

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 00-77-B-S
) Civil No. 03-148-B-S
WUILMER HERNANDEZ-FUENTES,)
a/k/a LORENZO ACOSTA-HERNANDEZ)
)
Defendant)

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Wuilmer Hernandez-Fuentes has filed a motion for relief pursuant to 28 U.S.C. § 2255. (Docket No. 50.) Hernandez-Fuentes presents one ground: his attorney was ineffective because he did not assist Hernandez-Fuentes in persuading the United States to file a motion under Federal Rule of Criminal Procedure 35(b) seeking a reduction in Hernandez-Fuentes's sentence on the grounds that after sentencing Hernandez-Fuentes did/could provide substantial assistance in investigating or prosecuting another person. The United States has filed a response to which Hernandez-Fuentes has replied. I now recommend that the Court **DENY** the motion summarily.

Discussion

The United States' response provides many sound reasons why Hernandez-Fuentes's ineffective assistance of counsel claim does not meet the Strickland v. Washington, 466 U.S. 668 (1984) two-pronged test for establishing a constitutional infirmity of this ilk. Without engaging in any speculation as to what discussions may or may not have occurred between petitioner and his counsel, (See Resp. § 2255 Mot. at 21 -

22), I find two of the arguments presented by the Government to be dispositive of this motion. Hernandez-Fuentes complains about the following paragraph in the response:

In light of such rampant prevarication under oath which so heavily influenced both the prosecutor and the sentencing court, even if Hernandez-Fuentes had been told he could cooperate after he was sentenced, and even if he had cooperated and had given valuable information, it is highly unlikely that his sentence would have been lowered as a result. This is not because of the nature of the advice his counsel gave him or even because of the soundness of that advice but instead because by testifying falsely at trial, Hernandez-Fuentes rendered himself useless as a Government witness. This aspect of the Sixth Amendment claim should be summarily rejected.

(Id. at 24.) Hernandez-Fuentes retorts:

The above Government's contention is nothing but a mockery of this court. This Honorable Court have seen its share of defendants lying to the court and to the government. The Government wants to represent to this court that its substantial assistance witnesses belonged to "Mother Teresa Club." If the Government can list to notorious criminals like "Sammy the Bull", then the Government should give the Petitioner the opportunity. What does the government had to loss, if the information counsel prevented Petitioner from providing are verifiable and accurate? However, for the government to argue that the Defendants providing the Government with information are all "Saints," defies logic and common sense.

(Reply at 6.). I find the United States' analysis of Hernandez-Fuentes's lack of suitability as a candidate for such a departure highly persuasive.

Hernandez-Fuentes also takes umbrage at the United States faulting him for not identifying the nature of the information he could have provided to assist them. Rather than informing the Court of the factual basis of this aspect of his claim, Hernandez-Fuentes states that there have been debriefings of him that are not public record and that the government should not expect him to include the factual information in an unsealed format. (Id. at 2-3.) However much this caution might demonstrate consideration for the need of the government to keep confidential such information (or perhaps Hernandez-

Fuentes's own concern to protect the market value of his information), disclosure of the factual basis for his claim that he was prejudiced by counsel's failure to assist with seeking the post-sentence departure is a requisite to obtaining an evidentiary hearing in the § 2255 forum. Moreno-Morales v. United States, 334 F.3d 140, 145 (1st Cir. 2003) ("Evidentiary hearings on § 2255 petitions are the exception, not the norm, and there is a heavy burden on the petitioner to demonstrate that an evidentiary hearing is warranted."); United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devor of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted). Hernandez-Fuentes' petition is devoid of any factual recitation underpinning his claim of his ability to provide substantial assistance and for that reason fails as well.

Conclusion

For the reasons articulated in the United States' Response to Hernandez-Fuentes's 28 U.S.C. § 2255 motion, as qualified and highlighted above, I recommend that the Court **DENY** Hernandez-Fuentes relief from his sentence.

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 of 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.

November 25, 2003.

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:00-cr-00077-GZS-ALL
Internal Use Only

Case title: USA v. HERNANDEZ-FUENTES

Other court case number(s): None

Date Filed: 10/24/00

Magistrate judge case number(s): 1:00-mj-00055

Assigned to: JUDGE GEORGE

Z. SINGAL

Referred to:

Defendant(s)

WUILMER HERNANDEZ-FUENTES (1)
TERMINATED: 07/13/2001

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PRO SE

aka

**LORENZO ACOSTA-
HERNANDEZ (1)**

Pending Counts

None

Disposition

Highest Offense Level (Opening)

None

Terminated Counts

8:1326.F REENTRY OF
DEPORTED ALIENS
(1)

8:1326A.F REENTRY OF
DEPORTED ALIENS
(1s)

18:1546.F Fraud and Misuse of
Employment Authorization Card
(2)

18:1546.F FRAUD AND MISUSE
OF EMPLOYMENT
AUTHORIZATION CARD
(2s)

Disposition

Imprisonment of 96 months on
Counts 1 & 2, concurrent.
Supervised Release of 3 years on
Counts 1 & 2, concurrent. Special
Assessment; Deft remanded to
custody of US Marshal.

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Counts 1 & 2, concurrent.
Supervised Release of 3 years on
Counts 1 & 2, concurrent. Special
Assessment; Deft remanded to
custody of US Marshal.

**Highest Offense Level
(Terminated)**

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Felony

Complaints

Ct. I - 8:1326(a)(b)(2);
1101(a)(43)(F) - Illegal Re-Entry
Into U.S. after Deportation
Subssequent to Conviction for
Aggravated Felony [1:00-m -55]

Disposition

Plaintiff

USA

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