

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

**GILROY BRYCE MERREN**

Petitioner

**CIVIL NO. 16-2105 (CCC)**

**(Related to Cr. No. 14-244 (CCC))**

v.

**UNITED STATES OF AMERICA**

Respondent

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**UNITED STATES' RESPONSE IN OPPOSITION TO  
PETITIONER'S §2255 MOTION**

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**TO THE HONORABLE COURT:**

Gilroy Bryce Merren claims his attorney was ineffective because she did not visit or talk to him after the sentencing hearing to discuss an appeal and failed to file an appeal on his behalf. (ECF No. 1, p. 4; 1-1, p. 1). Rather than seek reinstatement of his right to appeal, Merren requests that the Court vacate, set aside, or correct his sentence. (ECF No. 1, p. 13). The government submits that since Merren's averments are without merit, the relief requested should be denied.

**Background**

In 2014, Merren pled guilty to conspiring to possess with intent to distribute at least 50, but less than 150 kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, pursuant to a plea agreement entered under Rule 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure. (ECF No. 45, 47). The parties agreed to recommend a sentence within the advisory guideline range for a total offense level of 33. (ECF No. 45, p. 4). Assuming a criminal history category of I, this range would be 135-168 months (*Id.*, p. 3). The plea agreement contained a waiver of appeal provision indicating that Merren waived his right to appeal his conviction and sentence if sentenced in accordance with the plea agreement's terms and conditions (*Id.*, p. 7).

Merren's appellate rights and the waiver of appeal were discussed at the change of plea hearing. Merren acknowledged that he voluntarily waived his right to appeal if the Court followed the plea agreement's sentencing recommendation:

Q. The law provides generally that defendants in a federal criminal case have the right to appeal any sentence the Court imposes. Are you aware of that right?

A. Yes, sir.

Q. But I want to point out to you that, in your plea agreement, at paragraph 15, you agree to waive your right to appeal both the judgment and the sentence provided the Court accepts your plea agreement and sentences you according to its recommendation. Are you aware of that?

A. Yes, Your Honor.

Q. And do you voluntarily agree to waive your right to appeal both your conviction and your sentence if the Court so accepts your plea agreement?

A. Yes, Your Honor.

(COPT, pp. 12-13).

At the sentencing hearing, the Court followed the parties' recommendation and sentenced Merren to 108 months' imprisonment, the upper end of the applicable guideline range for a total offense level of 29.<sup>1</sup> (SHT, p. 9). Despite his waiver, the Court advised Merren of his right to appeal.

THE COURT: ... Mr. Merren, although you pled guilty and pursuant to the terms of your plea agreement you waived your rights to appeal the judgment and sentence imposed in this case, you are advised nonetheless that you can appeal your conviction if you understand that your guilty plea was unlawful or involuntary, or if there is some other fundamental defect in the proceedings that

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1. While the total offense level was determined to be 29, this was in accordance with the plea agreement. The plea agreement's offense calculations were off, but the drug quantity stipulation was correct. (SHT, p. 8). Moreover, Merren complied with the safety-valve and his offense level was reduced by two additional levels (*Id.*).

was not waived by your plea agreement with the United States.

(SH Tr. pp. 11-12). Merren did not express any interest in appealing his sentence. Judgment was entered on June 26, 2015. (ECF No. 75). Merren did not appeal.

### **Discussion**

Merren has not fulfilled his burden of establishing he is entitled to relief pursuant to § 2255. To succeed on a claim of ineffective assistance of counsel, a petitioner must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). In the context of guilty pleas, the first prong requires that Merren show his counsel's performance was not within the range of competence. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Tollett v. Henderson*, 411 U.S. 258, 267, (1973) (“[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 was not within the standards set forth [by this Court].’”). The second prong of *Strickland* “focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” *Hill*, 474 U.S. at 59. That is, the petitioner “must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* A court need not address both parts of the *Strickland* test if the petitioner makes an insufficient showing on one. *See United States v. Caparotta*, 676 F.3d 213, 219-20 (1st Cir. 2012). Failure to satisfy one of the *Strickland* prongs is fatal and, therefore, a court is free to tackle either prong first. *United States v. Carrigan*, 724 F.3d 39, 44 (1st Cir. 2013).

Merren's complaint is not that he was not advised of his appellate rights by his attorney. Such a claim would be refuted by his on the record and under oath assertions that he discussed the

plea agreement with his counsel and his recognition that the plea agreement contained a waiver of appeal clause. Merren also does not claim that he instructed his attorney to file an appeal on his behalf and she refused to do so. Instead, his claim focuses on an inaction after he received a sentence more beneficial than what he had originally bargained for. In this context, even assuming that Merren's bald and conclusory allegations are correct, his attorney was not ineffective for not visiting him and not filing a notice of appeal.

Merren's attorney performance did not fall below an objective standard of reasonableness. This Court must apply a strong presumption that counsel's representation was within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 689. Counsel's performance fell squarely within the wide range of reasonable assistance. At sentencing, Merren received a sentence that was more beneficial than anticipated. Based on this result, and on Merren's failure to express a desire to appeal his sentence, counsel was not ineffective.

"[C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). In making this determination, relevant factors include "whether the conviction follows a trial or guilty plea" ("because a guilty plea reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings"), "whether the defendant received the sentenced bargained for as part of the plea" and "whether the plea expressly reserved or waived some or all appeal rights." *Id.* Neither factor is present here.

Merren's sentence was the result of a negotiated plea agreement that included a waiver of appeal clause. His sentence was consistent with the parties' recommendation and therefore the

waiver was enforceable. Moreover, Merren does not even allege that he expressed any interest in appealing his sentence. Thus, under the circumstances present here, counsel had no reason to think that a reasonable defendant would have wanted to appeal. *See Ryan v. United States*, 97 F. Supp.2d 190, 195 (D. Mass. 2000) (“That Petitioner pled guilty and received the relatively lenient sentences bargained for weighs strongly against a finding that a rational defendant would wish to appeal.”). As Merren has failed to show that his counsel’s performance was deficient, he cannot show that he was prejudiced by his counsel’s performance, especially when any appeal would have been dismissed pursuant to his waiver. *See Eubanks v. United States*, 11 F. Supp. 2d 455 (S.D.N.Y. 1998) (claim for ineffective assistance of counsel based on failure to file an appeal found baseless where the defendant waived his right to appeal his sentence).

**WHEREFORE**, in view of the foregoing the United States respectfully requests that Petitioner’s motion be dismissed.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, October 20, 2016.

**ROSA EMILIA RODRÍGUEZ-VÉLEZ**  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that the foregoing document was uploaded today, October 20, 2016, into the Court's website using the CM/ECF system and a copy served upon the person listed below by depositing in the United States Post Service in an envelope with correct postage for delivery.

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