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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	NOS. CR-04-2160-LRS
Respondent,)	(CV-08-3034-LRS)
)	
-vs-)	
)	ORDER DENYING 28 U.S.C. §2255
NICANDRO PINEDA-ARREGUIN,)	MOTION
)	
Movant.)	

Before the Court is Movant's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 20, 2008 (Ct. Rec. 85, CR-04-2160, Ct. Rec. 1, CV-08-3034). The Motion is submitted by Nicandro Pineda-Arreguin, who is appearing *pro se* for the purposes of these proceedings.

I. BACKGROUND

Mr. Pineda-Arreguin was indicted on November 10, 2004 for CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE in violation of 21 U.S.C. §846; DISTRIBUTION OF A CONTROLLED SUBSTANCE - METHAMPHETAMINE, in violation of 21 U.S.C. §841(a)(1); and POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE-METHAMPHETAMINE, in violation of 21 U.S.C. §841(a)(1). Defendant pleaded guilty to Count Three of the Indictment on October 11, 2005 with a written plea agreement. On March 23, 2006, Mr. Pineda-Arreguin was sentenced to a ten year minimum mandatory term of imprisonment with five years supervised release; and

1 a special assessment of \$100. Mr. Pineda-Arreguin filed a direct appeal
2 of his sentence on March 30, 2006 pursuant to Fed. R. App. P. 4(b)(1).

3 Mr. Pineda-Arreguin contends that his sentence is unconstitutional
4 based on two grounds: 1) safety valve should have been applied as he met
5 the five criteria; and 2) conviction obtained by plea of guilty which was
6 not "knowing nor intelligent." Ct. Rec. 136, at 3-4.

7 II. DISCUSSION

8 28 U.S.C. § 2255 provides, in part:

9 A prisoner in custody under sentence of a court
10 established by Act of Congress claiming the right to be
11 released upon the ground that the sentence was imposed
12 in violation of the Constitution or laws of the United
13 States, or that the court was without jurisdiction to
14 impose such sentence, or that the sentence was in excess
of the maximum authorized by law, or is otherwise
subject to collateral attack, may move the court which
imposed the sentence to vacate, set aside or correct the
sentence.

15 A petitioner is entitled to an evidentiary hearing on the motion to
16 vacate his sentence under 28 U.S.C. § 2255, unless the motions and the
17 files and records of the case conclusively show that the prisoner is
18 entitled to no relief. This inquiry necessitates a twofold analysis: (1)
19 whether the petitioner's allegations specifically delineate the factual
20 basis of his claim; and, (2) even where the allegations are specific,
21 whether the records, files and affidavits are conclusive against the
22 petitioner. *United States v. Taylor*, 648 F.2d 565, 573 (9th Cir.), cert.
23 denied, 454 U.S. 866 (1981) (internal quotations, citations and footnote
24 omitted).

25 The statute provides that only if the motion, file, and records
26 "conclusively show that the movant is entitled to no relief" may the

1 Court summarily dismiss the Motion without sending it to the United
2 States Attorney for response. 28 U.S.C. § 2255. The Rules regarding
3 section 2255 proceedings similarly state that the Court may summarily
4 order dismissal of a § 2255 motion without service upon the United States
5 Attorney only "if it plainly appears from the face of the motion and any
6 annexed exhibits and the prior proceedings in the case that the movant
7 is not entitled to relief in the district court." Rule 4(a), RULES-SECTION
8 2255 PROCEEDINGS. Thus, when a movant fails to state a claim upon which
9 relief can be granted or when the motion is incredible or patently
10 frivolous, the district court may summarily dismiss the motion. *Cf.*
11 *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v.*
12 *United States*, 772 F.2d 525, 526 (9th Cir. 1985).

13 **A. GROUND ONE-FAILURE TO GRANT SAFETY VALVE RELIEF**

14 Mr. Pineda-Arreguin challenges the fact that he did not receive
15 so-called "safety valve" relief at sentencing. 18 U.S.C. § 3553(f);
16 U.S.S.G. § 5C1.2. The safety valve allows the court to sentence certain
17 defendants without regard to the statutory minimum. U.S.S.G. § 5C1.2. He
18 argues that the court erred in not granting safety valve relief. He
19 claims that he qualified for safety valve relief and should have been
20 given a two-level reduction in his offense level. More specifically, Mr.
21 Pineda-Arreguin argues that he met the fifth criteria by providing a
22 detailed written proffer prior to sentencing which set forth all he knew
23 about the offense. Mr. Pineda-Arreguin concludes he should have received
24 an eighty-seven month sentence rather than a sentence of ten years.

25 Prior to sentencing, Mr. Pineda-Arreguin refused to an interview
26 with the government, despite an opportunity to do so. (Trans. 3/23/06:

1 4.) Three days before sentencing, Petitioner filed a written proffer.
2 The court found at sentencing, based on the government's arguments and
3 the written proffer, that Mr. Pineda-Arreguin had not truthfully provided
4 to the government all information and evidence concerning the offense or
5 offenses that were part of the same course of conduct or of a common
6 scheme or plan pursuant to 18 U.S.C.A. § 3553(f).

7 The safety valve allows the court to sentence certain defendants
8 without regard to the statutory minimum. U.S.S.G. § 5C1.2. A defendant
9 must meet all of the following criteria to be eligible for the safety
10 valve:

11 (1) the defendant does not have more than 1 criminal
12 history point, as determined under the sentencing
guidelines;

13 (2) the defendant did not use violence or credible
14 threats of violence or possess a firearm or other
dangerous weapon (or induce another participant to do
so) in connection with the offense;

15 (3) the offense did not result in death or serious
bodily injury to any person;

16 (4) the defendant was not an organizer, leader, manager,
17 or supervisor of others in the offense, as determined
under the sentencing guidelines and was not engaged in
a continuing criminal enterprise, as defined in section
408 of the Controlled Substances Act; and

18 (5) not later than the time of the sentencing hearing,
19 the defendant has truthfully provided to the Government
20 all information and evidence the defendant has
concerning the offense or offenses that were part of the
21 same course of conduct or of a common scheme or plan,
but the fact that the defendant has no relevant or
22 useful other information to provide or that the
Government is already aware of the information shall not
preclude a determination by the court that the defendant
23 has complied with this requirement.

24 18 U.S.C. § 3553(f).

25 Mr. Pineda-Arruguin has failed to offer additional evidence showing
26 that he met the requirements of § 3553(f)(5), nor does the record in this

1 case contain any such evidence. (Trans. 3/23/06: 14-15.) Mr. Pineda-
2 Arreguin has a difficult road to travel in attempting to show prejudice
3 in this case. That is because safety valve consideration is just
4 that-consideration. Pineda-Arreguin had been given the opportunity to be
5 interviewed by the government-which he refused. Instead, he proffered
6 written information only, at his peril, for safety valve analysis. The
7 government and the sentencing court believed that he had not provided a
8 full and truthful account of his knowledge concerning the offense. See,
9 e.g., *United States v. Stephenson*, 452 F.3d 1173, 1180-81 (10th Cir.2006)
10 (rejecting defendant's argument that his proffer letter was forthcoming
11 enough to garner safety valve relief from the mandatory minimum
12 sentence).

13 A motion for safety valve departure "does not entitle a defendant
14 to downward departure, but only enables the sentencing judge to depart
15 on that ground at his discretion." *United States v. Damer*, 910 F.2d 1239,
16 1240-41 (5th Cir.1990); *United States v. Harrison*, 918 F.2d 30, 32 (5th
17 Cir.1990). In this regard, what Petitioner fails to mention is that,
18 while the government did refuse to recommend a safety valve reduction
19 based on the written proffer only, the sentencing judge made the factual
20 determination that Petitioner did not qualify for it. (Trans. 3/23/06:
21 20). Specifically, the sentencing judge concluded that Petitioner had not
22 been completely forthcoming in his proffer:

23 The written proffer, which has come in three days before
24 sentencing, is in written format. It is under oath, but
25 it is also a statement which is lacking in the type of
26 detail which inherently must be present in this
defendant's knowledge. For example, he references a
name of a person in an area in California. That name is
by first name only. This person purportedly had

1 provided substantial amounts of methamphetamine on
2 credit, yet there's no detail with regard to where this
3 person can be reached, what he or she looks like, what
4 his background is, who he may be involved with, nor is
there any additional details concerning other activities
involved in the transport of that product from
California to the state of Washington.
(Trans. 9/13/04: 20-21.)

5 Moreover, the plea agreement that the government offered to Mr.
6 Pineda-Arreguin did not guarantee that he would receive the safety valve
7 if he pled guilty. The plea agreement Mr. Pineda-Arreguin signed
8 specifically stated in paragraph 11 that:

9 The United States and the Defendant acknowledge that the
10 Defendant **may** be eligible for the safety valve
11 provisions of 18 U.S.C. §3553(f) and U.S.S.G §5C1.2. **If**
12 **the Court determines the Defendant meets the criteria**
13 **set forth in 18 U.S.C.3553(f)(1-5)**, the Defendant shall
14 qualify for a 2-level reduction in the offense level,
and the Court shall impose a sentence in accordance with
the applicable sentencing Guideline without regard to
any statutory minimum sentence.

15 Ct. Rec. 87. at 9. [Emphasis added.]

16 The burden of proof is on the defendant to show, by a preponderance
17 of the evidence, his qualification for safety valve relief. *United*
18 *States v. Washman*, 128 F.3d 1305, 1307 (9th Cir.1997). However, this is
19 only an initial burden and once the defendant has shown he is eligible,
20 "it falls to the Government to show that the information he has supplied
21 is untrue or incomplete." *United States v. Shrestha*, 86 F.3d 935, 940
22 (9th Cir.1996). The court's finding that Defendant-Petitioner did not
23 meet the requirements of the safety valve, i.e., his truthful cooperation
24 with the government, is fully supported by the evidence. It is
25 additionally noted that Defendant-Petitioner also had safety concerns
26 relating to his disclosure of information. (Ct. Rec. 112). The Court

1 finds that the Movant has failed to show a constitutional violation under
2 Ground One.

3 **B. GROUND TWO-GUILTY PLEA NOT KNOWING NOR INTELLIGENT**

4 Mr. Pineda-Arreguin alleges that his attorney Mr. Hernandez "assured
5 him that if he signed the plea agreement he would qualify for a Guideline
6 safety valve reduction because of his first offense status and his minor
7 role in the organization." Ct. Rec. 136, at 3. He suggests that his plea
8 was unknowing because his attorney allegedly promised that he would be
9 afforded safety valve relief and receive an 87-month sentence.
10 Therefore, based on the advice from his attorney, Petitioner states his
11 plea was not knowing and intelligent as required by Rule 11.

12 A plea may be involuntary due to counsel's errors where the attorney
13 materially misrepresents the consequences of the guilty plea. *United*
14 *States v. Silva*, 430 F.3d 1096, 1099 (10th Cir.2005), cert. denied, 547
15 U.S. 1164, 126 S.Ct. 2318, 164 L.Ed.2d 841 (2006). Nowhere in his
16 petition does Petitioner claim that counsel's advice regarding pleading
17 guilty was erroneous. Nowhere in his petition does Petitioner claim that
18 his counsel's allegedly deficient performance affected the knowing and
19 intelligent nature of his guilty plea.

20 The court notes that the plea agreement and the change of plea
21 colloquy make it clear that a sentence different than the one purportedly
22 promised to him (87 months) by his defense attorney could be imposed.
23 The court found on October 11, 2005 that defendant's plea of guilty to
24 Count 3 of the Indictment was knowing, intelligent, and voluntary, and
25 not induced by fear, coercion, or ignorance. (Ct. Rec. 88). Petitioner
26 chose to provide a written proffer in lieu of an interview opportunity

1 with the government. Given that the information for the § 3553(f)(5)
2 safety valve analysis was within Petitioner's possession, not his
3 attorney's, the court cannot now conclude that his plea was unknowing
4 based on his failure to qualify for the 2-level reduction that would
5 result in an 87-month sentence. The court finds that the Movant has
6 failed to show a constitutional violation under Ground Two.

7 **III. CONCLUSION**

8 The Petitioner asked for an evidentiary hearing. The court finds
9 that Petitioner is not entitled to an evidentiary hearing on the motion
10 to vacate his sentence under 28 U.S.C. § 2255. Under the record before
11 the court, Petitioner's motion is herewith dismissed without sending it
12 to the United States Attorney for response. Accordingly,

13 **IT IS ORDERED** that:

14 1. Mr. Pineda-Arreguin's Motion to Vacate, Set Aside, or Correct
15 Sentence by a Person in Federal Custody, filed May 20, 2008 (Ct. Rec.
16 135, CR-04-2160-LRS; Ct. Rec. 1, CV-08-3034-LRS) is **DENIED**.

17 2. The District Court Executive is directed to:

18 (a) File this Order;

19 (b) Provide a copy to Petitioner **AND TO** the United States
20 Attorney, Yakima, Washington; and

21 (c) **CLOSE THESE FILES**.

22 **DATED** this 18th day of November, 2008.

23 *s/Lonny R. Suko*

24 _____
25 LONNY R. SUKO
26 UNITED STATES DISTRICT JUDGE