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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

10 LIBERATO CONTRERAS-
11 SANCHEZ,

Petitioner,

12 vs.

13
14 UNITED STATES OF AMERICA,

15 Respondent.

CASE NOS. 12-CV-251-BEN
10-CR-3375-BEN

**ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

[Civil Docket No. 1/Criminal Docket
No. 25]

16
17 Before this Court is the Motion to Vacate, Set Aside, or Correct Sentence
18 Pursuant to 28 U.S.C. § 2255 filed by Petitioner Liberato Contreras-Sanchez. (Docket
19 No. 25).¹

20 **I. BACKGROUND**

21 Petitioner, who is not a United States citizen, was deported from the United
22 States in November 2006 following a 2002 felony conviction in the Northern District
23 of Illinois for attempting to possess with intent to distribute cocaine. (Plea Ag., Gov.
24 Ex. 5, ¶ 3). Petitioner attempted to re-enter the United States without the express
25 consent of the Attorney General, or his designated successor, the Secretary of the
26 Department of Homeland Security. (*Id.*) Petitioner was charged by information on
27 August 24, 2010 with violating 8 U.S.C. § 1326(a) and (b). (Information, Gov. Ex. 3).

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¹All docket numbers refer to the docket in the criminal case, 10-CR-3375.

1 Petitioner signed a fast-track plea agreement with the Government on September
2 16, 2010. (Plea Ag.) Petitioner agreed to plead guilty to a violation of 8 U.S.C.
3 § 1326(a) and (b), which carries a maximum term of imprisonment of 20 years. (*Id.* ¶
4 1). Petitioner admitted to committing the elements of the offense and agreed to certain
5 facts, including the fact that he had previously been deported following a prior
6 aggravated felony conviction. (*Id.* ¶ 3). The parties agreed to sentencing guidelines
7 calculations that reduced Petitioner's offense level by five levels for acceptance of
8 responsibility and acceptance of a fast-track offer. (*Id.* ¶ 4). The Government agreed
9 to recommend that Petitioner be sentenced to the low end of the guidelines range,
10 followed by three years of supervised release. (*Id.* ¶ 8).

11 Petitioner pled guilty before Magistrate Judge Jan M. Adler on September 21,
12 2010. (Plea Hearing Tr., Gov Ex. 6). Petitioner was sentenced by this Court to 37
13 months of imprisonment on December 9, 2010. (Sentencing Hearing Tr., Gov. Ex. 7).

14 Petitioner signed the instant Motion on January 24, 2012. Petitioner makes two
15 claims of ineffective assistance of counsel: (1) counsel failed to file a notice of appeal
16 after Petitioner requested it, and (2) counsel failed to object to a sentence that exceeded
17 the statutory maximum. For the reasons stated below, the Motion is **DENIED**.

18 **II. LEGAL STANDARD**

19 A district court may "vacate, set aside or correct" a sentence of a federal prisoner
20 that was imposed in violation of the Constitution or a law of the United States. 28
21 U.S.C. § 2255(a). A district court must hold an evidentiary hearing before denying a
22 § 2255 motion, unless it is conclusively shown that the prisoner is entitled to no relief.
23 28 U.S.C. § 2255(b). However, if it is clear the petitioner has failed to state a claim,
24 or has "no more than conclusory allegations, unsupported by facts and refuted by the
25 record," a district court may deny a § 2255 motion without an evidentiary hearing.
26 *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986).

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1 **III. DISCUSSION**

2 Review of the record in this matter reveals that Petitioner’s claims are barred by
3 his valid waiver of his collateral attack rights. Petitioner’s claim regarding the
4 statutory maximum also fails on the merits.

5 A. Waiver

6 As part of the plea agreement, Petitioner agreed to waive his right to collaterally
7 attack his sentence. (Plea Ag. ¶ 11). The Ninth Circuit has upheld the validity of
8 waivers of the right to collateral attack a sentence pursuant to § 2255. *United States*
9 *v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.), *cert. denied*, 508 U.S. 979 (1993). Waivers
10 in plea bargaining are “an important component of this country’s criminal justice
11 system.” *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (citation
12 omitted) (in the context of a waiver of right to appeal). The Ninth Circuit has held that
13 public policy strongly supports plea agreements. *Id.* Plea bargaining saves the state
14 time and money, allowing it to promptly impose punishment without expending
15 resources. *Id.* at 322 (citing *Town of Newton v. Rumery*, 480 U.S. 386, 393 n.3 (1987)).
16 Additionally, and “perhaps the most important benefit of plea bargaining, is the finality
17 that results.” *Id.* at 322.

18 The right of collateral attack in a criminal case is purely statutory. *Abarca*, 985
19 F.2d at 1014. A waiver of the right to collateral attack will be upheld where it was
20 “knowing and voluntary.” *Id.* A knowing and voluntary waiver is enforceable where
21 the language of the waiver encompasses the grounds raised. *See Patterson-Romo v.*
22 *United States*, No. 10-cr-3319, No. 12-cv-1343, 2012 WL 2060872, at *1 (S.D. Cal.
23 June 7, 2012); *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011)(citation
24 omitted) (discussing the right to appeal).

25 1. Knowing and Voluntary

26 The waiver of a statutory right to challenge a conviction or sentence is knowing
27 and voluntary if the plea agreement as a whole was knowing and voluntary. *See United*
28 *States v. Jeronimo*, 398 F.3d 1149, 1154 (9th Cir. 2005) (discussing the right to appeal)

1 (overruled on other grounds); *United States v. Portillo-Cano*, 192 F.3d 1246, 1250
2 (9th Cir. 1999) (“waivers of appeal must stand or fall with the agreement of which they
3 are a part”) (internal quotations and citations omitted). A waiver will be considered
4 knowing and voluntary where the plea colloquy satisfies Rule 11, and the record
5 reveals no misrepresentation or gross mischaracterization by counsel that tainted the
6 plea. *See United States v. Sepulveda-Irube*, 197 Fed. Appx. 592, 592 (9th Cir. 2006)
7 (citing *Jeronimo*, 398 F.3d at 1157 n.5) (discussing right to appeal). After a careful
8 review of the written plea agreement, the Rule 11 plea colloquy, and the entire record
9 in this matter, this Court finds that the plea and the waiver were knowing and
10 voluntary.

11 The agreement conferred significant benefits on Petitioner. Although he faced
12 a maximum sentence of 20 years for his offense, the agreement lead the Government
13 to recommend a 37-month sentence which this Court ultimately agreed to impose.

14 In the agreement, Petitioner agreed to a paragraph entitled “Defendant Waives
15 Appeal and Collateral Attack.” (*Id.* ¶ 11). In relevant part:

16 In exchange for the Government’s concessions in this plea agreement,
17 defendant waives, to the fullest extent of the law, any right to appeal or to
18 collaterally attack the guilty plea, conviction and sentence . . . unless the
19 Court imposes a custodial sentence above the greater of the high end of
the guideline range recommended by the Government pursuant to this
agreement at the time of sentencing or statutory minimum term, if
applicable.

20 (*Id.*) This Court did not impose a custodial sentence above the high end of the
21 guideline range or any statutory minimum.

22 By signing the agreement, Petitioner stated that he was representing that he had
23 “full opportunity to discuss all facts and circumstances with defense counsel and has
24 a clear understanding of the charges and the consequences of the plea,” that no one had
25 made any other promises or offered any reward for his plea, that he was not threatened,
26 and that he was pleading guilty only because he was in fact guilty. (Plea Ag. ¶ 1(b)).
27 He agreed that he had discussed the sentencing guidelines with counsel. (*Id.* ¶ 4).
28 Petitioner also agreed to a paragraph which stated that:

1 By signing this agreement, defendant certifies that defendant has read it
2 (or that it has been read to defendant in defendant's native language), has
3 discussed its terms with defense counsel and fully understands its
4 meaning and effect. Defendant also has communicated with defense
5 counsel and is satisfied with the representation received.

6 (*Id.* ¶ 14). Petitioner signed and dated the agreement, and initialed every page. The
7 agreement was also signed by Petitioner's counsel. (*Id.* at 4). The final page of the
8 agreement bears handwritten notations stating that the document was translated on
9 August 26, 2010 and that it was "reviewed" by a second interpreter on September 16,
10 2010, the date it was signed by Petitioner. (*Id.*)

11 The Court also reviewed the transcript of the change of plea hearing held before
12 Magistrate Judge Adler. (Plea Hearing Tr.) Petitioner, who was represented by
13 counsel, was informed by the Magistrate Judge about the rights he was giving up by
14 pleading guilty. (*Id.* at 5:18-6:6). The Magistrate Judge explained, and Petitioner
15 stated that he understood, the charge, (*id.* at 6:9-15), the maximum penalties, (*id.* at
16 6:17-7:6), the deportation consequences, (*id.* at 7:16-20), and the role of the sentencing
17 guidelines, (*id.* at 7:23-8:8). He stated that he had discussed the guidelines with his
18 attorney. (*Id.* at 8:9-13). The Magistrate Judge also specifically inquired about the
19 plea agreement. Petitioner stated to the Magistrate Judge that he recalled signing and
20 initialing the agreement, that he had a chance to go over it with his attorney, that it was
21 translated into Spanish, and that he had no questions about it. (*Id.* at 8:17-9:5). The
22 Magistrate Judge highlighted the waiver provision and explained its meaning to
23 Petitioner. (*Id.* at 9:6-16). Petitioner stated that he understood and agreed to the
24 provision. (*Id.* at 9:16-18). The Magistrate Judge went over the factual basis of the
25 plea, and Petitioner admitted to the relevant facts. (*Id.* at 10:14-11:15). Petitioner's
26 counsel also affirmed to the Magistrate Judge that he had discussed the agreement with
27 Petitioner and believed that his client understood it, and that he believed the plea was
28 made freely and voluntarily. (*Id.* at 9:19-23; 11:19-22). The Magistrate Judge
specifically found that his plea was "freely and voluntarily given with an
understanding, knowing and intelligent waiver of each defendant's rights." (*Id.* at

1 12:17-20). The Magistrate Judge found that he was competent to enter the plea and
2 that there was a factual basis. (*Id.* at 12:20-22).

3 Finally, when Petitioner was sentenced before this Court, both Petitioner and his
4 counsel stated to this Court that Petitioner had waived his right to appeal and collateral
5 attack. (Sent. Hearing Tr. at 7:13-18).

6 Since the Rule 11 colloquy was proper, the waiver will be considered proper if
7 there is no misrepresentation or gross mischaracterization by counsel. *See Sepulveda-*
8 *Iribe*, 197 Fed. Appx. at 592. No misrepresentation or mischaracterization has been
9 alleged. Petitioner nowhere alleged that his plea or his plea agreement was not
10 knowing and voluntary. He does not challenge the agreement or plea colloquy. He
11 nowhere asserts that counsel was ineffective during the plea process. After full
12 consideration of the briefing and the record in this matter, this Court concludes that the
13 waiver of collateral attack rights was knowing and voluntary.

14 2. Scope of the Waiver

15 Petitioner's claims will be waived if they come within the scope of the provision.
16 Plea agreements are contractual in nature and are measured by contractual standards.
17 *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir.), *cert. denied*, 531 U.S. 1057
18 (2000). In interpreting a plea agreement, a court looks to what the parties reasonably
19 understood to be the terms of the agreement. *See United States v. Torres*, 999 F.2d 376,
20 378 (9th Cir. 1993) (citation omitted).

21 The waiver provision of this agreement is broad and clearly covers the claims
22 that Petitioner asserts. Petitioner claims that his counsel was ineffective for failing to
23 file a notice of appeal, and for failing to object to a sentence that exceeded the statutory
24 maximum. Such claims are covered by Petitioner's waiver of his right to collaterally
25 attack his guilty plea, conviction, or sentence, to the full extent of the law. (Plea Ag.
26 ¶ 11). His challenge of counsel's alleged failure to file a notice of appeal is an effort
27 to challenge that conviction and/or sentence. His challenge regarding the statutory
28 maximum is an attack on the legality of the sentence imposed. Both claims are within

1 the scope of the agreement.

2 There is a narrow category of claims which the Ninth Circuit has suggested
3 might not be precluded by a waiver, such as claims that challenge the voluntariness of
4 the waiver or claims that the petitioner received ineffective assistance of counsel when
5 considering a plea agreement. *See Abarca*, 985 F.2d at 1014 (declining to hold that a
6 waiver categorically forecloses a defendant from bringing any § 2255 proceeding, such
7 as a claim of ineffective assistance of counsel or involuntariness of the waiver);
8 *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005) (waiver provision in plea
9 agreement unenforceable with respect to ineffective assistance of counsel claim
10 pursuant to § 2254 that challenges the voluntariness of the waiver). However,
11 Petitioner's claims do not challenge the waiver, the plea agreement, or their
12 voluntariness in any fashion.

13 Courts have enforced collateral attack waivers in the face of claims of ineffective
14 assistance of counsel for refusal to file a notice of appeal. *United States v. Dominguez-*
15 *Barajas*, No. CV 13-959, 2013 WL 4026895, at *3 (D. Ariz. Aug. 7, 2013); *United*
16 *States v. Gomez-Cazares*, CV 12-2527, 2013 WL 394208, at *3 (D. Ariz. Jan. 31,
17 2013); *Lewis v. United States*, No. CV 08-2084, 2009 WL 4694042, at *4-5 (D. Ariz.
18 Dec. 4, 2009).

19 The Court notes that at least one district court has repeatedly interpreted the
20 Supreme Court's opinion in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and the Ninth
21 Circuit's opinion in *United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005)
22 to mean that a valid waiver of the right to collateral attack cannot preclude a claim of
23 ineffective assistance of counsel based on counsel's refusal to file a notice of appeal
24 when asked. *E.g.*, *Sanchez v. United States*, No. CV-F-05-346, CR-F-03-5165, 2008
25 WL 2622866, at *1 (E.D. Cal. June 24, 2008); *Torres v. United States*, No. CV-F-05-
26 878, CR-F-03-5165, 2008 WL 2622867, at *1 (E.D. Cal. June 24, 2008) (nearly
27 identical orders issued by the same district judge).

28 In *Flores-Ortega*, the Supreme Court considered an ineffective assistance of

1 counsel claim in which the attorney failed to file a notice of appeal where the client did
2 not specifically instruct the attorney to file or not to file. 528 U.S. at 475, 477. The
3 Court cited to its past conclusion that “a lawyer who disregards specific instructions
4 from the defendant to file a notice of appeal acts in a manner that is professionally
5 unreasonable.” *Id.* at 477 (citations omitted). In citations, the Court quoted past
6 precedent that stated that “[W]hen counsel fails to file a requested appeal, a defendant
7 is entitled to [a new] appeal without showing that his appeal would likely have had
8 merit.” *Id.* at 477 (quoting *Peguero v. United States*, 526 U.S. 23, 28 (1999) (alteration
9 in *Flores-Ortega*). In stating the test for prejudice where an attorney fails to file a
10 notice of appeal, the Court stated that the relevant inquiry is whether there was a
11 reasonable probability that a defendant would have appealed, and not that a defendant
12 would have prevailed. *See id.* at 484, 486.

13 The Ninth Circuit in *Sandoval-Lopez* ruled that when a petitioner claims that he
14 asked his attorney to file a notice of appeal and the attorney fails to do so, the district
15 court cannot dismiss the motion without an evidentiary hearing, even if there was a
16 valid waiver of the right to appeal, Petitioner did not appear to have nonfrivolous
17 grounds for appeal, and a new trial after a successful appeal would likely result in a
18 longer sentence. *Sandoval-Lopez*, 409 F.3d at 1197-98. The Ninth Circuit’s opinion
19 was based upon the court’s interpretation of Supreme Court precedent, which it
20 characterized as “it is ineffective assistance of counsel to refuse to file a notice of
21 appeal when your client tells you to, even if doing so would be contrary to the plea
22 agreement and harmful to your client.” *Sandoval-Lopez*, 409 F.3d at 1197.

23 The district court in *Sanchez* and *Torres* held that:

24 Although *Sandoval-Lopez* did not specifically involve a waiver of the
25 right to appeal and a waiver of the right to collaterally attack his
26 conviction and sentence, the Ninth Circuit’s holding, when conjoined with
27 the Supreme Court’s statement in *Roe v. Flores-Ortega*, 528 U.S. 470,
28 477 . . . (2000), strongly implies that this claim of ineffective assistance
of counsel may proceed to the merits, notwithstanding waiver issues.

Sanchez, 2008 WL 2622866, at *1; *Torres*, 2008 WL 2622867, at *1 (same language).
The court did not elaborate on its reasoning.

1 Upon examination of the relevant precedent, this Court agrees with those courts
2 that have held that a valid collateral attack waiver may preclude a claim of ineffective
3 assistance of counsel based upon refusal to file a notice of appeal. Neither *Flores-*
4 *Ortega* nor *Sandoval-Lopez* addressed the impact of a waiver of *collateral attack*
5 rights. *Flores-Ortega* and *Sandoval-Lopez* discussed the impact that a petitioner's
6 chance of success on appeal or waiver of appeal had on the *merits* of an ineffective
7 assistance of counsel claim, and not the question of whether such a claim could be
8 brought in the first place. With the possible exception of claims attacking the
9 voluntariness of the waiver itself, a valid waiver of § 2255 collateral attack rights will
10 be enforced, even if the grounds for the collateral attack are meritorious. Indeed, if the
11 enforceability of a waiver were dependent on the merits of the claims, the waiver would
12 be of no value to the government. As the district court explained in *Lewis v. United*
13 *States*:

14 What is at issue here is not the validity of Movant's claim that counsel
15 was ineffective for failing to file an appeal. Rather, what is at issue here
16 is the enforceability of Movant's waiver of his right to assert such a claim
in a collateral attack. Nothing in *Flores-Ortega* or *Sandoval-Lopez*
would render Movant's waiver unenforceable.

17 2009 WL 4694042, at *5.

18 3. Conclusion

19 Petitioner's waiver of his right to collaterally attack his sentence pursuant to
20 § 2255 was knowing and voluntary, and the scope of waiver provision encompasses his
21 claims. As such, both of Plaintiffs claims are barred by the collateral attack waiver.

22 B. Failure to Object to Illegal Sentence

23 Given Petitioner's valid waiver, it is not necessary for this Court to consider the
24 merits of the claims. However, even if Petitioner's waiver was invalid, his claim would
25 fail because he was not illegally sentenced.

26 Petitioner claims that his attorney should have objected because his sentence
27 exceeded the two-year sentence statutory maximum set in 8 U.S.C. § 1326(a). (Mot.
28 at 5). 8 U.S.C. § 1326(a) states that an alien meeting the requirements "shall be fined

1 under Title 18, or imprisoned not more than 2 years, or both.” It appears to this Court
2 that Petitioner believes he is subject to that subsection. However, subsection (a) also
3 explicitly states that it is “subject to subsection (b) of this section.” *Id.* Subsection (b)
4 imposes different criminal penalties for certain aliens. If a defendant is in one of the
5 categories described in this section, a court may impose a higher penalty. *See* 8 U.S.C.
6 § 1326(b). Specific to this case, the statute permits aliens who commit the actions
7 described in § 1326(a), and who were previously removed because of an aggravated
8 felony, to be imprisoned up to 20 years. 8 U.S.C. § 1326(b)(2). This Court imposed
9 its sentence pursuant to 8 U.S.C. § 1326(b). (Judgment, Docket No. 23, at 2).

10 In the plea agreement, Petitioner agreed and admitted to certain facts, including
11 the fact that he had previously been deported and removed after suffering a prior
12 aggravated felony conviction. (Plea Ag. ¶ 3). Petitioner was informed by the
13 Magistrate Judge at his change of plea hearing that he was subject to a maximum of 20
14 years in prison, and he indicated that he understood. (Plea Hearing Tr. at 6:18-17:6).
15 The Magistrate Judge specifically inquired about the factual basis for the plea,
16 including the prior aggravated felony conviction and the resulting increase in his
17 offense level for the purposes of the sentencing guidelines. (*Id.* at 11:5-15).

18 As the facts clearly demonstrate that Petitioner had a prior aggravated felony
19 conviction, he was subject to a 20-year maximum, not a 2-year maximum, and it was
20 not error for his attorney to fail to raise a meritless objection. *See Gonzalez v. Knowles*,
21 515 F.3d 1006, 1017 (9th Cir. 2008) (trial counsel is not ineffective for failing to raise
22 a meritless objection).

23 **IV. EVIDENTIARY HEARING**

24 Unless the motion and the records of a case conclusively show that the prisoner
25 is entitled to no relief, a court is required to grant a hearing. 28 U.S.C. § 2255(b).
26 However, where the record demonstrates that a petitioner has failed to state a claim, a
27 district court may deny a § 2255 motion without an evidentiary hearing. *Quan*, 789
28 F.2d at 715. Given the foregoing discussion, this Court finds that Petitioner cannot

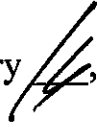
1 succeed upon his claims, and holding an evidentiary hearing or seeking additional
2 briefing would serve no purpose.


3 **V. CONCLUSION**

4 In accordance with the conclusions set forth above, Petitioner's Motion to
5 Vacate, Set Aside, or Correct Sentence is **DENIED**.

6 A court may issue a certificate of appealability where the petitioner has made a
7 "substantial showing of the denial of a constitutional right," and reasonable jurists
8 could debate whether the motion should have been resolved differently, or that the
9 issues presented deserve encouragement to proceed further. *See Miller-El v. Cockrell*,
10 537 U.S. 322, 335 (2003). This Court finds that Petitioner has not made the necessary
11 showing. A certificate of appealability is therefore **DENIED**.

12 **IT IS SO ORDERED.**

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14 Dated: January , 2014


15 **HON. ROGER T. BENITEZ**
16 United States District Judge

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