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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF
AMERICA,
Plaintiff/Respondent,
v.
JOHN JAMES FLORES,
Defendant/Movant.

Case Nos. EDCV 14-00822-VAP
EDCR 12-00017-VAP

**ORDER DENYING MOTION FOR
RELIEF UNDER 28 U.S.C.
§ 2255**

**[Motion filed on April 24,
2014]**

I. SUMMARY OF PROCEEDINGS

On April 24, 2014, John James Flores ("Petitioner") filed a "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct A Sentence by a Person in Federal Custody." ("Motion" or "Mot.") ([Crim.] Doc. No. 595; [Civ.] Doc. No. 1,).¹ On June 2, 2014, the United States filed an Opposition ("Opp'n") to the Motion. ([Crim.]

¹ Some of the documents filed in connection with this Motion appear only on the docket in the underlying criminal case, CR 12-00017(A)-VAP. Citations to [Civ.] indicate documents on the docket for this Motion. Citations to [Crim.] indicate documents on the docket for the underlying criminal case.

1 Doc. No. 599.) Petitioner filed a Response to the
2 Government's Opposition on June 18, 2014.² On July 23,
3 2014, Petitioner filed a "Motion to comply with Local
4 Rule 11-4.1." ("Motion to Comply" ([Crim.] Doc. No. 612;
5 [Civ.] Doc. No. 5).) The Court addresses the additional
6 contentions asserted in the Response and that motion
7 separately, below.

8 9 **II. BACKGROUND**

10 On January 8, 2013, Petitioner pled guilty to Count 1
11 of the Superseding Indictment, conspiracy to possess with
12 intent to distribute and distribute heroin in violation
13 of 21 U.S.C. § 846. (Minutes of Change of Plea Hearing
14 ([Crim.] Doc. No. 298).) Petitioner entered his guilty
15 plea pursuant to a written plea agreement. ("Plea
16 Agreement") ([Crim.] Doc. No. 259).

17
18 The Plea Agreement contains the following provisions:
19 (1) Petitioner agreed to waive his right to a direct
20 appeal of his conviction, with the exception of bringing
21 an appeal that his plea was involuntary (Plea Agreement
22 ¶ 18); (2) Petitioner agreed to waive his right to bring
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24
25 ² The Response was initially stricken from the
26 Court's docket for failure to comply with former Local
27 Rule 11-4.1, which required litigants to provide one
28 extra copy of each document filed for the judge's use.
(See [Crim.] Doc. Nos. 606-07; [Civ.] Doc. No. 4.) By
order of the Court, these entries were restored to the
docket on July 31, 2014. (See [Crim.] Doc. No. 618;
[Civ.] Doc. No. 6.)

1 a direct appeal challenging the calculation of his
2 sentence, provided that he was assigned an offense level
3 of 31 or lower, and the criminal history category
4 calculated by the Court (Plea Agreement ¶ 19);
5 (3) Petitioner agreed to waive his right to bring a post-
6 conviction collateral attack on his conviction or
7 sentence, with the exception of claims based on
8 ineffective assistance of counsel, newly discovered
9 evidence, or a change to the Sentencing Guidelines,
10 sentencing statutes, or statutes of conviction (Plea
11 Agreement ¶ 20); and (4) Petitioner further agreed that
12 no promises, inducements, or representations of any kind
13 had been made to him other than those contained in the
14 agreement. Moreover, he agreed that no one had
15 threatened him or forced him to sign the agreement and
16 that he was pleading guilty to take advantage of the
17 promises in the agreement. (Plea Agreement,
18 Certification of Defendant.)

19

20 On May 6, 2013, the Court sentenced Petitioner to a
21 144 month term of imprisonment, along with a 5 year
22 period of supervised release. (J. & Commitment Order
23 ([Crim.] Doc. No. 414).)

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25 On April 24, 2014, Petitioner filed the instant
26 Motion. Construing the Motion liberally, it asserts
27 three claims for relief under § 2255:

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- (1) the Court erred by convicting him without substantial evidence;
- (2) due process was violated because the Government used prior felonies listed in criminal history reports to enhance his criminal history, when he was not, in fact, convicted of those prior felonies;
- (3) Defense counsel "induced" him to sign the plea agreement.

(Mot. at 5.)

III. LEGAL STANDARD

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on some constitutional error, jurisdictional defect, or an error resulting in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783-84 (1979). If the record clearly indicates that a movant does not have a claim or that he has asserted "no more than conclusory allegations, unsupported by facts and refuted by the record," a district court may deny a §

1 2255 motion without an evidentiary hearing. United States
2 v. Quan, 789 F.2d 711, 715 (9th Cir. 1986); see also
3 United States v. Chacon-Palomares, 208 F.3d 1157, 1159
4 (9th Cir. 2000) ("When a prisoner files a § 2255 motion,
5 the district court must grant an evidentiary hearing
6 '[u]nless the motion and the files and records of the
7 case conclusively show that the prisoner is entitled to
8 no relief.'" (quoting 28 U.S.C. § 2255)).

9 10 IV. DISCUSSION

11 **A. Petitioner's Claims Based on Ineffective Assistance** 12 **of Counsel Fail**

13 In the Motion, Petitioner claims his counsel was
14 ineffective for: (1) inducing him to sign the Plea
15 Agreement and (2) failing to object to the calculation of
16 his criminal history category using felonies of which he
17 was not convicted. These claims were not waived in the
18 Plea Agreement (see Plea Agreement ¶ 20), nor could they
19 have been. See United States v. Pruitt, 32 F.3d 431,
20 432-33 ("We doubt that a plea agreement could waive a
21 claim of ineffective assistance of counsel based on
22 counsel's erroneously unprofessional inducement of the
23 defendant to plead guilty or accept a particular plea
24 bargain."); Washington v. Lampert, 422 F.3d 864, 871 (9th
25 Cir. 2005) (finding that waivers cannot bar ineffective
26 assistance of counsel claims associated with the
27 negotiation of plea agreements).

1 To establish ineffective assistance of counsel, a
2 defendant must prove: (1) "counsel's representation fell
3 below an objective standard of reasonableness," and (2)
4 there is a reasonable probability that, but for counsel's
5 errors, the result of the proceeding would have been
6 different." Strickland v. Washington, 466 U.S. 668,688,
7 694 (1984). The "likelihood of a different result must
8 be substantial, not just conceivable." Harrington v.
9 Richter, 131 S. Ct. 770, 792 (2011).

10
11 **1. Counsel's Inducement to Sign the Plea Agreement**

12 Petitioner alleges that his trial counsel induced him
13 to sign the Plea Agreement. (Mot. at 5.) The Motion,
14 however, contains no facts or evidence to support this
15 claim or to demonstrate that he was coerced or
16 erroneously induced into signing the Plea Agreement. The
17 record does indicate, however, that the Court
18 specifically asked Petitioner during the plea colloquy if
19 anyone had promised him anything, aside from the benefits
20 of the Plea Agreement, in exchange for his guilty plea.
21 Petitioner answered no, and stated that he was pleading
22 guilty voluntarily.

23
24 Petitioner's bare assertion that he was wrongfully
25 induced by defense counsel to sign the Plea Agreement,
26 absent any supporting evidence, constitutes an
27 insufficient basis to conclude that counsel's conduct was
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1 ineffective. The Court finds Petitioner's statements at
2 the change of plea hearing, made under penalty of
3 perjury, more credible than the conclusory allegations
4 asserted in the Motion. To the extent the Motion argues
5 to the contrary, the Court finds those allegations have
6 little weight. See Blackledge v. Allison, 431 U.S. 63,
7 74 (1977) ("[S]olemn declarations in open court carry a
8 strong presumption of verity.") Moreover, the Motion
9 lacks any detail about how Petitioner's counsel may have
10 wrongfully induced him to sign the Plea Agreement. A
11 district court may deny a § 2255 motion if the petitioner
12 asserts "no more than conclusory allegations, unsupported
13 by facts and refuted by the record." See United States
14 v. Chacon-Palomares, 208 F.3d 1157, 1159 (9th Cir.
15 2000)(quoting 28 U.S.C. § 2255).

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17 Additionally, when assessing "the petitioner's claim
18 that ineffective assistance led to the improvident
19 acceptance of a guilty plea, the Court [has] required the
20 petitioner to show 'that there is a reasonable
21 probability that, but for counsel's errors, [the
22 defendant] would not have pleaded guilty and would have
23 insisted on going to trial.'" Lafler v. Cooper, 132 S.
24 Ct. 1376, 1384-85 (2012). Petitioner has made no such
25 showing here.

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1 Thus, the Court finds that Petitioner's counsel was
2 not ineffective with respect to Petitioner's acceptance
3 of the Plea Agreement and his subsequent guilty plea, and
4 accordingly, DENIES the Motion on this ground and finds
5 that the Plea Agreement remains valid.

6
7 **2. Counsel's Failure to Object to the Court's**
8 **Calculation of His Criminal History Category**

9 Petitioner avers that "the government used old prior
10 felonies based on criminal history reports, instead of
11 court judgements (sic) as due process. . . . [I] was
12 never convicted of such charges." (Mot. at 5.)
13 Petitioner further contends that his trial counsel's
14 performance was ineffective for failing to object to the
15 use of prior felonies in the determination of his
16 sentence. (Id. ("[trial counsel] failed to object in
17 open court against the government's usage of [these] old
18 prior felonies").)³

21 ³ To the extent Petitioner claims that the Court
22 erred in its calculation of his criminal history category
23 in the first instance, the Plea Agreement bars that
24 claim. (See Plea Agreement ¶ 19 ("Defendant agrees that,
25 provided the Court imposes a term of imprisonment within
26 or below the range corresponding to an offense level of
27 31 and the criminal history category calculated by the
28 Court, defendant gives up the right to appeal all of the
following: (a) the procedures and calculations used to
determine and impose any portion of the sentence; (b) the
term of imprisonment imposed by the Court").)
The Court calculated Petitioner's total offense level to
be 31. (See Statement of Reasons ([Crim.] Doc. No. 410)
at 1.)

1 To the extent Petitioner contends the Court erred by
2 relying on computer databases rather than the physical
3 copies of court or police records in determining his
4 criminal history category, this claim lacks merit. At
5 sentencing, the district court is not limited to only
6 considering information admissible at trial or limited by
7 the Federal Rules of Evidence; rather, the court "may
8 consider information that 'has sufficient indicia of
9 reliability to support its probable accuracy.'" United
10 States v. Langer, 618 F.3d 1044, 1047 (9th Cir. 2010)
11 (quoting USSG § 6A1.3(a)).
12

13 Here, the Court relied upon the Presentence Report
14 ("PSR") in determining Petitioner's criminal history
15 category. ([Crim.] Doc. No. 339.) In the Presentence
16 Report, the Probation Officer assigned to this case
17 stated that she searched through existing records in
18 making her findings concerning Petitioner's criminal
19 history. The PSR States that

20 A criminal record inquiry was conducted through
21 the Justice Data Interface Controller System
22 (JDIC) which accesses several databases on the
23 county, state and national level. Arrest
24 records and court records were obtained from the
25 following additional sources: San Bernardino
26 Superior Court; Redlands Municipal Court; San
27 Bernardino Sheriff's Department (SBSD); Redlands
28 Police Department (RPD); California Department
of Corrections (CDC); and the California
Department of Motor Vehicles (DMV).

1 (PSR ¶ 41.) Those documents reveal a lengthy criminal
2 history. (See id. ¶¶ 43-98.) Pursuant to Ninth Circuit
3 precedent, the Court was not required to obtain certified
4 copies of judgments or other records in order to rely
5 upon them for purposes of sentencing. Instead, it was
6 permissible to rely on a Probation Officer's
7 representations about a defendant's criminal history
8 where "there is no 'discernable reason' to question the
9 probation officer's honesty, and the sources relied on by
10 the probation officer are equally trustworthy." United
11 States v. Felix, 561 F.3d 1036, 1042 (9th Cir. 2009)
12 (citing United States v. Marin-Cuevas, 147 F.3d 889, 891,
13 894 (9th Cir. 1998) and United States v. Romero-Rendon,
14 220 F.3d 1159, 1163 (9th Cir. 2000)). This is especially
15 true where the defendant "offer[s] no evidence to
16 contradict the PSR but only argue[s] that the government
17 failed to sustain its burden of proof." Id. (citing
18 United States v. Felix, 561 F.3d 1036, 1043 (9th Cir.
19 2009)). Such is the case here. The PSR relied upon
20 official records obtained from government databases and
21 the record indicates no reason to believe the Probation
22 Officer had any reason to prevaricate. Marin-Cuevas, 147
23 F.3d at 895. Petitioner does not contend that the record
24 of any particular crime in his criminal history is in
25 dispute, only that the Government has failed to meet its
26 burden to show that he was actually convicted of, or was
27 arrested for, those crimes. Accordingly, the Court's
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1 reliance on the PSR, and the records referenced therein,
2 was proper. As "the failure to raise a meritless legal
3 argument does not constitute ineffective assistance of
4 counsel," (see Baumann v. United States, 692 F.2d 565,
5 572 (9th Cir. 1982)), the Court finds that Petitioner's
6 trial counsel did not render ineffective assistance for
7 failing to object to the use of the PSR to determine his
8 criminal history, and accordingly, the Court DENIES the
9 Motion on this ground.

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11 **B. Petitioner's Remaining Claim Regarding the**
12 **Sufficiency of the Evidence is Barred by His Plea**
13 **Agreement**

14 As noted above, the Plea Agreement agreed to by
15 Petitioner contained explicit waivers of his right to
16 bring a direct appeal and to bring a post-conviction
17 collateral attack on his sentence in most respects. (See
18 Plea Agreement ¶¶ 18-20.) Waivers of direct appeal and
19 post-conviction relief rights are valid, so long as those
20 waivers are express. See United States v. Abarca, 985
21 F.2d 1012, 1014 (9th Cir. 1993).

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23 Thus, Petitioner's claim that he was convicted
24 without substantial evidence is barred by the terms of
25 the Plea Agreement, and is not covered by any exception

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1 contained therein. Accordingly, the Court DENIES the
2 Motion on this ground.⁴

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4 **C. The Additional Allegations in Petitioner's Response**
5 **and "Motion to Comply"**

6 **1. Petitioner's Plea Agreement**

7 In Petitioner's Response, he makes additional
8 allegations concerning his Plea Agreement.
9 Specifically, he contends that the Plea Agreement
10 reserved his right to file a direct appeal, and that the
11 Court indicated as much at his sentencing. (Response
12 at 3-4.) Additionally, he contends that his trial
13 counsel was required to submit a direct appeal on his
14 behalf, but failed to do so. (Id.)

15
16 Preliminarily, the Court is not required to address
17 issues first raised in a reply brief. See Montes v.
18 United States, 2012 WL 3778856, at *5 (E.D. Cal. Aug. 31,
19 2012) (denying ineffective assistance claim in § 2255
20 motion where first raised in a reply brief). In any
21 event, Petitioner is mistaken that his Plea Agreement
22 reserved the right to file a direct appeal. As noted
23 previously, the Plea Agreement contains express waivers
24 of the right to appeal his conviction, the calculation of

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26 ⁴ Not only is this claim barred by the Plea
27 Agreement, it has also been procedurally defaulted due to
28 Petitioner's failure to raise this claim on direct
appeal. See Bousley v. United States, 523 U.S. 614, 622
(1998).

1 his sentence, subject to conditions precedent that did
2 not occur, and his right to bring a post-conviction
3 collateral attack on his conviction or sentence. (Plea
4 Agreement ¶¶ 18-20.)

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6 Moreover, at the close of sentencing, the Court noted
7 that although he had gave up most of his appellate rights
8 through the Plea Agreement, Petitioner still had the
9 right to file an appeal within fourteen days of the date
10 of sentencing, provided he had proper grounds to file
11 such an appeal. Petitioner stated that he understood.
12 Accordingly, to the extent Petitioner's Response raises
13 additional grounds for relief, the Court DENIES those
14 claims as well.

15
16 **2. Petitioner's Allegations Concerning Document**
17 **Production**

18 Petitioner further faults the Government for not
19 complying with the Court's Order requiring a Return to
20 Petitioner's Motion. (See Response at 1-2 (quoting Order
21 Requiring Return ([Civ.] Doc. No. 3)).) Petitioner
22 appears to renew this allegation in the Motion to Comply.
23 (Motion to Comply at 1.) In the Order Requiring Return,
24 the Court stated that "the United States Attorney [shall]
25 file a Return to the motion on or before June 2, 2014,
26 accompanied by all records, and that Respondent [shall]
27 serve a copy of the Return upon the Petitioner prior to
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1 the filing thereof." (Order Requiring Return at 1.)
2 Petitioner appears to be under the impression that this
3 Order required the Government to submit: (1) all
4 documents supporting his criminal history calculation;
5 (2) documents demonstrating that he was read his Miranda
6 rights; (3) documents pertaining to an allegedly unlawful
7 wiretap, and (4) a certification that it employed a
8 certified Spanish language interpreter during the
9 investigation that led to his arrest. (Response at 2-3.)

10

11 Petitioner is mistaken. The Court's Order only
12 requires the United States Attorney to produce all
13 records *relevant to the filing of the Return*. Here, no
14 additional documents were necessary in the resolution of
15 the Motion. Accordingly, the Court declines to find that
16 the Government failed to comply with the Court's order.⁵

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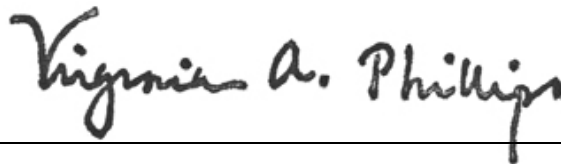
26 ⁵ Petitioner also filed a "Motion to respond to
27 Notice of Discrepancy" on August 19, 2014, stating his
28 hope that the previously filed Notices of Discrepancy
will not affect the adjudication of the instant Motion.
([Civ.] Doc. No. 8.)

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V. CONCLUSION

For the foregoing reasons, the Court DENIES
Petitioner's Motion.

Dated: September 18, 2014



VIRGINIA A. PHILLIPS
United States District Judge