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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MYRON COSMO CURRY,)	CASE NO. C09-0288 RSM
)	
Petitioner,)	
)	ORDER DENYING PETITIONER’S
v.)	MOTION FOR CERTIFICATE OF
)	APPEALABILITY
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

This matter comes before the Court on Petitioner’s “Motion for Certificate of Appealability” (Dkt. #19). Petitioner pleaded guilty to attempted possession of oxycodone with intent to distribute and carrying a firearm during and in relation to a drug trafficking crime. He filed a federal habeas petition with this Court requesting that his sentence be set aside because Petitioner was allegedly denied effective assistance of counsel in violation of the Sixth Amendment. Specifically, Petitioner claimed that his counsel gave him misinformation regarding his possible sentence and was ineffective at the sentencing because he did not advocate for a base offense level of six instead of 36. This Court adopted Magistrate Judge Donohue’s Report and Recommendation, which dismissed Petitioner’s claims. (Dkt. #15). Petitioner now requests that this Court issue a certificate of appealability (“COA”).

1 A final order in a proceeding under 28 U.S.C. § 2255 may not be appealed unless the
2 Court issues a COA. 28 U.S.C. § 2253(c)(1). “A certificate of appealability may issue . . .
3 only if the applicant has made a substantial showing of the denial of a constitutional right.”
4 *Id.* § 2253(c)(2). To meet this standard, a petitioner must show “that reasonable jurists could
5 debate whether (or, for that matter, agree that) the petition should have been resolved in a
6 different manner or that the issues presented were adequate to deserve encouragement to
7 proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotations and
8 citations omitted).

9 Petitioner’s claims are not fairly debatable. Since the Report and Recommendation
10 already discussed each of Petitioner’s contentions in detail, presently the Court will only
11 briefly outline why Petitioner has not made a substantial showing of the denial of a
12 constitutional right.

13 To make out a case for ineffective assistance of counsel, Petitioner must show that (1)
14 counsel’s performance fell below an objective standard of reasonableness, and (2) there is a
15 reasonable probability that but for counsel’s error the result of the proceedings would have
16 been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner first claims
17 that his counsel inaccurately advised him that he faced a life sentence when in fact the
18 maximum penalty was twenty years. First, Petitioner’s counsel denied this contention in his
19 declaration. Secondly, any alleged error on counsel’s part could not have contributed to
20 Petitioner’s guilty plea because Petitioner was repeatedly informed of the correct penalty for
21 his offense. The record shows that Magistrate Judge Arnold advised Petitioner of the correct
22 statutory maximum penalty twice in open court: at Petitioner’s arraignment and at the change
23 of plea hearing. Additionally, the plea agreement that Petitioner signed correctly states the
24 statutory maximum.

25 The same analysis applies to Petitioner’s claim that his counsel incorrectly predicted his
26 likely sentence. Counsel denied that such a prediction was ever made and in any case
27 Petitioner affirmed in open court that he understood there was no guarantee regarding the
28 sentence that would ultimately be imposed.

1 Finally, Petitioner claims that his counsel should have argued for a base offense level of
2 six instead of 36 because the undercover agent delivered placebo pills containing zero grams
3 of oxycodone. As explained in the adopted Report and Recommendation, it would have been
4 futile for counsel to present such an argument at sentencing because (1) Petitioner stipulated
5 to a base offense level of 36 in his plea agreement, and (2) the law is well settled that the base
6 offense level in reverse sting cases is determined by the amount of contraband the buyer and
7 seller agree upon, not the amount actually delivered. *United States v. Mkhsian*, 5 F.3d 1306,
8 1313 (9th Cir. 1993); U.S.S.G. § 2D1.1 App. Note 12.

9 Accordingly, there is no room for debate regarding whether Petitioner's constitutional
10 right to effective assistance of counsel was violated. Petitioner's motion is DENIED.

11 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
12 and the remainder of the record, the Court hereby finds and ORDERS:

- 13 (1) Petitioner's "Motion for Certificate of Appealability" (Dkt. #19) is DENIED.
14 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

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16 DATED this 8 day of December, 2009.

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19 RICARDO S. MARTINEZ
20 UNITED STATES DISTRICT JUDGE
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