UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
v.	***)***	***Criminal No. 90-36-P***
	)	***(Civil No. 98-175-P-H)***
MARIA ELVIRA MORENO,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S NOTICE AND MOTION UNDER RULE 60(b)(6), 28 U.S.C. **[sic]**

The defendant, who was convicted and sentenced in 1990 on a charge of conspiracy to distribute and to possess with intent to distribute in excess of 500 grams of cocaine, brings this motion seeking a downward departure from her sentence of 151 months imprisonment, purportedly pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Notice and Motion Under Rule 60(b)(6), 28 U.S.C. ("Motion") (Docket No. 45) at 1. That rule of procedure is not available to defendant under the circumstances, and her motion is most appropriately construed as an action under 28 U.S.C. § 2255 and 18 U.S.C. § 3582, to the extent that her claims are within the jurisdiction of this court at all. I recommend that the action be dismissed.

Rule 60(b)(6) of the Federal Rules of Civil Procedure "simply refers to relief from Judgments or Orders entered by mistake in *civil* cases. [The defendant's] conviction was not a civil case." *United States v. Chapman*, 955 F. Supp. 781, 782 (W.D.Mich. 1997). An attack on the sentence imposed in a criminal case may be brought on direct appeal of the sentence, under 28 U.S.C. § 2255, and in certain limited circumstances under 18 U.S.C. § 3582. It may not be brought under Rule

60(b)(6). *See, e.g., United States v. Rich*, 1998 WL 239022 (5th Cir. May 13, 1998) at *2 (motions purportedly brought under Rule 60(b) by federal prisoners which seek to set aside convictions on constitutional grounds may be treated as § 2255 motions); *Lopez v. Douglas*, 1998 WL 161663 (10th Cir. Apr. 8, 1998) at *1 (Rule 60(b) motion to vacate judgment denying § 2254 petition entered eight years earlier treated as second habeas petition); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996) (purported Rule 60(b)(6) motion construed as second or successive habeas corpus application). A direct appeal is not available to the defendant because more than ten days has elapsed since judgment was entered on her criminal conviction and sentence. Fed. R. App. P. 4(b).

To the extent that the defendant raises a constitutional claim in the instant motion, it will be treated as a petition under section 2255. The applicable statute of limitations for such claims in most cases is one year from the date upon which the judgment of conviction became final. 28 U.S.C. § 2255. The defendant's motion in this case has been filed many years after the expiration of that deadline. The motion does not specify the date or dates of the occurrence of the events underlying the defendant's only constitutional claim — that denial of access to certain rehabilitation programs in the federal prison system due to her status as an alien constitutes cruel and unusual punishment. Motion at 4. Accordingly, the defendant cannot rely on the alternate statute of limitations that extends one year from the date on which the facts supporting the claim could have been discovered through the exercise of due diligence.[1]

To the extent that any other, non-constitutional claims are presented by the defendant in her

[1] The defendant's constitutional claim may also be construed as a challenge to the conditions of her confinement or the execution of her sentence. Such claims must be raised in the district in which the defendant is incarcerated, which in this case is the District of Connecticut. *See United States v. DiRusso*, 535 F.2d 673, 675-76 (1st Cir. 1976).

motion, they are waived on collateral review unless the error alleged is "akin to a denial of due process." *Chapman*, 955 F. Supp. at 783. The motion makes no such allegation. Even if it did, however, the defendant is not entitled to relief on the merits of her non-constitutional claims. The defendant seeks a reduction in her sentence based on post-conviction rehabilitation, relying on *Koon v. United States*, 116 S.Ct. 2035 (1996). In that case, the Supreme Court dealt with an appeal from the initial sentencing of the defendant. *Id*. at 2042. Nothing in the text of the opinion in that case authorizes a downward departure in a sentence after the sentence has been imposed and the defendant is serving it. The defendant also seeks a downward departure based on an "Executive Order" dated April 28, 1995 allowing deportation of certain aliens. This is an apparent reference to a memorandum of the Attorney General of the United States of that date, Section II of 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 her, even if it were somehow construed to apply retroactively to defendants already in prison under terms of plea agreements accepted by the courts.

The defendant's final claim is that she is entitled to retroactive application of Amendment 439 to the United States Sentencing Commission Guidelines, which amended Section 1B1.3(a) of the Guidelines effective November 1, 1992, to reduce her sentence. This claim must be brought under 18 U.S.C. § 3582(c), which provides that

> [t]he court may not modify a term of imprisonment once it has been imposed except that —
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> * * *
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> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its

> own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The defendant cites *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), as support for her argument. The First Circuit in *LaBonte* held that clarifying amendments to the Guidelines could be applied retroactively to reduce a sentence, in the discretion of the trial court. *Id.* at 1410-11 & n.13. The Sentencing Commission stated that Amendment 439 "clarifie[d] and more fully illustrate[d] the operation of" section 1B1.3 of the Guidelines. United States Sentencing Commission Guidelines Manual, Appendix C, Amendment 439, at 249. However, the only amendments to the Guidelines that are allowed to be applied to reduce the sentence of a defendant already serving a term of imprisonment pursuant to the policy statement of the Commission are set forth at section 1B1.10(c) of the Guidelines, and Amendment 439 is not included. Therefore, the defendant's application for a reduction in her sentence based on this amendment must fail under 18 U.S.C. § 3582(c).[2]

All of the defendant's claims are barred by the statute of limitations set forth in 28 U.S.C. § 2255, fail to allege non-constitutional violations meeting the requirements for review under 28 U.S.C. § 2255, concern matters that should be brought before the federal court of the district in which she is incarcerated, and/or seek relief not available under 18 U.S.C. § 3582(c). Accordingly, I recommend that the court dismiss this action without an evidentiary hearing. *See Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (section 2255 motion may be dismissed without evidentiary hearing if the allegations, accepted as true, would not entitle petitioner to relief).

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[2] The defendant also cites 18 U.S.C. § 3577 in support of her motion. That statute, now codified at 18 U.S.C. § 3661, simply provides that no limit shall be placed on the information received and considered by the court for the purpose of imposing an appropriate sentence. It is of no assistance to a defendant seeking reduction in a sentence already imposed.

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 28th day of May, 1998.

David M. Cohen
United States Magistrate Judge