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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 GUADALUPE GONZALEZ ALVARADO,

15 Defendant.

CASE NO. 07cr2466 JM

ORDER DENYING MOTION FOR
REDUCTION OF SENTENCE

16 Pursuant to 28 U.S.C. §2255 Defendant Guadalupe Gonzalez-Alvarado
17 (“Defendant”) moves for a reduction in her custodial sentence (“Motion”). “As the
18 files and records of the case conclusively show that the prisoner is entitled to no relief,”
19 28 U.S.C. §2255(b), the court has not requested a response from the United States.
20 For the reasons set forth below, the court denies the Motion and denies Defendant a
21 certificate of appealability because she fails to make “a substantial showing of the
22 denial of a constitutional right.” 28 U.S.C. §2253(c).

23 **BACKGROUND**

24 On August 8, 2008 Defendant entered a “straight-up” guilty plea to possession
25 of methamphetamine with intent to distribute (Count 2) and possession of heroin with
26 intent to distribute (Count 3). Defendant was sentenced to a custodial sentence of 108
27 months, followed by a three year term of supervised release. The following statement
28 of facts is taken from the Government’s Sentencing Memorandum:

1 A. Defendant's Arrest at the Port of Entry

2 On August 10, 2007, Defendant entered the United States driving her rental
3 vehicle. There was a TECS generated referral placed by the ICE agent based on the
4 activity, the day before. Agents found two Tupperware containers with 1.10 kilograms
5 of methamphetamine in her purse. Defendant admitted that it contained "crystal" to the
6 inspectors. Defendant had 1.85 kilograms of heroin from the waistband area of her
7 pants.

8 B. Delivery of Methamphetamine By Defendant The Day Before

9 During an unrelated DEA state wiretap investigation, agents were monitoring
10 calls of Eric Artiaga, who arranged for the distribution of methamphetamine (he resided
11 in Mexico). On August 9, 2007, Artiaga was arranging for the distribution of
12 methamphetamine for an unidentified person named "Memo" (who was interesting in
13 buying methamphetamine). During intercepted calls, they described the courier (the
14 Defendant) as driving a wine-colored Impala, who was to arrive to meet with Memo.
15 They claimed that Defendant was already there at the Target on Palamor. Artiaga
16 claimed that she had to go back for the other "two trucks" (two pounds of
17 methamphetamine) right now. They described how the drugs are on her (on her body).
18 Artiaga describes how the Defendant can go with Memo or how Memo can go into her
19 car (to remove the drugs). Artiaga said "two vehicles today" (two pounds of
20 methamphetamine) and in a "little while" another "two" and then "another two
21 tomorrow." (Exhibit 1, Affidavit of DEA Agent David McGuckin.). At one point,
22 Memo can not locate Defendant's vehicle. After Memo meets with the Defendant,
23 agents intercept additional calls where Artiaga claims that "she's been doing it that way
24 for a while" to Memo and later states "that's how she does it all the time" (referring to
25 how she transports the drugs on her body).

26 Based on the activities in the Target parking lot, agents observed the Defendant
27 in the rental vehicle and subsequently placed her vehicle into TECS, expecting that she
28 would be delivering two pounds of methamphetamine later that day. Later, Artiaga is
informing "Juan" that the "lady" (the Defendant) was on her way, but she had to take
her son to the doctor's office and she (the Defendant) did not like doing it at night, but
that she would do it the next day (August 10, 2008).

1 C. Defendant's Involvement With Harold Garner

2 In another unrelated federal wiretap investigation, DEA Special Agent Thomas
3 Lennox had identified the Defendant as the courier for Harold Garner (GARNER) who
4 distributed pound quantities of methamphetamine locally and to other states. (Exhibit
5 1 – Complaint implicating Defendant as courier). Defendant was intercepted on that
6 federal wiretap on many occasion, smuggling methamphetamine from Mexico in to the
7 United States for distribution in Southern California.

8 During that wiretap investigation, it became clear that Defendant worked for
9 other drug trafficking organizations. Defendant discussed the difficulties of locating
10 methamphetamine at a fair price and the current prices for methamphetamine (ranging
11 from 12-14,000). Defendant knew of other sources for methamphetamine, but they
12 were still too expensive for GARNER.

13 D. Defendant's First Debrief

14 When Defendant was arrested in August 2007, Defendant offered to cooperate
15 through her then-attorney Gretchen Von Helms. Prior to the debrief, the prosecutor
16 orally informed Defendant that any statements would not be used against her unless she
17 lied and misled the interviewing agents. The agent from the state wiretap case (Agent
18 McGlucken) and the federal wiretap (Agent Tom Lennox) were present. There was no

1 written cooperation or proffer agreement.

2 Defendant claimed that she was hired by "Norma" to cross the heroin and
3 methamphetamine in her possession on August 10, 2007. Defendant claimed that she
4 worked for "Norma" twice a month crossing drugs into the United States. She said that
5 she smuggled drugs for Norma since January 2007 (approximately 16 times). She also
6 claimed that she picked up money for Norma – on one occasion, she picked up
7 \$70,000; on others, she believed the quantity was more based on the size of the
8 bundles.

9 On August 10, 2007, when she was arrested, Defendant said that she was
10 instructed to take the methamphetamine to Target. When asked the last time she
11 smuggled for "Norma," defendant claimed two weeks earlier at K-Mart). [NOTE:
12 Defendant never told the interviewing agents that she smuggled narcotics the day
13 before at the same Target location and never told the agents about the identities or
14 descriptions of the men in the Target parking lot.]

15 Defendant initially claimed that she rented one car (August 2007) and that
16 "Norma" paid for that rental vehicle, but when agents confronted her about other rental
17 agreements in the defendant's name, defendant said that she rented cars since January
18 2007 at the direction of Norma, although the rental agreements go back to the summer
19 of 2006. When agents confronted her with 17 prior rental agreements since June 2006
20 to August 2007, defendant then admitted that she worked for "Gordo" whom she met
21 through Norma, by smuggling 5 pounds of methamphetamine on only two occasions.
22 However, when asked about the high mileage of the vehicles, she eventually claimed
23 that she smuggled for "Memo" (Paris' brother-in-law), smuggling three times a week
24 for the past year, transporting between 2-15 pounds on each occasion. [NOTE:
25 This is not the same "Memo" who met her in the parking lot at Target on August 9,
26 2007, because that "Memo" did not know what she looked like or who she was.] She
27 never claimed that she met Memo through Norma.

28 Defendant did not provide any information about the full names of the
traffickers. For example, while she claimed that she knew Norma for many years, she
told the agents that she did not know Norma's last name or other information about her.
She provided a hair saloon location in Mexico as a business associated with Norma, but
did not provide any information about where she lived (she did not draw any maps).
She did not know "Gordo's" last name or "Memo's" last name. During the interview,
she never claimed that she was a methamphetamine courier for GARNER (his phone
numbers were in her phone directory). Similarly, she did not mention her activities the
day before in the Target parking lot on August 9, 2007, or provide any description of
these individuals.

20 E. Attempted Interview

21 Defendant attempted to "cooperate" according to her attorney, so another
22 meeting was arranged, but Defendant elected not to provide any additional information.

23 F. Safety Valve Interview

24 During the safety valve interview, Defendant expanded the number of times she
25 imported and smuggled for Norma and Norma's associates (far greater than 16 times).
26 In addition, Defendant was truthful about the offense.

27 (Ct. Dkt. 36).

28 **DISCUSSION**

Legal Standards

28 U.S.C. §2255

1 Pursuant to the Antiterrorism and Effective Death Penalty Act (“AEDPA”), “A
2 prisoner in custody under sentence of a court . . . claiming . . . that the sentence was
3 imposed in violation of the Constitution or laws of the United States, . . . or that the
4 sentence was in excess of the maximum authorized by law . . . may move the court
5 which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. §
6 2255. AEDPA applies only to habeas petitions that were filed after its effective date
7 (April 24, 1996). See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Motions to
8 contest the legality of a sentence must generally be filed under section 2255 in the court
9 in which the petitioner was sentenced. See Hernandez v. Campbell, 204 F.3d 861, 864
10 (2000). “Section 2255 is available to prisoners claiming the right to be released from
11 custody.” United States v. Thiele, 314 F.3d 399, 400 (9th Cir. 2002).

12 Ineffective Assistance of Counsel

13 The law regarding ineffective assistance of counsel is well settled. In Strickland
14 v. Washington, 466 U.S. 668 (1984), the Supreme Court articulated a two-prong test
15 to analyze claims of ineffective assistance of counsel. In order to establish a claim of
16 ineffective assistance of counsel, Defendant must show both deficient performance by
17 counsel (the “incompetence prong”), and that such deficient performance prejudiced
18 his defense (the “prejudice prong”). Id. at 687.

19 To demonstrate deficient performance by counsel, the incompetence prong,
20 Defendant must show that counsel's performance was “outside the wide range of
21 professional competent assistance.” Id. at 690. “A convicted defendant making a claim
22 of ineffective assistance must identify the acts or omissions of counsel that are alleged
23 not to have been the result of reasonable professional judgment.” Id. at 690.
24 Defendant must show that his counsel's performance failed to meet an objective
25 standard of reasonableness. Id. at 689. In evaluating a claim of ineffective assistance
26 of counsel, the court “should recognize that counsel is strongly presumed to have
27 rendered adequate assistance and made all significant decisions in the exercise of
28 reasonable professional judgment.” Id. at 690. As stated by the Ninth Circuit, “we

1 'indulge a strong presumption that counsel's conduct falls within the wide range of
2 reasonable professional assistance; that is, the defendant must overcome the
3 presumption that, under the circumstances, the challenged action might be considered
4 sound trial strategy.'" Jones v. Ryan, 583 F.3d 626, 636-37 (9th Cir.2009) (quoting
5 Strickland, 466 U.S. at 689 (citation and quotation marks omitted)). "A fair assessment
6 of attorney performance requires that every effort be made to eliminate the distorting
7 effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct,
8 and to evaluate the conduct from counsel's perspective at the time." Strickland, 466
9 U.S. at 689.

10 Under the prejudice prong, Defendant "must show that there is a reasonable
11 probability that, but for counsel's unprofessional errors, the result of the proceeding
12 would have been different." Id. at 694. That is, Defendant must demonstrate "that
13 counsel's errors were so serious as to deprive [her] of a fair trial." Id. at 687. "An error
14 by counsel, even if professionally unreasonable, does not warrant setting aside the
15 judgment of a criminal proceeding if the error had no effect on the judgment." Id. at
16 691.

17 **Right to a Plea Agreement**

18 Defendant contends that her counsel was ineffective because she failed to obtain
19 a plea agreement and thereby "foreclosed various options in the sentencing range that
20 prejudiced defendant." (Motion at p.1). The court denies this contention because there
21 is no constitutional or statutory right to a plea agreement and therefore trial counsel
22 could not be ineffective in failing to obtain one.

23 The United States Supreme Court has long recognized that "there is no
24 constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to
25 trial." Weatherford v. Bursey, 429 U.S. 545, 561 (1977); United States v. Osif, 789
26 F.2d 1404, 1405 (9th Cir.1986) ("a defendant does not have a constitutional right to a
27 plea bargain"). Defendant cites no authority that a defense attorney has a duty to
28 initiate plea negotiations. This court could not locate any authority obligating defense

1 counsel to seek a plea agreement on the defendant's behalf. See e.g., Welch v. United
2 States, Docket No. 09-2873, 2010 WL 1538866, at *3 (3rd Cir. April 19, 2010)
3 (unpublished) ("It is well-established ... that counsel does not have an absolute
4 obligation to pursue plea negotiations in every case."); United States v. Huddy, 184
5 Fed. Appx. 765, *767 (10th Cir. June 19, 2006) (unpublished) (rejecting the
6 defendant's argument that her counsel was ineffective for failing to initiate plea
7 negotiations); United States v. Cabaccang, 2010 WL 3000196 (D. Guam July 28, 2010)
8 (unpublished) ("Because trial counsel was under no duty to initiate plea negotiations,
9 he was not required to request a plea agreement from the Government prosecutor.")

10 Rule 2 of Rules Governing Section 2255 Proceedings requires the Motion to
11 "state the facts supporting each ground." The only fact cited by Defendant is that
12 "Defense Counsel did not obtain a plea agreement." On this fact, Defendant is not
13 entitled to relief because trial counsel was under no duty to initiate plea negotiations,
14 nor required to request a plea agreement from the Government prosecutor. Moreover,
15 even if trial counsel had made a plea agreement request, the prosecutor is not obligated
16 to offer a plea bargain. See Weatherford, 429 U.S. at 561.

17 The only authority cited by Defendant, United States v. Herrera, 412 F.3d 577
18 (5th Cir. 2005), is not helpful to her. There, the defendant rejected a plea offer with a
19 maximum 48 month custodial sentence based upon counsel's advice that, if he
20 proceeded to trial, he faced a maximum 51 month maximum guideline sentence. In
21 actuality, the defendant faced a 78 to 97 month sentence. The court concluded that
22 defense counsel's performance was deficient because it did not permit the defendant
23 to make an intelligent choice about whether to accept or reject the plea. Here, Herrera
24 is not helpful to Defendant because there are no facts suggesting that she was ever
25 offered, or sought, a plea agreement.

26 Accordingly, the court concludes that Defendant fails to establish that her
27 counsel provided deficient performance.

28 **The Challenge to Drug Quantity**

1 Defendant contends that counsel provided ineffective assistance of counsel by
2 failing to object to the drug quantity. The only authority cited in support of this claim
3 is United States v. Gordon, 156 F.3d 376 (2nd Cir. 1998). This authority is not helpful
4 to Defendant because it does not discuss any issue related to drug quantity. Rather, the
5 Second Circuit reached the unremarkable conclusion that defense counsel who “grossly
6 underestimate” the potential sentence provides ineffective assistance of counsel.

7 Here, the court denies this ground for relief because Defendant admitted in open
8 court that she possessed more than 500 grams of methamphetamine and more than one
9 kilogram of heroin. (RT 8:14-9:10; 11:3-11). As Defendant admitted the quantity of
10 methamphetamine and heroin (and she fails to contradict her sworn statements),
11 Defendant fails to satisfy either prong of Strickland.

12 **Minor Role**

13 Defendant contends that counsel failed to determine Defendant’s role in the drug
14 trafficking conspiracy. Apparently, Defendant contends that defense counsel should
15 have sought a Fed.R.Crim.P. 7(f) bill of particulars on Count 1, the conspiracy count
16 in the information. (Ct. Dkt. 6).

17 This argument is without merit as the conspiracy count was dismissed and did
18 not form a basis for Defendant’s sentence. Consequently, this contention fails to
19 satisfy either prong of Strickland.

20 In sum, the court denies the Motion and denies Defendant a certificate of
21 appealability pursuant to 28 U.S.C. §2253.

22 **IT IS SO ORDERED.**

23 DATED: May 27, 2011

24
25 
26 **JEFFREY D. MILLER**
United States District Judge

27 cc: All parties

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