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

GERARDO LOPEZ-GERARDA,
Movant-Defendant,
v.
UNITED STATES OF AMERICA,
Respondent-Plaintiff.

Civ. Case No. 13cv400 BTM
Crim. Case No. 11cr4360 BTM

**ORDER DENYING
DEFENDANT'S § 2255
MOTION FOR SENTENCE
REDUCTION AND DENYING
CERTIFICATE OF
APPEALABILITY**

Defendant Gerardo Lopez-Gerarda has filed a motion to reduce his sentence under 28 U.S.C. § 2255. For the reasons discussed below, the Court **DENIES** Defendant's motion for sentence reduction and **DENIES** a certificate of appealability.

I. BACKGROUND

On October 18, 2011, pursuant to a Plea Agreement, Defendant pled guilty to violating 8 U.S.C. § 1326 for being a deported alien found in the United States without approval after previously having been deported and removed from the United States to Mexico. In an order dated December 5, 2011, the Court accepted Defendant's guilty plea. Thereafter, on June 8, 2012, Defendant was sentenced to a 46-month term of imprisonment and 3 years of supervised release. Judgment was entered against Defendant on June 12, 2012.

1 **II. DISCUSSION**

2 Defendant makes the following arguments in his motion for sentence reduction:
3 (1) the United States Attorney General can offer up to a two-point downward departure
4 if the Defendant accepts a final deportation order; and (2) the court should grant a
5 downward departure because his deportable alien status prohibits him from residing in
6 a minimum security facility. As discussed below, Defendant has waived his right to
7 appeal and/or collaterally attack his conviction, and thus his motion is **DENIED**.

8
9 **A. Waiver of Appeal**

10 A prisoner sentenced by the court may move to have his or her sentence vacated
11 or corrected on the grounds that the sentence was in violation of the laws or
12 Constitution of the United States. 28 U.S.C. § 2255(a). However, a waiver of a
13 statutory right is enforceable if it is made both knowingly and voluntarily. United
14 States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993).

15 The Plea Agreement states that Defendant, with the advice and consent of his
16 counsel, “has a clear understanding of the charges and the consequences of his plea.”
17 (Plea Agreement § VI, ECF No. 14.) Furthermore, the Plea Agreement provides that
18 “defendant *waives, to the full extent of the law, any right to appeal or to collaterally*
19 *attack the conviction and sentence*, except a post-conviction collateral attack based on
20 a claim of ineffective assistance of counsel, unless the court imposes a custodial
21 sentence above the high end of the guideline range recommended by the Government
22 pursuant to this agreement at the time of sentencing.” (Plea Agreement § XI)
23 (emphasis added).

24 As stipulated in the Plea Agreement, Defendant is barred from arguing for a
25 reduction in his sentence. Defendant, with the advice and consent of his attorney,
26 voluntarily consented to the discretion of the sentencing judge. (Plea Agreement § IX.)
27 In the Plea Agreement, the parties agreed on a base offense level of 8, an adjustment
28 of either 2 or 3 points for acceptance of responsibility, and a 4-point departure for fast-

1 track. (Plea Agreement § X, ¶ A.) The parties agreed that the applicability of any
2 Specific Offense Characteristics would be argued at the sentencing hearing. (Plea
3 Agreement § X, ¶ A, n.4.)

4 At the sentencing hearing, the Court followed the Government’s
5 recommendation of an additional 16-point increase pursuant to Specific Offense
6 Characteristics, specifically previous deportation after a felony conviction for
7 possession of a controlled substance for sale, resulting in an adjusted offense level of
8 24. (See Sentencing Summary Chart, ECF No. 25.) After applying the 3-point
9 adjustment for acceptance of responsibility and 4-point departure for fast-track, and
10 given a criminal history category of V, the Government recommended a sentence of 46
11 months imprisonment– the low end of the guideline range of 46-57 months. (Id.) On
12 June 8, 2012, Defendant was sentenced to 46 months imprisonment and 3 years of
13 supervised release. (ECF No. 28.)

14 Defendant does not argue that his attorney was ineffective. Rather, Defendant
15 seeks relief on the grounds that he should get a further reduction for agreeing to
16 deportation and that his Equal Protection and Due Process rights are being violated.
17 During the sentencing hearing, the Court confirmed that Defendant was waiving his
18 right to appeal or collaterally attack his sentence. (See Docket Entry No. 27.) “[A]n
19 express waiver of the right to appeal in a negotiated plea of guilty is valid if knowingly
20 and voluntarily made.” United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991)
21 (citing United States v. Navarro-Botello, 912 F.3d 318, 320 (9th Cir. 1990)). Because
22 the Defendant is not challenging his sentence on the grounds of ineffective assistance
23 of counsel, and because the Court sentenced Defendant pursuant to the low end of the
24 guideline range recommended by the Government pursuant to the Plea Agreement,
25 Defendant is barred by the Plea Agreement from making a section 2255 motion to
26 vacate or correct his sentence.

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1 B. Merits of Claims

2 Assuming Defendant was not barred from bringing his motion for sentence
3 reduction, Defendant's claims lack merit. Defendant first argues that the Attorney
4 General can offer a 2-point departure should he accept a final deportation order.
5 However, as part of his consideration for the fast-track departure agreement, Defendant
6 agreed to an order of removal from the United States. (Plea Agreement § X, ¶ H.) He
7 has already received a reduction for stipulating to removal, and is entitled to nothing
8 more.

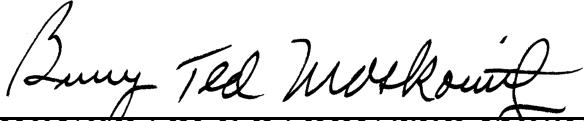
9 Defendant next contends that his Constitutional rights have been violated
10 because his deportable alien status makes him ineligible to qualify for a one-year
11 sentence reduction through a drug treatment program in a minimum security facility.
12 This argument has been repeatedly rejected by this Court. See e.g., United States v.
13 Rodriguez-Tovar, 2013 WL 101078 (S.D. Cal. Jan. 7, 2013); Cabanillas-Garcia v.
14 United States, 2012 WL 5928154 (S.D. Cal. Nov. 26, 2012). See also McLean v.
15 Crabtree, 173 F.3d 1176 (9th Cir. 1999) (noting that the practice of excluding prisoners
16 with Immigration and Naturalization detainers from community-based treatment
17 programs was not a violation of their constitutional rights). Therefore, had Defendant's
18 motion been allowed by the Plea Agreement, it would be denied because the claims
19 lack merit.

20
21 **III. CONCLUSION**

22 For the reasons discussed above, Defendant's motion for sentence reduction
23 pursuant to 28 U.S.C. § 2255 is **DENIED**. Further, the Court **DENIES** a certificate of
24 appealability. The Clerk shall enter judgment accordingly.

25
26 **IT IS SO ORDERED.**

27 Dated: July 15, 2013

28 
HONORABLE BARRY TED MOSKOWITZ
United States District Judge