



1 **BACKGROUND**

2 On September 30, 2011, petitioner, with the advice and consent of counsel, signed a  
3 plea agreement, admitting that he assaulted a Federal Officer in violation of 18 U.S.C. §§  
4 111(a) and (b). See Doc. Nos. 36, 37. Specifically, petitioner admitted as “true and  
5 undisputed” that on or about April 14, 2010, at the San Ysidro Port of Entry to the United  
6 States, he recklessly, and with extreme indifference to human life, forcibly assaulted U.S.  
7 Customs and Border Protection Officer J. Aguirre by driving a vehicle in reverse at high  
8 speed in the direction of Officer Aguirre. See Doc. No. 37 at 3-4.

9 On October 6, 2011, this Court held a change of plea hearing. See Doc. No. 95-1.  
10 During the hearing, petitioner affirmed that he discussed the plea agreement with his  
11 attorney, initialed every page of the plea agreement, and signed the plea agreement. Id. at  
12 117-18. Moreover, this Court inquired whether petitioner fully understood the agreement,  
13 had sufficient time to review the agreement, and understood all the terms of the plea  
14 agreement. Id. at 18. Petitioner answered all of these questions in the affirmative. Id.  
15 Following the Rule 11 colloquy, which included advisal of all constitutional rights, and the  
16 maximum penalties, and that he was giving up those rights, petitioner affirmed that he  
17 wanted to plead guilty. Id.

18 On March 10, 2014, petitioner was sentenced to 57 months in custody followed by  
19 3 years of supervised release. See Doc. No. 29. Judgment was entered on March 13, 2014.  
20 See Doc. No. 30. Then, on May 19, 2014, petitioner, proceeding pro se, filed his motion to  
21 vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. See Doc. No 31.  
22 Thereafter, on June 12, 2014, petitioner filed a supplemental brief in support. See Doc. No.  
23 33. On December 23, 2014, Respondent United States of America (“respondent”) timely  
24 filed a response in opposition. See Doc. Nos. 41, 42, 45.

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1 **DISCUSSION**

2 **1. Legal Standard**

3 Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set aside,  
4 or correct his sentence on the ground that: (1) the sentence was imposed in violation of the  
5 Constitution or laws of the United States; (2) the court was without jurisdiction to impose  
6 such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4)  
7 the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v.*  
8 *Speelman*, 431 F.3d 1226, 1230 n.2 (9th Cir.2005).

9 Ineffective assistance of counsel is a grounds for § 2255 relief. See *Massaro v.*  
10 *United States*, 583 U.S. 500, 502 (2003). Under the Sixth Amendment, a criminal defendant  
11 is guaranteed the right to effective assistance of counsel. *Strickland v. Washington*, 466  
12 U.S. 668, 685 (1984) (“*Strickland*”). To demonstrate ineffective assistance, a petitioner  
13 must establish that (1) counsel’s performance was deficient and (2) the defendant was  
14 prejudiced as a result of that deficient performance. *Id.* at 687.

15 To establish deficient performance, a petitioner must show that “counsel made errors  
16 so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by  
17 the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Counsel’s representation must fall  
18 below an objective standard of reasonableness. *Id.* at 687–88. There is a strong presumption  
19 that counsel's conduct falls within the “wide range of reasonable professional assistance.”  
20 *Id.* at 689.

21 To establish prejudice, a petitioner must show that “counsel’s errors were so serious  
22 as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466  
23 U.S. at 687. The petitioner has the burden of showing that “there is a reasonable probability  
24 that, but for counsel’s unprofessional errors, the result of the proceeding would have been  
25 different.” *Id.* at 694-96. If the petitioner fails to meet its burden, or, if “it plainly appears”  
26 from the motion, attached exhibits, and record of prior proceedings that the prisoner is not  
27 entitled to relief, the district court may sua sponte dismiss the § 2255 motion. See Rule 4  
28 of the Rules Governing § 2255 Proceedings; *Blaylock*, 20 F.3d at 1465. Thus, when a

1 “movant’s allegations, viewed against the record, either do not state a claim for relief or  
2 are so palpably incredible or patently frivolous as to warrant summary dismissal[,]” the  
3 “district court may deny a section 2255 motion without an evidentiary hearing.” See United  
4 States v. Mejia-Mesia, 153 F.3d 925, 931 (9th Cir. 1998) (quoting United States v. Burrows,  
5 872 F.2d 915, 917 (9th Cir. 1989). Moreover, “[i]f it is easier to dispose of an  
6 ineffectiveness claim on the ground of lack of sufficient prejudice,” a court may examine  
7 the prejudice component without determining whether counsel’s performance was  
8 deficient. Strickland, 466 U.S. at 697.

## 9 **2. Analysis**

10 As a threshold matter, the Court is aware that petitioner was released from Bureau  
11 of Prisons custody on June 6, 2014. Accordingly, petitioner’s motion to vacate, set aside,  
12 or correct his sentence must be **DENIED AS MOOT**. United States v. Kramer, 195 F.3d  
13 1129 (9th Cir. 1999) (“[A] defendant seeking relief under 28 U.S.C. § 2255 . . . must be  
14 in custody, [and] . . . claim the right to be released from custody.”). Nevertheless, even if  
15 petitioner was still in custody, this Court would **DENY** his claim for ineffective assistance  
16 of counsel for failure to meet his Strickland burden. Strickland, 466 U.S. at 687; McMann  
17 v. Richardson, 397 U.S. 759, 770-71 (1970).

18 Petitioner’s ineffective assistance claims arise from two underlying grievances. See  
19 Doc. No. 97 at 2-3. First, from petitioner’s perception that counsel was disinterested in  
20 recovering his property seized by the government; and, second, because petitioner “felt  
21 pressured into signing the plea agreement.” Id. at 2, 5.

22 With respect to the property seized, petitioner contends that “over the course of  
23 several months[,] . . . counsel was difficult to contact[,] seldom visit[ed], [and] [i]n the few  
24 attorney/client consultations that took place . . . neither Mr. Rexrode, [n]or Mr. Stewart  
25 showed any real interest in recovering Petitioner’s property[.]” See Doc. No. 97 at 2.  
26 Petitioner reaches this conclusion despite counsel’s assurance, “on more than one  
27 occasion[,]” that they were “looking into the property and money seized [by the  
28

1 government].” Id. at 2. Petitioner has not shown how counsel’s performance was deficient  
2 on this issue.

3 With respect to signing the plea agreement under pressured conditions, petitioner  
4 first alleges that—

5 Counsel for the defendant did not seriously investigate, explore  
6 or attempt to apprise Defendant as to all facts and law relevant to  
7 his decision to plead guilty. Had Mr. Cress be fully advised, and  
8 had counsel competently explained all options to Defendant and  
9 then exhaustively pursued all avenues besides advising  
10 Defendant into a plea agreement, there is a reasonable probability  
11 that Defendant would not have pled guilty and proceeded to trial.  
12 But for counsel’s unprofessional error(s), there is a reasonable  
13 probability that the outcome of the proceeding would have been  
14 different. Defendant will be more specific in his memorandum in  
15 support of 2255.

16 See Doc. No. 68 at 7. In a separate filing, petitioner elaborates that, on September 30, 2011,  
17 “at about 4:15 p.m.,” he was told that his attorney was waiting for him in the visiting room.  
18 Doc. No. 97 at 2. Upon entering the visiting room, counsel informed petitioner that the  
19 government extended a plea offer. Id. Petitioner recounts that counsel explained the plea  
20 agreement to him, and that he “briefly read each page.” Id. Thereafter, petitioner  
21 communicated his desire to “take the plea agreement and discuss it” with family, then  
22 discuss it again with counsel “on the following week.” Id. Counsel then informed petitioner  
23 that the government’s offer was conditioned upon his express agreement no later than 5:00  
24 p.m. that same day, otherwise, the offer would expire and the government would proceed  
25 with trial. Id. Petitioner felt pressured by this. Id. Ultimately, petitioner signed the  
26 agreement, but initialed several pages with the initials NA,<sup>1</sup> indicating that the information  
27 on those pages “was not applicable to my understanding.” Id.

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28 <sup>1</sup> Petitioner explains that he initialed pages 2 through 13 with the “NA” mark,  
specifically, because he did not want to waive his right to forfeiture and his appeal rights.  
See Doc. No. 97 at 3.

1 After a careful review of the entire record on this matter, the Court finds that even if  
2 petitioner's allegations are true, "such 'pressure' does not constitute constitutionally  
3 deficient performance." See e.g. *United States v. Kwon*, 122 Fed. Appx. 351, 352 (9th Cir.  
4 2005) (holding that petitioner was not denied effective assistance of counsel as result of  
5 counsel's alleged pressure on defendant to plead guilty, where alleged pressure consisted  
6 of telling defendant that it would be better for his family and that he would not prevail if  
7 he went to trial) (citing *Strickland*, 466 U.S. at 688-89).

8 Indeed, under *Strickland*, "a guilty plea cannot be attacked as based on inadequate  
9 legal advice unless counsel was not 'a reasonably competent attorney' and the advice was  
10 not 'within the range of competence demanded of attorneys in criminal cases.'" 466 U.S.  
11 at 687 (quoting *McMann*, 397 U.S. at 770-71). In other words, a convicted defendant must  
12 show that, in light of all the circumstances, "counsel's representation[s] fell below an  
13 objective standard of reasonableness." *Id.* at 688. Furthermore, "judicial scrutiny of  
14 counsel's performance must be highly deferential." *Id.* Consequently, to overturn the  
15 "strong presumption" that counsel rendered constitutionally adequate assistance,  
16 *Harrington v. Richter*, 562 U.S. 86, 103 (2011), petitioner must demonstrate that the  
17 challenged action, inaction, or advice cannot reasonably be considered sound strategy  
18 under the circumstances. See *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006);  
19 *Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir.1999).

20 Here, petitioner offers only self-serving, after-the-fact, speculation that he would  
21 have rejected the offer presented he had been better advised and/or was provided more time  
22 to consider the government's offer. See generally Doc. Nos. 68, 97. It is clear that petitioner  
23 told the Court, during the Rule 11 colloquy, that he had sufficient time to review the plea  
24 agreement and understood its terms. See Doc. No. 95-1 at 117-18. Additionally, petitioner  
25 does not present facts or circumstances to suggest that petitioner would have rejected the  
26 plea offer if he were advised to his satisfaction or was provided more time to consider it.  
27 Furthermore, petitioner would still have to convince the Court that either (1) the  
28 government would have offered, he would have accepted, and the Court would have

1 honored a plea agreement calling for a shorter term of imprisonment; or (2) petitioner  
2 would have gone to trial and the jury would have acquitted him, or at least been unable to  
3 reach a verdict. Petitioner attempts no such showing, and, therefore fails to show Strickland  
4 prejudice.

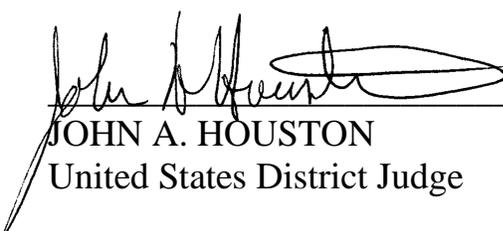
5 **CONCLUSION AND ORDER**

6 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 7 1. Petitioner's motion to vacate, set aside, or correct his sentence, [doc. no. 68], is  
8 **DENIED AS MOOT**;
- 9 2. Petitioner's motion for updated an updated status on ECF. No. 68, [doc. no. 101],  
10 is **DENIED AS MOOT**.

11 **IT IS SO ORDERED.**

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13 DATED: August 21, 2017

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16 JOHN A. HOUSTON  
17 United States District Judge  
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