

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Lucille Leonard,  
Movant/Defendant,  
vs.  
United States of America,  
Respondent/Plaintiff.

CV 19-08067-PCT-DGC (MHB)  
CR 15-08075-PCT-DGC

**REPORT AND RECOMMENDATION**

TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

On March 4, 2019, Movant Lucille Jean Leonard filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“2255 motion”). (Doc. 1.) That 2255 motion was denied with leave to amend. (Doc. 3.) On May 3, 2019, Movant filed an Amended 2255 motion. (Doc. 4.) On October 1, 2019, Respondent, the United States of America, filed a Response. (Doc. 7.) Movant has not filed a Reply.

In Movant’s 2255 motion, she sets forth three grounds for relief: (1) ineffective assistance of trial counsel in that she did not adequately advise Movant of the consequences of her plea agreement and misadvised regarding her ability to receive “good time” credits to her sentence, (2) Movant’s participation was minimal, and her sentence was improperly based upon conduct for which she was not convicted, and (3) the Court erred in applying a 2-level guideline firearm enhancement. (Doc. 4 at 5-7.) Respondent asserts Movant’s claims are waived or lack merit.

## BACKGROUND

Movant was charged by a Second Superseding Indictment on October 12, 2016, along with four co-defendants, with one count of RICO Conspiracy. (CRDoc. 131.<sup>1</sup>) The conspiracy involved allegations that the defendants engaged in racketeering activity to include murder, robbery, arson, kidnapping, drug trafficking, obstruction of justice and witness tampering. (*Id.*) Movant subsequently entered into a plea agreement with the Government, in which she agreed to plead guilty to Count One, the RICO Conspiracy count. (CRDoc. 436.) Movant agreed to be sentenced to a term of imprisonment not to exceed 120 months. (*Id.* at 2.) The agreement provided that the parties would be “free to argue for whatever Sentencing Guidelines calculations and adjustments they deem appropriate.” (*Id.* at 4.) The plea agreement contained a “waiver of defenses and appeals rights” paragraph, which provided that Movant waived any right to “file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, [] the entry of judgment against the defendant, or any aspect of defendant’s sentence,” to include the right to file a habeas petition pursuant to 28 U.S.C. § 2255. (*Id.* at 5.) As is applicable here, the waiver did not apply to a claim by defendant of ineffective assistance of counsel. (*Id.*)

In the “approval and acceptance” section of the plea agreement, Movant indicated she (1) read and understood the agreement, (2) that she understood the nature and range of her possible sentence and that the ultimate sentence would be determined by her sentencing judge after consulting the sentencing guidelines, (3) that she entered the agreement voluntary and without any force or promises outside of the agreement, (4) that any promises made to her, including any sentencing guideline promises, not contained in the agreement are null and void and have no affect, and (5) that she was satisfied with her attorney’s performance. (CRDoc. 436 at 11-12.) Movant signed the agreement on November 14, 2017. (*Id.*)

On November 21, 2017, Movant appeared before presiding Judge Campbell for a change of plea proceeding. (Doc. 7, Exh. A.) Judge Campbell reviewed the plea agreement

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<sup>1</sup>“CRDoc.” refers to docket entries in the underlying criminal case.

1 with Movant. He confirmed that she read it, understood it, discussed it with her attorney, and  
2 that she was satisfied with the assistance that her lawyer had given her. (Id. at 3-6.) Movant  
3 confirmed that the plea agreement contained everything agreed to between her and the  
4 Government, and that there were no outside promises. (Id. at 5.) After explaining Movant's  
5 right to not plead guilty and have a jury trial, Movant stated she understood that she would  
6 be giving up these rights by pleading guilty, and that this is what she wanted to do. (Id. at  
7 8.)

8 The Court also discussed the appeal waiver paragraphs of her plea agreement, and  
9 Movant confirmed she understood that she was giving up her right to appeal or collaterally  
10 attack the judgment and sentence, and that if the Court accepted the plea agreement, there  
11 would be "no other court [Movant could] go to" to change the sentence. (CRDoc. 463 at 8.)  
12 With regard to the sentencing stipulation, the Court advised Movant that it would consider  
13 the sentencing guidelines, but that the court was not bound by them, and that the Court could  
14 sentence Movant to any sentence up to the 120-month cap. (Id. at 10-11.) Movant indicated  
15 that she understood. (Id.)

16 Finally, the Court reviewed the factual basis set forth in the plea agreement, which  
17 constituted over four pages. Movant confirmed she had read those facts, spoke to her  
18 attorney about them, and agreed that they are "true and correct." (CRDoc. 463 at 15.) The  
19 Court then discussed specifically some of the paragraphs to ensure that a factual basis existed  
20 for the guilty plea. Movant agreed that (1) she and other individuals named were members  
21 or associates of the Red Skin Kings gang, (2) that the members of the gang had a common  
22 purpose that included violence, threats of violence, and intimidation to promote the gang, and  
23 enhanced its activities through firearms, threatening and intimidating, distributing controlled  
24 substances, and by using violence and fear to collect drug debts, (3) that Movant and other  
25 members sold methamphetamine and that various gang members collected drug debts owed  
26 to other members of the gang to include Movant, (4) that during the collection efforts, guns  
27 would be displayed, brandished or discharged and that some debtors would be beaten in an  
28 effort to collect payments owed to Movant, (5) that Movant received a truck stolen by

another gang member, and (6) that Movant traveled with others to a rival drug dealer's residence where gang members committed criminal damage to the residence. (Id. at 15-20.)

Movant appeared for sentencing on May 9, 2018. (CRDoc. 464.) The Court determined that Movant's guideline range, based upon an offense level of 40 and a criminal history category III, was 360-months to life, but that since the statutory maximum was 20 years, Movant's guideline range was 240 months. (Id. at 5.) Movant's counsel then made statements on her client's behalf, in particular to emphasize her client's involvement in the gang activity was limited to "witness tampering and drug trafficking." (Id. at 25.) In Movant's sentencing colloquy, she apologized for her choices, took full responsibility, and expressed deep regret and shame. (Id. at 27.) The Court then sentenced Movant to 120 months, explaining:

Ms. Leonard, in arriving at the sentence in your case, I am to consider the same factors that I described when sentencing your son, and I have considered those factors.

Your case is also a case which could justify a higher sentence than ten years. You weren't committing the violence, but you certainly facilitated it. And under the law, that makes you responsible as well.

In fact, if we were to go to trial, under the law you could be held liable for everything the gang did that you helped facilitate. So a much higher sentence than the 120-month cap that the government has agreed to would be an appropriate sentence as well in this case.

But in this case I also feel I should defer to the prosecutor's judgment. I think 120 months is sufficient to reflect the crimes that you have pled guilty to of drug distribution and interfering with a witness.

(Id. at 30.)

## CLAIM ONE

### INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel is cognizable as a claim for denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so

1 undermined the proper functioning of the adversarial process that the proceeding cannot be  
2 relied upon as having produced a just result. See id.

3 To prevail on a claim of ineffective assistance of counsel, Movant must satisfy a two  
4 prong test, demonstrating: (1) deficient performance, such that counsel's actions were outside  
5 the wide range of professionally competent assistance, and (2) that Movant was prejudiced  
6 by reason of counsel's actions. See id. at 686-90. "Failure to satisfy either prong of the  
7 *Strickland* test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805  
8 (9th Cir. 2002). Indeed, it is unnecessary for a federal court considering a habeas ineffective  
9 assistance claim to address the prejudice prong of the *Strickland* test if the petitioner cannot  
10 establish incompetence under the first prong. See Siripongs v. Calderon, 133 F.3d 732, 737  
11 (9th Cir. 1998). Similarly, a court need not determine whether counsel's performance was  
12 deficient before examining the prejudice suffered by the defendant as the result of the alleged  
13 deficiencies. See Strickland, 466 U.S. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 &  
14 n.3 (9th Cir. 1995) (approving district court's refusal to consider whether counsel's conduct  
15 was deficient after determining that petitioner could not establish prejudice).

16 There is a strong presumption that counsel's conduct falls within the wide range of  
17 reasonable assistance. See Strickland at 689-90. "A fair assessment of attorney performance  
18 requires that every effort be made to eliminate the distorting effects of hindsight, to  
19 reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct  
20 from counsel's perspective at the time." Id. at 689. Review of counsel's performance is  
21 extremely limited. Acts or omissions that "might be considered sound trial strategy" do not  
22 constitute ineffective assistance of counsel. Id. The prejudice component "focuses on the  
23 question whether counsel's deficient performance renders the result of the trial unreliable or  
24 the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

25 Because she pled guilty, Movant can only challenge her attorney's effectiveness with  
26 regard to advice given that affected the voluntariness of her plea. Tollett v. Henderson, 411  
27 U.S. 258, 267 (1973). "A defendant who pleads guilty upon the advice of counsel may only  
28 attack the voluntary and intelligent character of his guilty plea by showing that the advice he

1 received from counsel was not within the range of competence demanded of attorneys in  
2 criminal cases.” United States v. Signori, 844 F.2d 635, 638 (9<sup>th</sup> Cir. 1998).

3 Movant’s sworn statement carries a “strong presumption of verity,” and “constitute  
4 a formidable barrier in any subsequent collateral proceeding.” Blackledge v. Allison, 431  
5 U.S. 63, 74 (1977). “The subsequent presentation of conclusory allegations unsupported by  
6 specifics is subject to summary dismissal, as are contentions that in the face of the record are  
7 wholly incredible.” Id.

8 Movant’s conclusory allegation that her attorney did not advise her sufficiently  
9 regarding the consequences of her plea agreement are belied by the record of the plea and  
10 sentencing proceedings. Movant was asked several questions intended to ensure that she  
11 fully understood her plea agreement, and fully understood the sentence she faced. She  
12 answered affirmatively to all of those questions. She also affirmed that she was satisfied  
13 with the performance of her counsel. Movant was a 48-year old woman at the time of her  
14 guilty plea who had some post-high school education, and had prior felony and misdemeanor  
15 convictions for which she served time in custody. (CRDoc. 424; PSR ¶¶ 3, 85-87, 103.)  
16 Movant provides no explanation for why she would be disingenuous with the Court or how  
17 she could have misunderstood the Court’s clear advisements. Movant fails to demonstrate  
18 that her attorney’s performance was outside the wide range of professionally competent  
19 assistance.

20 Regarding Movant’s claim that her attorney was ineffective in failing to advise her  
21 she would not receive “good time credits,” this claim too is belied by the record. Movant is  
22 receiving “good conduct time” while incarcerated in the Bureau of Prisons, has already  
23 earned 108 days off of her sentence, and is projected to earn a total of 470 days over the  
24 course of her sentence. (Doc. 7, Exh. E.)

## 25 CLAIM TWO

### 26 SENTENCE BASED UPON IMPROPER FACTORS

27 Movant claims that her sentence was improperly based upon conduct for which she  
28 was not convicted. She asserts that:

Petitioner/Defendant participation in the offense was minimal and the Government dismissed all remaining counts, which the court erred in its recognition of the relevant conduct that the defendant “presumption of innocence was restored on uncharged conduct. When there is not charged the conduct of others (co-defendants) is not a relevant factor during sentence. The defendant was less capable than any other participant in the offense did not gain momentarily from the offense nor did she stand to gain or benefit, profit or enjoy the fruits of the tree.

(Doc. 4 at 6.)

Movant’s plea agreement contained an appeal and collateral attack waiver provision, that advised her that this waiver included the right to challenge “any aspect of [her] sentence.” Movant affirmed in court that she understood this provision. The waiver, as stated in the plea agreement “shall result in the dismissal of any . . . collateral attack, or other motion the defendant might file challenging the conviction . . . or sentence in this case.”

(Doc. 7, Exh. C at 5.)

With limited exceptions not relevant here based on the claims raised in Movant’s § 2255 Motion, a defendant may waive the statutory right to bring a § 2255 motion if he knowingly and voluntarily signs a plea agreement that contains an express waiver of that right. See United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993); see also United States v. Charles, 581 F.3d 927, 931 (9th Cir. 2009) (a “defendant’s waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made” (internal quotation omitted)); United States v. Nunez, 223 F.3d 956, 959 (9<sup>th</sup> Cir. 2000) (a defendant may waive her right to file a 2255 motion, if she does so expressly).

In her plea agreement, and again on the record, Movant expressly waived her right to raise this issue in a 2255 motion. Notwithstanding her waiver, Movant’s claims regarding her “minimal involvement” are belied by the facts set forth in her plea agreement which she affirmed during the plea proceedings. She admitted her association with the members of the gang, her knowledge of gang member collection of drug debts owed to her, admitted that she accompanied other gang members on illegal ventures, and acknowledged that firearms were



1 sometimes utilized during debt collection activity. Movant's second claim in her 2255  
2 motion should be dismissed as having been waived in her plea agreement, and in the  
3 alternative, as lacking merit.

### 4 CLAIM THREE

#### 5 FIREARM ENHANCEMENT

6 In a similar vein, Movant asserts that she should not have received a 2-level guideline  
7 enhancement for "possession of a firearm or [] firearm in the furtherance of felony," as she  
8 did not "plea to any offense pertaining to a firearm." (Doc. 4 at 7.) This claim is also  
9 precluded by Movant's appeal waiver. In any event, Movant admitted in her plea agreement  
10 and on the record in court sufficient facts to support the enhancement, which provides that  
11 an offense level should be increased by two levels "[i]f a dangerous weapon (including a  
12 firearm) was possessed" during a drug-trafficking offense.

13 Movant admitted in her sworn statement that "guns would be displayed, brandished  
14 and discharged" when gang members collected drug debts, to include drug debts owed to  
15 Movant. Movant's third claim in her 2255 motion should be dismissed as having been  
16 waived, and in the alternative, as lacking merit.

### 17 CONCLUSION

18 Movant's claims fail on the merits, or are precluded from review by the appeal waiver  
19 in Movant's plea agreement, and therefore Movant's 2255 motion should be denied and  
20 dismissed with prejudice.

21 **IT IS THEREFORE RECOMMENDED** that Movant's Amended Motion to  
22 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. §2255, (CRDoc. 461; CVDoc. 4),  
23 be denied and dismissed with prejudice.

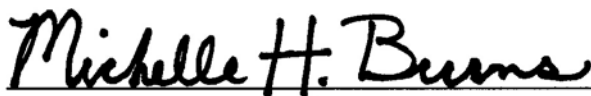
24 **IT IS FURTHER RECOMMENDED** that the Court deny a Certificate of  
25 Appealability and leave to proceed in forma pauperis on appeal because Movant has not  
26 made a substantial showing of the denial of a constitutional right.

27 This recommendation is not an order that is immediately appealable to the Ninth  
28 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of



1 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
2 parties shall have fourteen days from the date of service of a copy of this recommendation  
3 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
4 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
5 days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of  
6 Civil Procedure for the United States District Court for the District of Arizona, objections  
7 to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure  
8 timely to file objections to the Magistrate Judge's Report and Recommendation may result  
9 in the acceptance of the Report and Recommendation by the district court without further  
10 review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure  
11 timely to file objections to any factual determinations of the Magistrate Judge will be  
12 considered a waiver of a party's right to appellate review of the findings of fact in an order  
13 or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72,  
14 Federal Rules of Civil Procedure.

15 DATED this 20<sup>th</sup> day of April, 2020.

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18 Michelle H. Burns  
19 United States Magistrate Judge  
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