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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 FRANCISCO JAVIER ORTIZ-LUNA,
15 Defendant.

Civil Case No.: 17cv1146-JAH
Criminal Case No.: 16cr874-JAH

**ORDER DENYING DEFENDANT'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255
[Doc. No. 145]**

16
17 **INTRODUCTION**

18 Pending before the Court is Defendant Francisco Javier Ortiz-Luna (“Defendant”) motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* Doc. No. 19 145. Plaintiff, the United States of America (“Government”), filed a response in opposition 20 to Defendant’s motion. *See* Doc. No. 161. Having carefully considered the pleadings in 21 this action and for the reasons set forth below, the Court hereby **DENIES** Defendant’s 22 motion. 23

24 **BACKGROUND**

25 On April 27, 2016, an eight-count indictment was filed charging Defendant and 4 26 co-defendants as follows: Count one with 21 U.S.C. §§ 952, 960, and 963, conspiracy to 27 import controlled substances; Count two with 21 U.S.C. §§ 841(a)(1) and 846, conspiracy 28

1 to distribute methamphetamine; Count three with 21 U.S.C. §§ 841(a)(1) and 846,
2 conspiracy to distribute heroin; Count four with 21 U.S.C. §§ 952 and 960, importation of
3 methamphetamine; Count five with 21 U.S.C. § 841(a)(1), possession with intent to
4 distribute methamphetamine; Count Six with 21 U.S.C. §§ 952 and 960, importation of
5 heroin, and 18 U.S.C § 2, aiding and abetting; Count seven with 21 U.S.C. §§ 952 and 960,
6 importation of heroin, and 18 U.S.C. § 2, aiding and abetting; and Count eight with 21
7 U.S.C. § 841(a)(1), possession of heroin with intent to distribute. *See* Doc. No. 85 at 4.
8 Defendant was charged with Counts 1-3, and 5-6. *Id.*

9 On September 13, 2016, Defendant entered into a plea agreement and pled guilty to
10 Count 1, conspiracy to import controlled substances. *See* Doc. No. 71. The Court sentenced
11 Defendant to a 75-month term of imprisonment followed by 5 years of supervised release.
12 *See* Doc. No. 126. On June 6, 2017, Defendant filed the instant motion to vacate, set aside,
13 or correct sentence pursuant to 28 U.S.C. § 2255. *See* Doc. No. 145. The Government filed
14 a response in opposition to Defendant's motion. *See* Doc. No. 161.

15 **LEGAL STANDARD**

16 A section 2255 motion may be brought to vacate, set aside or correct a sentence on
17 the following grounds: (1) the sentence "was imposed in violation of the Constitution or
18 laws of the United States," (2) "the court was without jurisdiction to impose such
19 sentence," (3) "the sentence was in excess of the maximum authorized by law," or (4) the
20 sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Habeas relief is
21 available to correct errors of jurisdiction and constitutional error, but a general "error of
22 law does not provide a basis for collateral attack unless the claimed error constituted a
23 fundamental defect which inherently results in a complete miscarriage of justice." *United*
24 *States v. Addonizio*, 442 U.S. 178, 185 (1979). The petitioner carries the burden of
25 establishing that he is entitled to post-conviction relief pursuant to 28 U.S.C. § 2255. *See*
26 *United States v. Frady*, 456 U.S. 152, 170 (1982).

DISCUSSION

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2 Defendant contends that he received ineffective assistance of counsel for the
3 following reasons: (1) lack of advice from his counsel; (2) failure to advise appellate rights;
4 (3) failure to obtain “fast track” points; and (4) failure to obtain Government cooperation
5 points. *See* Doc. No. 145 at 4-6, 8. Under the Sixth Amendment, criminal defendants are
6 entitled to “effective assistance of counsel,” in which representation is objectively
7 reasonable in light of “prevailing professional norms.” *Strickland v. Washington*, 466 U.S.
8 668, 686-688 (1984). To sustain a claim for ineffective assistance, a petitioner has the
9 burden of satisfying *Strickland*’s two-prong standard. *Id.* First, “defendant must show that
10 counsel’s performance was deficient. This requires a showing that counsel made errors so
11 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the
12 Sixth Amendment.” *Id.* at 687. Second, “defendant must show that the deficient
13 performance prejudiced the defense.” *Id.* This requires “showing that the counsel’s errors
14 were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”
15 *Id.*

1. Ground One—*Lack of Advice from Counsel*

16 Defendant alleges that his counsel provided ineffective assistance by pushing him to
17 sign the plea agreement. *See* Doc. No. 145 at 4. Defendant also claims that his counsel
18 failed to advise him of his sixth amendment right to testify. *Id.*

19 First, Rule 11 of the Federal Rules of Criminal Procedure provides that courts must
20 address a criminal defendant personally and in open court to ensure that the plea is
21 voluntary and not caused by force threats or other promises. *See* Fed. R. Crim. P. 11. The
22 trial judge must make an affirmative finding that a plea of guilty is made intelligent and
23 voluntary. *Boykin v. Alabama*, 395 U.S. 238, 240 (1969). Furthermore, a defendant must
24 have a sufficient present ability to “consult a lawyer with a reasonable degree of rational
25 understanding and have a rational as well as factual understanding of the proceedings
26 against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*).
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1 Here, Defendant initialed each page of the plea agreement, which states that
2 “Defendant has had a full opportunity to discuss all the facts and circumstances of this case
3 with defense counsel and has a clear understanding of the charges and the consequences of
4 this plea.” *See* Doc. No. 71 at 7. Defendant also initialed that “[n]o one has threatened
5 defendant or defendant's family to induce this guilty plea.” *Id.* Moreover, the record
6 indicates that Defendant was addressed in open court before the Magistrate Judge to ensure
7 that the plea was voluntary and not caused by threats or other promises. *See* Doc. No. 161-
8 2 at 11. During the hearing, the Magistrate Judge also asked if Defendant had any questions
9 or clarifications, in which Defendant responded, “No.” *See Id.*

10 Defendant was represented by Adriana Cespedes (“Counsel”), who has been
11 licensed to practice law in California since 2007. *See* Doc. No. 161-1, Exh. 1 at 2. She has
12 been practicing criminal defense throughout her legal career. *Id.* In Counsel’s sworn
13 declaration, she indicates that she met with Defendant approximately five times and was
14 able to consult with him in Spanish (Defendant’s native language). *See* Doc. No. 161-1,
15 Exh. 1 at 3. During those meetings, Counsel discussed his case, the evidence against him,
16 and the plea agreement offered by the Government. *Id.* Furthermore, once Defendant pled
17 guilty, Counsel once again reviewed the plea agreement with Defendant. *Id.* The evidence
18 provided suggests Defendant had a factual and reasonable degree of understanding of the
19 proceedings against him. Therefore, the Court finds that Defendant’s guilty plea was
20 intelligent and voluntary.

21 Next, Defendant contends that Counsel failed to advise him of his trial rights, such
22 as his Sixth Amendment right to testify. *See* Doc. No. 145 at 4. The language in plea states
23 that “Defendant understands that this guilty plea waives the right to: ...(B) A speed and
24 public trial by jury;... (E) Testify and present evidence and to have witnesses testify on
25 behalf of defendant; and, not testify and present evidence and to have witnesses testify on
26 behalf of defendant.” *See* Doc. No. 71 at 6. To solidify Defendant’s acknowledgement and
27 understanding of his waiver of trial rights, he initialed section 4 on page 6 of the plea
28 agreement titled “DEFENDANT’S WAIVER OF TRIAL RIGHTS.” *Id.* Counsel also

1 advised Defendant of the constitutional rights being waived prior Defendant signing the
2 plea agreement. *See* Doc. No. 161-1, Exh. 1 at 3. Moreover, at the change of plea hearing,
3 Defendant affirmed that he understood the constitutional rights being waived as a result of
4 agreeing to sign the plea agreement. *See* Doc. No. 161-2 at 5-6. Therefore, Defendant has
5 not provided sufficient facts to indicate Counsel was ineffective in advising him of his trial
6 rights. As a result, Defendant is unable to satisfy the first prong of the *Strickland* standard
7 for ineffective assistance of counsel.

8 **2. Ground Two--*Failure to Advise Appellate Rights***

9 Second, Defendant asserts that Counsel was ineffective by failing to advise him of
10 his appellate rights. *See* Doc. No. 145 at 5-6, 8-9. “A waiver of appellate rights is
11 enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds
12 raised, and (2) the waiver is knowingly and voluntarily made.” *United States v. Medina-*
13 *Carrasco*, 815 F.3d 457, 461 (9th Cir. 2016). To determine whether an appeal waiver was
14 knowingly and voluntarily made, the court must “look ‘to the circumstances surrounding
15 the signing and entry of the plea agreement to determine whether the defendant agreed to
16 its terms knowingly and voluntarily.’” *United States v. Lo*, 839 F.3d 777, 783–84 (9th Cir.
17 2016) (quoting *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996)). This
18 requires the court to consider “the express language of the waiver and the facts and
19 circumstances surrounding the signing and entry of the plea agreement, including
20 compliance with Federal Rule of Criminal Procedure 11.” *United States v. Nguyen*, 235
21 F.3d 1179, 1182 (9th Cir. 2000), abrogated on other grounds by *United States v. Rahman*,
22 642 F.3d 1257, 1259 (9th Cir. 2011).

23 Here, the plea agreement contains a provision regarding waiver of Defendant’s
24 appellate rights. *See* Doc. No. 71 at 12. The language in the plea agreement states that
25 “defendant waives, ... any right to appeal or to collaterally attack the conviction and any
26 lawful restitution order... defendant also waives any right to appeal or to collaterally attack
27 the sentence....” *Id.* Defendant initialed the page acknowledging that he knowingly and
28 voluntarily waived his appellate rights in exchange for the terms expressed in the plea

1 agreement. *Id.* Defendant’s actions signify that he understood and acknowledged his
2 appellate rights were being waived. Moreover, as discussed above, Counsel explained
3 Defendant’s waiver of appellate rights prior to Defendant signing the plea agreement.

4 Nevertheless, “a statement by the defendant and his attorney that they discussed the
5 nature of the charge is ... insufficient to satisfy Rule 11(c), because vague references to [a]
6 discussion of ‘the charges’ and ‘the nature of the charges’ does not provide a complete
7 record showing compliance with Rule 11(c).” *United States v. Portillo-Cano*, 192 F.3d
8 1246, 1251 (9th Cir. 1999) (quoting *United States v. Smith*, 60 F.3d 595, 598 (9th Cir.
9 1995)) (internal quotations omitted). The court is required to “address the defendant
10 personally in open court and inform [him] of, and determine that the defendant understands
11 ... the nature of the charge to which the plea is offered.” Fed. R. Crim. P. 11(c)(1); *United*
12 *States v. Pena*, 314 F.3d 1152, 1155-1156 (9th Cir. 2003).

13 Here, the Court advised Defendant of his right to appeal and that signing the plea
14 agreement will waive such right. *See* Doc. No. 161-2 at 10. The Court also reviewed the
15 plea agreement and confirmed that Defendant’s initials were on each page. *Id.* By
16 defendant responding that he understood the Court and confirming his understanding of
17 the plea agreement with his initials, Defendant’s waiver was knowing and voluntary. *See*
18 *Id.* Furthermore, at Defendant’s sentencing hearing, the Court confirmed Defendant’s
19 waiver by asking, “Do you understand you’ve waived your right to appeal and to
20 collaterally attack your conviction and sentence?” *See* Doc. No. 158 at 18. Defendant
21 responded, “Yes.” *Id.* As such, Defendant is unable to satisfy the first prong of the
22 *Strickland* standard for ineffective assistance of counsel.

23 **3. Ground Three--Failure to Obtain “Fast-Track” Points**

24 Next, Defendant claims Counsel was ineffective for failing to obtain “fast-track”
25 points. *See* Doc. No. 145 at 6. A defendant seeking to challenge the validity of his
26 conviction on the ground of ineffective assistance of counsel must demonstrate that his
27 counsel's performance was deficient and was prejudiced as a result of the deficiency.
28 *Strickland*, 466 U.S. at 687–88. Prejudice is established by a showing of a reasonable

1 probability that “the end result of the criminal process would have been more favorable by
2 reason of a plea to a lesser charge or a sentence of less prison time.” *Missouri v. Frye*, 566
3 U.S. 137, 147 (2012).

4 Here, Defendant fails to show that his counsel failed to obtain “fast track” points. As
5 stated in the plea agreement, Defendant was provided “fast-track” points in which he
6 received a minus four downward departure, pursuant to United States Sentencing
7 Guidelines (“USSG” or “Guidelines”) § 5K3.1. *See* Doc. Nos. 71, 85 at 9, 21. Counsel’s
8 performance was neither deficient nor prejudicial as Defendant received the benefit of
9 “fast-track” points. Therefore, Defendant fails to satisfy the first prong *Strickland* standard
10 for ineffective assistance of counsel.

11 **4. Ground Four--*Failure to Obtain Government Cooperation***

12 Finally, Defendant claims Counsel was ineffective for failing to obtain cooperation
13 points for providing substantial assistance to the government under § 5K1.1 of the USSG.
14 *See* Doc. No. 145 at 8. “Section 5K1.1 permits a district court to depart from the Guidelines
15 “[u]pon motion of the government stating that the defendant has provided substantial
16 assistance in the investigation or prosecution of another person who has committed an
17 offense.” *See* U.S.S.G. § 5K1.1. Section 5K1.1 allows the government to move for a
18 departure when a defendant has substantially assisted, but it imposes no duty to do so. *See*
19 *Wade v. United States*, 504 U.S. 181, 185 (1992); *see also United States v. Arishi*, 54 F.3d
20 596, 597 (9th Cir. 1995). “Even if a defendant has provided substantial assistance, [the
21 Court] may not grant relief unless the government's refusal to file a § 5K1.1 motion was
22 based on impermissible motives, constituted a breach of a plea agreement, or was not
23 rationally related to a legitimate governmental purpose.” *United States v. Flores*, 559 F.3d
24 1016, 1019 (9th Cir. 2009); *see also U.S. v. De La Fuente*, 8 F.3d 1333, 1340 (9th Cir.
25 1993) (holding that the court has the power to depart downward without such a motion if
26 the government acted unconstitutionally in declining to file a motion for cooperation
27 points).

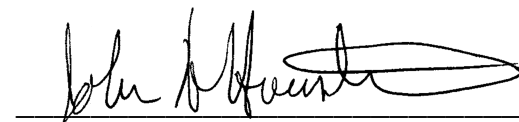
1 Here, Defendant's counsel did not fail to make a Section 5K1.1 motion because the
2 record does not provide that the Government was willing to recommend the downward
3 departure. *See* Doc. Nos. 71, 85, 158, 161. Since the Government did not file a motion,
4 Counsel did not provide deficient nor was Defendant prejudiced as a result of Counsel's
5 performance. Moreover, neither the record nor Defendant provides facts to suggest that the
6 Government's decision to not file a motion was based on impermissible motives,
7 constituted a breach of a plea agreement, unconstitutional, or not related to a legitimate
8 governmental purpose. As a result, Defendant fails to satisfy the first prong of the
9 *Strickland* standard for ineffective assistance of counsel.

10 **CONCLUSION**

11 For all the reasons discussed above, IT IS HERE BY ORDERED that Defendant's
12 motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is **DENIED**.

13 **IT IS SO ORDERED.**

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17 DATED: December 1, 2020

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20 Hon. John A. Houston
21 United States District Judge
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