

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISMAEL MENDOZA RODRIGUEZ,

Defendant.

Case No. [4:15-cr-00547-JD-10](#)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE
SECTION 2255 MOTION TO VACATE**

Re: Dkt. Nos. 599

Ismael Mendoza Rodriguez is currently serving a sentence in a federal prison after pleading guilty to one count of conspiracy to distribute, and to possess with intent to distribute, a controlled substance, and one count of possession of a firearm in furtherance of a drug trafficking crime. Rodriguez pled guilty under a “C” plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Dkt. No. 252. Among other terms in the agreement, he admitted that the total amount of controlled substances attributable to him for the purposes of his relevant conduct was twelve pounds of methamphetamine (actual) and 528 grams of cocaine. *Id.* ¶ 2. Rodriguez also agreed to accept a term of imprisonment between 180 and 360 months, or 15 to 30 years. *Id.* ¶ 8.

The conspiracy count carried a mandatory minimum prison term of 10 years, and the firearm count carried a mandatory consecutive prison term of 5 years. *Id.* ¶ 1. After a detailed colloquy at the sentencing hearing, the Court accepted the C plea agreement, and imposed a term of 200 months in custody based on 140 months for the conspiracy count and 60 months for the firearm count, to be served consecutively. Dkt. No. 558. This sentence was just 20 months longer than the low end of custody Rodriguez agreed to in his plea agreement.

Approximately nine months after sentencing, Rodriguez filed a pro se notice of appeal to the Ninth Circuit. Dkt. No. 537. The appeal was dismissed as untimely. Dkt. No. 567.

Rodriguez also filed a pro se motion to vacate or set aside the sentence under 28 U.S.C. § 2255. Dkt. No. 564. He filed an amended motion, Dkt. No. 572, several weeks later without

1 leave, which the Court accepted in light of his pro se status. Dkt. No. 584 at 2. The Court denied
2 the motion in all respects except one: Rodriguez alleged that he had asked his lawyer immediately
3 after sentencing to file a notice of appeal, and that the lawyer did not follow this request. *Id.* at 4.
4 Although Rodriguez knowingly and voluntarily waived his right to appeal his conviction or
5 sentence, he retained the single ground of ineffective assistance of counsel for an appeal. *See* Dkt.
6 No. 252 ¶ 4. The Supreme Court has determined that counsel’s failure to file a notice of appeal
7 when asked to do so by the defendant, even when, as here, the defendant waived his appeal rights
8 in a plea agreement, is presumptively ineffective assistance under *Strickland v. Washington*, 466
9 U.S. 668 (1984). *See Garza v. Idaho*, 139 S. Ct. 738, 749 (2019); *see also United States v.*
10 *Fabian-Baltazar*, 931 F.3d 1216, 1217 (9th Cir. 2019).

11 Consequently, the Court determined that further exploration of the appeal request was
12 warranted. Dkt. No. 584 at 5. The Court directed the government to respond to Rodriguez’s claim
13 under *Garza* and the facts related to it. *Id.* The Court also appointed counsel to represent
14 Rodriguez on the issue. *Id.*

15 The parties filed conflicting evidence. Rodriguez re-alleged that he made the request. *See*
16 Dkt. No. 599 at 5. Attorney K.C. Maxwell, who represented Rodriguez through sentencing in the
17 underlying criminal case, submitted a declaration stating that she had not received that instruction.
18 *See* Dkt. No. 608-3 ¶ 4.

19 To resolve this dispute of fact, the Court held an evidentiary hearing on October 25, 2021.
20 Dkt. No. 645; *Fabian-Baltazar*, 931 F.3d at 1218 (9th Cir. 2019). The ineffective assistance claim
21 put into play Rodriguez’s communications with attorney Maxwell about filing a notice of appeal.
22 “It has long been the rule in federal courts that, where a habeas petitioner raises a claim of
23 ineffective assistance of counsel, he waives the attorney-client privilege as to all communications
24 with his allegedly ineffective lawyer.” *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003).

25 Rodriguez and attorney Maxwell testified in court. The Court enters the following
26 findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a)(1).
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FINDINGS OF FACT

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2 1. Rodriguez was represented by attorney Maxwell from her appointment as his
3 lawyer in November 2015 through sentencing. Hearing Transcript (Hr. Tr.) at 13:5-6.¹

4 2. Attorney Maxwell is an experienced criminal defense attorney who has practiced
5 for over 20 years in the field. *Id.* at 12:8-16. She knew that she had an obligation to file a notice
6 of appeal at a client's request within 14 days of entry of judgment, without any discretion to not
7 file it. *Id.* at 12:17-13:1.

8 3. Although Rodriguez spoke English well, attorney Maxwell used a Spanish
9 language interpreter to discuss important issues and concepts with him to be sure he understood.
10 *Id.* at 14:13-20.

11 4. Before Rodriguez signed the plea agreement, attorney Maxwell counseled him
12 about the appeal waivers in the agreement, and answered his questions about the waivers. An
13 interpreter was present for these discussions. *Id.* at 14:21-15:16; 15:23-25. Attorney Maxwell
14 specifically discussed with Rodriguez the advantages and disadvantages that he might face in
15 taking an appeal. *Id.* at 29:17-24.

16 5. Based on these discussions, attorney Maxwell concluded that Rodriguez
17 understood he was waiving his right to appeal for the most part by entering his plea agreement.
18 *Id.* at 15:10-22; 16:1-4.

19 6. Rodriguez never expressed to attorney Maxwell a desire to file an appeal between
20 the entry of his guilty plea and the date of his sentencing. *Id.* at 16:5-8.

21 7. Prior to sentencing, attorney Maxwell believed she had made a reasonable effort to
22 determine whether Rodriguez wanted to file an appeal, and concluded that he did not. *Id.* at
23 29:25-31:11.

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28 ¹ The Court cites the record only when it is of particular utility to do so. *See Norcia v. Samsung Telecomms. Am., LLC*, No. 14-CV-00582-JD, 2014 WL 4652332, at *1 n.2 (N.D. Cal. Sept. 18, 2014), *aff'd*, 845 F.3d 1279 (9th Cir. 2017).

12. For his part, Rodriguez testified that he talked with an interpreter right after the sentence was imposed and before he was escorted from the courtroom by United States Marshals Service deputies. When asked by the Court, “did you talk directly to your lawyer about filing an appeal?”, Rodriguez said, “With the interpreter.” *Id.* at 10:4-17.

Section 2255 provides, in pertinent part, that a federal prisoner may ask the sentencing court to vacate, set aside, or correct his sentence if it was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). One ground for asking the sentencing court to vacate a sentence is ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* requires that a petitioner show that (1) his representation fell below objectively “reasonabl[e] effective assistance” and (2) a reasonable probability that the result was prejudiced by counsel’s actions. *Id.* at 687-88. Where “counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). In that circumstance, “prejudice to the defendant should be presumed ‘with no further showing from the defendant of the merits of his underlying claims.’” *Garza*, 139 S. Ct. at 742 (quoting *Roe*, 528 U.S. at 484).

1 A failure of counsel to file a notice of appeal in light of clear directions and requests to do
2 so constitutes deficient performance by counsel that deprives a defendant of an appeal that he
3 otherwise would have taken. *Id.* at 746. This is so even when the defendant has waived an appeal
4 in a plea agreement. *Id.* at 747; *see also Fabian-Baltazar*, 931 F.3d at 1217. In evaluating a
5 Section 2255 motion that alleges an attorney was expressly instructed to file a notice of appeal, the
6 Court must determine “whether such an instruction was given, and if not, whether counsel failed
7 to consult, and if so whether that failure constituted deficient performance.” *Fabian-Baltazar*, 931
8 F.3d at 1218. The term “consult” has the specific meaning of “advising the defendant about the
9 advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the
10 defendant’s wishes.” *Roe*, 528 U.S. at 478.


11 The evidence adduced at the hearing establishes that Rodriguez did not ask his lawyer to
12 file a notice of his appeal before or after he was sentenced. Attorney Maxwell testified that she
13 and Rodriguez had discussed the pros and cons of waiving an appeal on several occasions before
14 sentencing, and that Rodriguez was of a mind not to appeal. As the Court determined in a prior
15 order, it expressly examined Rodriguez at his change of plea about the waiver of an appeal, and
16 concluded that he understood and agreed to the waiver. *See* Dkt. No. 584 at 1. Attorney Maxwell
17 also testified that she knew she had a non-discretionary obligation to file a notice of appeal if
18 asked, but that Rodriguez did not ask her to file a notice of appeal after he was sentenced, even
19 though he and his family knew how to reach her by phone.

20 The Court finds that attorney Maxwell’s testimony was credible and to the point.
21 Rodriguez did not expressly contradict any of her testimony. At most, he said that he spoke to an
22 interpreter about filing an appeal, and not to attorney Maxwell herself. Even giving this testimony
23 full credit, a comment to an interpreter is not grounds for an ineffective assistance claim under
24 *Strickland*, *Roe*, or *Garza*. Rodriguez’s counsel at the evidentiary hearing agreed with this
25 conclusion. Hr. Tr. at 34:13-35:17.

Consequently, the Section 2255 motion is denied.

IT IS SO ORDERED.

Dated: November 2, 2021



JAMES DONATO
United States District Judge

United States District Court
Northern District of California