

1 On April 20, 2009, Petitioner filed a pro se motion to vacate her sentence pursuant to 28
2 U.S.C. § 2255. (Dkt. No. 1.) The Magistrate Judge concluded that Petitioner should have
3 counsel appointed. Petitioner pursues two issues in her petition: (1) she claims she was deprived
4 of her Fifth and Sixth Amendment rights when her trial counsel failed to timely file a notice of
5 appeal on her behalf; and (2) she claims she was deprived of her Fifth and Sixth Amendment
6 rights at sentencing. (Dkt. No. 34.) The Magistrate Judge held an evidentiary hearing on
7 Petitioner’s contention that she was denied effective assistance of counsel at sentencing and with
8 regard to filing an appeal. Petitioner and her trial counsel, Stephen Illa, dispute what requests
9 Petitioner made to Mr. Illa to appeal her sentence. After holding an evidentiary hearing where
10 both Petitioner and Mr. Illa testified, the Magistrate Judge issued an R&R recommending denial
11 of the petition. Petitioner filed objections to the substance of the R&R, while the government
12 filed objections to the recommendation to issue a Certificate of Appealability (“COA”).

13 **Analysis**

14 A. Ineffective Assistance of Counsel Regarding Appeal

15 Petitioner argues the Magistrate Judge made incorrect credibility determinations after
16 holding an evidentiary hearing on Petitioner’s ineffective assistance of counsel claim. Petitioner
17 takes issue with the R&R’s conclusion that “petitioner did not clearly instruct counsel to file a
18 notice of appeal on her behalf.” (Dkt. No. 48 at 2; Dkt. No. 50 at 2.) Petitioner believes that the
19 Magistrate Judge inappropriately accepted Mr. Illa’s testimony and discounted hers. The record
20 supports the Magistrate Judge’s determination.

21 Petitioner argues that Mr. Illa’s testimony lacks credibility because they shared a
22 contentious relationship. (Dkt. No. 50 at 2-3.) The Magistrate Judge addressed this argument
23 and found the rocky attorney-client relationship had no impact on Mr. Illa’s credibility as to his
24 discussions with Petitioner about whether to appeal the sentence. The Magistrate Judge noted
25 that Mr. Illa had nothing to gain by not filing an appeal or by lying about it at the evidentiary
26 hearing. (Dkt. No. 48 at 9-10.) The Court finds no flaw in the R&R on this issue. Petitioner

1 also argues that if Mr. Illa had truly obtained her acquiescence not to appeal, he would have sent
2 her a written waiver. (Dkt. No. 50 at 2-3.) This is pure speculation that is not evidence of her
3 attorney's lack of veracity. Neither argument shows any clear error in the Magistrate Judge's
4 credibility determination.

5 Petitioner also argues that the Magistrate Judge improperly credited Mr. Illa's testimony
6 that he drafted a memorandum on May 19, 2008 memorializing Petitioner's statement to Mr. Illa
7 that she did not wish to appeal. (Dkt. No. 50 at 3.) Petitioner argues the memorandum was not
8 contemporaneously drafted because its electronic date does not match its purported date of
9 creation. Petitioner also argues the memorandum was fabricated because the letterhead indicates
10 it was not made in 2008. The Magistrate Judge examined these issues and found the error in the
11 electronic date of the memorandum was inadvertent and did not undermine the contents of the
12 memorandum. The Magistrate Judge noted that Mr. Illa had an independent memory of the
13 conversation, such that the memorandum was secondary to Mr. Illa's actual memory and
14 otherwise credible testimony. (Dkt. No. 48 at 10.) Petitioner has provided no reasoned basis to
15 reject the Magistrate Judge's credibility determination.

16 Petitioner contends the Magistrate Judge incorrectly found her testimony lacked
17 credibility on the issue of whether she sought to appeal her sentence. (Dkt. No. 50 at 3-4.) The
18 reasons Petitioner puts forwards are dealt with fully in the R&R and Petitioner has provided no
19 basis to reach a different conclusion that the one set out in the R&R. There is no evidence
20 Petitioner received ineffective assistance of counsel with regard to appealing the sentence, which
21 would likely have been precluded by her waiver of appellate rights. The Court ADOPTS the
22 R&R on this issue and DENIES Petitioner's claim of ineffective assistance of counsel with
23 regard to her appellate rights.

24 B. Ineffective Assistance of Counsel as to Sentencing

25 Petitioner argues she received ineffective assistance of counsel at sentencing because her
26 counsel failed to respond to the claims of dishonesty leveled against her by probation. (Dkt. No.

1 50 at 4.) The Magistrate Judge found that Mr. Illa did not provide robust mitigating evidence as
2 to Petitioner's honesty, but that there is no evidence of prejudice. The Court agrees. Nothing in
3 the record suggests that the sentence was impacted by Petitioner's honesty or lack thereof.
4 Assuming for the sake of argument that Petitioner received ineffective assistance, she has not
5 shown that she suffered any prejudice. This is highlighted by the fact that this Court departed
6 well below the guideline range in sentencing petitioner. The Court ADOPTS the R&R and
7 DENIES the petition on this issue.

8 C. Certificate of Appealability


9 The government objects to the R&R's recommendation that the Court issue a COA. The
10 Court agrees with the R&R that close issues of fact warrant granting the COA. Petitioner has
11 made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(3).
12 The Court ADOPTS the R&R on this issue and ISSUES the COA as to both claims raised in the
13 petition.

14 **Conclusion**

15 Petitioner has failed to show any defects in the R&R. The Magistrate Judge's credibility
16 determinations were proper and there is no evidence Petitioner received ineffective assistance of
17 counsel with regard to her sentence or her rights to appeal the sentence. The Court ADOPTS the
18 R&R and DENIES the petition. The Court GRANTS the issuance of a certificate of
19 appealability on both issues Petitioner pursues and ADOPTS the R&R on this issue.

20 The Clerk shall transmit a copy of this Order to all counsel of record.

21 Dated this 3rd day of August, 2010.

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24 Marsha J. Pechman
25 United States District Judge
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