

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 98-224-01
	:	
RAFAEL SANCHEZ	:	

MEMORANDUM AND ORDER

MEMORANDUM

Presently before the Court is a document filed by defendant, Rafael Sanchez, entitled "Alienage 10% (6 Months) Departure/Release Date/Expedited Removal." Defendant's request for relief will be denied on the ground that this Court lacks jurisdiction to modify the sentence about which defendant complains.

I. BACKGROUND

On April 30, 1998, a federal grand jury in the Eastern District of Pennsylvania returned a three count indictment charging defendant, Rafael Sanchez (a Dominican national), and two co-defendants with conspiracy to distribute heroin, in violation of 21 U.S.C. § 846 (Count One), possession with intent to distribute heroin and aiding and abetting, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2 (Count Two), and criminal forfeiture, pursuant to 21 U.S.C. § 853 (Count Three). Defendant pled guilty to the three counts of the Indictment on August 13, 1998. On July 6, 2000, the Court sentenced the defendant, *inter alia*, to concurrent terms of imprisonment of 64 months on Counts One and Two of Indictment .

II. DISCUSSION

Defendant, in essence, is asking the Court to depart downward from the Sentencing Guideline Range by reason of his alienage. This request is based on defendant's argument that he is entitled to a downward departure because, as a deportable alien, he is not eligible to participate in "such rehabilitative activities as drug programs, halfway house, minimum security prison, or intensive confinement center. . . ." Because of his ineligibility for such prison programs, defendant argues that service of his sentence is "a more severe punishment" than the service of the same sentence by a similarly situated citizen of the United States.

A district court, under appropriate circumstances, can, pursuant to a 28 U.S.C. § 2255 motion, vacate, set aside or correct a sentence. In addition, under Federal Rule of Criminal Procedure 35, a district court is granted authority to correct a sentence on remand, reduce a sentence for substantial assistance, or correct a sentence imposed as a result arithmetical, technical, or other clear error. There is no other authority for granting the relief sought by defendant.

Defendant filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 on September 12, 2000. In that Motion, defendant argued that his attorney was unconstitutionally ineffective for failing to seek at sentencing a reduced offense level pursuant to U.S. Sentencing Guideline § 3B1.2, for defendant's purported mitigating role in the offense. The Court notes that in making this argument, defendant referred to a "downward departure" under § 3B1.2. By Memorandum and Order dated March 25, 2002, the Court denied defendant's § 2255 Motion. Defendant may not now file a second § 2255 motion which addresses issues relating to his sentencing on July 6, 2000.

The authority of a court to correct or reduce a sentence under Rule 35 is limited to the circumstances set forth in the Rule. *See, United States v. Barragan-Mendoza*, 174 F.3d 1024, 1028-29 (9th Cir. 1999). There is no conceivable basis for applying to Rule 35(a) - correction of a sentence on remand - or Rule 35(b) - reduction of a sentence for substantial assistance - in this case. That leaves Rule 35(c) - reduction of a sentence for arithmetical, technical or other clear error. However, any motion under Rule 35(c) must be filed within seven days of sentencing, and the seven-day time limit is considered to be jurisdictional. *United States v. Wisch*, 275 F.3d 620, 626 (9th Cir. 2001). Thus, any application under Federal Rule of Criminal Procedure 35(c) must be made within seven days of the date of the imposition of the sentence, or the Court lacks jurisdiction to grant any such relief.

III. CONCLUSION

Defendant's application in this case was filed almost two years after sentencing. In essence, he asks the Court to depart downward from his sentence by reason of his alienage. The Court lacks jurisdiction to consider defendant's request on the present state of the record. Thus, defendant Rafael Sanchez's document entitled "Alienage 10% (6 months) Departure/Release Date/Expedited Removal" will be denied.

ORDER

AND NOW, this 27th day of June, 2002, upon consideration of defendant Rafael Sanchez's request made in a document entitled "Alienage 10% (6 months) Departure/Release Date/Expedited Removal" (Document No. 81, filed June 5, 2002), and the Government's Opposition, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that

defendant's request made in a document entitled "Alienage 10% (6 months) Departure/Release Date/Expedited Removal," is **DENIED**.

BY THE COURT:

JAN E. DUBOIS, J.

Defendant has not filed a motion under § 2255, and it is clear that the Court's authority to correct or reduce a sentence under Rule 35 is limited to the circumstances presented in the Rule.