

Unpublished Disposition

243 F.3d 552

NOTICE: THIS IS AN UNPUBLISHED OPINION.

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United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Roberto VARGAS-LOPEZ, Defendant-Appellant.

No. 99-50310. D.C. No. CR-98-00956-LBG. Submitted Aug. 25, 2000<sup>2</sup>. Decided Nov. 20, 2000.

Appeal from the United States District Court for the Central District of California Lourdes G. Baird, District Judge, Presiding.

Before [WRIGHT](#), [CHOY](#), and [SKOPIL](#), Circuit Judges.

**Opinion**

**MEMORANDUM<sup>1</sup>**

*\*I* Roberto Vargas-Lopez appeals from his guilty-plea conviction and 18-month sentence for conspiracy to transfer false identification documents, in violation of 18 U.S.C. §§ 371 and 1028(a)(2), and for aiding and abetting the transfer of false identification documents, in violation of 18 U.S.C. §§ (2)(a) and 1028(a)(2). He contends, and we agree, that he received ineffective assistance of counsel. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate the conviction and sentence.

Ineffective assistance of counsel claims are considered on direct appeal only "when the record on appeal is sufficiently developed to permit review and determination of the issue," or "when the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir.1992).

Here, Vargas-Lopez's counsel admitted, prior to sentencing, his own "inadvertence" in failing to have the plea agreement executed, and the fact that he could not meet the agreement deadline because of his involvement in an unrelated trial. Based on counsel's admissions, we conclude that the record is sufficiently developed for examination of the ineffective assistance of counsel claim on direct appeal. *Cf. United States v. Recio*, 226 F.3d 1087, 1090 (9th Cir.2000) (government's concession makes a sufficient record to find ineffective assistance on direct appeal).

Counsel's admission that he inadvertently missed the plea agreement execution deadline, and his subsequent attempt to rely on the un-executed agreement at sentencing, reflect that his actions were not part of the defense strategy, and those actions fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *cf. United States v. Blaylock*, 20 F.3d 1458, 1465-69 (9th Cir.1994) (ineffective assistance where counsel failed to communicate a plea offer to his client); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir.1993) (ineffective assistance where counsel failed to file timely notice of appeal).

There is a reasonable probability that but for counsel's failure to properly execute the plea agreement, the results of the proceedings would have been different. *See Strickland*, 466 U.S. at 694. Under the terms of the plea agreement, Vargas-Lopez would have pleaded guilty to one count instead of four. The government would have been bound to stipulate that the crime involved 24 or fewer documents, which would have reduced the offense level and the guideline range, and the government also would have been bound to recommend a sentence on the low end of the guidelines. If the court had sentenced Vargas-Lopez to a term of less than 12 months, he might not have been sentenced to supervised release. *See U.S.S.G. § 5D1.1(b)*.

The Sixth Amendment mandates that the State (or the government) bear the risk of constitutionally deficient assistance of counsel.” *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir.1994) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986)). The remedy for counsel's ineffective assistance “should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred.” *Id.* at 1468. Here, the appropriate remedy is to direct the government to reinstate its original plea offer. *See id.* at 1468-69.

\*2 VACATED and REMANDED.

### Parallel Citations

2000 WL 1728114 (Table)

### Footnotes

- 2 The panel unanimously finds this case suitable for decision without oral argument. *See Fed. R.App. P. 34(a)(2)*.
- 1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

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