

APPENDIX

FILED

DEC 14 2017

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**ABEL HERIBERTO FABIAN-
BALTAZAR, AKA Abel Heriberto
Fabia Baltazar,**

Defendant-Appellant.

No. 15-16115

D.C. Nos. 1:14-cv-00984-AWI
1:13-cr-00032-AWI-
BAM-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted December 4, 2017
San Francisco, California

Before: **KOZINSKI** and **HURWITZ**, Circuit Judges, and **KEELEY**,**
District Judge.

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

** The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

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The district court didn't err by enforcing Fabian-Baltazar's express waiver of his right to bring a 28 U.S.C. § 2255 petition. See United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993). "[A] plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2255 is unenforceable with respect to an IAC claim that challenges the voluntariness of the waiver." Washington v. Lampert, 422 F.3d 864, 871 (9th Cir. 2005). But, even construed liberally, Fabian-Baltazar's pro se habeas petition didn't challenge the voluntariness of his collateral appeals waiver. See Estelle v. Gamble, 429 U.S. 97, 106 (1976).

AFFIRMED.

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7 **IN THE UNITED STATES DISTRICT COURT FOR THE**
8 **EASTERN DISTRICT OF CALIFORNIA**
9

10 **ABEL HERIBERTO FABIAN-**
11 **BALTAZAR,**

12 **Plaintiff,**

13 **v.**

14 **THE UNITED STATES OF AMERICA,**

15 **Defendant.**

CASE NO. 1:13-CR-00032-AWI-BAM

**ORDER DENYING PETITIONER'S
MOTION TO CORRECT, VACATE OR
SET ASIDE SENTENCE PURSUANT TO
28 U.S.C. SECTION 2255**

(Doc. 29)

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19 **I. INTRODUCTION**

20 This matter arises from the guilty plea of Petitioner Abel Heriberto Fabian-Baltazar
21 ("Petitioner"). Petitioner is currently incarcerated at the Taft Correctional Institution. Petitioner
22 brings a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. section 2255
23 based on ineffective assistance of counsel. Petitioner lists three grounds to support his claim for
24 ineffective assistance of counsel: (1) failure to file a notice of appeal after sentencing as expressly
25 requested by Petitioner, (2) failure to object to the Government's breach of the plea agreement and
26 the safety valve reduction, and (3) failure to file a motion to suppress evidence seized in an
27 unlawful search. For the following reasons, Petitioner's motion pursuant to section 2255 will be
28 denied.

II. FACTS AND PROCEDURAL BACKGROUND

On December 18, 2012, near Madera, California, California Highway Patrol (“CHP”) officers conducted a traffic stop on a 2009 Honda Civic. The driver was identified as Abel Heriberto Fabian-Baltazar on his Mexican driver’s license and passport. The CHP service canine alerted the officers to the odor of narcotics. Petitioner then consented to a search of the vehicle. A search of the trunk revealed many scented items including Bounce fabric sheets, dish soap, bleach and a bag of laundry detergent, which officers believed were being utilized as masking agents. The trunk also contained a box of Fresh Step kitty litter, which when picked up and shaken, did not feel like kitty litter, but instead bulky items shifted inside the box. Upon opening the litter box, officers found six separate Ziploc bags, all containing packaged quantities of methamphetamine. Petitioner was then placed under arrest. Officers seized the vehicle’s registration confirming that the vehicle was registered to Petitioner. Officers also found travel documents revealing that Petitioner had flown into San Jose, California, from Guadalajara, Mexico, on December 13, 2012, with intentions of returning to Mexico, on December 24, 2012.

Petitioner was charged with possession with intent to distribute methamphetamine in violation of Title 21 United States Code §§ 841(a)(1) and (b)(1)(A); and a forfeiture allegation pursuant to Title 21, United States Code § 853. On August 5, 2013, Petitioner and the Government entered a plea agreement in which the Petitioner pled guilty to Count One, possession with intent to distribute 50 grams or more of methamphetamine. Doc. 21 at 2:4-6. On December 16, 2013, Petitioner was sentenced to 120 months in prison. Doc. 27. On June 23, 2014, Petitioner filed this motion pursuant to 28 U.S.C. § 2255. Doc. 29. The motion is ripe for screening.

III. LEGAL STANDARD

Title 28 U.S.C. § 2255 provides, in pertinent part: “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence.” Habeas relief is available to correct errors of jurisdiction and constitutional error but a general “error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect

which inherently results in a complete miscarriage of justice.” United States v. Addonizio, 442 U.S. 178, 185 (1979).

Under Rule 4(b) of the Rules Governing section 2255 Proceedings, when a court receives a section 2255 motion, the court must initially screen it, and dismiss it summarily if it plainly appears that the moving party is not entitled to relief. See United States v. Quan, 789 F.2d 711, 715 (9th Cir.1986).

Courts must “construe pro se habeas filing liberally.” Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir.2003). Under Section 2255, “a district court must grant a hearing to determine the validity of a petition brought under that section, ‘[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.’” United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir.1994), quoting 28 U.S.C. § 2255. The court may deny a hearing if the petitioner's allegations, viewed against the record, fail to state a claim for relief or “are so palpably incredible or patently frivolous as to warrant summary dismissal.” United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir.1996), citations omitted. Mere conclusory statements or statements that are inherently incredible in a section 2255 motion are insufficient to require a hearing. United States v. Howard, 381 F.3d 873, 879 (9th Cir. 2004); United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir. 1980).

IV. DISCUSSION

A. Ineffective Assistance of Counsel

“The Sixth Amendment guarantees criminal defendants the effective assistance of counsel.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003). The Court “must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance. The [petitioner] bears the burden of showing ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed [petitioner] by the Sixth Amendment.’” Gonzalez v. Wong, F.3d 965, 987 (9th Cir. 2011).

To establish a constitutional violation for ineffective assistance of counsel actionable under section 2255, petitioner must demonstrate (1) a deficient performance by counsel, and (2) prejudice to petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v.

1 Jeronimo, 398 F.3d 1149, 1155 (9th Cir. 2005). To prove deficient performance of counsel, the
 2 petitioner must demonstrate that his attorney “made errors that a reasonably competent attorney
 3 acting as a diligent and conscientious advocate would not have made.” Butcher v. Marquez, 758
 4 F.2d 373, 376 (9th Cir. 1985). To show prejudice, petitioner must demonstrate that “there is a
 5 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
 6 would have been different.” Strickland, 466 U.S. 668 at 694. In the context of a plea bargain, the
 7 prejudice requirement is met by showing that, but for counsel’s alleged errors, the petitioner
 8 would have rejected the plea offer and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-
 9 59 (1985); United States v. Alvarez-Tautimez, 160 F.3d 573, 577 (9th Cir. 1998). A court
 10 addressing a claim of ineffective assistance of counsel need not address both prongs of the
 11 Strickland test if the petitioner’s showing is insufficient as to one prong; “[i]f it is easier to dispose
 12 of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be
 13 followed.” Strickland, 466 U.S. 668 at 697.

14 **1. Failure to File a Notice of Appeal**

15 Petitioner contends that trial counsel was ineffective for failing to file a “notice of appeal”
 16 with the Court after his sentence was imposed. A notice of appeal was not filed because Petitioner
 17 waived his right to appeal. Petitioner maintains that he had discussed an appeal both before and
 18 after his sentencing. Doc. 29 at 5.

19 Despite the petitioner having understood and subsequently having waived his right to
 20 appeal, the court in U.S. v. Sandoval-Lopez held that the petitioner retained the right to appeal.
 21 U.S. v. Sandoval-Lopez, 409 F.3d 1193, 1197 (9th Cir. 2005). The court held that a section 2255
 22 petitioner has a valid ineffective assistance of counsel claim when: (1) the petitioner can show that
 23 he or she asked that an appeal be filed on their behalf, and (2) that counsel failed to file a timely
 24 notice of appeal, despite having waived this right pursuant to a plea agreement. Id. at 1198. These
 25 two requirements show deficient performance by counsel and prejudice to the petitioner as
 26 specified by the Strickland test. The court in Roe v. Flores-Ortega held that the deficient
 27 performance prong of the Strickland test is satisfied when “there is reason to think either (1) that a
 28 rational defendant would want to appeal (for example, because there are nonfrivolous grounds for

1 appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was
2 interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). The Roe court also held
3 that to show prejudice, the petitioner “must demonstrate that there is a reasonable probability that,
4 but for counsel’s deficient failure to consult with him about an appeal, he would have timely
5 appealed.” Roe, 528 U.S. 470 at 484. The petitioner does not need to show that meritorious
6 grounds for appeal exist, but simply that the petitioner promptly expressed a desire to appeal, and
7 lost the opportunity to file the appeal. Sandoval-Lopez, 409 F.3d 1193 at 1196.

8 The Petitioner states in his moving papers that “but for his attorney’s deficient
9 performance, he would have taken an appeal....” Doc. 29 at 8. Accordingly, Petitioner alleges
10 facts that, if true, meet the requirements set out in Sandoval-Lopez.

11 However, this case is distinguishable from Sandoval-Lopez in one critical respect. In
12 Sandoval-Lopez, Sandoval-Lopez merely waived his right to appeal in his written plea agreement.
13 Sandoval-Lopez, 409 F.3d 1193 at 1194. There were no facts showing that Sandoval-Lopez also
14 waived his right to challenge his conviction on collateral attack in his plea agreement. Here,
15 Petitioner waived his right to collateral attack in his plea agreement. Petitioner’s plea agreement
16 states, “The defendant also waives his right to challenge his conviction, sentence or the manner in
17 which it was determined in any post-conviction attack, including but not limited to a motion
18 brought under Title 28, United States Code, Sections 2241 or 2255.” Doc. 21 at 3:15-17.

19 The general rule is that a waiver cannot bar a claim that relates to the validity of the waiver
20 itself. United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993). Claims of ineffective
21 assistance of counsel often implicate the validity of plea agreements that are secured through the
22 efforts of the allegedly ineffective assistance of counsel, those claims are not normally considered
23 waived by the plea agreements. See United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994).
24 However, the Ninth Circuit has recognized that courts should enforce a waiver of the right to
25 collaterally review a conviction if “(1) the language of the waiver encompasses the defendant’s
26 right to [dispute] the grounds claimed..., and (2) the waiver is knowingly and voluntarily made.”
27 United States v. Ligon, 461 F.App’x 582, 583 (9th Cir. 2011) (quoting United States v. Nunez,
28 223 F.3d 956, 958 (9th Cir. 2000)). In United States v. Ligon, the court affirmed the district

1 court's dismissal of Ligon's petition because "Ligon knowingly and voluntarily waived his right to
 2 collaterally attack his ... conviction." Ligon, 461 F.App'x 582 at 583. Similarly, this Court has
 3 previously followed this reasoning and held that it is "reluctant to read Sandoval-Lopez to permit a
 4 district court to refuse to enforce an admittedly voluntary waiver of collateral review based on a
 5 finding that an issue may be meritorious [had it not been] waived." Loviano v. United States, 1:09-
 6 cr-00272, 2014 WL 3362210, *2 (E.D. Cal. July 8, 2014); see United States v. Barraza, 2014 WL
 7 3867423, *4-5 (E.D. Cal. 2014).

8 The section 2255 motion filed by Petitioner is a form of collateral relief encompassed by
 9 the plea agreement. In addition, Petitioner has made no claim in his section 2255 motion that the
 10 waiver of his right to collaterally attack his conviction and sentence was not knowingly and
 11 voluntarily made. Therefore, the Court finds that Petitioner knowingly and voluntarily entered into
 12 the plea agreement waiving his right to collateral attack, and the Court will enforce this agreement.
 13 Accordingly, the Court finds that Petitioner is not entitled to an evidentiary hearing on this claim
 14 as Petitioner does not have a meritorious claim. This claim will be dismissed.

15 **2. Failure to Object to Government Breach of Plea Agreement**

16 In Petitioner's second ground for ineffective assistance of counsel, he contends that
 17 defense counsel failed to object to the Government's breach of the plea agreement. Petitioner
 18 maintains that he meets the safety valve criteria and that the statutory minimum sentence of ten
 19 years does not apply. The statutory minimum term of imprisonment for possession with intent to
 20 distribute methamphetamine is 10 years. 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A).
 21 Petitioner pled guilty to possession with intent to distribute 50 grams or more of
 22 methamphetamine. Doc. 21 at 2:4-5. Petitioner's plea agreement specified that the mandatory
 23 minimum term of imprisonment for the offense was ten years imprisonment. Doc. 21 at 7.
 24 Nowhere in the plea agreement is there any representation or promise by the government that the
 25 mandatory minimum would not apply. Doc. 21. Rather, the government agreed to recommend an
 26 acceptance of responsibility reduction and a "safety valve" reduction. Doc. 21 at 5.

27 In order to evaluate this claim the Court must explain the sentencing calculation. The Court
 28 recently ordered the release of the presentence report to Petitioner at the request of the Federal

Defender. Doc. 32. The guideline calculation found therein is consistent with the Court's own calculation using the 2013 Sentencing Guidelines, and is as follows: The base offense level was 38 because Petitioner was found to be in possession of 2,636 grams of actual methamphetamine. U.S.S.G. § 2D1.1(c)(1) (2013); Doc. 24 at 6. Petitioner then received a 2-level "safety valve" reduction in accordance with U.S.S.G. § 2D1.1(b)(16) because he met the criteria set forth in subdivisions (1) – (5) of subsection (a) of U.S.S.G. § 5C1.2. U.S.S.G. § 2D1.1(b)(16) (2013); Doc. 30 at 7; Doc. 24 at 6. Petitioner also received a 3-level departure for acceptance of responsibility and assistance with authorities in the investigation. U.S.S.G. 3E1.1; Doc. 30 at 7; Doc. 24 at 6. This resulted in a total offense level of 33. Petitioner had a criminal history category of I. The sentencing guidelines provided for a range of imprisonment exceeding the statutory minimum, specifically 135 to 168 months. The government recommended that the Court sentence Petitioner to a low-end guideline sentence of 135 months. Doc. 26 at 2:17-18. Petitioner was sentenced below the government's recommendation of 135 months, to the mandatory minimum; 120 months.¹ Therefore the Government did not breach the plea agreement because Petitioner received all of the departures that the government agreed to recommend, and the Court sentenced below the guideline range. Petitioner fails to show facts that the Government breached the plea agreement, therefore defense counsel's failure to object at sentencing is not a meritorious ground for ineffective assistance of counsel. Accordingly, Petitioner is not entitled to an evidentiary hearing for this claim. This claim will be dismissed.

3. Failure to File a Motion to Suppress Evidence

Petitioner's final ground of ineffective assistance of counsel is that defense counsel failed to file a meritorious motion to suppress evidence seized in violation of the Fourth Amendment. Petitioner contends that he was unlawfully stopped for a traffic stop because he was racially profiled. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v.

¹ Because petitioner was sentenced to the mandatory minimum, he cannot benefit from Amendment 782 to the sentencing guidelines. He is ineligible for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) on that ground.

1 Henderson, 411 U.S. 258, 267 (1973). An intentional and voluntary guilty plea bars the later
 2 assertion of constitutional challenges. See U.S. v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992). As
 3 discussed above, the Court has found that Petitioner knowingly and voluntarily entered into his
 4 plea agreement with the Government. Since Petitioner voluntarily entered a plea of guilty, any
 5 antecedent constitutional violations are waived. Based on the foregoing, the Court finds that
 6 Petitioner is not entitled to an evidentiary hearing on this claim as Petitioner does not have a
 7 meritorious argument. This claim will be dismissed.

8 **V. CERTIFICATE OF APPEALABILITY**

9 Unless a circuit justice or district judge issues a certificate of appealability (“COA”), an
 10 appeal may not be taken to the court of appeals from a final decision of a district judge in a habeas
 11 corpus proceeding or a proceeding under 28 U.S.C. § 2255. 28 U.S.C. § 2253(c)(1); Muth v.
 12 Fondren, 676 F.3d 815, 818 (9th Cir. 2012). A COA may issue only if the applicant has made a
 13 substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To do so, a
 14 petitioner must demonstrate that “jurists of reason would find it debatable whether the petition
 15 states a valid claim of the denial of a constitutional right.” Slack v. McDaniel, 529 U.S. 473, 479
 16 (2000). The Ninth Circuit will not act on a motion for a COA if the district court has not ruled
 17 first. Ninth Cir. R. 22-1(a); Wilson v. Belleque, 554 F.3d 816, 827 (9th Cir. 2009).

18 Here, jurists of reason would not find it debatable whether Petitioner’s motion states a
 19 valid claim of the denial of a constitutional right. The plea agreement demonstrates on its face a
 20 knowing and voluntary waiver of the right to challenge the sentence under section 2255, and
 21 Petitioner has not raised new facts or allegations demonstrating the contrary. Petitioner’s grounds
 22 for ineffective assistance of counsel fail to show denial of a constitutional right. There are no facts
 23 to show that the government breached the plea agreement, and Petitioner’s entry of a voluntary
 24 guilty plea waived any antecedent constitutional violations. Hence, the Court declines to issue a
 25 COA.

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VI. ORDER

Based on the foregoing, it is hereby ORDERED that:

Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 21 U.S.C. § 2255 is DISMISSED;

The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: March 30, 2015



SENIOR DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 20 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABEL HERIBERTO FABIAN-
BALTAZAR, AKA Abel Heriberto Fabia
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Defendant-Appellant.

No. 15-16115

D.C. Nos. 1:14-cv-00984-AWI
1:13-cr-00032-AWI-

BAM-1
Eastern District of California,
Fresno

ORDER

Judges Hurwitz and Keeley have voted to deny the petition for panel rehearing. Judge Hurwitz has also voted to deny the petition for rehearing en banc, and Judge Keeley so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 46, is **DENIED**.¹

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

¹ Due to the retirement of Judge Kozinski, the order denying the petition for rehearing was voted upon only by Judges Hurwitz and Keeley.

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TRANSCRIPT OF ORAL ARGUMENT
HELD DECEMBER 4, 2017

VS.

$$\left. \begin{array}{l} \text{---} \\ \text{---} \\ \text{---} \\ \text{---} \\ \text{---} \end{array} \right\}$$

J-H: Circuit Judge Hurwitz
J-K: Circuit Judge Kozinski
PS: Peggy Sasso, Assistant Federal Defender
MA: Melanie Alsworth, Assistant United States Attorney

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1 and distinct from a claim involving ineffective assistance of representation involving
2 conviction and sentencing.

3 J-H: Is the failure to file a notice of appeal ineffective assistance of counsel on appeal? Or, is
4 it ineffective assistance of counsel in the district court?

5 PS: It's, under *Flores-Ortega*

6 J-H: It's filed, it's filed in the district. I understand that ineffective assistance of counsel on
7 direct appeal may be a separate species.

8 PS: Right.

9 J-H: But here your claim, your problem, your claim is that counsel failed to file a notice of
10 appeal, right?

11 PS: That's *Flores-Ortega*, yes. And the mechanism for, for, in, in, in, for pursuing that right
12 is a 2255 motion across the board in all of the cases that we look at. That's the
13 mechanism that a defendant has when the, when counsel has failed to file a notice of
14 appeal. Because as in *Flores-Ortega*, if, if the defendant then files a late notice of appeal,
15 that's going to be dismissed. At which point the defendant must bring the 2255. That's
16 *Flores-Ortega*.

17 J-H: So, so work with me here for a second.

18 PS: Yes Your Honor.

19 J-H: I understand you must bring in a 2255. Where in the language of the, of the collateral
20 attack waiver do you find an exception for this case?

21 PS: The language is very clear. The plain language only waived collateral attack challenge
22 on the conviction, the sentence, and the manner in which the sentence was imposed.

23 J-H: What are you, what are you challenging in his 2255?

24 PS: In the 2255

25 J-H: Either the conviction or the sentence

26 PS: No Your Honor, then the, the challenge is to the denial of counsel, the Sixth Amendment
27 right to counsel on direct appeal.

28

1 J-H: Let me try this one more time because we're missing each other. What relief do you seek
2 in the 2255?

3 PS: The 2255 seeks his right to be able to have counsel on direct appeal, so

4 J-H: Well no, but you have a, you have a conviction and a sentence, right?

5 PS: That's correct Your Honor.

6 J-H: You're going to appeal, what are you going to appeal? The conviction or the sentence?

7 PS: Your Honor, that's not before this Court. The Supreme Court is very clear. There is a
8 distinction between preserving the defendant's Sixth Amendment right to counsel on
9 direct appeal as opposed to the merits of any appeal that he would bring. Now in the
10 interest of substantial equality and fair process to all, if a defendant requests that his
11 counsel bring a notice of appeal, counsel is required to do so and to defend that appeal.
12 If, in the process of the representation counsel determines that the appeal is frivolous, the
13 Supreme Court has put in place a process for dealing with that, that's *Anders*. The,
14 counsel would have to file the brief, would have to identify the issues, would allow the
15 defendant to respond, we would then go to this Court to look at the totality of the
16 proceedings, make an assessment about whether

17 J-H: I understand how all that works.

18 PS: But

19 J-H: This is not my first rodeo either.

20 PS: But that's

21 J-H: The question I'm asking is one we're still missing each other on. If your client were to
22 file a notice of appeal,

23 PS: Yes Your Honor

24 J-H: Which is the complaint here that his counsel did not file a notice of appeal.

25 PS: That's correct.

26 J-H: Would he not be attacking either his conviction or his sentence?

27 PS: He, right now, he's, he's

28 J-H: No, isn't the answer to my question, yes?

1 PS: The
2 J-H: What else could he appeal but his conviction or sentence?
3 PS: Well, absolutely. What he's seeking now is the, is the denial of counsel on direct appeal,
4 but absolutely, on direct appeal he is, he is entitled under *Washington v. Lambert*, to
5 bring a claim alleging ineffective assistance of counsel with respect to the plea agreement
6 and the waiver that is contained within the plea agreement. In addition to that, a
7 defendant also has a right to, to address the illegality of the sentence, among other things.
8 So, there
9 J-H: But, none of those things deal with a collateral attack waiver. And where I'm having
10 difficulty with your case is this, that you want to get out of the collateral attack waiver so
11 you may attack on appeal, either the conviction or the sentence, because those are the
12 only things that happen to your client in the district court, aren't they?
13 PS: But he's absolutely entitled to do so under this plea agreement. He has not waived his
14 collateral attack to bring a 2255 motion alleging the denial of counsel on direct appeal.
15 He has not waived that. This case is on all fours with *Sandoval-Lopez* and *Flores-*
16 *Ortega*. Whatever the merits of his
17 J-H: But *Sandoval-Lopez*, let's be fair, *Sandoval-Lopez* did not involve a collateral attack
18 waiver, correct? It involved an appeals waiver.
19 PS: But this is exactly the same. He has a
20 J-H: It's not exactly the same because you have a collateral attack waiver. What I'm trying to
21 figure out and where you're not helping me, is why, the Court, I understand why an
22 appeals waiver would not bar what you seek. What I'm having difficulty figuring out is
23 why the collateral attack waiver doesn't. So, help me with the collateral attack waiver.
24 Is there any case that says a collateral attack waiver is void when somebody wants to
25 challenge ineffective assistance of counsel on appeal?
26 PS: Your Honor, he, I believe this case is on four, on all fours with *Sandoval-Lopez* because
27 he hasn't waived it in his collateral attack waiver. This is not a broad, all encompassing
28

1 J-H: So what you're telling me, is that is you rely on the language of the waiver, but you don't
2 have a case that's on point.

3 PS: Well, there's a lot of cases that this has which says that the government doesn't get more
4 than what it bargained for and that the plain language of the plea agreement controls and
5 that if there's any ambiguity it's to be construed in favor of the defendant. I would note
6 that you can compare the direct waiver appeal, a direct waiver with the collateral attack
7 waiver in this plea agreement, and in the direct appeal waiver it has very broad sweeping
8 language that says, or on any basis whatsoever, that is noticeably missing from the
9 collateral attack waiver here. The government did not bargain for a broad all-
10 encompassing 2255 waiver, and it is not entitled to get more than it bargained for. So,
11 that makes this case on all fours with *Sandoval-Lopez* because he has not waived his
12 2255 motion to bring a claim involving the denial of counsel on direct appeal. That was
13 not waived.

14 J-K: You're down to less than three minutes.

15 PS: I'll reserve the remainder of my time.

16 ME: May I please the Court. Good morning Your Honors, Melanie Alsworth appearing on
17 behalf of the United States. The district court did not err in this case when it summarily
18 dismissed the defendant's 2255 motion and denied an evidentiary hearing. The basis for
19 the court's decision was that the defendant did in fact enter a knowing and voluntary plea
20 in which he waived his right to a 2255 motion.

21 J-H: But what, can you deal with your colleague's argument? She says he waived his 2255
22 rights with respect to everything that happened leading up to his conviction and his
23 sentencing but not with respect to ineffective assistance of counsel in failing to file a
24 notice of appeal.

25 ME: Yes Your Honor. I believe when you look at the record as a whole, the defendant is in
26 fact challenging the sentence that he received in this case.

27 J-H: Well not yet. He'd like to. Your colleague says he'd like to file a notice of appeal and
28 challenge them, but that's not where he is yet. All he's challenging now is his counsel's

1 failure to file a notice of appeal, which our cases, *Sandoval-Lopez* says survives an appeal
2 waiver. So, the appeal might get dismissed. It might be frivolous. But he's not, he's not
3 yet challenging his conviction and sentence, he would just like to file a notice of appeal.
4 What's, what's wrong with that?

5 ME: He could have filed a notice of appeal. He could have filed a notice of appeal late, in
6 which circumstance it likely would have

7 J-K: Well I thought his claim was that he told his lawyer to do it and was relying on the
8 lawyer to do it. The lawyer didn't say, no I'm not going to do it, you do it yourself.
9 Which is, would have opened up the option you've just offered, which is he could have
10 just done it himself. My understanding is that he relied on the lawyer to file the notice
11 and the lawyer didn't file it. At least, at least that's what I understand to be his claim.
12 And if he's relying on the lawyer to do it, then the answer you gave is not a very adequate
13 answer, right?

14 ME: Well Your Honor

15 J-K: I mean he, he could have done it himself. In fact, he couldn't have done it himself,
16 because he's represented, we regularly bounce pleadings from unrepresented parties,
17 including criminal defendants, right?

18 ME: And Your Honor, in this circumstance the district court never reached that issue because
19 they summarily dismissed with regard to that issue

20 J-K: I'm only addressing the answer you gave. If you want to withdraw the answer, that's
21 fine, I wasn't

22 ME: I guess I was just trying to explain it Your Honor. There wasn't an evidentiary hearing

23 J-K: But you are trying to give me a wrong explanation, I mean you're trying to explain the
24 *inaudible*

25 ME: That's correct.

26 J-K: Ok, he couldn't have done it. And he would have had no reason to do it.
27
28

1 J-H: He's represented by counsel and he says to his counsel file a notice of appeal, at least
2 that's what he alleges. There's no evidentiary hearing so we don't have any evidence to
3 the contrary.

4 ME: That is correct.

5 J-H: So at this point we have to assume he instructed his counsel to file a notice of appeal.

6 ME: That is correct.

7 J-H: And counsel failed to do so.

8 J-K: And counsel hadn't withdrawn as his lawyer, so it's not at all clear the district court
9 would have accepted a notice of appeal filed by a pro se defendant who is represented. I
10 think, I think most of the courts wouldn't. I, I don't know. I don't think, I'm pretty sure
11 our court wouldn't. I mean we get most of people's, stuff that's filed.

12 ME: Yes Your Honor, but even in the district court proceedings he never objected to the
13 advice he was given. He never raised the issue.

14 J-H: He didn't have an opportunity, he didn't have an opportunity to. There's been no, the
15 process plays itself out. He gets sentenced. He wants an appeal. He says to his counsel I
16 want to file a notice of appeal. Nothing further happens in the district court after that,
17 except him filing a 2255, which says I asked my counsel to file a notice of appeal and he
18 didn't. So I'm not sure at what opportunity in the district court proceedings he was
19 supposed to object to his counsel's failure to file a notice of appeal.

20 ME: The defendant seems to be bootstrapping this.

21 J-H: No, you said he never objected below. Tell me at what point below he could have
22 objected to his counsel's failure to file a notice of appeal.

23 ME: Yes if I may explain Your Honor. During the plea colloquy he was advised to what the
24 potential sentence could be. He never expressed to the court that his attorney gave him a
25 different sentencing range. And so there was no objection there.

26 J-H: I, I, I think you can demonstrate that the plea was voluntary, that's not, I don't have any
27 difficulty with that on this record. My difficulty is that you, you say that he should have
28 objected at some time below if he wanted to say that he wanted to file a notice of appeal.

1 He did what I think *Sandoval-Lopez* says. He waited until he was sentenced, went to his
2 counsel and said file a notice of appeal. His counsel might have said it's a frivolous case,
3 I won't do it. But there wasn't any opportunity in the district court for him to raise that,
4 that claim until the 2255, was there?

5 ME: Following the sentencing he could have submitted a notice of appeal even if he had asked
6 his attorney to do so.

7 J-H: But that's the issue Judge Kozinski has just been asking you about. Normally you have a
8 lawyer and you ask the lawyer to file a notice of appeal and you expect the lawyer to do
9 so, if not you're going to have to do so yourself. So, let's get, I wanted you to get back
10 to, to counsel's argument. Why does this collateral attack waiver cover ineffective
11 assistance of counsel on appeal?

12 ME: I believe it goes directly to what he's saying the appeal would have been about, which is
13 the nature of his sentence. And the sentence is covered by the 2255 waiver. He's saying
14 that his counsel was ineffective and failing to file a direct appeal because he wanted to
15 challenge the sentence in this matter. Additionally, he says that his counsel ineffectively,
16 ineffectively advised him because the sentencing range that was provided was
17 approximately 33 months less than the sentence that he actually received. Therefore
18 when you consider

19 J-H: He eventually got nine years and he thought he was going to get seven to eight.

20 ME: That, that's, he got ten years Your Honor.

21 J-H: Excuse me?

22 ME: He got ten years.

23 J-H: Didn't it get reduced?

24 ME: Eventually, yes to 108 months

25 J-H: Ok

26 ME: But the initial sentence was

27 J-H: Right, but at least at this point we're dealing with a sentence that's one year above the
28 range he thought he was going to get.

1 ME: That's correct Your Honor, yes. Yes, and so therefore it's the government's position that
2 he's actually challenging the sentence and that is encompassed within the 2255 waiver,
3 which as the Court has already pointed out, was entered knowingly and voluntarily. Any
4 additional questions?

5 J-H: Thank you.

6 ME: Thank you.

7 PS: We do not safeguard a defendant's Sixth Amendment right to counsel on direct appeal by
8 asking the defendant whose counsel has abandoned him by, to come up with meritorious
9 issues that he would have raised on the appeal, if he'd had counsel at the time he filed his
10 appeal. That is

11 J-K: There's no harmless error standard?

12 PS: There is, if the individual meets the requirements under *Flores-Ortega*, which he has
13 here, he's alleged facts that entitled him to relief, then it is an automatic remand, a
14 reverse, because the district court was required to hold a hearing under 2255.

15 J-K: To hold a hearing, find at best, he should have had a notice of appeal, which then gets
16 bounced because he had an appeal waiver, right?

17 PS: Well he has, he has an appeal waiver to, to, to certain aspects, but as this Court has said
18 under *Washington*

19 J-K: No, but this gets back to the, the discussion you had with Judge Hurwitz. All the things
20 that he would be complaining about are the things that are covered by the appeal waiver.

21 PS: We, we don't know that Your Honor. He hasn't had counsel, so he hasn't had time to
22 marshal his arguments.

23 J-K: Oh let's use our imaginations.

24 PS: Yes Your Honor.

25 J-K: What could he be complaining about? I mean he's a criminal defendant? He's
26 complaining about the conviction or the sentence?

27 PS: He would be, he

28 J-K: What else is there?

1 PS: Your Honor under *Washington v. Lambert* he has the right to claim that the plea
2 agreement and the waiver therein was the product of ineffective assistance of counsel. I
3 think that potentially there is a meritorious argument there. If you look at the plea
4 agreement it does not look like it's supported by any consideration. And I think that
5 certainly looks like meritorious argument on appeal, but we don't get there right now.
6 All we know and all we're considering is his denial of his Sixth Amendment right to
7 counsel on direct appeal. He has alleged facts, that if true, entitle him to relief and he is
8 entitled to a hearing on the motion. So the district court abused his discretion.

9 J-H: I want to come back to this because your, your client says in the 2255, originally pro se,
10 but the client says, I was told by counsel I would only get seven to eight years, right?

11 PS: Yes, that is, that is his

12 J-H: That's the claim of why there is a defect in the claim.

13 PS: Your Honor, that is a pro se defendant responding to Judge Ishii saying that he didn't
14 articulate that it wasn't

15 J-H: I understand, but that's the, that's the claim.

16 PS: Without counsel, yes.

17 J-H: Wait, but you have a 2255, you're now, he's not counseled. Does he have any other
18 claims in his 2255?

19 PS: I, I just mentioned to the Court that I think there may very well be.

20 J-H: But that wasn't made. You're now saying if we, if we can bring a 2255 we might amend
21 it to bring a different claim. Is that what you're saying?

22 PS: Your Honors the 2255 is simply limited to the failure of his attorney to file the notice of
23 appeal. That's it. It's limited to that. The Supreme Court is very clear. We do not get to
24 the merits at this point.

25 J-H: I know you don't get to the merits. That's not what I'm asking. And, and this is not an
26 easy question so I need help rather than, than, than combative answers, if you will. My
27 question is, at the end of the day if he's attacking his conviction or his sentence, as Judge
28 Kozinski asked, where do we go from here? So does he, are you asking that he be, that

1 his counsel, that his, his, that the conviction be, be reinstated, which is what our case says
2 when you get ineffective assistance of counsel on appeal, to allow a fresh notice of
3 appeal?

4 PS: That's correct. That's the remedy.

5 J-H: That's all you're asking? That's all you can ask for under, under our case involving
6 appeal waivers, right?

7 PS: Absolutely.

8 J-H: Ok, if a fresh notice of appeal were filed

9 PS: Yes Your Honor

10 J-H: Since, when it, what would it attack?

11 PS: It, I believe it would attack exactly what *Washington v. Lambert* entitles him to attack.

12 J-H: Now tell me, don't tell me what other cases say, tell me what it would attack.

13 PS: But that, that is the claim, the

14 J-H: No, you, no, don't tell me that, I've read the cases.

15 PS: Ok

16 J-H: What would you attack on appeal? His conviction? His sentence? Or both? Easy
17 question.

18 PS: I, I, I'm sorry, I think I'm answering it, it's, it's that he

19 J-H: There's only two things that are possible to attack.

20 PS: Right which

21 J-H: The conviction or the sentence.

22 PS: Right.

23 J-H: Do you, do you intend to reserve your right to attack both of them, only one of them, and
24 if so, which one?

25 PS: He, he would first establish that the plea agreement was the product of ineffective
26 assistance of counsel. At that point he would be entitled to attack both his conviction and
27 his sentence. There would be no waiver at that point.
28

1 J-H: So you're asking for more than what our cases say. You're asking not, that you're asking
2 that the conviction be vacated? Or reinstated? One of, which, which, which of the two?

3 PS: Simply that, that it be reinstated.

4 J-H: Ok, thank you.

5 J-K: Ok, thank you. Case was argued and submitted.

6

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8 I, Delia Rivera-Stark, declare that I listened to the above oral argument held December 4, 2018
9 from the mp3 format file on the Ninth Circuit Court of Appeals website, and transcribed it to the
best of my ability.

10 Dated: May 21, 2018

/s/ Delia Rivera-Stark
DELIA C. RIVERA-STARK
Staff Interpreter
Office of the Federal Defender

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