. 1991). Counsel is not ineffective if
18 counsel "fails" to raise a meritless argument. See, e.g.,
19 Wilson v. Henry, 185 F.3d 986, 991 (9th Cir. 1999); James v.
20 Borg, 24 F.3d 20, 27 (9th Cir. 1994); Morrison v. Estelle, 981
21 F.2d 425, 427-28 (9th Cir. 1992); Baumann v. United States, 692
22 F.2d 565, 572 (9th Cir. 1982). Additionally, Movant bears the
23 burden of providing sufficient evidence from which the Court can
24 conclude his counsel was ineffective. See Turner v. Calderon,
25 281 F.3d 851, 878 (9th Cir. 2002).

26 Ineffective assistance of counsel claims in the context
27 of cases wherein the defendant did not go to trial are also
28 governed by the doctrine of Strickland. See, e.g., Hill v.
Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 369 (1985); Fields v.

1 Attorney General, 956 F.2d 1290, 1296-97 (4th Cir. 1992). When
2 a defendant challenges a conviction or sentence resulting from
3 a plea agreement the "prejudice" prong of the Strickland test is
4 modified; the defendant must show there is a reasonable
5 probability that, but for counsel's alleged errors, he would not
6 have pled guilty to the charges against him, but instead would
7 have insisted on going to trial. See Hill, 474 U.S. at 59, 106
8 S. Ct. at 370. Accord Fields, 956 F.2d at 1297; Craker v.
9 McCotter, 805 F.2d 538, 542 (5th Cir. 1986).

10 An affidavit attached to the Response indicates
11 Movant's counsel met with Movant on at least ten occasions, on
12 one occasion for over two hours. See Response, Exh. E. The
13 affidavit indicates Spanish is Movant's counsel's first
14 language, counsel having spent the first six years of his life
15 in Uruguay with Spanish-speaking grandparents. Id., Exh. E.

16 This Court has reviewed the pleadings submitted by the
17 parties, including the transcripts of the plea hearing and the
18 plea agreement, and defense counsel's affidavit. Counsel's
19 performance was not deficient and resulted in a plea agreement
20 which was substantially advantageous to Movant. Although more
21 than 7000 marijuana plants were actually located, Movant was
22 charged with cultivation of 1000 plants. Additionally, although
23 he acknowledged he was aware of the presence of the guns at the
24 site, Movant was not charged with possession of a firearm in
25 connection with a drug crime, a conviction on which would have
26 resulted in a mandatory consecutive five-year term of
27 imprisonment.

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1 Movant has not established his counsel's advice as to
2 the consequences of the plea was not within the range of
3 competence demanded of criminal attorneys. Furthermore, there
4 is no reasonable probability that, but for counsel's alleged
5 errors, Movant would not have pled guilty but instead would have
6 insisted on going to trial.

7 **III. Conclusion**

8 Movant waived his right to collaterally attack his
9 conviction and sentence in the written plea agreement. Because
10 Movant's sentence was in accordance with the plea agreement and
11 because Movant provides no evidence that his plea was coerced by
12 the government, unknowing or involuntary, Movant's waiver of his
13 right to seek collateral relief should be affirmed and his
14 section 2255 action dismissed. Additionally, Movant's claims of
15 ineffective assistance of counsel are not meritorious.

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17 **IT IS THEREFORE RECOMMENDED** that Mr. Guesar's Motion to
18 Vacate, Set Aside, or Correct Sentence, be **denied and dismissed**
19 **with prejudice.**

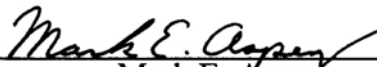
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21 This recommendation is not an order that is immediately
22 appealable to the Ninth Circuit Court of Appeals. Any notice of
23 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
24 Procedure, should not be filed until entry of the district
25 court's judgment.

26 Pursuant to Rule 72(b), Federal Rules of Civil
27 Procedure, the parties shall have ten (10) days from the date of
28 service of a copy of this recommendation within which to file

1 specific written objections with the Court. Thereafter, the
2 parties have ten (10) days within which to file a response to
3 the objections. Pursuant to Rule 7.2, Local Rules of Civil
4 Procedure for the United States District Court for the District
5 of Arizona, objections to the Report and Recommendation may not
6 exceed seventeen (17) pages in length.

7 Failure to timely file objections to any factual or
8 legal determinations of the Magistrate Judge will be considered
9 a waiver of a party's right to de novo appellate consideration
10 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
11 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003).
12 Failure to timely file objections to any factual or legal
13 determinations of the Magistrate Judge will constitute a waiver
14 of a party's right to appellate review of the findings of fact
15 and conclusions of law in an order or judgment entered pursuant
16 to the recommendation of the Magistrate Judge.

17 DATED this 25th day of June, 2009.

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21 _____
22 Mark E. Aspey
23 United States Magistrate Judge
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