

Count Two carried a statutory maximum sentence of forty years' imprisonment and a mandatory minimum of five years' imprisonment.

After the sentencing hearing, and by Order of May 24, 2010, this Court applied a two-level enhancement to Pena-Gonell's offense level pursuant to U.S.S.G. § 3C1.1 for willfully obstructing or impeding the administration of justice with respect to the investigation, prosecution, or sentencing of his offense because the Court found Pena-Gonell threatened his two codefendants and their families in an effort to influence the outcome of the case. The Court also applied a two-level enhancement pursuant to U.S.S.G. § 3B1.1 because Pena-Gonell played an aggravating role in the offense, finding Pena-Gonell acted as a leader and supervisor of the cocaine distribution conspiracy. Because these two enhancements applied, the Court held Pena-Gonell was not eligible for the U.S.S.G. § 5C1.2 "safety-valve" provision, which allows a court to impose a sentence without regard for the statutory minimum sentence if the defendant meets certain criteria. The Court also refused to grant Pena-Gonell a one-level reduction for timely acceptance of responsibility because he took his plea just before trial in his case was set to begin. Given these findings, the Court determined Pena-Gonell had a total offense level of 34. With a criminal history category of I and an offense level of 34, the Guidelines range of imprisonment was 151-188 months. The Court sentenced him to 168 months (or fourteen years) imprisonment on each Count to run concurrently. Pena-Gonell appealed his sentence, and on June 22, 2011, the United States Court of Appeals for the Third Circuit affirmed.

On October 31, 2011, Pena-Gonell filed a petition for habeas corpus pursuant to 28 U.S.C. § 2255, and, in accordance with this Court's order, refiled the petition December 2, 2011. In his petition, Pena-Gonell claims he was denied his Sixth Amendment right to effective assistance of counsel for two reasons: (1) he was induced to plead guilty because his counsel

failed to adequately explain the terms of the guilty plea agreement to him by telling him he would only have to serve approximately ten years' imprisonment and by failing to inform him he could be deported, and because his counsel refused to conduct pretrial investigations or share with Pena-Gonell the evidence against him, and (2) at the sentencing hearing, his counsel failed to object to certain Guidelines enhancements as unconstitutional. By Order of January 30, 2014, Pena-Gonell was permitted to amend his petition and assert an additional claim that his counsel was ineffective for allowing him to make an "an unimmunized proffer" to federal agents. Pena-Gonell also requests an evidentiary hearing to clarify and expand the record.

DISCUSSION

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may seek to have his sentence vacated, set aside, or corrected if it was imposed in violation of the Constitution or laws of the United States, or is otherwise subject to collateral attack. Relief may be granted only if an error of law or fact occurred, and if such error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Eakman*, 378 F.3d 294, 298 (3d Cir. 2004) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). A defendant who seeks relief pursuant to § 2255 based on a claim of ineffective assistance of counsel must satisfy the two-prong test set forth in *Strickland v. Washington* by showing (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984).

As to the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and to be considered deficient, counsel's performance must fall below "an objective standard of reasonableness" when measured against "professional norms." *Id.* at 688-89. To establish the second prong, prejudice, "[t]he defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An error by counsel, even if unreasonable, does not "warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. As set forth above, Pena-Gonell advances his ineffective assistance claim on three separate grounds.

First, Pena-Gonell asserts his counsel induced him to plead guilty by lying about the terms of the plea agreement. Pena-Gonell claims his counsel promised him that his sentence if he pleaded guilty would be approximately ten years, but his actual sentence was fourteen years. Assuming, without deciding, that Pena-Gonell's attorney promised a sentence of approximately ten years and this promise constitutes deficient performance under the first prong of the *Strickland* test, his claim fails under the second prong because such a promise did not prejudice Pena-Gonell's defense. The Third Circuit has repeatedly recognized that while a defendant must be informed of the consequences of pleading guilty, "the law does not require that a defendant be given a reasonably accurate 'best guess' as to what his/her actual sentence will be." *United States v. Mustafa*, 238 F.3d 485, 492 n.5 (3d Cir. 2001). Even if a "best guess" is given, "an erroneous sentencing prediction by counsel is not ineffective assistance of counsel where . . . an adequate plea hearing was conducted." *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007). In fact, "defense counsel's conjectures to his client about sentencing are irrelevant where the written plea agreement and in-court guilty plea colloquy clearly establish the defendant's maximum potential exposure and the sentencing court's discretion." *Id.*; see also *United States v. Jones*, 336 F.3d 245, 254 (3d Cir. 2003) (holding defendant's counsel was not ineffective for allegedly promising a sentence of "no more than 71 months" even though defendant received 130 months because defendant was advised in open-court colloquy of the potential maximum

sentence and defendant told the court no one had made any threat, promise, or assurance of any kind to convince him to plead guilty); *Mustafa*, 238 F.3d at 492 (“[A]ny alleged misrepresentations that [defendant’s] former counsel may have made regarding sentencing calculations were dispelled when [defendant] was informed in open court that there was no guarantee as to sentence, and that the court could sentence him to the maximum.”); *Masciola v. United States*, 469 F.2d 1057, 1059 (3d Cir. 1972) (per curiam) (holding “[a]n erroneous prediction of a sentence by defendant’s counsel does not render a guilty plea involuntary” when the defendant acknowledged he was aware of the maximum potential sentence and was questioned as to the voluntariness of his plea during the plea colloquy).

In this case, even if Pena-Gonell’s attorney erroneously promised a certain sentence, any error was negated because Pena-Gonell received an adequate plea colloquy in which he was made fully aware of both his maximum sentencing exposure and of the court’s discretion to impose a maximum sentence. During the plea colloquy, the Court repeatedly told Pena-Gonell that the maximum sentence he could receive was life imprisonment and he was facing a mandatory minimum term of ten years. *See, e.g.*, Change of Plea Hearing Tr. 10, 25-26, 28-29, Oct. 19, 2009 (hereinafter COP Tr.). Pena-Gonell testified he understood his maximum and minimum sentencing exposure. *Id.* at 10, 26, 29. The Court also informed Pena-Gonell that no one could guarantee the sentence the Court would impose, and although his lawyer will make a recommendation, the Court would decide the ultimate sentence. *Id.* at 28-29.¹ Pena-Gonell told the Court he had no questions or reservations about pleading guilty and he was not being forced to plead. *Id.* at 21, 29. Pena-Gonell stated his attorney answered all his questions, and he was

¹ The Court stated “Nobody could give you any guarantees as to what a potential sentence would be that I will be giving you; you understand that?” COP Tr. 28-29. Pena-Gonell responded, “Yes, sir.” *Id.*

satisfied with his attorney's representation and advice. *Id.* at 20-21. Thus, any alleged misrepresentations by Pena-Gonell's attorney were dispelled when he was informed in open court about the minimum and maximum statutory terms of imprisonment and testified he both understood the consequences of pleading guilty and was not being forced to plead.

Under this first claim, Pena-Gonell also asserts his counsel was ineffective because his counsel failed to inform him he could be deported, as required by the Supreme Court's holding in *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010).² However, even assuming Pena-Gonell's counsel's performance was deficient in this regard, Pena-Gonell's accusation fails under the second prong of the *Strickland* test because the alleged deficiency was cured by the Court's extensive discussion of the issue. At the plea colloquy, the Assistant United States Attorney opined that Pena-Gonell would be deported, and the Court manifested its agreement. COP Tr. 31. Pena-Gonell assured the Court he understood that his guilty plea would have an impact on his status as a resident and he could become subject to deportation. *Id.* 31-32. Pena-Gonell was explicitly advised in the course of the colloquy that his plea would render him subject to deportation and he acknowledged, under oath, that he understood. Thus, even assuming Pena-Gonell's counsel failed to warn him about the possibility of deportation, because Pena-Gonell engaged in a detailed and explicit colloquy that focused on the potential immigration consequences of his decision to plead guilty, there is not a reasonable probability that but for counsel's errors, Pena-Gonell would not have pleaded guilty and would have insisted on going to trial. *See Mendoza v. United States*, 774 F. Supp. 2d 791, 799 (E.D. Va. 2011) (holding that

² The *Padilla* Court noted it was only deciding that in a case in which the deportation consequences were "truly clear," counsel's failure to give correct advice regarding those consequences fails the first prong under the *Strickland* test, deficient performance. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Whether or not the defendant in that case could satisfy the second prong, prejudice, was remanded to the state court. *Id.*

petitioner's sworn acknowledgment during the Rule 11 colloquy "that her guilty plea would render her subject to deportation" and "that she understood this possible consequence" is dispositive of the prejudice analysis); *Brown v. United States*, No. 10-3012, 2010 WL 5313546, at *6 (E.D.N.Y. Dec. 17, 2010) ("As courts applying *Padilla* have recognized, when a defendant learns of the deportation consequences of his plea from a source other than his attorney, he is unable to satisfy *Strickland*'s second prong because he has not suffered prejudice."); *Gonzalez v. United States*, No. 10-5463, 2010 WL 3465603, at *1 (S.D.N.Y. Sept. 3, 2010) ("Assuming that [the defendant's] trial attorney failed to advise him that he could be deported as a result of pleading guilty, that failure was not prejudicial since, prior to accepting his plea, [the Court] advised [the defendant] that he could be deported as a result of his guilty plea."); *United States v. Cruz-Veloz*, No. 07-1023, 2010 WL 2925048, at *3 (D.N.J. July 20, 2010) (concluding "[p]etitioner was not prejudiced by counsel's alleged failure to inform him of the deportation consequences of his plea because the court informed him of the consequences" in the course of the plea hearing).³ Thus, Pena-Gonell cannot establish prejudice because the Court and Government counsel advised him of the risk of deportation.

³ Pena-Gonell submitted several replies and notices of supplemental authorities, in which he cites many cases he claims advance his argument that his counsel was ineffective for failing to advise him of the possibility of deportation. However, these cases confirm Pena-Gonell cannot establish prejudice even if his attorney did not inform of the risks of deportation because the sentencing courts in those cases gave warnings that were general and vague, whereas here, the Court was explicit in informing Pena-Gonell of the deportation consequences. *See e.g., United States v. Orocio*, 645 F.3d 630, 646 (3d Cir. 2011) (finding the court's allusion to immigration authorities and warning the plea was not binding on the Immigration and Naturalization Service were insufficient to alert the defendant of the immigration consequences of a guilty plea), *abrogated on different grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013); *United States v. Akinsade*, 686 F.3d 248, 253 (4th Cir. 2012) (explaining that although a "defendant may be unable to show prejudice if at the Rule 11 proceeding the district court provides an admonishment that corrects the misadvice," the defendant in that case demonstrated prejudice because his attorney affirmatively misled him by assuring him he would not be deported and the admonishment by the district court was too general and equivocal).

Pena-Gonell also argues his counsel induced him to plead guilty by informing him that he would not conduct any pretrial investigation to determine the possibility of presenting a defense at trial and not giving him an opportunity to review the discovery in the case. Pena-Gonell asserts he told the Court throughout the colloquy he did not have an opportunity to review the evidence against him and he was not satisfied with his counsel's assistance.

Although Pena-Gonell includes selective portions of the transcript from the plea colloquy indicating he did not feel satisfied with his counsel, he fails to include the Court's follow-up which clarified Pena-Gonell's understanding of the case against him. For example, Pena-Gonell informed the Court that he did not have enough time to review all of the discovery because he only received it a few days before the plea colloquy. However, after the Court explored this issue, Pena-Gonell affirmed that his attorney had discussed the case and evidence against him, and had answered all of his questions. COP Tr. 17-18, 20. Pena-Gonell also assured the Court he was satisfied with his counsel's representations. *Id.* at 20-21. When Pena-Gonell told the Court he did not know what the statements of the other codefendants were, the Court again followed up three times to confirm he understood those codefendants would be called to testify against him and he had an understanding as to what they would say. *Id.* at 18-19. The record also contradicts Pena-Gonell's assertion that his attorney threatened that if he did not plead guilty then "certain things were liable to happen." Pet'r Mem. of Law 2-3. During the plea colloquy, Pena-Gonell testified that no promises or threats had been made, and he was not being forced to plead guilty. COP Tr. 22-24.

Because the Court's careful and detailed plea colloquy correctly informed Pena-Gonell of his maximum and mandatory minimum sentencing exposure, as well as the likelihood of his deportation, any misinformation Pena-Gonell's attorney supplied him did not prejudice him.

Further Pena-Gonell repeatedly assured the Court he understood the evidence against him and was satisfied with his attorney's representation. Thus, his claim for ineffective assistance of counsel will be denied.

In his second claim, Pena-Gonell asserts his counsel was ineffective because at the sentencing hearing his counsel failed to object to the Guidelines enhancements for obstruction and leadership as unconstitutional fact-finding by the Court. His claim fails under the first prong of the *Strickland* test because his counsel's failure to challenge the Court's finding was not deficient. The Supreme Court held in *Alleyne v. United States* that facts which trigger a statutory mandatory minimum, as with facts necessary for the imposition of a statutory maximum sentence, must be submitted to a jury and cannot simply be found by a judge during sentencing. 133 S. Ct. 2151, 2155 (2013). However, the decision in *Alleyne* "did not curtail a sentencing court's ability to find facts relevant in selecting a sentence within the prescribed statutory range." *United States v. Smith*, 751 F.3d 107, 117 (3d Cir. 2014) (citing *Alleyne*, 133 S. Ct. at 2163). The facts underlying a sentencing enhancement need not be found by a jury beyond a reasonable doubt as long as those facts are used in an advisory sentencing system. *See United States v. Grier*, 475 F.3d 556, 565 (3d Cir. 2007) ("There can be no question . . . that the right to proof beyond a reasonable doubt does not apply to facts relevant to enhancements under an advisory Guidelines regime."). Here, the applicable statutory maximum terms of imprisonment for Pena-Gonell's convictions were life imprisonment for the Count One drug conspiracy and forty years for the Count Two drug distribution offense. Even with the enhancements, Pena-Gonell received a sentence of 168 months which is well below either statutory maximum. The Court was well within its authority to enhance the Guideline range based on its own findings that Pena-Gonell had obstructed justice and had been organizer or leader. Thus, Pena-Gonell's counsel's failure to

object to the findings as judicial fact-finding does not fall below an objective standard of reasonableness, and is therefore not deficient.

Lastly, Pena-Gonell asserts his counsel was ineffective for allowing Pena-Gonell to make two “unimmunized proffer[s]” to Special Agent (S.A.) Mark Koss on January 6 and January 16, 2010. Pena-Gonell argues the statements he made during the interviews were used against him at sentencing to (1) increase his offense by two levels for obstruction of justice, (2) increase his offense level by two levels for playing an aggravating role in the offense, (3) deny him safety-valve relief, and (4) deny him a one-level reduction in offense level for acceptance of responsibility.

Even if his attorney erred in allowing him to participate in the interviews, Pena-Gonell fails to establish there is a reasonable probability the result of the proceeding would have been different had he not participated, and therefore, his claim fails under the second prong of the *Strickland* test. The sentencing enhancements and denials of reductions were based on evidence other than Pena-Gonell’s interviews. First, the denial of the one-level reduction in offense level for acceptance of responsibility was based on the fact the Government did not make the required motion and Pena-Gonell had decided to plead guilty the morning of his trial. Sentencing Hr’g Tr. 65, May 24, 2010. Second, the increase in Pena-Gonell’s offense level for his aggravating role in the offense was based on witnesses who testified at the sentencing hearings to Pena-Gonell’s supervisory role as his brother’s right hand man.⁴ *Id.* at 67-68, 74-75. Next, the Court’s denial of

⁴ Pena-Gonell’s first sentencing hearing was held on April 22, 2010, and several witnesses testified for both the Government and the Defendant. However, because Pena-Gonell’s case agent, Special Agent Mark Koss, (a Government witness) was unavailable, the Court decided to keep the proceedings open so it could take his testimony before pronouncing Pena-Gonell’s sentence. *See* Sentencing Hr’g Tr. 7, April 22, 2010. Pena-Gonell’s second sentencing hearing took place on May 24, 2010.

the safety-valve reduction was based on the fact that Pena-Gonell was a leader and supervisor in the drug conspiracy and he failed to fully disclose to the Government all the information known to him about the drug conspiracy.⁵ *Id.* at 67. Although Pena-Gonell’s failure to fully disclose the information was based on his proffers, his leadership role was established independently of those proffers and would have alone prevented him from qualifying for the safety-valve provision. Lastly, Pena-Gonell received a two-level increase for obstruction of justice because the Court found he threatened his codefendants and their families. *Id.* at 64. The Court’s conclusion was based on testimony given by Government witnesses at the sentencing hearings and not on Pena-Gonell’s January interviews. *See, e.g.*, Sentencing Hr’g Tr. 43-45, 66-67, April 22, 2010.⁶

⁵ The safety valve provision of the Sentencing Guidelines, U.S.S.G. § 5C1.2, “establish[es] that a defendant shall be sentenced pursuant to the sentencing guidelines without regard to any statutory minimum sentence in certain drug offense cases in the event that . . . five conditions are met.” *United States v. Sabir*, 117 F.3d 750, 751 (3d Cir. 1997). In this case, Pena-Gonell and the Government stipulated that Pena-Gonell met two of the criteria. Pena-Gonell was left prove the remaining three requirements: (1) “the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense,” U.S.S.G. § 5C1.2(a)(2); (2) “the defendant was not an organizer, leader, manager, or supervisor of others in the offense, . . . and was not engaged in a continuing criminal enterprise,” U.S.S.G. § 5C1.2(a)(4); and (3) “not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense,” U.S.S.G. § 5C1.2(a)(5).

⁶ Pena-Gonell’s claims also fail under the first prong of the *Strickland* test because his attorney’s performance did not fall below the standard of reasonableness and was therefore not deficient. The defendant bears the burden of proving his eligibility for the safety-valve provision. *See Sabir*, 117 F.3d at 754; *see also United States v. Ishmael*, 469 F. App’x 86, 88 (3d Cir. 2012). Pena-Gonell participated in the January interviews with S.A. Koss to meet the fifth requirement of the safety-valve provision—that he has provided the Government all the information and evidence he has concerning the offense. Several strategic reasons support Pena-Gonell’s attorney’s choice to conduct the interview sessions in advance of the sentencing, as opposed to allowing Pena-Gonell to testify during the sentencing hearing. For example, because Pena-Gonell cooperated, the Government may have agreed the conditions for the safety-valve provision had been satisfied, as demonstrated by the fact the Government stipulated that two of the five criteria had been met. The Court may not use hindsight or second-guess sound tactical decisions when assessing a counsel’s performance and “strategic choices must be respected in these circumstances if they are based on professional judgment.” *Strickland*, 466 U.S. at 681,

The Court will also deny Pena-Gonell's request for a hearing. Section 2255 requires a district court to "grant a prompt hearing" when a habeas motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The factual allegations in Pena-Gonell's motions relate primarily to occurrences inside the courtroom and the record in this case is therefore sufficient to evaluate his claims. In this case, the record conclusively shows Pena-Gonell is not entitled to any relief. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962) ("What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be.").

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

689. Counsel's strategic choice in allowing his client to participate in the interview with S.A. Koss for the purpose of establishing eligibility for the safety-valve provision was within the range of professionally reasonable judgments.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 08-264-1
	:	
v.	:	CIVIL ACTION NO. 11-6725
	:	
RAFAEL PENA-GONELL	:	

ORDER

AND NOW, this 9th day of September, 2014, for the reasons set forth in the accompanying Memorandum, it is ORDERED Petitioner Rafael Pena-Gonell's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Document 137) is DENIED. There has been no substantial showing of the denial of a constitutional right warranting the issuance of a certificate of appealability. The Clerk of Court is DIRECTED to mark both cases CLOSED.

It is further ORDERED Pena-Gonell's Ex Parte Motion for Appointment of Counsel (Document 139) is DISMISSED as moot and his Motion to Reconsider (Document 163) is DENIED.¹

¹ "The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citation and internal quotation marks omitted). To succeed in his request to amend a prior judgment, a party seeking reconsideration must show: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its prior decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* A motion for reconsideration "addresses only factual and legal matters that the Court may have overlooked. . . . It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through—rightly or wrongly." *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (citation and internal quotation marks omitted). Pena-Gonell's motion provides no basis to grant reconsideration of the Court's January 30, 2014, Order finding Pena-Gonell's proposed supplemental claims do not relate back to the claims contained in his original habeas petition and are therefore untimely.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

