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

UNITED STATES OF AMERICA,
Respondent,
v.
MARCO CLAROS-GUZMAN,
Petitioner.

CASE NO. 15cr1422 JM
CASE NO. 17cv0739

ORDER DENYING MOTION FOR
RELIEF UNDER 28 U.S.C. 2255

Petitioner Marco Claros-Guzman moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 (the “Motion”). The Government opposes the Motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the Motion.

BACKGROUND

Pursuant to the Fast Track Plea Agreement, on June 11, 2015, Petitioner pleaded guilty to being a Removed Alien Found in the United States in violation of 8 U.S.C. §1326(a) and (b). In addition to setting forth the factual basis for the plea, the Plea Agreement specifically acknowledged a March 2, 2012 felony conviction for Deported Alien Found in the United States. The Plea Agreement also provided for a waiver of appeal and collateral attack. Petitioner was sentenced at the middle of the Guideline Range recommended by the Government.

1 On November 5, 2015, Petitioner was sentenced to a custodial term of nine
2 months, followed by three years of supervised relief. (Ct6. Dkt. 29). On August 11,
3 2016, pursuant to Fed.R.App.P. 36, the court entered an amended judgment to correct
4 clerical errors in the original judgment. (Ct. Dkt. 31).

5 In the Motion, Petitioner alleges that, on September 7, 2016, the Immigration
6 Judge “terminated the withholding proceedings that form the basis for the 8 U.S.C.
7 §1326 conviction.” (Petition at p.5). Petitioner contends that he was eligible for
8 adjustment of status “but was denied an opportunity to apply for such relief because
9 the removal order was entered in absentia while” Petitioner was in state custody. Id.
10 Petitioner represents that he was arrested on the current charge based on an order
11 obtained in absentia.

12 DISCUSSION

13 **28 U.S.C. § 2255 Review**

14 Claims for relief under 28 U.S.C. § 2255 must be based on a constitutional error,
15 a jurisdictional error, a defect resulting in a miscarriage of justice, or an unfair
16 procedure. 28 U.S.C. § 2255(a); United States v. Timmreck, 441 U.S. 780, 783-84
17 (1979). Under Rule 4(b) of the Rules Governing Section 2255 Proceedings, “[i]f it
18 plainly appears from the motion, any attached exhibits, and the record of prior
19 proceedings that the moving party is not entitled to relief, the judge must dismiss the
20 motion and direct the clerk to notify the moving party.” The court does not need to hold
21 an evidentiary hearing or obtain a response from the government. See 28 U.S.C.
22 § 2255; United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986).

23 Here, Petitioner does not identify any violation of federal law or alleged facts
24 supportive of a federal claim. Moreover, the thrust of the Motion is that the removal
25 order was entered in absentia and therefore violated an undisclosed federal right.
26 However, the Government’s Exhibits clearly establish that Petitioner was ordered
27 removed following a November 26, 2003 administrative hearing. (Response Exh.2).
28 Accordingly, the Motion fails to establish a claim subject to 28 U.S.C. §2255.

1 In sum, the court dismisses the Motion.

2 **Statute of Limitations**

3 Under 28 U.S.C. §2255(f), there is a one-year statute of limitations period to file
4 a collateral attack on a federal conviction that runs, in pertinent part here, from the date
5 on which the judgment of conviction becomes final. 28 U.S.C. §2255. If no direct
6 appeal is taken to the Ninth Circuit, a defendant’s conviction becomes final when the
7 time for filing a direct appeal expires. United States v. Gilbert, 807 F.3d 1197, 1199
8 (9th Cir. 2015).

9 In Gilbert, the defendant was sentenced to a 300-month custodial sentence and
10 the imposition of restitution. The amount of restitution was not identified in the final
11 judgment because the defendant’s assets were still being liquidated. Nearly two years
12 later, an amended judgment issued fixing the amount of restitution and, shortly
13 thereafter, Petitioner filed a §2255 motion. Petitioner argued that his §2255 motion
14 was timely because the limitations period did not begin to run until entry of the
15 amended judgment. The district court denied the §2255 motion as time-barred and the
16 Ninth Circuit affirmed. In reliance upon Dolan v. United States, 560 U.S. 605 (2010),
17 the Ninth circuit concluded “that a judgment that imposes a sentence is a final
18 judgment.” Gilbert, 807 F,3d at 1199.

19 Here, final judgment was entered on November 5, 2015, and judgment became
20 final 14 days later when Petitioner failed to file a Notice of Appeal. See FRAP 4(b).
21 Accordingly, Petitioner had until November 20, 2016, to file his Motion but waited
22 until April 12, 2017, to file the Motion. As the amended judgment was entered to
23 correct a clerical error pursuant to Fed.R.Crim.P. 36 (the custodial sentence remained
24 the same), the Motion is time-barred. (Ct. Dkt. 31).

25 In sum, the Motion is dismissed as time-barred.

26 **Waiver**

27 The court also concludes that Petitioner waived his right to collaterally attack the
28 sentence. In the Plea Agreement, Petitioner specifically waived his right to appeal or

1 to collaterally attack his conviction and sentence unless the court imposed a custodial
2 sentence greater than the high end of the guideline range recommended by the
3 government. This waiver provision is enforceable to bar Petitioner from seeking
4 collateral relief because he was sentenced within the guideline range. See United
5 States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979 (1993).
6 The Plea Agreement’s language clearly embraces a waiver of any collateral attack on
7 Defendant’s sentence, including a § 2255 motion. See United States v. Schuman, 127
8 F.3d 815, 817 (9th Cir. 1997) (per curiam) (finding that defendant waived his right to
9 appeal an incorrect application of the Sentencing Guidelines even though the plea
10 agreement did not specifically mention this right; to find otherwise “would render the
11 waiver meaningless”). If a waiver of appellate rights was made knowingly and
12 voluntarily, inquiry into the waiver’s validity must end. United States v. Nguyen, 235
13 F.3d 1179, 1182 (9th Cir. 2000). A valid waiver bars a defendant from challenging his
14 conviction and sentence. Id. The Ninth Circuit, however, has indicated that exceptions
15 to this rule may exist in limited circumstances, including where a § 2255 petition
16 challenges a plea agreement’s validity by way of an ineffective assistance of counsel
17 or involuntariness claim. Washington v. Lampert, 422 F.3d 864, 870–71 (9th Cir.
18 2005). Furthermore, Petitioner does not challenge the voluntariness of his waiver or
19 otherwise inform the court of any other basis to invalidate his waiver. The record
20 reflects that Petitioner’s waiver was knowing and voluntary.

21 While a waiver provision does not necessarily waive ineffective assistance of
22 counsel claims, Petitioner validly waived his right to collaterally attack his sentence
23 when he executed a plea agreement expressly waiving his right to appeal or to
24 collaterally attack his conviction and sentence unless the court imposed a custodial
25 sentence greater than the high end of the guideline range recommended by the
26 government. The waiver applies because, at sentencing, Petitioner obtained the
27 bargained for shorter custodial sentence when the court imposed a sentence within the
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1 guideline range recommended by the Government. The record reveals that Defendant's
2 waiver was knowing and voluntary.¹

3 In sum, the court concludes that Petitioner validly waived his right to collaterally
4 attack his sentence and dismisses the Motion.

5 **Procedural Bar**

6 Even if Petitioner did not waive the right to collaterally attack his sentence, he
7 has procedurally defaulted on his claim. A defendant procedurally defaults on claims
8 that he could have, but did not raise on appeal. See Bousley v. United States, 523 U.S.
9 614, 621-22 (1998). Defendant did not raise these claims on direct appeal. He does not
10 allege that he is innocent nor that cause and prejudice existed to excuse his procedural
11 default. See Murray v. Carrier, 477 U.S. 478, 485 (1996). Accordingly, the court
12 dismisses the Motion.

13 **Certificate of Appealability**

14 For the reasons set forth herein, Defendant fails to make a substantial showing
15 of the denial of a constitutional right. Accordingly, the court denies any request for a
16 certificate of appealability. See 28 U.S.C. §2253(c)(2).

17 In sum, the Motion is denied.

18 **IT IS SO ORDERED.**

19 DATED: July 25, 2017

20 
21 Hon. Jeffrey T. Miller
United States District Judge

22 cc: All parties

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25 ¹ The court notes that Petitioner has had several opportunities to challenge either
26 the 2001 absentia hearing, or the 2003 administrative hearing, but has failed to do so.
27 The record indicates that Petitioner could have challenged his removal in hearings
28 conducted in 2001 (the absentia proceeding), 2003 (the administrative removal
proceeding), November 22, 2009 (conviction for illegal entry), November 20, 2011,
(conviction for deported alien found in the United States), or the present underlying
case.