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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

11	UNITED STATES OF AMERICA)	Case Nos. 2:15-CR-00002-CAS
)	2:16-CV-03784-CAS
12	Plaintiff,)	
13	v.)	
14)	ORDER
15	JOSE ANTONIO SIMENTAL)	
16	Defendant.)	
17)	

I. INTRODUCTION

Defendant Jose Antonio Simental is a Mexican citizen with no legal status within the United States. See Cr. Dkt. 7 (“Plea Agreement”) ¶ 10.¹ During the period when petitioner illegally resided within the United States, he committed several crimes resulting in deportation which are relevant to the instant motion. Cv. Dkt. 9 (“Opp’n”) at

¹ Simental’s criminal case was assigned case number 15-cr-0002. Simental’s criminal docket is cited herein as “Cr. Dkt. [X].” Simental’s civil case number is 16-cv-3784, generated upon Simental’s filing of the instant motion. Simental’s civil docket is cited herein as “Cv. Dkt. [X].”

1 2–4. Simental’s prior convictions include aggravated felonies, most recently in 2003 for
2 possession for sale of a narcotic controlled substance. Plea Agreement ¶ 10. After
3 Simental’s imprisonment for the 2003 aggravated felony, Simental was deported to
4 Mexico in 2006. Opp’n at 4. Petitioner returned to the United States almost
5 immediately. Id. In 2008, the government charged Simental with illegal reentry under
6 8 U.S.C. § 1326(a), (b)(2). See United States v. Jose Antonio Simental, No. 08-cr-145-
7 CAS (C.D. Cal), dkt. 1 (“2008 Illegal Reentry Case”). Prior to sentencing in the 2008
8 Illegal Reentry Case, Simental executed a “fast track” plea agreement. Opp’n at 4. As
9 set forth in the plea agreement in the 2008 Illegal Reentry Case, Simental was sentenced
10 to a low-end term of 51 months imprisonment, followed by a three-year term of
11 supervised release, which included conditions that petitioner must not illegally reenter the
12 United States or commit any new crimes. Id. at 5. Upon completing the prison term,
13 Simental was again deported to Mexico. Id. Again, Simental illegally returned to the
14 United States. Id.

15 Simental violated multiple terms of his federal supervised release. Id. In addition
16 to illegally returning to the United States, Simental was arrested for receiving stolen
17 property in April 2014. Id. In June 2014, petitioner was taken into federal custody to
18 answer the alleged supervised release violations. Id.

19 On January 6, 2015, the government filed an information charging Simental with
20 illegal reentry pursuant to Section 1326, along with a plea agreement signed by Simental
21 and his counsel. See Cr. Dkt. 1; Plea Agreement. The 2015 plea agreement sought to
22 resolve liability for (a) Simental’s supervised release violations and (b) Simental’s second
23 Section 1326 illegal reentry charge. Plea Agreement ¶¶ 3–4. As part of the plea
24 agreement, the U.S. Attorney’s Office (“USAO”) agreed to recommend (i) no additional
25 prison time for violations of Simental’s 2008 supervised release and (ii) the termination
26 of that term of supervision. Id. ¶ 4. For the 2015 illegal reentry charge, the parties
27 stipulated that Simental would be sentenced to a term of imprisonment at the mid-point of
28 the applicable Sentencing Guidelines range. Id. ¶ 13. The applicable Sentencing

1 Guidelines range would be determined by Simental's Total Offense Level. Id. In the
2 plea agreement, Simental and the USAO calculated the Total Offense Level at 17, but
3 stipulated that if Simental's Calculated Criminal History Category was assessed at
4 Category VI, instead of a lower category, then Simental's Early Disposition Program
5 Departure would be worth only two credits instead of four, bringing the Total Offense
6 Level to 19. Id. ¶ 12. On May 7, 2015, the USAO filed a brief on Simental's sentencing,
7 noting that his Criminal History Category was correctly calculated at VI, bringing
8 Simental's Total Offense Level to 19 in accordance with paragraph twelve of the plea
9 agreement. Cr. Dkt. 23 at 1, n.1. Therefore, the USAO recommended a sentence of
10 seventy months (the mid-point of the applicable Guidelines range), followed by a new
11 three-year term of supervised release, and a special assessment of \$100. Id. at 1.

12 On May 8, 2015, Simental's counsel filed a sentencing memorandum arguing that
13 the classification of his criminal history as Category VI was inaccurate, his proper
14 category was lower, and he should be permitted to enter into the plea agreement with a
15 Total Offense Level of 17 rather than 19. Cr. Dkt. 24 ("Defense Memorandum"). On
16 July 6, 2015, the Probation Office issued a supplemental Presentence Report affirming
17 the criminal history calculation as accurate and declining to revise the report to reflect the
18 Simental's lower calculation. Cr. Dkt. 28. On September 15, 2015, in accordance with
19 the plea agreement and supplemental presentence report, the Court sentenced Simental to
20 seventy months imprisonment, followed by a three-year term of supervised release, and a
21 special assessment of \$100. Cr. Dkt. 34. Simental did not file a direct appeal.

22 On May 31, 2016, Simental filed the instant pro se motion to vacate, set aside, or
23 correct his sentence pursuant to 28 U.S.C. § 2255 on the grounds of ineffective assistance
24 of counsel and prosecutorial misconduct. Cv. Dkt. 1. Simental submitted a
25 memorandum of points and authorities in support of his motion. Cv. Dkt. 2 ("Mot.").
26 The Court ordered the government to file an opposition no later August 8, 2016.
27 Cv. Dkt. 5. The government did not file an opposition until March 1, 2017, when it
28 submitted a document under seal. Cv. Dkt. 9 ("Opp'n"). On March 27, 2017, Simental

1 moved to unseal the government’s response. Cv. Dkt. 10. The Court denied Simental’s
2 motion to unseal the government’s response and granted an extension for Simental to file
3 a reply by June 26, 2017. Cv. Dkt. 12. Simental did not file a reply.

4 **II. LEGAL STANDARD**

5 A prisoner in custody claiming the right to be released may move the court to
6 vacate, set aside or correct his sentence if he can show “that the sentence was imposed in
7 violation of the Constitution or laws of the United States, or that the court was without
8 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
9 authorized by law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255(a).

10 **III. DISCUSSION**

11 In the instant Section 2255 motion, Simental alleges ineffective assistance of
12 counsel (“IAC”) and prosecutorial misconduct. Mot. at 1.

13 **A. Whether Simental’s Claims Are Barred by Procedural Default**

14 As a preliminary matter, the government asserts that Simental procedurally
15 defaulted on his claims, with the exception of his challenge to the constitutional adequacy
16 of his counsel’s representation, by not raising them before this Court or on a direct
17 appeal. Opp’n at 10.

18 “Habeas review is not to substitute for an appeal.” United States v. Braswell, 501
19 F.3d 1147, 1150 (9th Cir. 2007). “When a party could have raised an issue in a prior
20 appeal but did not, a court later hearing the same case need not consider the matter.”
21 United States v. Nagra, 147 F.3d 875, 882 (9th Cir. 1998). “Section 2255 is not designed
22 to provide criminal defendants repeated opportunities to overturn their convictions on
23 grounds which could have been raised on direct appeal.” United States v. Dunham, 767
24 F.2d 1395, 1397 (9th Cir. 1985). “A § 2255 movant procedurally defaults his claims by
25 not raising them on direct appeal and not showing cause and prejudice or actual
26 innocence in response to the default.” United States v. Ratigan, 351 F.3d 957, 962 (9th
27 Cir. 2003) (citing Bousley v. United States, 523 U.S. 614, 622 (1998)). A petitioner
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1 shows cause for procedural default where “the claim rests upon a new legal or factual
2 basis that was unavailable at the time of direct appeal.” Braswell, 501 F.3d at 1150.

3 Here, Simental did not raise a claim for prosecutorial misconduct during his
4 proceedings before this Court or before the Ninth Circuit on a direct appeal; indeed,
5 Simental did not pursue an appeal. Furthermore, Simental has not presented any
6 justification for the default or attempted to demonstrate cause and prejudice.

7 Accordingly, the Court concludes that Simental is procedurally barred from raising the
8 issue of prosecutorial misconduct for the first time by way of a Section 2255 motion. See
9 United States v. Frady, 456 U.S. 152, 168 (1982).

10 Similarly, Simental did not raise his IAC claim on an appeal. However,
11 “constitutional claims may be raised in collateral proceedings even if the defendant failed
12 to pursue them on appeal.” United States v. Schaflander, 743 F.2d 714, 717 (9th Cir.
13 1984). Indeed, “the customary procedure in this Circuit for challenging the effectiveness
14 of defense counsel in a federal criminal trial is by collateral attack on the conviction
15 under 28 U.S.C. § 2255.” Id. If the performance of petitioner’s counsel “fell below the
16 standard of competency of counsel set forth in Strickland v. Washington, 466 U.S. 668
17 (1989) . . . he has demonstrated cause for his procedural default.” United States v.
18 Skurdal, 341 F.3d 921, 925 (9th Cir. 2003). If a petitioner succeeds in showing cause, the
19 prejudice prong requires a showing that the errors at his trial “worked to his *actual* and
20 substantial disadvantage, infecting his entire trial with error of constitutional
21 dimensions.” Frady, 456 U.S. at 170 (emphasis in original).

22 The Court will thus consider whether Simental’s IAC claim meets the Strickland
23 test and thereby demonstrates cause and prejudice to excuse procedural default with
24 regard to that claim.

25 **B. Whether Simental Establishes Ineffective Assistance of Counsel**

26 The Supreme Court set forth a two-prong test for establishing ineffective assistance
27 of counsel in Strickland. First, the defendant must show that counsel’s performance was
28 deficient, and second, that the deficient performance prejudiced the defense. Strickland,

1 466 U.S. at 687. With respect to the first prong, a deficient performance is one that falls
2 “below an objective standard of reasonableness.” Id. at 688. “To this end, the defendant
3 must identify the acts or omissions that are alleged not to have been the result of
4 reasonable professional judgment.” United States v. Schaflander, 743 F.2d 714, 718 (9th
5 Cir. 1984). “Judicial scrutiny of counsel’s performance must be highly deferential. . . .
6 [A] court must indulge a strong presumption that counsel’s conduct falls within the wide
7 range of reasonable professional assistance.” Strickland, 466 U.S. at 689. Second, the
8 defendant must affirmatively prove prejudice. Id. at 693. “He must show that there is a
9 reasonable probability that, but for counsel’s unprofessional errors, the result of the
10 proceeding would have been different. A reasonable probability is a probability
11 sufficient to undermine confidence in the outcome.” Schaflander, 743 F.2d at 718.

12 Simental argues that defense counsel provided ineffective assistance because his
13 attorney: (a) “allowed the government to use prior illegal reentry convictions” to
14 incorrectly enhance his Criminal History Score, Mot. at 3; (b) never provided Simental
15 with a copy of the presentence report, id. at 4;² (c) failed “to argue for departures such as
16 cultural assimilation . . . and other mitigating factors,” id. at 3; and (d) failed to “[explain]
17 the ramifications of the waivers in the plea,” id. at 3. The Court addresses these
18 arguments in turn.

19 First, in response to Simental’s argument regarding the accuracy of his Criminal
20 History Score, the government contends that Simental fails to “present a cognizable claim
21 as non-constitutional sentencing errors are not subject to review in a Section 2255
22 proceeding.” Opp’n at 9. The Ninth Circuit has held that “allegations of such sentencing
23 errors, when not directly appealed, are not generally reviewable by means of a §
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25 ² Simental attaches an email he sent to his attorney, dated August 13, 2015, in
26 which he states, “I have never seen my indictment, nor have I seen the Sentencing
27 Memorandum, that we or the government filed. The PSR and recommendation???
28 Never seen anything.” Cv. Dkt. 1, Ex. A.

1 2255 petition.” United States v. Schlesinger, 49 F.3d 483, 484 (9th Cir. 1994). However,
2 if defense counsel failed to challenge a presentence report at or before sentencing, that
3 omission may strengthen a claim of ineffective assistance. See United States v. Donn,
4 661 F.2d 820, 824 (9th Cir. 1981). In Donn, the Ninth Circuit held that “a defense
5 counsel’s failure to show his client the presentence report falls below the standard of
6 reasonably competent representation. If the report contained materially false information
7 that the trial court relied on in sentencing, the failure to show it to [the defendant] clearly
8 was prejudicial.” Id.; see also Jones v. United States, 783 F.2d 1477 (9th Cir. 1986)
9 (explaining that the narrow holding of Donn applies only when the sentencing court has
10 relied on the challenged information to impose a sentence not warranted by the testimony
11 at trial).

12 In this case, Simental’s counsel filed a sentencing memorandum that challenged
13 the government’s calculation of Simental’s Criminal History Score and argued for a
14 lower Total Offense Level. See Defense Memorandum. The Defense Memorandum
15 states that the presentence report “accurately count[ed]” criminal history points for each
16 of the offenses listed. Id. In addition, the Defense Memorandum states that “the PSR
17 correctly assess[ed]” points for Simental’s prior illegal reentry conviction. Id. at 4.
18 However, the Defense Memorandum reaches a lower Criminal History Score only by
19 excluding, without explanation, the six offenses listed and the corresponding points
20 calculated on pages 6, 8, and 10 of the presentence report. See id. at 4; Cr. Dkt. 21.

21 Simental now contends that his attorney incorrectly allowed the government to add
22 points from his 2008 Illegal Reentry conviction. Mot. at 5. Simental cites
23 8 U.S.C. § 1325 for the proposition that improper entries are classified as petty offenses
24 for which no points are to be given. Id. However, Section 1325, which assigns civil
25 penalties for improper entry, does not apply in this case. Rather, Section 1326(b)(2)
26 assigns criminal penalties for the reentry of certain aliens, including those previously
27 removed subsequent to an aggravated felony conviction. See 8 U.S.C. § 1326. Because
28 of Simental’s prior aggravated felony convictions, the government properly charged him

1 under Section 1326, not Section 1325. See Cr. Dkt. 1 at 2. Accordingly, Simental’s
2 argument that no points are to be given for Section 1325 offenses is incorrect. Simental
3 “has not demonstrated any basis upon which a reasonable attorney would have objected
4 to his presentence report . . . nor has he shown prejudice from the alleged oversight of his
5 counsel.” United States v. Boubon, No. 97-15008, 1997 U.S. App. LEXIS 23681, *3
6 (9th Cir. Sep. 5, 1997). “The failure to raise a meritless legal argument does not
7 constitute ineffective assistance of counsel.” Baumann v. United States, 692 F.2d 565,
8 572 (9th Cir. 1982).

9 Second, although defense counsel may have been deficient in his failure to show
10 Simental the presentence report, Simental has not shown any actual prejudice from this
11 error. Simental has not made a plausible claim suggesting that the calculation of his
12 Criminal History Score was false or misleading. Consequently, Simental has failed to
13 show any prejudice that his lawyer could have prevented. Therefore, counsel’s
14 representation “cannot be deemed ineffective” in that regard. See United States v. Lewis,
15 880 F.2d 243, 246 (9th Cir. 1989) (holding counsel’s representation cannot be deemed
16 ineffective where defendant had not shown that his presentencing report was inaccurate
17 and thereby failed to show any prejudice).

18 Third, Simental asserts that his counsel failed to request downward departures for
19 cultural assimilation, “along with other sentencing factors.” Mot. at 3, 5; see U.S.S.G.
20 § 2L1.2 Application Notes at no.7. The government points out that Simental does not
21 identify the “other sentencing factors” that defense counsel allegedly failed to argue.
22 Opp’n at 9. Furthermore, the government asserts that “petitioner fails to establish how
23 the purported error resulted in actual prejudice to him.” Id. at 10.

24 Simental’s plea agreement contained a stipulation against seeking “any other
25 specific offense characteristics, adjustments, departures, or variances in the sentence.”
26 Cr. Dkt. 7 ¶ 15. If Simental’s attorney had breached the terms of the plea agreement to
27 argue for a downward departure at sentencing, he would have raised the possibility that
28 the government would seek to vacate the plea agreement, which favorably terminated

1 Simental’s supervised release for his 2008 Illegal Reentry without recommending
2 additional time for its violation. Considering the potential consequence for a breach of
3 the plea agreement, counsel’s failure to seek a departure did not fall below an objective
4 standard of reasonableness. See Escalante v. United States, No. 06-cv-280-REC, 2006
5 U.S. Dist. LEXIS 21196, at *25–26 (E.D. Cal. Apr. 11, 2006) (denying defendant’s claim
6 for ineffective assistance of counsel when arguing for a departure at sentencing would
7 have breached the terms of the plea agreement); see also Guam v. Santos, 741 F.2d 1167,
8 1169 (9th Cir. 1984) (“A tactical decision by counsel with which the defendant disagrees
9 cannot form the basis of a claim of ineffective assistance of counsel.”).

10 Finally, Simental contends that his counsel failed to “[explain] the ramifications of
11 the waivers in the plea.” Mot. at 3. In support of his motion, Simental submits several
12 emails that he sent to his attorney prior to sentencing that express “great stress and
13 uncertainty” regarding the plea. Cv. Dkt. 1, Ex. A. In an email dated September 9, 2015,
14 Simental writes to his attorney, “I do not understand what we are doing. I am lost here.”
15 Id. Simental states that he entered the plea agreement on the belief that he would be
16 released after sentencing based on paragraph four’s stipulation “to recommend no
17 additional prison time . . . regarding the revocation of defendant’s supervised release.”
18 Mot. at 2–3. The government argues that “petitioner had extensive experience with the
19 criminal justice system and the plea process, had previously entered into a near identical
20 ‘fast track’ plea agreement, had certified in the current agreement that he had been
21 advised of and understood its terms, and had similarly affirmed this fact during his plea
22 colloquy.” Opp’n at 14–15.

23 “A guilty plea cannot be attacked as based on inadequate legal advice” unless
24 counsel’s advice “was not within range of competence demanded of attorneys in criminal
25 cases.” Strickland, 466 U.S. at 687 (quotation marks omitted). “Counsel is strongly
26 presumed to have rendered adequate assistance and made all significant decisions in the
27 exercise of reasonable professional judgment.” Id. at 690. “In assessing the
28 voluntariness of the plea, statements made by a criminal defendant contemporaneously

1 with his plea should be accorded great weight.” Chizen v. Hunter, 809 F.2d 560, 562
2 (9th Cir. 1986).

3 Simental does not allege that his attorney misrepresented the sentence to be
4 obtained, but argues that counsel did not explain the ramifications of the plea. Mot. at 3.
5 Simental apparently believed that he would be released or deported after sentencing
6 based upon paragraph four of the plea agreement, which stipulates “to recommend no
7 additional prison time” for Simental’s violation of his supervised release. Mot. at 2–3.
8 Simental’s contention that he did not understand that he would be subject to
9 imprisonment for the Section 1326 offense belies the plain language of the plea
10 agreement, which contains several pages calculating the applicable Sentencing
11 Guidelines range and laying out the agreed-upon sentence of imprisonment. Plea
12 Agreement ¶¶ 11–16. The plea agreement expressly provides for “a term of
13 imprisonment of duration equal to the mid-point of the applicable Sentencing Guidelines
14 range.” Id. ¶ 13. Simental signed and certified the plea agreement, including the
15 following statements: (1) “I understand the terms of this agreement, and I voluntarily
16 agree to those terms” and (2) “I am satisfied with the representation of my attorney in this
17 matter.” Id. at 17. Simental does not claim that he does not understand English and
18 Simental’s emails to his attorney are written in English. See Cv. Dkt. 1, Ex. A.
19 Accordingly, the Court finds that Simental was aware at the time he entered into the plea
20 agreement, based upon clear and express statements in that agreement, that his plea could
21 result in imprisonment, and he cannot sustain an allegation of ineffective assistance on
22 this basis. See, e.g., United States v. Trujillo-Chavez, No. 07-cv-08069-DDP, 2011 U.S.
23 Dist. LEXIS 47674, at *13 (C.D. Cal. Apr. 26, 2011) (denying an ineffective assistance
24 claim where defendant agreed at the time that he entered the plea that he understood
25 various collateral consequences); United States v. Edwards, No. 15-cv-07683-SJO, 2016
26 U.S. Dist. LEXIS 60098, at *32 (C.D. Cal. Feb. 29, 2016) (denying an ineffective
27 assistance claim for failure to properly inform petitioner of sentence length where the
28 defendant’s signed plea agreement specifically contemplated a longer sentence).

1 **IV. CONCLUSION**

2 In accordance with the foregoing, the Court **DENIES** Simental's motion to vacate,
3 set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

4 **IT IS SO ORDERED.**

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6 DATED: July 25, 2017



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8 — CHRISTINA A. SNYDER
9 UNITED STATES DISTRICT JUDGE
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