

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Respondent/Plaintiff,
vs.
JOSE UGARTE,
Petitioner/Defendant.
Case No.: 2:16-cr-00242-GMN-CWH-4
ORDER

Pending before the Court is Petitioner Jose Ugarte’s (“Petitioner’s”) Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (“2255 Motion”), (ECF No. 148). The Government filed a Response, (ECF No. 151), and Petitioner did not file a reply.

Also pending before the Court are Petitioner’s Motion to Transfer, (ECF No. 145), and Motion for Order regarding the Motion to Transfer, (ECF No. 154). The Government did not respond to either Motion.

For the reasons discussed below, Petitioner’s 2255 Motion is GRANTED in part and DENIED in part. Petitioner’s Motion to Transfer is DENIED.

I. BACKGROUND

On April 20, 2015, Petitioner participated in an armed bank robbery in Las Vegas, Nevada. (See Plea Agreement 4:8–5:8). About a year later, Petitioner and one of his co-defendants planned to carry out another armed robbery, but they were apprehended prior to its execution. (Id. 5:9–15).

On May 19, 2016, the State of Nevada charged Petitioner with crimes relating to both the 2015 robbery and the 2016 attempted robbery in Case No. C-16-315046. (See State Docket, Ex. 1 to Resp. to 2255 Mot., ECF No. 151). On August 3, 2016, a federal grand jury returned the Indictment charging Petitioner and three co-defendants with Conspiracy to Interfere with

1 Commerce by Robbery in violation of 18 U.S.C. § 1951(a) based on the same conduct for  
2 which Petitioner was charged in the state case. (*See* Indictment, ECF No. 1). On August 12,  
3 2016, the United States Marshalls brought Petitioner into federal custody on a writ of habeas  
4 corpus ad prosequendum. (*See* Writ of Habeas Corpus Ad Prosequendum, ECF No. 10).

5 On April 21, 2017, Petitioner pleaded guilty to the one count in the Indictment and  
6 admitted to his involvement in the 2015 robbery and 2016 attempted robbery. (Plea Agreement  
7 3:22–5:22). Petitioner and the Government agreed to recommend his state and federal  
8 sentences run concurrently. (*Id.* 10:3–5). The Government represents that, “counsel for the  
9 Government’s recollection is that the parties intended for Ugarte to receive a fully concurrent  
10 sentence (i.e., that Ugarte, who was in federal custody on a writ, receive credit toward his  
11 federal sentence back to the date of his state arrest).” (Resp. to 2255 Mot. 2:23–3:2).

12 On November 17, 2017, the Court sentenced Petitioner to 60 months in custody to run  
13 concurrently to his anticipated state sentence. (*See* Judgement at 2, ECF No. 172). Petitioner  
14 was then returned to state custody, and he was sentenced on the state charges twelve days later.  
15 (*See* State Docket, Ex. 1 to Resp. to 2255 Mot.).

## 16 **II. LEGAL STANDARD**

17 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the Court which  
18 imposed the sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a  
19 motion may be brought on the following grounds: “(1) the sentence was imposed in violation of  
20 the Constitution or laws of the United States; (2) the court was without jurisdiction to impose  
21 the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the  
22 sentence is otherwise subject to collateral attack.” *Id.*; *see United States v. Berry*, 624 F.3d  
23 1031, 1038 (9th Cir. 2010).

24 Motions pursuant to § 2255 must be filed within one year from “the date on which the  
25 judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1). “[A] district court may deny a

1 Section 2255 motion without an evidentiary hearing only if the movant’s allegations, viewed  
2 against the record, either do not state a claim for relief or are so palpably incredible or patently  
3 frivolous as to warrant summary dismissal.” *United States v. Burrows*, 872 F.2d 915, 917 (9th  
4 Cir. 1989). “No evidentiary hearing is necessary when the issue of credibility can be  
5 conclusively decided on the basis of documentary testimony and evidence in the record.” *Shah*  
6 *v. United States*, 878 F.2d 1156, 1160 (9th Cir. 1989).

### 7 **III. DISCUSSION**

8 The Court’s below discussion addresses each of Petitioner’s claims for relief in turn.

#### 9 **a. 2255**

10 In his 2255 Motion, Petitioner asserts two grounds for the Court to vacate, set aside, or  
11 correct his sentence. First, he argues that he has been denied his Fourteenth Amendment right  
12 to due process because he did not receive credit for time served between his initial federal  
13 detention and his sentencing. (2255 Mot. at 5). Second, he argues that he received ineffective  
14 assistance of counsel because his attorney failed to raise the argument at his sentencing that he  
15 should receive credit for time served. (*Id.* at 6). Neither argument supports ordering 2255  
16 relief.

17 Under federal law, a sentence does not “commence” until the date of sentencing. *See*  
18 *Schleining v. Thomas*, 642 F.3d 1242, 1248 (9th Cir. 2011) (“Because a prisoner can receive  
19 GCT credit only on time served on his federal sentence, and his federal sentence does not  
20 ‘commence’ until after he has been sentenced in federal court, [defendant] is not eligible for  
21 GCT credit for the 21 months he spent in state custody . . . before imposition of his federal  
22 sentence.”). Additionally, the Bureau of Prisons (“BOP”) cannot credit a defendant with time  
23 served on his federal sentence for time in which he is incarcerated in a state facility on state  
24 charges. *See* 18 U.S.C. § 3585(b). When a defendant is housed in a federal facility after  
25 execution of a writ of habeas corpus ad prosequendum, the Petitioner technically remains in

1 state custody. *Schleining*, 642 F.3d at 1243 n.1 (“despite his brief transfer to the BOP’s custody  
2 pursuant to a writ of habeas corpus ad prosequendum, [defendant] was in ‘state custody’ for the  
3 21-month period from his state arrest . . . to his sentencing in federal court . . .”).

4 Petitioner was in state custody after his arrest, and he appeared in federal court pursuant  
5 to a writ of habeas corpus ad prosequendum. (*See* Writ of Habeas Corpus Ad Prosequendum,  
6 ECF No. 10). The BOP therefore could not give Petitioner credit for time served from the time  
7 of Petitioner’s arrest to his sentencing because he technically remained in state custody.

8 Therefore, neither Petitioner’s right to due process of law nor his right to counsel were violated  
9 through the alleged miscalculation of his federal prison term.

10 **b. Resentencing**

11 The Government argues that, while Petitioner’s claims for habeas relief should be denied  
12 on the merits because his constitutional rights have not been violated, it “will not oppose an  
13 order from this Court granting in part Ugarte’s § 2255 motion, vacating his sentence, and  
14 entering an amended judgment sentencing Ugarte to 42 months of imprisonment, with all  
15 remaining aspects of the sentence to remain the same.” (Resp. to 2255 Mot. 7:1–7, ECF No.  
16 151). In its Response to Petitioner’s 2255 Motion, the Government concedes that the “the  
17 parties intended to give [Petitioner] full credit for his time in custody” because his state and  
18 federal convictions “are based on essentially entirely the same conduct.” (*Id.*). Accordingly,  
19 the Government represents that that Court should, in the interest of justice, reduce Petitioner’s  
20 sentence from 60 months to 42 months because he served 18 months in state custody prior to  
21 his federal sentencing. (*Id.* 6:4–7:16). The Court agrees and therefore vacates and modifies the  
22 Judgment only to the extent that Petitioner’s sentence shall be for 42 months imprisonment  
23 from the date of his federal sentencing.

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1                   **c. Transfer**

2                   Petitioner moves this Court to transfer him to a federal facility in New York pursuant to  
3 its recommendation to the Bureau of Prisons. (*See* Motions to Transfer, ECF Nos. 145, 154).  
4 The Court does not have the ability to order the requested transfer from state to federal custody.  
5 While the Court did recommend to the Bureau of Prisons that Petitioner be housed in a facility  
6 in New York, (*see* Judgment at 2, ECF No. 122), the recommendation is only effective for any  
7 time Petitioner serves in a BOP facility after the completion of his state sentence. Therefore,  
8 the Court denies Petitioner’s Motions to Transfer.

9                   **d. Certificate of Appealability**

10                  Additionally, the Court will not issue a certificate of appealability, which is required for  
11 Petitioner to proceed with an appeal of this Order. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22;  
12 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950–51 (9th Cir. 2006); *see also United States*  
13 *v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001). This means that Petitioner must make “a  
14 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v.*  
15 *McDaniel*, 529 U.S. 473, 483–84 (2000). He bears the burden of demonstrating that the issues  
16 are debatable among jurists of reason; that a court could resolve the issues differently; or that  
17 the questions are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at  
18 483–84.

19                  The Court has considered the issues raised by Petitioner with respect to whether they  
20 satisfy the standard for issuance of a certificate of appealability, and determines that the issues  
21 do not meet that standard. The Court therefore **DENIES** Petitioner a certificate of  
22 appealability.

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Petitioner's Motion to Vacate, Set Aside, or Correct  
3 Sentence under 28 U.S.C. § 2255, (ECF No. 148), is **GRANTED in part** and **DENIED in**  
4 **part**. The Court **DENIES** Petitioner's claims for relief under 28 U.S.C. § 2255. However, in  
5 the interest of justice and to effectuate the parties' intended Settlement Agreement, the Court  
6 **VACATES** and **AMENDS** the Judgment, (ECF No. 122). The Court now sentences Petitioner  
7 to 42 months imprisonment, beginning from the date of his federal sentencing, November 17,  
8 2017. The remaining conditions of the Judgment shall remain unchanged.

9 **IT IS FURTHER ORDERED** that Petitioner's Motion for Transport of Prisoner, (ECF  
10 No. 145), is **DENIED**.

11 **IT IS FURTHER ORDERED** that Petitioner's Motion for Order regarding the Motion  
12 for Transport of Prisoner, (ECF No. 154), is **DENIED as moot**.

13 **DATED** this 23 day of December, 2019.

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17 Gloria M. Navarro, District Judge  
18 United States District Court  
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