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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

CASE NO. CR F 09-0140 LJO

Plaintiff,

**ORDER ON DEFENDANT’S 28 U.S.C. § 2255
MOTION**
(Doc. 11.)

vs.

OCTAVIO HAROS,

Defendant.

INTRODUCTION

Defendant Octavio Haros (“defendant”) is a federal prisoner and proceeds pro se to seek to reduce his 37-month prison sentence, pursuant to 28 U.S.C. § 2255 (“section 2255”), based on his status as a deportable alien. This Court considered defendant’s section 2255 motion on the record and DENIES defendant’s requested relief.

BACKGROUND

Plea Agreement

Defendant entered into an August 6, 2009 F.R.Crim.P. 11(c) Memorandum of Plea Agreement (“plea agreement”) by which defendant voluntarily agreed to plead guilty to the felony of being a deported alien found in the United States in violation of 8 U.S.C. § 1326. With the plea agreement, defendant agreed that a 37-month prison term “is part of an overall ‘reasonable sentence.’” Defendant further agreed and/or acknowledged that he:

- 1 1. Would not seek “a downward departure or reduction of his sentence beyond the four (4)
- 2 level departure agreed to by the government under this plea agreement”;
- 3 2. Would not argue “for a term of imprisonment of less than thirty-seven (37) months”;
- 4 3. Waived “all Constitutional and statutory rights to appeal his conviction and sentence”
- 5 and “to attack collaterally . . . his plea, his sentence, including . . . , filing a motion under
- 6 28 U.S.C. § 2255”; and
- 7 4. Waived trial and appeal rights.

8 An August 12, 2009 judgment was entered to impose a 37-month sentence.

9 **Section 2255 Motion**

10 Defendant filed his December 9, 2009 section 2255 motion to reduce his sentence in that his

11 alien status deprived “his benefits and privileges.”

12 **DISCUSSION**

13 **Waiver**

14 Defendant’s waiver to attack his sentence collaterally with a 2255 motion precludes his claims

15 that his sentence should be reduced due to his status as a deportable alien.

16 A plea agreement is a contract and subject to contract law standards. *United States v. Escamilla*, 975

17 F.2d 568, 571 (9th Cir. 1992), *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985). A defendant

18 may waive the right to bring a section 2255 petition. *United States v. Abarca*, 985 F.2d 1012, 1013 (9th

19 Cir.), *cert. denied*, 508 U.S. 979 (1993). “[A] prisoner may not collaterally attack a judgment if the

20 prisoner waived the right to do so.” *United States v. Racich*, 35 F.Supp.2d 1206, 1210 (S.D. Cal. 1999).

21 A plea agreement does not waive the right to bring a section 2255 petition unless it does so expressly.

22 *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994). The right to bring a collateral attack under

23 section 2255 is statutory, and a “knowing and voluntary waiver of a statutory right is enforceable.”

24 *Abarca*, 985 F.2d at 1014.

25 Defendant’s waiver of his appeal and collateral attack rights, as part of defendant’s knowing and

26 voluntary plea agreement, is valid. In the plea agreement, defendant waived and agreed not to attack his

27 conviction by a 2255 motion. Defendant waived an attack on his sentence based on his status as a

28 deportable alien.

1 Deportable Alien Status

2 Defendant appears to contend that this Court should reduce his offense level as a deportable alien
3 to address different treatment afforded citizens and aliens.

4 A court may depart downward if it finds that “there exists an aggravating or mitigating
5 circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating
6 the guidelines and that should result in a sentence different from that described.” 18 U.S.C. § 3553(b).
7 Sentencing Guidelines §5K2.0 finds departures from the stated guideline range appropriate when factors
8 “that have not been given adequate consideration by the Commission” are present, or if “in light of the
9 unusual circumstances, the weight attached to that factor under the guidelines is inadequate or
10 excessive.” The decision to depart from the relevant guideline is within the sound discretion of the
11 sentencing court. *United States v. Charry Cubillos*, 91 F.3d 1342, 1343 (9th Cir. 1996).

12 Generally, downward departure is discouraged due to a presumption that the Sentencing
13 Commission, if only implicitly, considered all possible factors. *See, e.g., United States v. Restrepo*, 999
14 F.2d 640, 644 (2nd Cir. 1993). The United States Supreme Court has emphasized that “[b]efore a
15 departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the
16 heartland of cases in the Guideline. To resolve this question, the district court must make a refined
17 assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day
18 experience in criminal sentencing.” *Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 2046
19 (1996).

20 Defendant appears to contend that he is entitled to a downward departure because as a deportable
21 alien, his sentence is more severe than it would be if he were a United States citizen. Courts have
22 considered effects of alienage on sentencing and agree that a sentencing court should not consider
23 immigration-related consequences that are marginal or collateral to the sentence, including hardship of
24 deportation or ineligibility for release to a half-way house. *See, e.g., United States v. Nnanna*, 7 F.3d
25 420, 422 (5th Cir. 1993) (“collateral consequences from conviction are not a basis for downward
26 departure”); *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990) (“possibility of
27 deportation” is not an appropriate ground for departure).

28 The Ninth Circuit Court of Appeals has recognized that a downward departure from a stated

1 guideline requires a district court to make findings to consider the “structure and theory” of the
2 guidelines as a whole, bearing in mind the Commission’s expectation that departures based on grounds
3 not mentioned in the Sentencing Guidelines are infrequent. *Charry Cubillos*, 91 F.3d at 1343. A
4 sentencing court must indicate why a departure is so unusual to fall outside the heartland of cases.
5 *Charry Cubillos*, 91 F.3d at 1343.

6 Further, the Ninth Circuit has held that the threat of deportation is not a factor that the district
7 court may consider for sentencing purposes. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th
8 Cir.1990) (deportability is not a valid factor for departure because it merely describes the defendant's
9 status, and does not "affect [defendant's] culpability or the seriousness of the offense."); *U.S. v. Lipman*,
10 133 F.3d 726, 730 (9th Cir. 1998) (a sentencing court cannot downwardly depart based on the fact that
11 a defendant faces future deportation.)

12 Defendant offers nothing to suggest that his sentence falls outside the heartland of cases.
13 Defendant fails to substantiate a sentencing error resulting from his status as a deportable alien or
14 grounds for further downward departure. Nothing in the record supports section 2255 relief.

15 Certificate Of Appealability

16 28 U.S.C. § 2253(c)(1) precludes an appeal from a final order in section 2255 proceedings unless
17 a circuit justice or judge issues a certificate of appealability (“COA”). A COA may issue “only if the
18 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c)(2);
19 *see Williams v. Calderon*, 83 F. 3d 281, 286 (9th Cir. 1996). A COA issues when defendant demonstrates
20 the questions raised are “debatable among jurists of reason; that a court could resolve the issues [in a
21 different manner]; or that the questions are adequate to deserve encouragement to proceed further.”
22 *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4, 103 S.Ct. 3382, 3394-3395, n. 4 (1983). In the absence of
23 a COA, no appeal in a section 2255 proceeding may be heard. 28 U.S.C. § 2253(c).

24 This Court has reviewed the record of this case and finds no jurist of reason could debate the
25 correctness to deny defendant collateral relief. *See Barefoot*, 463 U.S. at 893, n. 4, 103 S.Ct. at 3394-
26 3395, n. 4; *Clark v. Lewis*, 1 F. 3d 814, 819 (9th Cir. 1993). On the merits of this case, reasonable jurists
27 would not debate the constitutionality of defendant’s conviction. A certificate of appealability is
28 improper.

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CONCLUSION AND ORDER

For the reasons discussed above, this Court DENIES defendant section 2255 relief and a certificate of appealability. The clerk is directed to close any civil action opened in connection with this 2255 motion.

IT IS SO ORDERED.

Dated: December 11, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE