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

UNITED STATES OF AMERICA,

vs.

PABLO OSCAR ANAZALDO-
CONTRERAS,

Plaintiff,

Defendant.

CASE NO. 11cr1447-LAB-2
and 15cv594-LAB

**ORDER DENYING MOTION
PURSUANT TO 28 U.S.C. § 2255**

On June 17, 2011, Defendant Pablo Oscar Anzaldo-Contreras was convicted by a jury of possession of marijuana with intent to distribute, importation of marijuana, and conspiracy to distribute marijuana. He took an appeal, which was unsuccessful. The Ninth Circuit issued its judgment on November 6, 2013, affirming the Court's judgment, and the mandate was entered on November 29, 2013. (See Docket no. 107.)

Anzaldo-Contreras later filed a motion to vacate, pursuant to 28 U.S.C. § 2255. (Docket no. 115.) The motion was received on March 11, 2015, but is dated February 28, 2015. For purposes of applying the prisoner mailbox rule, the Court's working assumption is that he delivered his motion to authorities for mailing on February 28, 2015. See *Lewis v. Mitchell*, 173 F.Supp.2d 1057, 1059 (C.D. Cal., 2001) (citing cases for the principle that, in the absence of other evidence, the date a pleading is signed is presumed to be the date the prisoner delivered it to prison authorities, for purposes of the prisoner mailbox rule). Because

1 Anzaldo-Contreras petitioned for certiorari, his conviction became final on March 3, 2013, the
2 date the Supreme Court denied his petition.

3 Anzaldo-Contreras raises claims of ineffective assistance of trial and appellate
4 counsel. To the extent he raises issues in his motion that he unsuccessfully raised on appeal,
5 the Court has no authority to overrule the Ninth Circuit's decision rejecting those claims.

6 The entire argument consists of nitpicking his attorney's performance, suggesting
7 arguments or suggestions he should have made. In the introductory section, he argues his
8 counsel should have disputed the suggestion that he stole some of the marijuana. (Motion
9 at 11–12, 30.) He argues his counsel should have objected to his being punished for failing
10 to admit guilt. (*Id.* at 11–12, 23, 33–35.) He also suggests that after the parties had
11 presented their arguments and the Court was making its findings, his counsel should have
12 interrupted the Court to object. (*Id.* at 23.) In the main section of his motion, Anzaldo-
13 Contreras argues his counsel should have moved to suppress his arrest. (Motion at 29–30.)
14 He argues his counsel was ineffective for failing to request minor role. (*Id.* at 30–31.) He
15 repeats his claim that he did not steal any marijuana and claims his counsel "slept through"
16 this. (*Id.* at 32–33.) He argues his counsel was ineffective for not insisting that he receive
17 credit for acceptance of responsibility. (*Id.* at 34–35.) He also argues his appellate counsel
18 was ineffective for failing to raise these ineffective assistance of counsel claims. (*Id.* at
19 35–37.) He argues that an evidentiary hearing is required, and seeks to have his sentence
20 vacated. None of these arguments have any merit.

21 The transcript of sentencing was lodged in connection with Anzaldo-Contreras'
22 appeal, and is filed in the docket. (Docket no. 77.) Claims of ineffective assistance of
23 counsel are analyzed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668,
24 687–88 (1984). Measured by this standard, Anzaldo-Contreras' claims of ineffectiveness of
25 trial and appellate counsel easily fail.

26 First, the government contested the discrepancy in the weight of marijuana, which
27 gave rise to a suspicion that Anzaldo-Contreras might have stolen some of it. (See Tr.,
28 17:12–19:10.) And Anzaldo-Contreras himself contested it. (*Id.* at 30:2–7.) There was no

1 need for defense counsel to contest it too. Moreover, the Court was not completely
2 convinced he had stolen any (*id.*, 23:17–19), although it suspected he did. (*Id.* at 39:9–13.)

3 And in any event, the possibility that he had stolen marijuana made no real difference.
4 The Court principally relied on the possibility when it was considering whether there was any
5 reason to sentence him to less than the low end of the guidelines sentence. (*Id.* at
6 38:20–39:18.) Even if the Court were convinced he had not stolen or planned to steal any
7 marijuana, a defendant's not having stolen marijuana is not a reason to reduce his sentence.

8 The allegedly unconstitutional seizure Anzaldo-Contreras thinks his attorney should
9 have challenged was Anzaldo-Contreras' own arrest, rather than evidence obtained in
10 connection with the arrest. (Motion at 29–30.) But such a challenge would have been
11 unsuccessful, under the *Ker-Frisbie* doctrine. See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032,
12 1039–40 (1984) (explaining that the defendant and his identity are not suppressible even if
13 the arrest was unlawful).

14 Anzaldo-Contreras was not entitled to credit for acceptance of responsibility after he
15 went to trial and even after trial denied having done anything wrong. His attorney was
16 therefore not ineffective for failing to ask for it, or for failing to object to the Court's
17 observation that he continued to maintain his innocence. He was also not entitled to minor
18 role, and would not have received it even if his attorney requested it. (See Tr. at 23:12–16
19 (Court's observation that evidence at trial had shown Anzaldo-Contreras "was involved in this
20 up to his hips"); 39:1–8 (emphasizing the huge amount of marijuana involved and Anzaldo-
21 Contreras' close involvement in it); 41:23–25 (emphasizing that Anzaldo-Contreras "had a
22 big part" in the criminal enterprise).)

23 The claim that defense counsel should have interrupted the Court to dispute its
24 findings (Motion at 23) is frivolous. After both sides make their arguments, it is time for the
25 Court to discuss the various sentencing factors and sentence the defendant. What is more,
26 the objections Anzaldo-Contreras thinks his counsel should have made (*id.*) would have
27 failed.

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1 In short, Anzaldo-Contreras wishes his trial counsel had argued differently. But this
2 does not give rise to an ineffective assistance of counsel claim. The Court has reviewed the
3 motion, and he has not identified any way in which his trial counsel was ineffective. Because
4 of this, his appellate counsel was not ineffective for failing to claim that his trial counsel was
5 ineffective. See, e.g., *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (“[T]rial counsel
6 cannot have been ineffective for failing to raise a meritless objection.”); *Rupe v. Wood*, 93
7 F.3d 1434, 1445 (9th Cir.1996) (“[T]he failure to take a futile action can never be deficient
8 performance”)

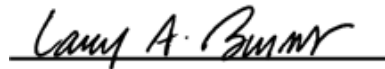
9 The motion is **DENIED** and a certificate of appealability is also **DENIED**.

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11 **IT IS SO ORDERED.**

12 DATED: March 20, 2015

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HONORABLE LARRY ALAN BURNS
United States District Judge

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