

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

United States of America,
Plaintiff/Respondent,

)
)
)

CV-16-8307-PCT-SPL (MHB)
CR-15-8221-PCT-SPL

10

11

vs.

REPORT AND RECOMMENDATION

12

Moises Alfredo Escobedo-Sanchez,
Defendant/Movant.

)
)
)

14

15

TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT JUDGE:

16

Defendant/Movant Moises Alfredo Escobedo-Sanchez (“Movant”), who is confined in the Federal Correctional Institution in Phoenix, Arizona, filed a *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (CV 16-8307 (“CV”) Doc. 1; CR 15-8221 (“CR”) Doc. 26.) Plaintiff/Respondent United States of America (the “Government”) filed a Response. (CV Doc. 7.) Movant did not file a Reply.

22

BACKGROUND

23

Movant was serving an Arizona state prison sentence when he was released to ICE custody on September 16, 2015, and charged in this Court with one count of Reentry of Removed Alien, in violation of 8 U.S.C. 1326(a), enhanced by (b)(1). (CR Doc. 1.) Movant had been sentenced in the Navajo County Superior Court for a drug trafficking offense, and was serving a two-and-a-half-year sentence when he was released to ICE custody. (CV Doc. 11, Exh. 8, sealed Presentence Investigation Report, at 7.) At the time, he had served 15

28

1 months of that sentence. (Id.) Movant also had two prior felony theft convictions he sustained
2 in the state of Utah, and another felony prior conviction in 2011 for illegal reentry, for which
3 he was sentenced to 15 months' imprisonment. (Id. at 6-7.) Movant had been previously
4 removed from the United States to Nogales, Arizona on February 6, 2012. (CR Doc. 1.)

5 Movant appeared for his initial appearance on September 17, 2015, and deputy
6 Federal Public Defender Jon M. Sands ("Mr. Sands") was appointed to represent him. (CR
7 Doc. 2.)

8 In September 2015, the Government offered Movant a "fast-track" plea offer. The
9 record reflects that Mr. Sands discussed the plea offer with Movant and sent Movant a letter
10 – in both Spanish and English – including a copy of the plea agreement. (CV Doc. 7, sealed
11 September 30, 2015 attorney letter.) The letter explained the statutory maximum penalties,
12 as well as counsel's estimate that the likely sentencing range would be 18 to 24 months'
13 imprisonment. (Id.) The letter stated, in pertinent part,

14 You have been through the fast track previously, when you[] received a 15
15 months sentence in Utah. The fast track here is along the same lines, except
16 that under the terms, and because of your criminal history, the deal results in
17 the possibility of a longer sentence than you received in Utah. The reason is
18 that the court and the prosecutor insist on the possibility of a longer sentence
19 than the 15 months because it is your second conviction for illegal reentry. I
20 have gotten the prosecutor to agree that I can ask for a lesser sentence. My
21 argument would be that you have already served state time, and that
22 punishment should count or be taken into consideration.

19 (Id.)

20 Movant accepted the plea offer, and on October 20, 2015, appeared before U.S.
21 Magistrate Judge Bridget Bade for a change-of-plea hearing. (CR Doc. 13.) During these
22 proceedings, Movant confirmed under oath that he was satisfied with Mr. Sands'
23 representation; that he was not threatened or coerced into the plea agreement; and that no
24 promises, other than those written in the agreement, had been made to him - he also
25 acknowledged that counsel's estimate of the likely sentencing range would not be binding
26 on the sentencing judge. (CR Doc. 30 at 8, 10, 16-17, and 19-20.) Specifically, the following
27 discussion took place, in pertinent part:
28

1 THE COURT: Did you go over your entire plea agreement with your attorney
and then have your attorney answer all of your questions before you signed it?

2 THE INTERPRETER: Both, yes.

3 THE COURT: Do you feel that you had enough time to speak with your
4 attorney about your plea agreement before you signed it?

5 THE INTERPRETER: Both, yes.

6 THE COURT: Do you feel that you understand your entire plea agreement?

7 THE INTERPRETER: Both, yes.

8 THE COURT: Mr. Escobedo, you have been represented by Mr. Sands. Have
9 you been satisfied with that representation?

10 DEFENDANT ESCOBEDO: Yes.

11 ...

12 THE COURT: Now, for both of you, in the last two days have you had any
13 drugs or alcohol or medication of any kind, including any prescription
medications?

14 THE INTERPRETER: Both, no.

15 THE COURT: Have you ever been treated for a mental or an emotional
disorder?

16 THE INTERPRETER: Both no.

17 THE COURT: For Mr. Moises Escobedo, does either the government or
18 defense counsel, Mr. Sands, have any reason to believe he's not competent to
enter a plea?

19 MS. BROWN: No, Your Honor.

20 THE COURT: Mr. Sands, do you believe your client is competent to enter a
21 plea?

22 MR. SANDS: Yes, Judge.

23 ...

24 THE COURT: Now, for both of you, did anyone try to threaten you or coerce
you in any way to get you to enter into a plea agreement?

25 THE INTERPRETER: Both, no.

26 THE COURT: Did anyone make any promises to you as a way to convince
27 you that you should enter your plea agreement other than the promises that are
in the written plea agreement?

28 THE INTERPRETER: Both, no.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE COURT: Now, for both of you, your plea agreement states that you will be pleading guilty to a violation of Title 8 of the United States Code, Section 1326(a), with a possible sentencing enhancement under either Section 1326(b)(1) or (b)(2). This offense is entitled reentry of removed alien. Do you both understand the charge against you?

THE INTERPRETER: Both, yes.

THE COURT: Are you pleading guilty voluntarily because you believe that you are guilty of the offense with which you have been charged?

THE INTERPRETER: Both, yes.

...

THE COURT: ... Mr. Escobedo, do you understand the sentencing agreements in your plea agreement?

DEFENDANT ESCOBEDO: Yes.

THE COURT: Mr. Sands, do you believe your client understands the sentencing agreements in the plea agreement and sentencing guidelines and the other sentencing factors?

MR. SANDS: Yes.

THE COURT: Have you provided him with any estimates of how you believe the guidelines may apply to him?

MR. SANDS: Yes.

...

THE COURT: For both of you, your attorneys have just stated that they provided you with some estimates of how they believe the guidelines will apply to you at sentencing, but your attorney's estimates are not binding on the district judge who will decide your sentence. Do you both understand this?

THE INTERPRETER: Both, yes.

(Id.)

Before sentencing, Mr. Sands filed a Sentencing Memorandum requesting a downward variance from the sentencing range. (CV Doc. 7, Exh. 4.) He argued that the Court should vary from the guidelines to account for Movant's time spent in state custody for the drug trafficking offense; an over representation of criminal history; and his personal circumstances, background, and hardships. (Id.)

\\

1 On December 29, 2015, Movant appeared for his sentencing. (CR Doc. 23.) At the
2 sentencing hearing, counsel again requested a downward variance stating, in pertinent part:

3 [H]e has spent far longer in custody this time than he's ever spent previously.
4 We are looking at someone who got – who has spent 15 to 18 months in State,
5 and is now going to serve, in my position, an additional 15 months. So he will
6 have doubled that time.

7 (CR Doc. 29 at 7.)

8 Movant then promised the Court that he would not return to the United States illegally, and
9 stated that he was satisfied with counsel:

10 THE COURT: Sir, are you pleased with all the assistance [trial counsel] Mr.
11 Sands has provided to you in this case?

12 DEFENDANT: Yes.

13 THE COURT: Sir, you're very, very fortunate to have Mr. Sands in your
14 corner, because if he didn't fight so hard in your case there's a chance that the
15 Government wouldn't have offered you this fast-track disposition. And Mr.
16 Sands is correct, you may have been facing five, ten years of incarceration
17 instead of what you're facing right now.

18 (Id. at 9-10.) The Court then granted Movant a 2-level downward variance, which reduced
19 Movant's guideline range from 30-37 months, down to 24-30 months. (Id.) Movant was
20 sentenced to 24-months, the minimum guideline sentence. (CR Doc. 23.)

21 On December 27, 2016, Movant filed a *pro se* Motion Under 28 U.S.C. § 2255 to
22 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Movant alleges that
23 his sentence is unconstitutional because he was provided with ineffective assistance of
24 counsel. (CV Doc. 1.) Specifically, Movant asserts that Mr. Sands promised him that the
25 Court would credit the 15 months he served in state custody toward his federal sentence.
26 Movant also vaguely contends that counsel intimidated him into accepting the plea stating
27 that he was "scared," and has "problems sleeping taking in the ambush and frustration that
28 my attorney induce in my mind by lying and given false hopes alleging himself the best
attorney ever." (Id. at 4, 12.)

DISCUSSION

In its Response, the Government asserts that Movant's ineffective assistance of
counsel claim, as well as Movant's allegations of promises and intimidation, have no merit,

1 and that Movant’s Motion to Vacate, Set Aside, or Correct Sentence should therefore be
2 denied and dismissed with prejudice. The Court agrees.

3 The two-prong test for establishing ineffective assistance of counsel was set forth by
4 the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an
5 ineffective assistance claim, a convicted defendant must show (1) that counsel’s
6 representation fell below an objective standard of reasonableness, and (2) that there is a
7 reasonable probability that, but for counsel’s unprofessional errors, the result of the
8 proceeding would have been different. See id. at 687-88.

9 The Strickland test also applies to challenges to guilty pleas based on ineffective
10 assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 58 (1985). A defendant who pleads
11 guilty based on the advice of counsel may attack the voluntary and intelligent character of
12 the guilty plea by showing that the advice he received from counsel fell below the level of
13 competence demanded of attorneys in criminal cases. See id. at 56. To satisfy the second
14 prong of the Strickland test, “the defendant must show that there is a reasonable probability
15 that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on
16 going to trial.” Id. at 59.

17 The court need not address both Strickland requirements if the petitioner makes an
18 insufficient showing regarding just one. See id. at 697 (explaining that “[i]f it is easier to
19 dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that
20 course should be followed.”); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) (stating that
21 “[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the
22 other”).

23 A. DEFICIENT PERFORMANCE

24 There is a strong presumption that counsel’s conduct falls within the wide range of
25 reasonable assistance. Strickland, 466 U.S. at 689-90. “A fair assessment of attorney
26 performance requires that every effort be made to eliminate the distorting effects of
27 hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate
28 the conduct from counsel’s perspective at the time.” Id. at 689. Review of counsel’s

1 performance is extremely limited. Id.

2 Movant's assertions that Mr. Sands promised him that the Court would credit the 15
3 months he served in state custody toward his federal sentence, and that Mr. Sands was
4 threatening toward him, are belied by the record.

5 Specifically, Movant confirmed at both his change-of-plea hearing and sentencing
6 hearing that: (1) he was satisfied with counsel's representation; (2) that his guilty plea was
7 voluntary and intelligent and that no one threatened him or coerced him into accepting the
8 plea offer; and, (3) that no one made any promises to convince him to plead guilty other than
9 those promises set forth in the written plea agreement. Furthermore, at the change-of-plea
10 hearing, Movant was advised that any estimates regarding sentencing provided by counsel
11 are merely estimates, and "are not binding on the district judge who will decide your
12 sentence." Movant confirmed that he understood this.

13 The sentencing court recognized that Movant significantly benefitted from counsel's
14 representation in that counsel argued for a downward variance on Movant's behalf despite
15 his Movant's lengthy criminal history:

16 THE COURT: Sir, are you pleased with all the assistance [trial counsel] Mr.
17 Sands has provided to you in this case?

18 DEFENDANT: Yes.

19 THE COURT: Sir, you're very, very fortunate to have Mr. Sands in your
20 corner, because if he didn't fight so hard in your case there's a chance that the
21 Government wouldn't have offered you this fast-track disposition. And Mr.
22 Sands is correct, you may have been facing five, ten years of incarceration
23 instead of what you're facing right now.

24 (CR Doc. 29 at 10.) Movant did not mention during the sentencing proceedings any alleged
25 promise that was made to him by Mr. Sands, or that Mr. Sands had been abusive or
26 threatening to him.

27 Lastly, even assuming that counsel promised Movant that the Court would credit the
28 15 months he served in state custody against the 24-month sentence imposed by the Court,
the Court finds that any inaccurate prediction in this case regarding what sentence Movant
would receive upon accepting a plea agreement does not necessarily constitute ineffective

1 assistance of counsel. See, e.g., Doganieri v. U.S., 914 F.2d 165, 168 (9th Cir. 1990). In
2 Doganieri, defendant’s counsel advised him that he would not receive a sentence of more
3 than 12 years if he pleaded guilty. Id. The defendant was subsequently sentenced to 15 years’
4 imprisonment, followed by a 20-year term probation. Id. The Ninth Circuit held that
5 counsel’s inaccurate prediction of what sentence Doganiere would receive upon pleading
6 guilty did not fall below the objective standard of reasonableness and, thus, did not constitute
7 deficient performance. Id.

8 Doganiere’s attorney’s inaccurate prediction of what sentence Doganiere
9 would receive upon pleading guilty does not rise to the level of a gross
10 mischaracterization of the likely outcome of his case, and thus does not
11 constitute ineffective assistance of counsel. [] Further, Doganiere suffered no
prejudice from his attorney’s prediction because, prior to accepting his guilty
plea, the court explained the discretion as to what the sentence would be
remained entirely with the court.

12 Id. (internal citation omitted).

13 As in the instant case, even if Mr. Sands had advised Movant incorrectly, his
14 prediction does not constitute ineffective assistance of counsel, especially in light of the fact
15 that the Court made abundantly clear its discretion in imposing sentence.

16 **B. PREJUDICE**

17 Having found that Movant’s ineffective assistance of counsel claim has no merit, the
18 Court need not examine the prejudice factor of Strickland. Nonetheless, Movant does not
19 demonstrate prejudice.

20 As the Court has stated, in Hill v. Lockhart, the United States Supreme Court
21 explained that a defendant who pled guilty demonstrates prejudice caused by counsel’s
22 incompetent performance in advising him to enter the plea by establishing a reasonable
23 probability that, but for counsel’s incompetence, he would not have pled guilty and would
24 have insisted, instead, on proceeding to trial. Hill, 474 U.S. 52, 59 (1985).

25 Here, Movant is not suggesting that he would not have pleaded guilty, that he wants
26 to withdraw his guilty plea, or that would have proceeded to trial. Rather, in his Motion,
27 Movant admits that he is “guilty of reentry,” and simply requests that the Court “reconsider
28 the sentence.” (CV Doc. 1 at 4, 13.) Movant has failed to demonstrate prejudice.

1 **CONCLUSION**

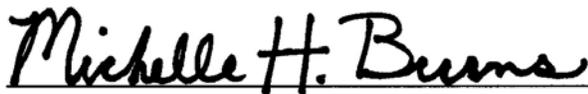
2 Having determined that Movant’s ineffective assistance of counsel claim is without
3 merit, the Court will recommend that Movant’s Motion Under 28 U.S.C. § 2255 to Vacate,
4 Set Aside, or Correct Sentence by a Person in Federal Custody be denied.

5 **IT IS THEREFORE RECOMMENDED** that Movant’s Motion Under 28 U.S.C.
6 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (CV Doc.
7 1; CR Doc. 26) be **DENIED and DISMISSED WITH PREJUDICE**.

8 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
9 to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a
10 substantial showing of the denial of a constitutional right.

11 This recommendation is not an order that is immediately appealable to the Ninth
12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
13 Appellate Procedure, should not be filed until entry of the district court’s judgment. The
14 parties shall have fourteen days from the date of service of a copy of this recommendation
15 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);
16 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
17 days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of
18 Civil Procedure for the United States District Court for the District of Arizona, objections
19 to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure
20 timely to file objections to the Magistrate Judge’s Report and Recommendation may result
21 in the acceptance of the Report and Recommendation by the district court without further
22 review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure
23 timely to file objections to any factual determinations of the Magistrate Judge will be
24 considered a waiver of a party’s right to appellate review of the findings of fact in an order
25 or judgment entered pursuant to the Magistrate Judge’s recommendation. See Rule 72,
26 Federal Rules of Civil Procedure.

27 DATED this 31st day of October, 2017.

28 

Michelle H. Burns
United States Magistrate Judge