

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
<i>v.</i>)	Criminal No. 89-33-P-C
)	(Civil No. 97-144-P-C)
ADALBERTO FRANCO-MONTOYA,)	
)	
Defendant)	

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

Adalberto Franco-Montoya moves this court to correct his sentence pursuant to 28 U.S.C. § 2255. Franco-Montoya was convicted after trial of possession of cocaine, aiding and abetting the possession of cocaine, and conspiracy to possess cocaine, all with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. He contends that he is entitled to a reduction in his sentence under an amendment to an application note to the United States Sentencing Commission Guidelines (“Guidelines” or “Guideline”) effective some four years after his conviction was affirmed on appeal and that he is also entitled to a reduction in his sentence under a memorandum of the Attorney General dated April 28, 1995 allowing prosecutors to seek downward departure from the Guideline sentencing range due to an alien defendant’s stipulation that he may be deported as part of an agreement to plead guilty.

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) (citation omitted). In this instance, I find that the allegations would not entitle Franco-Montoya to relief, and, accordingly, I recommend that his motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted on direct appeal of this matter, the defendant was one of four individuals charged in a “large-scale cocaine conspiracy.” *United States v. Rojo-Alvarez*, 944 F.2d 959, 962 (1st Cir. 1991). The defendant was “charged with being the ringleader of the conspiracy.” *Id.* All four individuals were charged with “possession of more than five kilos of cocaine with intent to distribute and with conspiracy to do so.” *Id.* at 963. The defendant was convicted on a jury verdict on April 12, 1990. *Id.*

Franco’s Presentence Report (“PSR”) established a base offense level of 34. The level reflected negotiations for thirty kilos of cocaine with the agents. The base level was increased four levels, to 38, due to Franco’s leadership role in the conspiracy. Most significantly, Franco received an additional two level increase, to 40, for obstruction of justice. The obstruction of justice increase suggested by the PSR was based on questions regarding Franco’s identity. The fingerprints and photograph in the INS file of “Adalberto Franco-Montoya” were not a match with the defendant. Moreover, the passport that Franco submitted to the authorities in support of his claim that he was indeed “Franco” had been altered.

Id. The defendant was sentenced to 365 months, the maximum for his range. *Id.* at 964. The conviction was upheld on appeal. *Id.* at 971.

II. Procedural Issue

The government argues that this action is barred by the one-year statute of limitations added to 28 U.S.C. § 2255 by the Anti-Terrorism and Effective Death Penalty Act of 1996, which took effect on April 24, 1996. Specifically, the government asserts that this action is barred because it was filed both more than one year after the defendant's conviction and sentence were final and more than one year after the Guideline amendment and the memorandum of the Attorney General, upon which he relies, took effect.

However, this court has allowed a one-year grace period for application of the new statute of limitations for section 2255 petitions. The Constitution requires that statutes of limitation allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982). Three circuit courts of appeal have held that a grace period equal to the new limitation period is a reasonable accommodation to this constitutional requirement. *Calderon v. United States Dist. Court*, 112 F.3d 386, 389 (9th Cir. 1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds* 117 S.Ct. 2059 (1997); *see also Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir. 1996) (same holding for claims brought under 28 U.S.C. § 2254 by state prisoners). Claims brought under section 2255 are thus not barred by the new statute of limitations if filed on or before April 23, 1997.

The defendant's motion was received by the clerk of this court on April 30, 1997. Docket No. 79. While this is one week after the statutory deadline, as extended, the inquiry does not end at this point. For prisoners who are not represented by counsel, as is the case here, the date of filing of any document with a court is the date upon which the document was given to prison authorities by the prisoner for mailing. *Houston v. Lack*, 487 U.S. 266, 270 (1988). In this case, the motion

bears a postmark of April 24, 1997 and the petition is dated April 23, 1997. Defendant's Motion at 7 & envelope attached thereto. In the absence of argument or evidence from the government to the contrary, the court will draw the inference from this evidence that the defendant did in fact present the motion for mailing on April 23, 1997, the last acceptable date under the amended section 2255.

III. Availability of Relief Sought

The government contends that the defendant's claim is barred because non-constitutional arguments concerning application of the Guidelines are not cognizable under section 2255, citing *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994). However, *Knight* deals with an asserted error that could have been raised on direct appeal. Here, the defendant bases his claim on an amendment to the Guidelines and a directive of the attorney general, both of which were issued for the first time well after his direct appeal was resolved. To apply *Knight* in the manner advocated by the government would block the application even of expressly retroactive changes in the Guidelines to the sentences of prisoners whose time to specify issues on direct appeal has expired. *Knight* does not extend so far.

Nonconstitutional federal claims are cognizable under section 2255 if "the claimed error . . . [is] a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U. S. 333, 346 (1974) (internal quotation marks and citation omitted). The defendant contends that his claimed applicability of the Attorney General's memorandum is one of constitutional dimension. Movant's Reply Brief (Docket No. 82) at 4-5. The government merely asserts that neither of the defendant's claims rises to a constitutional level and does not address the question whether he has presented a fundamental defect within the meaning of *Davis*. This court

need not resolve that question, but only because the defendant's claims on their merits do not rise to a constitutional level, nor do they entitle him to relief.

IV. The Substantive Claims

A copy of the Attorney General's memorandum upon which the defendant relies, dated April 28, 1995, is attached to the government's response to his petition. Docket No. 81. The defendant argues that he is entitled to a two-level reduction in his sentence pursuant to the memorandum because he is willing to admit alienage and deportability and to waive the right to hearing or other review of an order of deportation. Movant's Reply Brief at 5. The only section of the memorandum which embodies such requirements and provides such potential relief is Section II, which is styled "Stipulated Administrative Deportation in Plea Agreements."

The defendant did not enter into a plea agreement. Therefore, section II of the memorandum by its terms could not apply to him, even if it were somehow construed to apply retroactively to defendants already in prison under the terms of plea agreements accepted by the courts. The defendant argues, nonetheless, that denial of the benefits of this memorandum to defendants who are convicted after trial violates the equal protection provisions of the United States Constitution. However, it has been established law for some time that the availability of different sentencing terms for defendants who plead guilty as opposed to those who are convicted of the same charge after trial does not violate the constitutional guarantee of equal protection of the laws. *E.g.*, *United States v. Garcia*, 693 F.2d 412, 417 (5th Cir. 1982); *Humphries v. United States*, 328 F.2d 886, 887 (8th Cir. 1964). *See also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (prosecutor does not violate Constitution by offering reduced sentence as inducement to plead guilty).

The defendant's remaining argument is that an amendment to section 2D1.1 of the Guidelines (Amendment 518) should be applied retroactively to his sentence. The government argues that the amendment may not be applied retroactively because section 1B1.10(b) of the Guidelines limits retroactive application to only the specific amendments listed in section 1B1.10(c), and Amendment 518 is not one of those listed. *See also* U.S.S.G. § 1B1.10 n.2. The defendant maintains that Amendment 518 is only a clarification of application note 12 to section 2D1.1, and that he is entitled to the retroactive benefit of a clarifying amendment "as a matter of right," Reply Brief at 4, citing *United States v. LaCroix*, 28 F.3d 223, 227 n.4 (1st Cir. 1994).

The First Circuit in *LaCroix* states that amendments labeled by the Sentencing Commission "as 'clarifying' in nature, rather than revisionary, . . . may be taken into account retrospectively . . . by the sentencing court." *Id.* The petitioner offers no authority to support his assertion that Amendment 518 is a clarifying amendment, and it is not so labeled in Appendix C to the Guidelines, where all amendments are printed in sequence. The Commission labels clarifying amendments as such by stating that the purpose of the amendment is to clarify the guideline, or the operation of the guideline. *E.g.*, Amendments 3, 426, 445. In the case of Amendment 518, which has eight parts, the Commission states as to the part in issue here that "this amendment *revises* the Commentary to § 2D1.1." U.S.S.G. Manual, App. C at 424 (emphasis added). Thus, part eight of the amendment, upon which the defendant relies, cannot be considered under the *LaCroix* footnote as a clarifying change that may be taken into account retrospectively, in the discretion of the sentencing court. *See United States v. Sanchez*, 81 F.3d 9, 12 (1st Cir. 1996); *DeSouza v. United States*, 995 F.2d 323, 324 (1st Cir. 1993).

It is section 1B1.10(b) and its application note 2 that govern here. The unspecified reduction

in the sentence sought by the defendant¹ would not be “consistent with applicable policy statements issued by the Sentencing Commission,” 18 U.S.C. § 3582(c)(2), and his sentence therefore may not be modified.

V. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to vacate, set aside or 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 at Portland, Maine this 6th day of August, 1997.

*David M. Cohen
United States Magistrate Judge*

¹ This disposition of the petition makes it unnecessary to consider the government’s alternative argument that there would be no downward revision to the defendant’s sentence under the revised application note 12 to section 2D1.1 in any event, based on the evidence as recounted by the First Circuit’s opinion. The defendant does not address this argument in his Reply Brief.

