

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Darryl Bear Eagle,

10 Petitioner,

11 v.

12 United States of America

13 Respondent.
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No. CV-15-02028-PHX-SRB
CR01-00794-PHX-SRB
ORDER

15 On October 8, 2015 Petitioner filed his Motion Under 18 U.S.C. § 2255 to Vacate,
16 Set Aside or Correct Sentence alleging three grounds: 1) ineffective assistance of counsel
17 to preserve appeal; 2) ineffective assistance of counsel due to abandonment; and 3) his
18 sentence was unreasonable. After the motion was fully briefed, the Magistrate Judge
19 issued his Report and Recommendation recommending that the Motion be granted as to
20 Ground One and denied as to Grounds Two and Three. The Government filed a timely
21 objection to the recommendation that the Motion be granted as to Ground One.
22 Petitioner did not file any objection to the recommendations that the Motion be denied as
23 to Grounds Two and Three. Petitioner filed a response to the Government's objection.

24 After considering the briefing on the motion, the documents submitted, the Report
25 and Recommendation of the Magistrate Judge, the objection and the response to the
26 objection, the Court finds itself in agreement with the Report and Recommendation of the
27 Magistrate Judge and will overrule the Government's objection. The Court agrees with
28 the conclusion of the Magistrate Judge that counsel provided ineffective assistance of

1 counsel by failing to consult with the Petitioner as to whether he wished to appeal for the
2 reasons expressed by the Magistrate Judge in the Report and Recommendations.

3 Therefore;

4 IT IS ORDERED overruling the Government's objection to the Report and
5 Recommendation.

6 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
7 Magistrate Judge as the Order of this Court.

8 IT IS FURTHER ORDERED that Petitioner's Motion to Vacate, Set Aside, or
9 Correct Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 is granted
10 as to Ground One and denied as to Grounds Two and Three.

11 IT IS FURTHER ORDERED that a Certificate of Appealability and leave to
12 proceed in *forma pauperis* on appeal be denied as to the denial of the Motion on Grounds
13 Two and Three because Petitioner has not made a substantial showing of the denial of a
14 constitutional right as to Ground Two and because the denial of the Motion as to Ground
15 Three is justified by a plain procedural bar and jurists of reason would not find the
16 procedural ruling debatable.

17 IT IS FURTHER ORDERED that the judgment entered on May 12, 2015 in
18 CR01-00794-PHX-SRB (Doc. 67) is vacated and an amended judgment will be entered.
19 Petitioner has 14 days from the date of the amended judgment to file a Notice of Appeal.

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21 Dated this 18th day of November, 2016.

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Susan R. Bolton
United States District Judge