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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JUAN ROMERO MAGANA,	)	No. CR-F-06-158 OWW
	)	(No. CV-F-08-1393 OWW)
)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
UNITED STATES OF AMERICA,	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.)	
)	
)	

On September 12, 2008, Petitioner Juan Romero Magana timely filed pursuant to the "mailbox rule" a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

A. Background.

Petitioner was charged by Superseding Indictment with conspiring to manufacture and distribute marijuana (Count One) and conspiring to distribute and possess with intent to distribute controlled substances (Count Two). Petitioner pleaded guilty to both counts pursuant to a written Plea Agreement signed

1 by Petitioner, his attorney Glenn LoStracco, and AUSA Servatius.

2 (Doc. 100). The Plea Agreement provided:

3 2. Agreements by the Defendant.

4 ...

5
6 (c) The defendant agrees and
7 stipulates to request a sentence of not less
8 that 120 months. The defendant will not move
9 for a downward departure or reduction of his
10 sentence beyond that agreed to by the
11 government under the terms of this written
12 plea agreement. The defendant understands
13 and agrees that this agreement by him
14 includes, but is not limited to, not moving
15 for a downward departure of his offense
16 level, criminal history, criminal history
17 points, as defined by the United States
18 Sentencing Guidelines. The defendant further
19 agrees that he will provide no information to
20 the Court which would justify a downward
21 departure, nor make no written or oral
22 address to the Court which would suggest to
23 the Court that it is not bound by the plea
24 agreement. When addressing the Court, the
25 defendant will support and request a sentence
26 of at least 120 months.

17 ...

18 (e) The defendant understands and
19 agrees that the Court is not a party to this
20 agreement, that sentencing is a matter solely
21 within the discretion of the Court, the Court
22 is under no obligation to accept any
23 recommendations made by the government, and
24 the Court may in its discretion impose any
25 sentence it deems appropriate up to and
26 including the statutory maximum stated in
this Plea Agreement. If the Court should
impose any sentence up to the maximum
established by the statute, the defendant
cannot, for that reason alone, withdraw his
guilty plea, and he will remain bound to
fulfill all of the obligations under this
Agreement. The defendant understands that
neither the prosecutor, defense counsel, nor

1 the Court can make a binding prediction or
2 promise regarding the sentence he will
receive.

3 (f) If the defendant's conviction
4 on any of the counts to which he is pleading
is ever vacated at the defendant's request,
5 or his sentence is ever reduced at his
request, or if the defendant violates the
6 Plea Agreement, he shall thereafter be
subject to prosecution for any federal
7 criminal violation of which the government
has knowledge, including but not limited to
8 perjury, false statements, and obstruction of
justice. Because disclosures pursuant to
9 this Agreement will constitute a waiver of
the Fifth Amendment privilege against
10 compulsory self-incrimination, any such
prosecution may be premised on statements
and/or information provided by the defendant.
11 The government shall have the right (1) to
prosecute the defendant on any of the counts
12 to which he pleaded guilty; (2) to reinstate
any counts that may be dismissed pursuant to
13 this agreement; and (3) to file any new
charges that would otherwise be barred by
14 this agreement. The decision to pursue any
or all of these options will be solely within
15 the discretion of the United States
Attorney's Office. By signing this
16 agreement, the defendant agrees to waive any
objections, motions, and defenses he might
17 have to the government's decision, including
Double Jeopardy. In particular, he agrees
18 not to raise any objections based on the
passage of time with respect to such counts
19 including, but not limited to, any statutes
of limitation or any objection based on the
20 Speedy Trial Act or the Speedy Trial Clause
of the Sixth Amendment.

21 If it is determined that the defendant has
22 violated any provision of this Agreement or
if the defendant successfully moves to
23 withdraw his plea: (1) all statements made by
the defendant to the government or other
24 designated law enforcement agents, or any
testimony given by the defendant before a
25 grand jury or other tribunal, whether before
or after this Agreement, shall be admissible
26 in evidence in any criminal, civil, or

1 administrative proceedings hereafter brought
2 against the defendant; and (2) the defendant
3 shall assert no claim under the United States
4 Constitution, any statute, Rule 11(c)(6) of
5 the Federal Rules of Criminal Procedure, Rule
6 410 of the Federal Rules of Evidence, or any
7 other federal rule, that statements made by
8 the defendant before or after this Agreement,
9 or any leads derived therefrom, should be
10 suppressed. By signing this Agreement, the
11 defendant waives any and all rights in the
12 foregoing respects.

13 (g) The defendant is aware that
14 Title 18, United States Code, Section 3742
15 affords a defendant the right to appeal the
16 sentence imposed. Acknowledging this, the
17 defendant knowingly waives the right to
18 appeal his conviction or any sentence (or the
19 manner in which that sentence was determined)
20 which is within the statutory maximum for the
21 crime on the grounds set forth in Title 18,
22 United States Code, Section 3742 or on any
23 ground whatever, in exchange for the
24 concessions made by the United States in this
25 plea agreement. The defendant also waives
26 his right to challenge his conviction,
sentence or the manner in which it was
determined in any post-conviction attack,
including but not limited to a motion brought
under Title 28, United States Code, Sections
2241 or 2255.

...

3. Agreements by the Government.

(a) The government will recommend
that the defendant receive a three-level
reduction in the computation of his offense
level due to his acceptance of
responsibility, provided that the defendant
qualifies for such a reduction in his
interview with the probation officer.

(b) The government will recommend
that the defendant be sentenced at the bottom
of the applicable guideline range, or 120
months, whichever is greater.

(c) The government agrees that the

1 defendant is not entitled to a role
2 enhancement and that the firearms seized at
3 the time of his arrest should not be used to
4 enhance his offense level.

5 The Plea Agreement set forth the crimes charged against
6 Petitioner, the elements of those crime, and the factual basis to
7 which Petitioner was pleading. The Plea Agreement set forth the
8 maximum potential sentence Petitioner faced on each count,
9 including that each count provided a mandatory minimum sentence
10 of ten years and a maximum sentence of life imprisonment. The
11 Plea Agreement provided:

12 8. Entire Agreement.

13 The defendant and his attorney acknowledge
14 that no threats, promises or representations
15 have been made, nor agreement reached, other
16 than those set forth in this Agreement, to
17 induce defendant to plead guilty.

18 9. Court not a Party.

19 It is understood by the parties that the
20 sentencing Court is neither a party to nor
21 bound by this agreement and the sentencing
22 judge is free to impose the maximum penalties
23 as set forth in paragraph 5 above. Also,
24 should the court fail to follow any or all fo
25 the government's sentencing recommendations,
26 the defendant will not be allowed to withdraw
his plea.

Petitioner was sentenced on September 10, 2007 to 120 months
incarceration concurrent and a 60 month supervised release term
with a recommendation that Petitioner participate in the 500 hour
Bureau of Prisons Substance Abuse Treatment Program. (Docs. 136-
137). Petitioner did not file an appeal.

B. Grounds for Relief.

1 Petitioner requests that the Court "reduce his sentence to
2 the SIX-years, as proposed by attorney LoStracco."

3 In support of this motion, Petitioner asserts:

4 2. The grounds for petitioner's present
5 motion to vacate his sentence are that
6 attorney LoStracco at the time of presenting
7 the Plea Agreement through his translator,
8 Ms. Olivia Montano, informed me that he had
9 just spoken with the judge. Further stating
10 that the judge had informed him that 'you are
11 going to receive a SIX-years sentence,
12 including a reduction of ONE-year by taking
13 the 500 hour Drug Program offered by the
14 Federal Bureau of Prison, plus the Good
15 Time.' And that this petitioner would be
16 spending 'just THREE-and-ONE-half years under
17 federal custody.'

18 3. This petitioner did NOT hold on his hands
19 the aforementioned Plea Agreement when
20 presented to him. Attorney LoStracco simply
21 related the aforesaid as translated to him by
22 his secretary/translator, Ms. Olivia Montano.

23 4. Attorney LoStracco additionally informed
24 me that during sentencing, that I was to
25 simply 'remain silent' and 'not to speak to
26 the judge because he had everything under
control with the judge.'

 5. Mr. LoStracco lastly informed me that the
Probation Officer was about to show up any
moment and not to forget that I was NOT to
speak to her at all, or to her Spanish-
speaking translator. That everythig [sic]
was all taken care-of [sic], eventhough [sic]
I had informed Mr. LoStracco that I thought
that I should relate events to her!

 6. When the (female) Probation Officer
walked in to meet me, in the presence of Mr.
LoStracco and Ms. Montano; her (female)
translator introduced herself and the
Probation Officer. The P.O.'s translator
asked me if I wanted to answer questions, and
began asking questions. At that moment Mr.
LoStracco, once again informed me that I was
NOT to answer any questions. And finally

1 they left.

2 7. Once the P.O. and her translator had left
3 Mr. ... LoStracco scolded me for trying to
4 speak to the Probation and to her traslator
 [sic], and again reminded me to 'keep quiet
 during sentencing.'

5 8. I signed the ... Plea Agreement. But it
6 was not until some four weeks ago that the
7 Case Manager, Mr. Marrero of the institution,
8 F.C.I. - Lompoc, who provided me with a copy
9 of the Plea Agreement. Much to my surprise,
10 I noticed that on page 2 of the Plea
11 Agreement had the imposed 120 months sentence
 which is 'hand-written' and not typed as the
 rest of this agreement. There are NO
 initials by the hand written [120 months]
 sentence from none of the three signators;
 Mr. LoStracco, AUSA Ms. Kathleen A.
 Servatius, or mine

12 9. During sentencing, and upon my sentence,
13 the court's translator stated that I had
14 received an ['120-months'] sentence. It was
15 at this time that I tried to speak, but Mr.
16 LoStracco sternly instructed me to be quiet
17 in the presence of the court, further stating
18 to me 'I had already told you that I have
19 everything taken care of.' So I believed
20 that Mr. LoStracco somehow had arranged for
21 the SIX-year sentence above.

22 10. Thereafter, to this day I never met with
23 Mr. LoStracco nor with his translator,
24 despite several phone calls to him and
25 despite the \$20,000.00 paid for his
26 'representation.' My sister Carmen Romero-
 Rodriguez spoke with Ms. Montano over the
 phone (weeks after sentencing) and was
 informed that 'your brother did receive SIX-
 years sentence.' And although I and my
 family requested copies of my documentation
 in this case, to this date, I have not
 received any copies.

 11. ... This attorney had further failed to
 properly investigate the charges on the
 Indictment ... and having told this
 petitioner that should he (I) not agree to
 sign the Plea Agreement; this Petitioner may

1 end up with a Life-Sentence.

2 C. Waiver of Right to File Section 2255 Motion.

3 A defendant may waive the statutory right to bring a Section
4 2255 motion challenging the conviction or sentence. *United*
5 *States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994); *United States*
6 *v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1992), *cert. denied*, 508
7 U.S. 979 (1993). The Ninth Circuit ruled that "a plea agreement
8 that waives the right to file a federal habeas petition pursuant
9 to 28 U.S.C. § 2254 is unenforceable with respect to an IAC claim
10 that challenges the voluntariness of the waiver." *Washington v.*
11 *Lampert*, 422 F.3d 864, 871 (9th Cir.2005), *cert. denied*, 547 U.S.
12 1074 (2006).

13 Here, Petitioner appears to assert that he was denied the
14 effective assistance of counsel in entering into the Plea
15 Agreement and in the decision to plead guilty.

16 D. Ineffective Assistance of Counsel.

17 The standards governing an assertion of ineffective
18 assistance of counsel are set forth in *Strickland v. Washington*,
19 466 U.S. 668 (1984). As explained in *United States v. Quintero-*
20 *Barraza*, 78 F.2d 1344, 1348 (9th Cir. 1995), *cert. denied*, 519
21 U.S. 848 (1996):

22 According to *Strickland*, there are two
23 components to an effectiveness inquiry, and
24 the petitioner bears the burden of
25 establishing both ... First, the
26 representation must fall 'below an objective
standard of reasonableness.' ... Courts
scrutinizing the reasonableness of an
attorney's conduct must examine counsel's
'overall performance,' both before and at

1 trial, and must be highly deferential to the
2 attorney's judgments ... In fact, there
3 exists a 'strong presumption that counsel
4 "rendered adequate assistance and made all
5 significant decisions in the exercise of
6 reasonable professional judgment."' ... In
7 short, defendant must surmount the
8 presumption that, 'under the circumstances,
9 the challenged action "might be considered
10 sound trial strategy."' ... Thus, the proper
11 inquiry is 'whether, in light of all the
12 circumstances, the identified acts or
13 omissions were outside the wide range of
14 professionally competent assistance.'

15 If the petitioner satisfies the first prong,
16 he must then establish that there is 'a
17 reasonable probability that, but for
18 counsel's unprofessional errors, the result
19 would have been different

20 To prevail on a claim of ineffective assistance of counsel based
21 on the contention that a guilty plea was not knowing and
22 voluntary, the petitioner must show that (1) counsel's
23 representation fell below the range of competence demanded of
24 attorneys in criminal cases, and (2) there is a reasonable
25 probability that, but for counsel's errors, the petitioner would
26 not have pleaded guilty and would have insisted on going to
trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

Petitioner has not established ineffective assistance of
counsel under these standards.

During Petitioner's change of plea colloquy, Petitioner, who
was under oath, stated that the Plea Agreement had been
translated from English to Spanish before he signed it; that he
had discussed the Plea Agreement with Mr. LoStracco through an
interpreter and that he understood the Plea Agreement before he

1 signed it; and that Petitioner was satisfied with Mr. LoStracco's
2 representation. The Court reviewed every provision of the Plea
3 Agreement with Petitioner, including the agreement set forth in
4 Paragraph 2(c) of the Plea Agreement that Petitioner stipulated
5 to request a sentence not less than 120 months. Petitioner was
6 asked if he agreed and he responded affirmatively. The Court
7 advised Petitioner that the Court was not a party to the Plea
8 Agreement, that sentencing was in the sole discretion of the
9 Court, that Petitioner did not have a right to a specific
10 sentence, and that Petitioner would not be entitled to withdraw
11 his guilty plea if the Court sentenced Petitioner differently
12 from the sentence recommended in the Plea Agreement, if
13 Petitioner disagreed with the sentence. Petitioner stated that
14 he understood and agreed to those provisions. The Court also
15 reviewed the maximum punishment Petitioner faced for each count,
16 specifically advising Petitioner that he faced a mandatory
17 minimum of 120 months and a maximum of life imprisonment.
18 Petitioner was asked if he expected to get anything not stated in
19 the Plea Agreement and Petitioner responded negatively.

20 Petitioner's assertion that his attorney promised him a six-
21 month sentence is belied by the terms of the Plea Agreement and
22 Petitioner's statements under oath during the change of plea
23 proceedings. Petitioner's contention that the Plea Agreement is
24 invalid because the term "120" is handwritten over another figure
25 without being initialed by the parties to the Plea Agreement is
26 baseless given Petitioner's admissions under oath during the

1 change of plea proceedings that he understood and agreed to
2 request a sentence of 120 months and that he understood that he
3 faced a mandatory minimum sentence of ten years (120 months) for
4 the crimes to which he was pleading guilty.

5 Petitioner asserts that Mr. LoStracco represented to
6 Petitioner that he, Mr. LoStracco, had spoken to the judge at
7 some time about the sentence. The Court's invariable practice is
8 to never discuss prospective sentences with any attorney or party
9 except in the presence of the client on the record. The judge in
10 this case had no discussions with Mr. LoStracco about
11 Petitioner's sentence. The only discussions about sentence was
12 at the Rule 11 entry of plea and sentencing, both of which were
13 in open court on the record. No statement was ever made by the
14 judge about a sentence of six years (72 months).

15 Petitioner's claim that he was denied the effective
16 assistance of counsel because Mr. LoStracco told him not to
17 answer any questions by the Probation Officer assigned to
18 interview him for sentencing is without merit. Mr. LoStracco's
19 advice was within the range of reasonable professional conduct
20 given the terms of the Plea Agreement, the fact that Petitioner
21 faced a mandatory minimum sentence of 120 months, and the fact
22 that, pursuant to the Plea Agreement, if the Plea Agreement was
23 ever set aside at Petitioner's request, any statements he made to
24 the Probation Officer could be used against him.

25 Petitioner's claim that he was denied the effective
26 assistance of counsel because Mr. LoStracco told him that if

1 Petitioner did not sign the Plea Agreement, Petitioner faced the
2 possibility of life imprisonment is also baseless. Mr.
3 LoStracco's advice was correct.

4 Petitioner's claim Mr. LoStracco failed to investigate the
5 charges against him does not establish ineffective assistance of
6 counsel. Conclusory allegations unsupported by facts do not
7 suffice to establish entitlement to relief under Section 2255.
8 *See United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th
9 Cir.1998); *United States v. Hearst*, 638 F.2d 1190, 1194 (9th
10 Cir.1980), *cert. denied*, 451 U.S. 938 (1981).

11 For the reasons stated:

- 12 1. Petitioner Juan Romero Magana's motion to vacate, set
13 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;
- 14 2. The Clerk of the Court is directed to enter JUDGMENT FOR
15 RESPONDENT and against Petitioner.

16 IT IS SO ORDERED.

17 Dated: September 22, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE