No.

IN THE SUPREME COURT OF THE UNITED STATES

JUAN RODRIGUEZ,

Petitioner

v.

UNITED STATES,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX

NOT FOR PUBLICATION

FILED

DEC 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN CARLOS RODRIGUEZ, AKA Joel Castillo, AKA Shorty,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-56680

D.C. Nos. 2:16-cv-05987-MWF
2:13-cr-00542-MWF-4

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted October 15, 2019
Pasadena, California

Before: WARDLAW and COLLINS, Circuit Judges, and SETTLE,** District Judge.

Juan Carlos Rodriguez ("Rodriguez") appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his 2015 conviction and sentence for conspiracy to possess with intent to distribute and to distribute at least 50 grams of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

methamphetamine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. We have jurisdiction under 28 U.S.C. § 2253. The district court did not err when it summarily denied Rodriguez's motion. Therefore, we affirm.[1]

The district court did not err when it denied Rodriguez's motion for lack of prejudice. *Womack v. Del Papa*, 497 F.3d 998, 1001 (9th Cir. 2007) (reviewing the district court's denial of a section 2255 motion de novo). Rodriguez contends that his guilty plea was not voluntary because his lawyer misrepresented that his federal sentence would run entirely concurrently with a state sentence he was already serving based on the same criminal acts. "[A] defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" constituted ineffective assistance—that is, that the advice constituted deficient performance and prejudiced the defense. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *see also id.* at 58–59.

Even if Rodriguez's attorney did represent that the two sentences would run entirely concurrently, Rodriguez fails to demonstrate that he was prejudiced by this advice. *Womack*, 497 F.3d at 1003 (citing *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990) (holding prejudice not established when the plea

[1] In addition, the government's unopposed motion to supplement the record on appeal, Docket No. 23, is granted.

agreement and plea colloquy "alerted [the defendant] to the potential consequences of his guilty plea")). The district judge advised Rodriguez during the Rule 11 plea colloquy that he was not guaranteed a concurrent sentence and that it was "up in the air how any federal sentence might run" with the state sentence. Accordingly, he fails to demonstrate the requisite prejudice.

Rodriguez's argument that his plea agreement was vague and misleading because it failed to specify a date when the "undischarged portion" of the sentence would begin to run does not change this result. A federal sentence begins to run no earlier than the date it is imposed. *See* 18 U.S.C. § 3585(a). In this case, the district court imposed Rodriguez's sentence on August 6, 2015, which became the operative date for the Bureau of Prisons ("BOP") to determine the remaining, or undischarged, portion of his state sentence.[2] Moreover, the district judge informed Rodriguez at sentencing that the BOP would determine the credit he would receive for the state sentence, and Rodriguez did not object or seek to withdraw his plea.

For these same reasons, the district court did not abuse its discretion in

[2] Rodriguez's attorney did successfully move to continue the sentencing hearing five times, which had the practical effect of increasing the length of his overall incarceration by delaying the date on which his federal sentence would begin to run concurrently with the state sentence he was then serving. However, in his motion Rodriguez did not allege ineffective assistance based on his attorney's decisions to continue the hearing, and the record reveals that the attorney reasonably requested most of the continuances to determine Rodriguez's eligibility for statutory sentencing relief.

denying Rodriguez's petition without an evidentiary hearing; the record conclusively shows that Rodriguez cannot establish prejudice. *Doganiere*, 914 F.2d at 168.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

Case Nos. **CV-16-05987-MWF** **Date: September 5, 2017**
CR-13-00542-MWF
Title: Juan Carlos Rodriguez -*v*- United States of America

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None Present	None Present

Proceedings (In Chambers): ORDER DENYING THE MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 [1]

Before the Court is Petitioner Juan Carlos Rodriguez's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (the "Section 2255 Motion"), filed on August 11, 2016. (Docket No. 1). Respondent the United States filed an Opposition on October 28, 2016. (Docket No. 8). Petitioner filed his Reply on March 31, 2017. (Docket No. 12).

The Court has reviewed and considered the papers on the Motion. The Section 2255 Motion is **DISMISSED.** Petitioner fails to show that his attorney's advice was unreasonable. Even if his attorney's advice had been unreasonable, Petitioner fails to establish prejudice.

I. BACKGROUND

The parties do not dispute the underlying facts. On January 31, 2011, Petitioner was arrested for possession and transportation of methamphetamine for sale, in violation of California Health and Safety Code sections 11378 and 11379(A). On January 24, 2012, Petitioner was sentenced to 36 months of probation and one day in jail. On August 2, 2013, Petitioner was named in the federal indictment associated with the underlying criminal case, No. CR 13-542-MWF, and charged with conspiracy,

21 U.S.C. § 846, for the same underlying conduct as led to his arrest on January 31, 2011. Petitioner was charged only with conspiracy, not an underlying substantive distribution offense. On August 6, 2013, Petitioner was arrested, and on August 7, 2013, he was ordered released on bond.

On May 14, 2014, Petitioner was arrested for violating the terms of his state probation, and on May 19 Petitioner's probation was revoked. Petitioner was sentenced to a term of 56 months in California State Prison.

On August 3, 2014, Petitioner signed a written plea agreement, promising to plead guilty on the federal conspiracy charge. (*See* Opp. Ex. A). The plea agreement included a provision stating that the prosecutor agreed "not to oppose defendant's request that any sentence imposed by the Court run concurrently to any ***undischarged portion*** of the 56-month sentence defendant is currently serving on a probation violation in the Superior Court of the State of California . . . ." (Ex. A at 3) (emphasis added). Petitioner certified that he had read the entire agreement and discussed it in sufficient detail with his attorney. (*Id.* at 15).

Petitioner was subsequently writted into federal custody. On September 4, 2014, Petitioner pleaded guilty pursuant to the plea agreement. On August 6, 2015, Petitioner was sentenced to the mandatory minimum sentence of 120 months' (10 years') imprisonment. (*See* Opp., Ex. B ("Judgment and Commitment Order")). At the sentencing hearing, neither party requested that Petitioner receive credit, pursuant to United States Sentencing Guideline § 5G1.3(b)(1), for the time that he had already served on the Superior Court sentence.

As contemplated by the plea agreement, the Court ordered Petitioner's sentence "to run concurrent with any ***undischarged term*** of imprisonment arising from" Petitioner's Superior Court sentence. (*Id.* at 1) (emphasis added). Petitioner's counsel did not object to the sentence as set out in the Judgment and Commitment Order.

II. DISCUSSION

"A federal prisoner who seeks to challenge the legality of confinement must generally rely on a § 2255 motion to do so." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). Section 2255 grants federal prisoners the right to bring a motion "to vacate, set aside or correct the sentence" on the ground that the "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

Petitioner contends that his guilty plea was not knowing or voluntary because he was "affirmatively misinformed" by his counsel "that his federal sentence would run concurrent with his state sentence[.]" (Pet. at 3). Petitioner additionally contends that he received ineffective assistance of counsel, in violation of the Sixth Amendment, because his counsel misadvised him regarding the running of his sentence, and failed to move for dismissal of the indictment for prejudicial pre-indictment delay and for double jeopardy. (Reply at 2).

"Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Ruiz*, 536 U.S. 622, 629 (2002). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). A defendant like Petitioner, "who pleads guilty upon the advice of counsel[,] 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was" objectively unreasonable under the circumstances, and that without the challenged advice, the defendant would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 56–59. That is, all of Petitioner's

claims must be evaluated under the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and as applied to the context of guilty pleas in *Hill*. *See also Hedlund v. Ryan*, 854 F.3d 557, 576 (9th Cir. 2017) (describing *Hill*'s application of *Strickland* to guilty pleas); *Lambert v. Blodgett*, 393 F.3d 943, 979 (9th Cir. 2004) (explaining that a defendant who pled guilty upon the advice of counsel "is limited to challenging his plea by demonstrating that the advice he received from counsel did not constitute effective representation").

Petitioner presents no evidence from which the Court could conclude that he was misinformed as to whether his federal sentence would run concurrently with his state sentence. The written plea agreement, which Petitioner certified he had read and understood, clearly stated only that the prosecution agreed "not to oppose defendant's request that any sentence imposed by the Court run concurrently to any ***undischarged portion*** of the 56-month sentence defendant is currently serving . . . ." (Opp., Ex. A at 3). By failing to discount the sentence imposed by the 15 months Petitioner had already served in state custody, while indicating that the federal sentence should run concurrently with the "undischarged term of imprisonment" resulting from the state conviction, the Court imposed exactly the terms contemplated by the plea agreement. Petitioner got exactly what he bargained for. He thus fails to show that he received any advice from his attorney that was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Nor was Petitioner's counsel's failure to move for dismissal of the indictment for prejudicial delay, or for double jeopardy, unreasonable under the circumstances. Indeed, counsel's failure to bring either motion was legally correct. The government charged Petitioner within the statute of limitations, and Petitioner presents no evidence that he suffered "actual, non-speculative prejudice" from the government's delay. *See United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989) (concluding defendant's claim that an earlier charge would have resulted in his serving concurrent sentences rather than consecutive sentences was "too speculative to establish actual prejudice"); *United States v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986) (same); *United States v. Ryder*, 121 F.3d 719 (9th Cir. 1997) (unpublished) ("Nor does the mere possibility

that the delay deprived Ryder of a concurrent sentence establish prejudice."). And a motion to dismiss the indictment on double jeopardy grounds would not have succeeded, because "[a] substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes." *United States v. Saccoccia*, 18 F.3d 795, 798 (9th Cir. 1994); *United States v. Woods*, 652 F. App'x 559, 561 (9th Cir. 2016) (same). Petitioner's attorney's advice was thus objectively reasonable.

Moreover, Petitioner fails to provide any convincing evidence of prejudice. There is no indication, beyond Petitioner's own conclusory assertion, that Petitioner would have elected not to plead guilty and instead would have gone to trial if he had known that his sentence would not be reduced by an additional 15 months to account for the time he had already served in state custody. Indeed, Petitioner received the statutory minimum sentence. He makes no argument that he would have expected to qualify for a sentence lower than that had he withdrawn his plea and gone to trial. This is not sufficient to meet the prejudice requirement of *Strickland* and *Hill*.

Finally, Petitioner requests an evidentiary hearing. The Court need not grant Petitioner an evidentiary hearing if "the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 225. Because Petitioner has failed to raise any disputed facts requiring resolution in an evidentiary hearing, his request is **DENIED.**

III. CONCLUSION

For the foregoing reasons, the Section 2255 Motion is **DISMISSED.**

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.