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

UNITED STATES OF AMERICA	**:**	**CIVIL ACTION NO. 05-4829**
	:	
v.	**:**	**CRIMINAL ACTION NO. 04-217**
	:	
JUAN VELASQUEZ-FABIAN	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **March 22, 2007**

Now before the Court is the Motion of Petitioner Juan Velasquez-Fabian ("Petitioner") to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, the Motion will be denied.

I. Background

On April 15, 2004, Petitioner was charged by Indictment with illegal reentry after deportation, in violation of 18 U.S.C. § 1326(a) and (b)(2). Pursuant to a written plea agreement with the Government, Petitioner pled guilty on June 18, 2004. On September 14, 2004, this Court sentenced Petitioner to a term of 46 months imprisonment. Petitioner filed a direct appeal. After consulting with his attorney, Petitioner concluded that "no relief [could] be obtained by proceeding with the appeal" and voluntarily dismissed it on February 10, 2005. Petitioner filed the instant Motion on September 9, 2005.

II. Analysis

Petitioner has raised two claims in his habeas petition. He argues that he received ineffective assistance of counsel and that the Court unconstitutionally adjusted his sentence based on a prior conviction.

As part of his plea agreement, Petitioner expressly waived the right to challenge his sentence through a collateral attack, including any motion pursuant to 28 U.S.C. § 2255. Plea Agreement at 4. The Third Circuit has held that "waivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice." United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001). This principle applies equally to waivers of the right to collateral attack. See, e.g., United States v. Black, 2006 WL 759691, at *2 (E.D. Pa. March 23, 2006); United States v. White, 307 F.3d 336, 337 (5th Cir. 2002).

In this case, Petitioner knowingly and voluntarily entered into his plea agreement. The agreement Petitioner entered into contained an explicit waiver clause, which stated in pertinent part:

> 8. In exchange for the undertakings made by the government in entering this plea agreement, the defendant, voluntarily and expressly waived all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collaterally attack arises under 18 U.S.C. 3742, 28 U.S.C. 1291, 28 U.S.C. 2255, or any other provision of law.

Plea Agreement at 4. At Petitioner's change of plea hearing, the Court engaged Petitioner in a colloquy to ensure that he understood the contents of his plea agreement. As part of this colloquy, Petitioner was expressly asked by the Court if he understood that the plea agreement "prevents you from using later proceedings, like a collateral attack and habeas corpus, to challenge your conviction, sentence or any other matter?" 6/21/2004 Change of Plea Tr. at 19. Petitioner was also asked, "are you fully satisfied with the counsel, representation and advice given to you by [your lawyer, Assistant Federal Defender] Luis A. Ortiz?" Id. at 5. Petitioner

responded affirmatively to both questions and pled guilty. Id. at 23.

Furthermore, barring Petitioner from raising his habeas claims would not result in a miscarriage of justice. To determine whether a waiver of the right to appeal amounts to a miscarriage of justice, courts should consider, among other things, "the clarity of [any] error, its gravity, its character . . . the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." Khattak, 273 F.3d at 563 (citation omitted). In this case, no miscarriage of justice would result from enforcing Petitioner's waiver of the right to challenge his sentence because his claims are without merit.[1]

III. Conclusion

For the foregoing reasons, the Court will deny Petitioner's Motion to Vacate, Set Aside,

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[1]In his claims, Petitioner first alleges that his trial counsel was ineffective because he failed to object at his sentencing to the imposition of a 16-level enhancement to his base offense level for previously being deported after a conviction for an aggravated felony, pursuant to U.S.S.G. § 2L1.2(b)(1)(A). This allegation is factually inaccurate. In both a sentencing memorandum, see docket no. 15, and at Petitioner's sentencing hearing, see 9/14/2004 Sentencing Tr. at 4-5, trial counsel Ortiz challenged the constitutionality of applying the enhancement to Petitioner. These arguments were considered and rejected by this Court.

Second, Petitioner alleges that his trial counsel failed to file a notice of appeal on his behalf. Motion at 6. This allegation is also factually inaccurate. On September 21, 2004, Ortiz filed a notice of appeal. See docket no. 19. Furthermore, the record demonstrates that, on February 15, 2005, appellate counsel Elizabeth Hey filed a motion to voluntarily dismiss Petitioner's appeal. Petitioner clearly indicated his consent by signing the motion.

Finally, Petitioner argues that his sentence should be vacated because the 16-level U.S.S.G. § 2L1.2(b)(1)(A) enhancement to his base offense level violated his constitutional rights. Specifically, he contends that because the predicate aggravated felony conviction that served as the basis for the enhancement was not alleged in the Indictment, the enhancement was imposed in violation of his Sixth Amendment right to a trial by jury. This argument is without merit. In Almendarez-Torres v. United States, the Supreme Court held that the existence of a prior conviction that increases the statutory maximum sentence faced by the defendant may be determined by the judge at sentencing and need not be alleged in the Indictment or established as an element of the offense. 523 U.S. 224, 244 (1998); see also United States v. Ordaz, 398 F.3d 236, 241 (3d Cir. 2005).

or Correct Sentence. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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ORDER

AND NOW, this 22ND day of March, 2007, upon consideration of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (docket nos. 27 and 28), it is **ORDERED** that:

1. The Motion is **DENIED**.

2. The Clerk of the Court shall mark Civil Action No. 05-4829 **CLOSED**.

3. Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.