

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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|---------------------------|---|---------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff/Respondent, |) | CR 04-0112 PHX JAT |
| |) | |
| v. |) | CIV 05-2583 PHX JAT (ECV) |
| |) | |
| LAZARO MORALES RENTERIA, |) | |
| |) | |
| Defendant/Movant. |) | REPORT AND RECOMMENDATION |
| |) | |
| _____ |) | |

TO THE HONORABLE JAMES A. TEILBORG:

Mr. Lazaro Morales Renteria ("Movant") is currently incarcerated in a federal prison facility in California, pursuant to his conviction by the United States District Court for the District of Arizona. On August 26, 2005, Movant filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Motion"). Respondent filed a Response in Opposition to Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Response") on October 17, 2005 (Docket No. 128).

I. Procedural History

On March 31, 2004, Movant was charged by a superceding indictment with conspiracy to harbor illegal aliens, harboring illegal aliens, conspiracy to commit hostage-taking, and aiding and abetting the taking of hostages. See Docket No. 49 (2:04 CR 0112-2 PHX JAT).

1 On April 5, 2004, pursuant to a plea agreement, Movant
2 pled guilty to one count of conspiracy to harbor illegal aliens
3 in violation of 8 U.S.C. § 1324. Response, Exh. A; Docket No.
4 55 (2:04 CR 0112-2 PHX JAT). The plea agreement provides that
5 Movant would receive a sentence within the range specified in
6 the United States Sentencing Guidelines for Movant's offense of
7 conviction. See Response, Exh. A. Movant conceded, in the plea
8 agreement, that an enhancement of his base offense level was
9 warranted to reflect that a firearm was involved in the
10 commission of this offense. See id., Exh. A.¹

11 The plea agreement states that the maximum statutory
12 penalty for violation of 8 U.S.C. § 1324 is ten years
13 imprisonment. Id., Exh. A; 8 U.S.C. § 1324(a)(1)(B).² The plea
14 agreement also provided that Movant was, by pleading guilty,
15 waiving any right to appeal or collaterally attack his
16 conviction and sentence if the sentence imposed was consistent
17 with the terms of the plea agreement. Id.

18 The plea agreement provides, inter alia:

19 The defendant waives any and all motions,
20 defenses, probable cause determinations, and

21 ¹ Paragraph 2(c) of the plea agreement states:

22 Pursuant to Fed. R. Crim P. 11(c)(1)(C), the parties stipulate
23 and agree, that with respect to the guidelines offense
24 characteristic considered in section 2L1.1(b)(4), possession of
25 a dangerous weapon, an enhancement should be given as a weapon
was brandished or otherwise used in relation to harboring aliens
in furtherance of the conspiracy.

26 Response, Exh. A at 3.

27 ² If the aliens were harbored for the purpose of commercial advantage
28 or private financial gain, the maximum statutory penalty for this offense
is ten years; if done for other motives, the maximum statutory penalty for
this offense is five years. See 8 U.S.C. § 1324(a)(1)(B).

1 objections which the defendant could assert
2 to the indictment or to the Court's entry of
3 judgment against the defendant and imposition
4 of sentence upon the defendant providing the
5 sentence is consistent with this agreement.
6 The defendant further waives: (1) any right
7 to appeal the Court's entry of judgment
8 against defendant; (2) any right to appeal
9 the imposition of sentence upon defendant
10 under Title 18, United States Code, Section
11 3742 (sentence appeals); and (3) any right to
12 collaterally attack defendant's conviction
13 and sentence under Title 28, United States
14 Code, Section 2255, or any other collateral
15 attack.

9 Id., Exh. A at 3-4.

10 The plea agreement also provided that the other five
11 charges against Movant stated in the superseding indictment
12 would be dismissed. Id., Exh. A at 3.

13 The plea agreement was signed by both Movant and his
14 counsel on April 5, 2004. Id. Movant averred that he had read
15 the plea agreement, discussed it with his counsel, and
16 understood the rights he was ceding, stating:

17 I have been advised by my attorney of the
18 nature of the charges to which I am entering
19 my guilty plea. I have further been advised
20 by my attorney of the nature and range of the
21 possible sentence and that my ultimate
22 sentence will be determined according to the
23 guidelines promulgated pursuant to the
24 Sentencing Reform Act of 1984. I understand
25 that the Guideline Range referred to herein
26 or discussed with my attorney is not binding
27 on the court and is merely an estimate. I
28 further understand that under certain limited
circumstances the court may depart upward or
downward from the calculated guideline
range....

My guilty plea is not the result of force,
threats, assurances or promises other than
the promises contained in this agreement. I
agree to the provisions of this agreement as
a voluntary act on my part, rather than at
the direction of or because of the
recommendation of any other person, and I
agree to be bound according to its

1 provision....

2 I agree that this written plea agreement
3 contains all the terms and conditions of my
4 plea and that promises made by anyone
5 (including my attorney), and specifically any
6 predictions as to the guideline range
7 applicable, that are not contained within
8 this written plea agreement are without force
9 and effect and are null and void.

10 I am satisfied that my defense attorney has
11 represented me in a competent manner....

12 I have carefully reviewed every part of [this
13 agreement] with my attorney. I understand
14 it, and I voluntarily agree to it.

15 Id., Exh. A at 12-13.

16 The plea agreement also states:

17 I further agree that if this matter were to
18 proceed to trial the United States could
19 prove the following facts beyond a reasonable
20 doubt:

21 Beginning at a time prior to January 4, 2004,
22 and up to and including the date of my
23 arrest, I was involved in an organization
24 that smuggled illegal aliens from Mexico
25 across the border into Arizona. I was paid
26 for my efforts on behalf of the organization.
27 I, along with my co-defendants and others,
28 agreed that we would harbor aliens within the
District of Arizona. On the day I was
arrested, I and my co-defendants were keeping
3 undocumented aliens at 1001 N. 43rd Avenue,
#189 in Phoenix...

19 Id., Exh. A at 7.

20 Movant's presentence report indicates that Movant
21 never saw a weapon and that Movant was "unsure" if a weapon was
22 used in the commission of his offense. Id., Exh. B. The
23 presentence report calculated Movant's base offense level as 12,
24 then increased the base offense level by 8 levels to reflect
25 that a firearm was involved in the offense, and then decreased
26 the offense level by three levels for Movant's acceptance of
27 responsibility for his acts, resulting in a base offense level
28 of 17. See id., Exh. B. Combining Movant's base offense level

1 of 17 and his criminal history score of 1 resulted in a
2 sentencing range of 24 to 30 months imprisonment. See id., Exh.
3 B.³ The presentence report recommended Movant be sentenced to
4 a term of 27 months imprisonment. See id., Exh. B. The
5 presentence report indicates that, if Movant were to proceed to
6 trial and was found guilty of each of the charges stated in the
7 indictment, Movant faced a potential sentence of 235 months in
8 prison, or a possible maximum sentence of life imprisonment.
9 See id., Exh. B.

10 On August 9, 2004, Movant was sentenced to a term of 27
11 months imprisonment pursuant to his conviction for conspiracy to
12 harbor illegal aliens in violation of 8 U.S.C. § 1324. See id.,
13 Exh. C.

14 Movant did not file a direct appeal regarding his
15 conviction and sentence. On August 26, 2005, Movant filed his
16 section 2255 petition, asserting that he is entitled to relief
17 because Movant was actually innocent of the charge of possession
18 of a weapon and, therefore, that his sentence was improperly
19 enhanced based on this allegation; Movant further asserts that
20 his presentence report was inaccurate and Movant told his
21 counsel that the presentence report was inaccurate.

22 Movant further contends that he is entitled to relief
23 because he was deprived of his right to the effective assistance
24 of counsel. Movant contends his counsel

25 failed to properly investigate or I would not
26 have been saddled with the bogus gun
enhancement. Also counsel failed to explain

27
28 ³ The presentence report that Movant's only conviction as an adult was
for shoplifting in 2003. See Response, Exh. B.

1 we ha[ld a good defense as the Snitch
 2 (informant) produced biased hearsay to save
 3 his own hide....instead of getting my case
 4 dismissed counsel coerced me into pleading
 5 saying I'd get worse and I "had no choice".
 Counsel did as little as possible to get me
 in here, case adjudicated. Attorney had
 conflicting interests.

6 Motion at 5.

7 Movant further asserts that he is entitled to relief
 8 because it was never proved that Movant was the person accused
 9 of the alleged crime or the person convicted of the prior
 10 convictions alleged against Movant and because the charges
 11 against Movant were "bogus." Id., App.⁴ Movant further contends
 12 that his guilty plea was unknowing and involuntary, and that his
 13 counsel was ineffective for "failing to present potentially
 14 mitigating evidence." Id., App.

17 ⁴ An affidavit attached to the section 2255 motions states:

- 18 1. Phoenix police and I.C.E. police wearing ski masks broke into
 a home and beat five of us up.
- 19 2. They filmed this and broke one guys jaw, beat us all up bad,
 all while filming us being beaten.
- 20 3. Three (3) people were let go.
- 21 4. Myself, and another of the five (5) people beaten was
 incarcerated.
- 22 5. I was told I needed to plead guilty and was very afraid I
 would be beaten badly again if I tried to go to trial.
- 23 6. At an entirely different location the police and I.C.E. police
 acting in concert busted another guy who was also let go.
- 24 7. That guy had a gun and both myself and the other guy who is
 in here, our sentences were enhanced by a gun that I never
 touched, nor used nor had a single thing to do with.
- 25 8. The P.S.R./P.S.I. report unlawfully enhanced my sentence from
 a base level of 12 to a level of 20, an 8 point upward departure
 over a gun I had 0 to do with.
- 26 9. The gun was a false charge, not an element in my crime yet I
 do an enhanced and unconstitutional sentence over it.
- 27 10. This is very unfair, unjust, unconstitutional, arbitrary,
 capricious and therefore all unlawful.
- 28 11. How can justice allow my incarceration as a result of an
 ugly filmed unlawful beating? I am multiply punished unlawfully.

1 **II. Discussion**

2 **A. Respondent contends that the section 2255 motion**
3 **must be denied because Movant waived his right to appeal or**
4 **collaterally attack his conviction and sentence.**

5 The plea agreement signed by Movant expressly waived
6 his right to raise on appeal or collaterally attack any matter
7 pertaining to Movant's conviction and sentence if the sentence
8 imposed was consistent with the written terms of the agreement.
9 See Docket No. 94 (2:04 CR 0112-2 PHX JAT). As stated supra,
10 the plea agreement provides:

11 Except as expressly provided for elsewhere in
12 this agreement, defendant waives the right to
13 withdraw from the plea agreement and agrees
14 to be sentenced according to its terms.
15 Defendant hereby waives any right to appeal
16 or collaterally attack any matter pertaining
17 to this prosecution and sentence if the
18 sentence imposed is consistent with the terms
19 of this agreement....

20 The sentence imposed on Movant was consistent with the
21 terms of the plea agreement, i.e., Movant received a sentence of
22 27 months imprisonment. The sentence was in accordance with the
23 plea agreement and, therefore, Movant waived his right to
24 collaterally attack his conviction and sentence. Because Movant
25 waived his rights to bring this action, the section 2255 motion
26 may be summarily denied. See Mabry v. Johnson, 467 U.S. 504,
27 508-09, 104 S. Ct. 2543, 2546-47 (1984) ("It is well settled
28 that a voluntary and intelligent plea of guilty made by an
accused person, who has been advised by competent counsel, may
not be collaterally attacked."); United States v. Jeronimo, 398
F.3d 1149, 1157 (9th Cir. 2005) (reaching this conclusion in the
context of a direct appeal wherein the defendant waived his
right to directly appeal or collaterally attack his conviction

1 and sentence in a plea agreement); United States v. Bolinger,
 2 940 F.2d 478, 480-81 (9th Cir. 1991). See also Williams v.
 3 United States, 396 F.3d 1340, 1342 (11th Cir. 2005).⁵

4 However, some federal courts have concluded that a plea
 5 agreement which waives the right to file a direct appeal or a
 6 section 2255 motion is not enforceable if the waiver was
 7 involuntary or if the defendant's counsel was ineffective in
 8 negotiating the agreement. See, e.g., Jeronimo, 398 F.3d at
 9 1156 (concluding that the court did not have jurisdiction to
 10 consider the appeal of a defendant who had waived this right in
 11 a plea agreement because the agreement was knowing and voluntary
 12 on its face, stating: "A defendant's waiver of his appellate
 13 rights is enforceable if (1) the language of the waiver
 14 encompasses his right to appeal on the grounds raised, and (2)
 15 the waiver is knowingly and voluntarily made"); United States v.
 16 White, 307 F.3d 336, 343 (5th Cir. 2002); United States v.

17
 18 ⁵ In Williams, the Eleventh Circuit states:

19 [E]very Circuit to have addressed the issue has held that a valid
 20 sentence-appeal waiver, entered into voluntarily and knowingly,
 21 pursuant to a plea agreement, precludes the defendant from
 22 attempting to attack, in a collateral proceeding, the sentence
 23 through a claim of ineffective assistance of counsel during
 24 sentencing. See United States v. White, 307 F.3d 336, 341-44
 25 (5th Cir. 2002); Garcia-Santos v. United States, 273 F.3d 506,
 26 508-09 (2d Cir. 2001); Davila v. United States, 258 F.3d 448,
 27 451-52 (6th Cir. 2001); United States v. Cockerham, 237 F.3d
 28 1179, 1183-87 (10th Cir. 2001), cert. denied, 534 U.S. 1085, 122
 S.Ct. 821, 151 L.Ed.2d 703 (2002); Mason v. United States, 211
 F.3d 1065, 1069-70 (7th Cir. 2000)... We are persuaded by the
 foregoing consistent line of authority from our sister Circuits
 on this issue, particularly since a contrary result would permit
 a defendant to circumvent the terms of the sentence-appeal waiver
 simply by recasting a challenge to his sentence as a claim of
 ineffective assistance, thus rendering the waiver meaningless.

396 F.3d at 1342.

1 Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001) (concluding that
2 a collateral attack alleging ineffective assistance of counsel
3 in negotiating a plea agreement may be brought notwithstanding
4 a waiver of this right in the agreement, stating: "Such
5 agreements waiving the right to appeal are subject to certain
6 exceptions, including where the agreement was involuntary or
7 unknowing, where the court relied on an impermissible factor
8 such as race, or where the agreement is otherwise unlawful.");
9 Bridgeman v. United States, 229 F.3d 589, 591 (7th Cir. 2000).
10 Because Movant asserts that his counsel was ineffective and
11 implies that he did not knowingly and voluntarily enter into the
12 agreement, the Court will discuss the merits of these
13 contentions.

14 **B. Voluntariness of plea agreement**

15 To determine the validity of a guilty plea, the Court
16 must ascertain whether the plea represented a voluntary and
17 intelligent choice among the alternative courses of action open
18 to the defendant. See Hill v. Lockhart, 474 U.S. 52, 56, 106 S.
19 Ct. 366 (1985).

20 In the plea agreement itself and at the proceeding
21 regarding entry of the guilty plea, Movant was informed that, by
22 entering the plea agreement, he was giving up his right to
23 appeal his conviction and sentence and to collaterally attack
24 his conviction and sentence. Response, Exh. D. Movant
25 indicated at those times that he knew he was relinquishing these
26 rights by entering the plea agreement. Id., Exh. D. When
27 Movant entered his guilty plea, the Court concluded that Movant
28 was knowingly and voluntarily entering a guilty plea, and that

1 Movant was competent to enter that plea. Id., Exh. D.

2 Movant's contemporaneous statements regarding his
3 understanding of the plea agreement carry substantial weight in
4 determining if his entry of a guilty plea was knowing and
5 voluntary. See United States v. Mims, 928 F.2d 310, 313 (9th
6 Cir. 1991); United States v. Walker, 160 F.3d 1078, 1096 (6th
7 Cir. 1998) ("a straightforward and simple 'Yes, your Honor' is
8 sufficient to bind a defendant to [the] consequences [of a plea
9 agreement]"). The Court may properly credit a defendant's
10 testimony at a hearing regarding entry of a guilty plea over any
11 subsequent declarations to the contrary. See United States v.
12 Castello, 724 F.2d 813, 815 (9th Cir. 1984). Because Movant was
13 adequately informed of the consequences of his plea, his guilty
14 plea can be considered voluntary and knowing. See Boykin v.
15 Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969).
16 Because Movant stated at the time of his guilty plea that the
17 plea was knowing and voluntary, the Court concludes that the
18 plea was voluntary and made intelligently. See Chizen v.
19 Hunter, 809 F.2d 560, 562 (9th Cir. 1986); United States v.
20 Kamer, 781 F.2d 1380, 1383 (9th Cir. 1986). See also United
21 States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987) ("Solemn
22 declarations in open court carry a strong presumption of
23 verity").

24 **C. Movant asserts he is entitled to relief because he**
25 **was deprived of the effective assistance of counsel.**

26 Movant asserts that he was deprived of his right to the
27 effective assistance of counsel.

28 A defendant who enters a guilty plea on the advice of

1 counsel may attack the voluntary and intelligent character of
2 the plea by showing that counsel acted incompetently by advising
3 defendant to accept the plea. See Jeronimo, 398 F.3d at 1156
4 n.4⁶; Shah v. United States, 878 F.2d 1156, 1156 (9th Cir. 1989).
5 To establish that counsel was ineffective during plea
6 proceedings, the two-part test stated in Strickland v.
7 Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) is applied.
8 See Hill, 474 U.S. at 59, 106 S. Ct. at 370. The defendant must
9 show that counsel's advice as to the consequences of the plea
10 was not within the range of competence demanded of criminal
11 attorneys and that, but for counsel's advice, he would not have
12 pleaded guilty. Id., 474 U.S. at 58-59, 106 S. Ct. at 369-70;
13 Doganieri v. United States, 914 F.2d 165, 168 (9th Cir. 1990).

14 Movant stated in his plea agreement and at the hearing
15 regarding the entry of his guilty plea that he was satisfied
16 with his counsel's representation. Additionally, given the
17 strength of the case against Movant and the number of felonies
18 on which Movant was indicted, it is unlikely that Movant would
19 have gone to trial and risked the imposition of a guidelines

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21 ⁶

22 "We leave open the possibility that [the defendant] might
23 raise his ineffective assistance argument on federal habeas
24 procedure, through a § 2255 motion, notwithstanding that
25 [his] appeal waiver covered 'all his waivable statutory
26 rights to file a petition pursuant to 28 U.S.C. § 2255
27 challenging the length of his sentence.'
28 Although a defendant may waive the statutory right to file
a § 2255 petition 'challenging the length of his sentence,'
we do not decide whether such language would necessarily
encompass a claim challenging the knowing and voluntary
nature of the plea agreement (and accompanying waiver of §
2255 rights). Further, we do not decide whether even an
express waiver of all § 2255 rights could be enforced to
preclude an ineffective assistance claim implicating the
voluntariness of the waiver itself."

1 sentencing range of 235 to 293 months in prison, or a possible
2 life sentence if convicted on all of the charges,⁷ rather than
3 entering a guilty plea providing for a maximum sentence of
4 approximately 2 years imprisonment. The plea agreement resulted
5 in the dismissal of five other charges for which Movant was
6 indicted and provided that the prosecution would recommend both
7 a downward departure from, and a reduction in, the applicable
8 sentencing guideline range.

9 The plea agreement was beneficial to Movant because,
10 had he gone to trial and been convicted of all of the counts in
11 the indictment, Movant's term of imprisonment was likely to be
12 much greater than the 2 years imposed by the Court. Therefore,
13 Movant's counsel was not incompetent for recommending that
14 Movant accept the terms of the plea agreement. Accordingly,
15 Movant offers no reason why, but for counsel's advice, he would
16 have rejected the plea agreement and proceeded to trial.

17 Movant has not averred how counsel's advice to accept
18 the plea agreement was deficient nor has Movant established a
19 reasonable probability that, but for his counsel's advice, he
20 would have proceeded to trial. Therefore, Movant is not
21 entitled to relief pursuant to section 2255 on the basis of his
22 claim that he was deprived of the ineffective assistance of
23 counsel in his plea proceedings.

24 **III. Conclusion**

25 Movant waived his right to collaterally attack his
26 sentence in a plea agreement and, therefore, the Court may
27

28 ⁷ See Response, Exh. B at 12.

1 dismiss this action without addressing the merits of Movant's
2 claims for relief. Additionally, Movant has not established
3 that his plea agreement was unknowingly or involuntarily made,
4 and Movant has not established that he was deprived of the
5 effective assistance of counsel in his plea proceedings,
6 rendering his plea agreement unknowing or involuntary.

7
8 **IT IS THEREFORE RECOMMENDED** that Mr. Morales Renteria's
9 Motion to Vacate, Set Aside, or Correct Sentence, be **denied and**
10 **dismissed with prejudice.**

11 This recommendation is not an order that is immediately
12 appealable to the Ninth Circuit Court of Appeals. Any notice of
13 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
14 Procedure, should not be filed until entry of the district
15 court's judgment.

16 Pursuant to Rule 72(b), Federal Rules of Civil
17 Procedure, the parties shall have ten (10) days from the date of
18 service of a copy of this recommendation within which to file
19 specific written objections with the Court. Thereafter, the
20 parties have ten (10) days within which to file a response to
21 the objections. Failure to timely file objections to any
22 factual or legal determinations of the Magistrate Judge will be
23 considered a waiver of a party's right to de novo appellate
24 consideration of the issues. See United States v. Reyna-Tapia,
25 328 F.3d 1114, 1121 (9th Cir.) (en banc), cert. denied, 540 U.S.
26 900 (2003). Failure to timely file objections to any factual or
27 legal determinations of the Magistrate Judge will constitute a
28 waiver of a party's right to appellate review of the findings of

1 fact and conclusions of law in an order or judgment entered
2 pursuant to the recommendation of the Magistrate Judge.

3 DATED this 8th day of December, 2005.

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Edward C. Voss
United States Magistrate Judge