UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DANIEL VAZCONES,

Defendant.

Case No.: 13cr3309-MMA
Related Case No.: 16cv1651-MMA

ORDER DENYING DEFENDANT'S MOTION TO VACATE UNDER 28 U.S.C. § 2255

[Doc. No. 56]

On September 18, 2014, Defendant Daniel Vazcones was charged in a two-count Superseding Information with distribution of methamphetamine, in violation of Title 21, United States Code, section 841(a)(1), and possession of a firearm in furtherance of a drug trafficking crime, in violation of Title 18, section 924(c)(1). *See* Doc. No. 34. Defendant pleaded guilty to both counts. *See* Doc. No. 38. On March 23, 2015, the Court sentenced Defendant as a career offender to a term of 180 months in custody. *See* Doc. No. 53. Defendant now collaterally challenges his conviction and sentence pursuant to 28 U.S.C. § 2255. *See* Doc. No. 56. Defendant raises multiple grounds for relief, primarily challenging his classification as a career offender under the United States Sentencing Guidelines in light of *Johnson v. United States*, 576 U.S. ---, 135 S. Ct. 2551 (2015), and the passage of California Proposition 47, the Safe Neighborhoods and

Schools Act, Cal. Penal Code § 1170.18. Defendant also claims the government impermissibly amended the charging document in this case to add the weapons charge, and that he received ineffective assistance when his counsel advised him to plead guilty to the charges in the Superseding Information.[1] The government filed a response to Defendant's motion, to which Defendant replied. *See* Doc. Nos. 67, 75. For the reasons set forth below, the Court **DENIES** Defendant's 2255 motion.

DISCUSSION[2]

1. Legal Standard

If a defendant in a federal criminal case collaterally challenges his conviction or sentence, he must do so pursuant to 28 U.S.C. § 2255. *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). Under section 2255, a court may grant relief to a defendant who challenges the imposition or length of his incarceration on the ground that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A defendant must allege specific facts that, if true, entitle him to relief. *See United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004); *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) (citation omitted).

The Court is not required to hold an evidentiary hearing when the issues can be conclusively decided on the basis of the existing record. 28 U.S.C. § 2255; *see United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) (citing *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980)). The Court declines to hold an evidentiary hearing

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[1] Defendant has also filed a document styled as a "request for reconsideration," Doc. No. 59, which the Court **DENIES AS MOOT** and construes properly as supplemental documentation in support of his 2255 motion.

[2] The Court adopts the factual background as set forth by the government in its response brief. *See* Doc. No. 67 at 3-6.

in this case because the motion, on its face, conclusively demonstrates that Defendant is not entitled to relief.

2. Waiver

Pursuant to the terms of his written plea agreement, as confirmed on the record during the change of plea hearing and again during the sentencing hearing, Defendant waived his rights to directly appeal or collaterally attack his conviction and sentence. *See* Doc. No. 38 at 11-12. Therefore, as an initial matter, the government argues that this waiver precludes Defendant from seeking collateral relief. However, Defendant retained his right to pursue "a post-conviction collateral attack based on a claim of ineffective assistance of counsel." *Id*. at 11. Moreover, a waiver cannot bar a claim that relates to the validity of the waiver itself. *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993).

Here, Defendant brings multiple claims, including a challenge to the validity of his plea agreement (and the waivers contained therein) based on ineffective assistance of counsel. In the Ninth Circuit, such a claim is not waived. *See United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (expressing doubt that a plea agreement could waive a claim that counsel erroneously induced a defendant to plead guilty or accept a particular plea bargain); *Abarca*, 985 F.2d at 1014 (expressly declining to hold that a waiver forecloses a claim of ineffective assistance or involuntariness of the waiver). The Court therefore turns to the government's assertion that Defendant's claims are procedurally barred based on his failure to file a direct appeal.

3. Procedural Bar

Defendant did not challenge his sentence on direct appeal. As a result, the government argues that Defendant's claims of sentencing error are procedurally barred. Generally, on collateral review, an individual may not assert claims of constitutional error that were not previously raised before the district court or on direct review. *United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1997). To obtain review of issues at this juncture that could have been raised on direct appeal, Defendant must show cause for his

procedural default and actual prejudice resulting from the error. *Bousley v. United States*, 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") (internal citations omitted); *United States v. Frady*, 456 U.S. 152, 167-68 (1982); *United State v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985).

In his reply brief, Defendant argues that he is "actually innocent" of the career offender enhancement to his sentence. The Supreme Court has opined that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Ordinarily, a defendant can only be "actually innocent" of a noncapital sentencing enhancement if he is actually innocent of an underlying offenses used to enhance the sentence. *Marrero v. Ives*, 682 F.3d 1190, 1193-92 (9th Cir. 2012). Defendant does not claim to be innocent of his prior offenses.

In the alternative, Defendant contends that he could not have brought his *Johnson* claim previously, and he suffered prejudice as a result. Even if the Court accepts this assertion, it would not excuse Defendant's procedural default of his other claims. In any event, as discussed below, Defendant's claims lack merit.

4. Analysis

a) *Johnson* Claim

Defendant argues that his prior conviction for domestic battery under California Penal Code § 273.5(a) is no longer a "crime of violence" under *Johnson* for career offender purposes, and therefore his sentence was improperly enhanced under Section 4B1.1 of the Sentencing Guidelines.

In *Johnson v. United States*, the Supreme Court held the residual clause in the definition of a "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) ("ACCA"), to be unconstitutionally vague and a violation of the Due

Process Clause. 135 S. Ct. at 2557. Defendant was not sentenced under the ACCA's residual clause; he was sentenced based on the career offender enhancement provision of the Sentencing Guidelines. Nonetheless, Defendant argues that *Johnson*'s holding is applicable, because the ACCA's residual clause is identical in language to Section 4B1.2's residual clause. However, on March 6, 2017, the Supreme Court ruled that *Johnson*'s holding does not extend to the Sentencing Guidelines, in so far as "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause." *Beckles v. United States*, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). Under *Beckles*, "it plainly appears from the face of the motion" that Defendant "is not entitled to relief" on this basis. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. As such, Defendant's *Johnson* claim fails.

b) California Proposition 47

Defendant argues that the Court improperly applied the career offender enhancement because Defendant's prior conviction for possession of a controlled substance for sale, in violation of California Health and Safety Code section 11378(a), no longer qualifies as a felony under California Proposition 47. This claim fails for several reasons. First, while Proposition 47 amended Health and Safety Code section 11377, possession of a controlled substance, it did not amend Section 11378, possession for sale, the statute under which Defendant was convicted. *See* Cal. Pen. Code § 1170.18. Second, even if Proposition 47 applied, Defendant's claim fails under *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016), in which the Ninth Circuit held that Proposition 47 does not retroactively make a defendant's felony conviction a misdemeanor for purposes of federal law.

c) Additional Charge

Defendant argues that the government impermissibly amended the Indictment in this case to add a felon in possession of a firearm charge under 18 U.S.C. § 924(c). However, Defendant was charged in a Superseding Information with two counts, including the felon in possession charge, after waiving his right to prosecution by

indictment. *See* Doc. Nos. 34, 35. Defendant does not contest the validity of this waiver. Defendant's claim of charging error fails.

d) Ineffective Assistance of Counsel

Finally, Defendant claims that he received ineffective assistance when counsel advised Defendant to plead guilty without informing him of the additional felon in possession charge. The record clearly establishes that this claim is without merit. Defendant reviewed, initialed, and signed a written plea agreement that clearly set forth the nature of his plea, to both counts of the Superseding Indictment, as well as the factual basis underlying both counts. *See* Doc. No. 38. Defendant further attested that "[b]y signing this agreement, defendant certifies that defendant has read it (or that it has been read to defendant in defendant's native language). Defendant has discussed the terms of this agreement with defense counsel and fully understands its meaning and effect." *Id*. at 14. The magistrate judge confirmed the nature of the plea, its factual basis, and Defendant's knowledge and understanding of the plea, during the plea colloquy that took place during the change of plea hearing. *See* Doc. No. 39. Defendant does not contest these facts and does not provide any other basis for his claim of ineffective assistance of counsel. As such, his claim fails.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A defendant must obtain a certificate of appealability before pursuing any appeal from a final order in a Section 2255 proceeding. *See* 28 U.S.C. § 2253(c)(1)(B). When the denial of a Section 2255 motion is based on the merits of the claims in the motion, a district court should issue a certificate of appealability only when the appeal presents a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The defendant must show that reasonable jurists could debate whether the issues should have been resolved differently or are "adequate to deserve encouragement to proceed further." *Slack v.*

McDaniel, 529 U.S. 473, 483 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2); *see also Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009).

The Court has carefully reviewed Defendant's 2255 motion and considered the record as a whole. Because Defendant has not made a substantial showing of the denial of a constitutional right, and because the Court finds that reasonable jurists would not debate the denial of Defendant's motion, the Court declines to issue a certificate of appealability.

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendant's 2255 motion. The Court **DECLINES** to issue a certificate of appealability. The Clerk of Court is instructed to enter judgment in accordance herewith and close the related civil case.

IT IS SO ORDERED.

DATE: April 7, 2017

HON. MICHAEL M. ANELLO
United States District Judge