UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	*Docket No. CR-96-4-P-H-01*
	)	*(Civil No. 97-221-P-H)*
FRANCISCO MARTINEZ,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

In this action, which has been transferred to this court from the United States District Court for the Northern District of New York, Francisco Martinez moves the court to modify the sentence imposed by this court following his plea of guilty to charges of conspiracy to possess with intent to distribute heroin and cocaine base, in violation of 21 U.S.C. §§ 841 and 846, and distribution and possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841. He contends that he is entitled to a further reduction in the offense level used to calculate his sentence under the United States Sentencing Commission Guidelines, specifically Section 3E1.1 of those guidelines, due to his acceptance of responsibility as evidenced by his guilty plea.[1]

[1] Filed with Martinez's section 2255 motion is an "Application to the U.S. Attorney General for prompt deportation pursuant to the Immigration and Nationality Act § 242(h)." This petition is not addressed to the court, but it does state as an issue "whether . . . there exists [j]urisdiction [in this court] to compel the Attorney General to deport" the defendant. Application at [2]-[3]. The answer to that question is "no." *Thye v. United States*, 109 F.3d 127, 128 (2d Cir. 1997) (and cases cited therein). Such a request must be submitted to the Attorney General for consideration under her discretionary authority. 8 U.S.C. § 1252(h). It will not be considered further here.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that Martinez's allegations are contradicted by the record, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

Martinez and a co-defendant were charged as a result of sales of heroin and cocaine base to an undercover agent in Maine in December 1995 and January 1996. Prosecution Version (Docket No. 16) at 1. Martinez entered into a plea agreement. Docket No. 17. On August 14, 1996 he was sentenced to a term of 46 months imprisonment followed by four years of supervised release. Judgment (Docket No. 23) at 2-3. Martinez did not take an appeal.

II. Analysis

Martinez contends that he received a two-level downward adjustment to his offense level under the Guidelines, specifically section 3E1.1, at the time of sentencing, and that he should receive an additional one-level adjustment based on the retroactive application of an amendment to that section which took effect on November 1, 1992. In fact, the conduct subject to the charges to which Martinez pleaded guilty took place long after the effective date of that amendment, so there is no issue of retroactive application. More significant is the fact that Martinez actually received the three-level downward adjustment authorized by the amended section 3E1.1. Undisputed Findings

Affecting Sentencing (Docket No. 19) at 1, ¶ 5. Martinez is entitled to nothing further under section 3E1.1.

III. Conclusion

For the foregoing reasons, recommend that Martinez's motion to correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of September, 1997.

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David M. Cohen
United States Magistrate Judge