

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 11-545-1
	:	
FERNANDO PERDIGAO	:	CIVIL NO. 15-3301
	:	

Goldberg, J.

September 10, 2015

MEMORANDUM OPINION

Before me is the *pro se* motion of Fernando Perdigao (hereinafter referred to as “Petitioner”) to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner, a noncitizen who is subject to mandatory deportation on account of his guilty plea to bank fraud, primarily asserts that counsel was constitutionally ineffective for failure to adequately inform him of the immigration consequences of his plea. For the reasons set out below, I will deny his request for relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2011, Petitioner was charged by information with one count of bank fraud and aiding and abetting in violation of 18 U.S.C. §§ 1344 and 2. On November 15, 2011, Petitioner pleaded guilty to these charges. Petitioner was represented at the change of plea hearing by Attorney Arnold Silverstein.

The events giving rise to the conviction occurred while Petitioner was working as a real estate broker for the RE/MAX Gateway firm. Petitioner was working with a loan officer at Sovereign Bank and bringing in clients who were interested in purchasing or refinancing their property. While the clients would provide truthful information and documentation regarding their employment and income, Petitioner submitted false information and documentation so that

the loans – which the clients would otherwise have been ineligible to receive – would be approved. For instance, where a client was self-employed, Petitioner provided false alternative employment information and used his telephone number as a reference for the employer. He employed this scheme in connection with five properties from 2005 to 2007. Petitioner profited because the loans were approved, the properties were sold, and, as the real estate broker, he made commissions from the sale. (N.T. 11/15/2011 at 21-23.)

Sentencing was held on September 23, 2014. Under the sentencing guidelines, the adjusted offense level was 16 and the criminal history score was I, as Petitioner had no prior convictions. This resulted in an advisory guideline range of 21-27 months.¹ I granted the Government's §5K1.1 motion and departed down to an offense level of 10, which placed the advisory guideline range at 6-12 months. I then sentenced Petitioner to a term of incarceration of six months, with three years of supervised release to follow. I also ordered restitution to be paid in the amount of \$453,285.21, with a minimum payment of \$25 per quarter while he is incarcerated, and \$300 a month upon release. (N.T. 09/23/2014 at 7-12, 37-40.)

Petitioner did not appeal his judgment and conviction. However, on October 17, 2014, Attorney David Jay Glassman entered his appearance on Petitioner's behalf and submitted a letter "seek[ing] a modification of [Petitioner's] sentence to a term of House Arrest/Home Confinement" because "incarceration will visit a hardship upon [his spouse and daughter-in-law]," an issue which was "not raised during [Petitioner's] sentencing hearing." (Doc. no. 43.) On October 30, 2014, I denied this request because it was submitted outside of the fourteen-day time limit prescribed by Federal Rule of Criminal Procedure 35. (Doc. no. 45.)

On June 29, 2015, Petitioner filed this § 2255 motion. The Government has filed a response, and the matter is ready for disposition.

¹ Neither the Government nor Petitioner objected to that calculation. (N.T. 09/23/2014 at 8.)

II. DISCUSSION

Petitioner raises four claims of ineffective assistance of counsel which he asserts entitles him to relief under 28 U.S.C. § 2255. He first argues that counsel was ineffective for failing to inform him that his guilty plea would result in mandatory removal from the United States. Second, Petitioner contends that Attorney Glassman, the attorney who he retained post-sentencing, was ineffective for failing to file a direct appeal challenging first counsel's advice regarding the immigration consequences of his plea. Third, Petitioner alleges that counsel was ineffective for not adequately explaining the plea agreement. Fourth, Petitioner argues that counsel was ineffective for failing to challenge the calculation of the restitution judgment.

A. Legal Standard

1. Ineffective Assistance of Counsel Claims

28 U.S.C. § 2255 allows a “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . [to] move the court which imposed the sentence to vacate, set aside, or correct the sentence.”² 28 U.S.C. § 2255(a). Petitioner claims that his sentence is unconstitutional because it is the result of ineffective assistance of counsel.

The Supreme Court's standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment is set forth in Strickland v. Washington, 466 U.S. 668 (1984). According to Strickland, counsel is presumed to have acted effectively unless the petitioner can

² Although Petitioner has served his sentence of imprisonment, the fact that he is presently on supervised release is sufficient to satisfy the “in custody” requirement of Section 2255. United States v. Essig, 10 F.3d 968, 970 n.3 (3d Cir. 1993), abrogated on other grounds by LAR 31.3.

Furthermore, a § 2255 motion must be filed by a filed within one year from “the date on which the conviction becomes final.” 28 U.S.C. § 2255 (f)(1). The Government acknowledges that Petitioner's motion is timely.

demonstrate both that (1) “counsel’s representation fell below an objective standard of reasonableness” and that (2) there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 686-88, 693-94. In assessing whether counsel performed deficiently, the court must “reconstruct the circumstances of counsel’s challenged conduct’ and ‘evaluate the conduct from counsel’s perspective at the time.’” *Harrington v. Richter*, 131 S.Ct. 770, 779 (2011) (quoting *Strickland*, 466 U.S. at 689). Nonetheless, because the “ultimate focus of the inquiry [is] on the fundamental fairness of the proceeding whose result is being challenged . . . a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 696-97. In fact, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed.”³ *Id.* at 697.

B. Ineffective Assistance of Counsel Claims

1. Counsel’s Advice Regarding the Immigration Consequences of the Plea

Petitioner argues that counsel was ineffective for failing to inform him that his guilty plea would result in mandatory removal and permanent inadmissibility to the United States. Petitioner states that counsel told him erroneously that the guilty plea “would not constitute a deportable offense,” and “had he known he risked removal, he would not have plead [sic] guilty and would have gone to trial or attempted to plea to a non-deportable offense.” Relatedly, Petitioner alleges that the guilty plea colloquy conducted by the Court failed to “cure[] counsel’s affirmative misrepresentations.” (Pet’r.’s Br. at 8, 11.)

³ Where appropriate, and consistent with the Supreme Court’s prediction and directive, I have only considered the prejudice prong of the *Strickland* standard.

“[The Supreme Court] ha[s] long recognized that deportation is a particularly severe ‘penalty’” which is “intimately related to the criminal process.” Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)). Recent changes to immigration law “have expanded the class of deportable offenses,” such that “[t]he ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” Id. (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). With more noncitizens being deported than ever before, the Supreme Court has confirmed that advice regarding the deportation consequences of a criminal conviction may be the subject of a claim of ineffective assistance of counsel under the Sixth Amendment, and that such a claim is governed by the familiar Strickland standard. Id. at 366.

The first prong of Strickland asks courts to consider whether “counsel’s representation fell below an objective standard of reasonableness.” Id. at 688. For counsel’s representation of a noncitizen to be deemed objectively reasonable, counsel “must inform her client whether his plea carries a risk of deportation.” Padilla 559 U.S. at 374. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the] conviction,” counsel has a “duty to give correct advice” about the risk of deportation. Id. at 368-69.

This is a case where the immigration consequences of the plea are clear. For purposes of the Immigration and Nationality Act (“INA”)⁴, an offense that “involves fraud or deceit in which the loss to the victim or victims exceed \$10,000” constitutes an “aggravated felony,” and any noncitizen who is convicted of an aggravated felony is subject to mandatory deportation.

⁴ The Immigration and Nationality Act, which is incorporated into the United States Code as Title 8, is “the basic body of immigration law.” Immigration and Nationality Act, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (August 21, 2015), <http://www.uscis.gov/laws/immigration-and-nationality-act>.

8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii). Bank fraud, by definition, “‘involve[s]’ fraud or deceit for purposes of the INA.” Nijhawan v. Attorney General of United States, 523 F.3d 387, 391 (3d Cir. 2008). Further, having stipulated in the plea agreement to the fact “that the loss amount . . . is at least more than \$200,000,” the \$10,000 loss requirement of the immigration statute is easily met. (Plea Agr. at ¶ 8.b., attached as Exh. 1 to Gov’t.’s Resp.); see also Nijhawan, 523 F.3d at 395 (stating that documents such as “a stipulation for the purposes of sentencing . . . [may] provide clear and convincing evidence that the requisite loss was tied to [the noncitizen’s] offense of conviction.”) Therefore, because Petitioner pled guilty to an aggravated felony under the INA, counsel had a duty to correctly advise him that his plea “made him subject to automatic deportation.” Padilla, 559 U.S. at 560.

As stated above, Petitioner contends that counsel erroneously advised him that the guilty plea “would not constitute a deportable offense.” (Pet’r.’s Pet. at 8.) This allegation is contradicted by comments made by counsel at the change of plea hearing, where counsel expressed concern that Petitioner would be deported based on the guilty plea:

I explained to [Petitioner] that under the Guidelines, Your Honor, he was facing a 21 to 27-month sentence in this matter. Your Honor, I’ve also explained to him [] various other things that might be considered in this case. [] [O]ne of the big things I wanted to make sure he was aware of, Judge, is the fact that he was not a United States citizen, even though he’s been in this country for over 30 years, that this plea would put him at risk of losing his citizenship. I also explained to him that he would more likely than not be removed from this country. He understood that, Judge, and wanted to move forward in this manner.

(N.T. 11/15/2011 at 27) (emphasis added.)⁵

⁵ Although it is not immediately relevant to the question of whether counsel correctly advised Petitioner of the immigration consequences of his conviction in advance of the plea, several comments that counsel made at the sentencing hearing further show that counsel was cognizant of the likelihood of removal. Counsel identified removal as “a major, major issue,” stating that “because of the guilty plea in this case chances are very strong that Mr. Perdigao will be subject to removal and probably removed from this country.” Counsel continued that, “according to Mr. Perdigao, [that] is probably the saddest of all parts of this case, [] the fact that he [won’t] be able

While counsel's comments certainly refute Petitioner's allegation that counsel did not advise him that his plea would carry adverse immigration consequences, I am hesitant to conclude that counsel's representation was constitutionally competent.⁶ Counsel's statement that Petitioner "would more likely than not be removed from this country," while accurate, may not be sufficient in a case where, as here and in Padilla, it is clear that the consequence of a guilty plea is automatic removal. I will thus consider the prejudice prong of Strickland.

United States v. Fazio, ___ F.3d ___, 2015 WL 4620263 (3d Cir. 2015), is a recent precedential opinion from the United States Court of Appeals for the Third Circuit which involves circumstances similar to those in this case. Fazio, an Italian who had been living in the United States for many years as a permanent resident, pled guilty to "conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine." Id. at *1. While the offense is clearly characterized as an aggravated felony under the INA such that Fazio "was subject to automatic removal as a result of his plea," counsel advised Fazio that "it would be more likely than not that Fazio could remain in the United States." Id. at *6.

Notwithstanding this erroneous advice, the Third Circuit rejected Fazio's claim of ineffectiveness. The court reasoned that while Fazio was entitled to be advised that his plea would subject him to automatic deportation, he was not prejudiced within the meaning of Strickland because "[a]ny error in [counsel's] advice was remedied by the District Court's in-depth colloquy and the language of the plea agreement itself." Id. In so concluding, the court reviewed the language of the plea agreement, which stated that Fazio wanted to "plead guilty

to stay here in a country where he's built his life since he was approximately 20 some years of age." (N.T. 09/23/2014 at 21.)

⁶ I have accepted all of Petitioner's "nonfrivolous" factual claims" as true. Cherys v. United States, 405 F. App'x 589, 591 (3d Cir. 2011) (citing United States v. Dawson, 857 F.2d. 923, 928 (3d Cir. 1988)).

regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.” *Id.* at *2 (emphasis added). The plea colloquy echoed this language, the district court judge having confirmed with Fazio that he “nevertheless want[ed] to plead guilty regardless of any immigration consequences that [the] plea of guilty may entail, even if the consequence is [] automatic removal from the United States[.]” *Id.*

Here, the language of the plea agreement and colloquy concerning the immigration consequences of the plea is practically identical to that of Fazio. The plea agreement states that Petitioner “affirms that he wants to plead guilty regardless of any immigration consequences of his plea, even if the result is removal from the United States.” (Plea Agr. at ¶ 9.) During the plea colloquy, I confirmed with Petitioner that he “underst[ood] all of the ramifications [of the agreement],” including the fact that the “conviction could have implications on [his] ability to stay in the United States.” (N.T. 11/15/2011 at 9, 17.) I therefore conclude that any allegedly erroneous advice given by counsel was remedied by the language of the plea agreement and colloquy.

2. Counsel’s Alleged Failure to File a Direct Appeal

Petitioner next argues that Attorney Glassman, whom he retained after sentencing, was ineffective for failing to file a direct appeal challenging the advice that Attorney Silverstein gave him regarding the deportation consequences of his plea. Petitioner specifically contends that while he asked Attorney Glassman to file a direct appeal, Attorney Glassman instead filed an untimely letter requesting a modification of sentence, and further misled him by telling him that he would change his immigration status to “pending” such that he would not be deported. (Pet.r’s Pet. at 5-6.)

“There can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.” United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). As discussed above, in light of the language of the plea agreement and the in-depth plea colloquy, Petitioner was not prejudiced within the meaning of Strickland by any erroneous advice that Attorney Silverstein may have given him about the immigration consequences of his plea. Therefore, Petitioner’s claim that Attorney Glassman was ineffective for failing to file a direct appeal fails.

3. Counsel’s Explanation of the Plea Agreement

Petitioner next argues that counsel was ineffective for failing to adequately explain a change in the plea agreement which was made immediately before he entered his plea. Petitioner contends that while the initial plea agreement referenced three properties involved in the bank fraud, the altered plea agreement, which was given to him when he was “already inside the courtroom,” referenced five properties. (Pet.r’s Pet. at 7.) The Government disputes Petitioner’s version of the facts, stating that the “Plea Agreement was changed approximately two months prior to the defendant’s plea,” and, in any event, the only “change was from the defendant agreeing to plead guilty to Count One of an indictment charging him with bank fraud, to the defendant agreeing to plead guilty to Count One of an indictment or information charging him with bank fraud.” (Gov’t.’s Resp. at 14) (emphasis added.)

I need not wade into the factual circumstances surrounding the two plea agreements, nor need I address the reasonableness prong of Strickland. This is because “counsel’s purported failure to properly explain the provisions of the plea agreement” can be remedied by an adequate plea colloquy and plea agreement. United States v. Robinson, 244 F. App’x 501, 503 (3d Cir. 2007).

Here, the in-depth plea colloquy defeats Petitioner’s claim. I confirmed with Petitioner that he “had an ample amount of time to discuss this matter with [his] attorneys,” that he “underst[ood] all of the ramifications [of the plea agreement],” and that he signed the plea agreement, agreeing to its terms of his “own free will.” (N.T. 11/15/2011 at 9-10.) When asked to “summarize the facts she would prove if [Petitioner] went to trial,” the prosecutor detailed the fraud as it related to each of the five properties, identifying each property by the street, town, and state in which it was located, and the month and year in which the mortgages were obtained. (Id. at 21-24.) Petitioner then confirmed that the facts as recited by the prosecutor were accurate, and that he was “pleading guilty to those facts because [he was], in fact, guilty.” (Id. at 24.) In light of this, any purported failure on the part of counsel to explain the amended plea agreement was remedied by the plea colloquy and plea agreement.

4. Counsel’s Alleged Failure to Challenge the Restitution Judgment

Petitioner next alleges that counsel was ineffective for failing to challenge the calculation of the restitution judgment. Petitioner contends that counsel should have questioned whether the losses were proximately caused by the defendant, and in the case of one of the five properties, challenged whether there was even a loss since the “property was not sold.” (Pet.r’s Pet. at 8.) At the sentencing hearing, both the Government and Attorney Silverstein agreed on a loss amount of \$394,534.20 which, adding interest, costs and penalties, yielded a restitution amount of \$453,285.21. (N.T. 09/23/2014 at 7-9.)

The Government does not address Petitioner’s argument on the merits and instead, correctly argues that challenges to a restitution order are not cognizable under § 2255. The plain language of the statute indicates that § 2255 is available to “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the

ground that the sentence was imposed in violation of the Constitution.” 28 U.S.C. § 2255 (emphasis added). Tracking this language, the Court of Appeals for the Third Circuit has found that “§ 2255 may not be utilized by a person in federal custody to attack only the restitution portion of his sentence because § 2255 affords relief only to those claiming the right to be released from custody.” Trader v. United States, 281 F. App’x 87, 88 (3d Cir. 2008) (citing Blaik v. United States, 161 F.3d 1341, 1343 (11th Cir. 1998)); see also Easton v. Williamson, 267 F. App’x 116, 117 (3d Cir. 2008) (“Ordinarily, challenges to a restitution order are not cognizable under § 2255.”) (citing United States v. Kramer, 195 F.3d 1129, 1130 (9th Cir. 1999)). This final claim of ineffectiveness is thus not cognizable.⁷

C. An Evidentiary Hearing

Petitioner argues that he is entitled to an evidentiary hearing on his motion. 28 U.S.C. § 2255(b) provides that an evidentiary hearing shall be held “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” “In the context of an ineffective assistance of counsel claim presented in a § 2255 petition, a district court must therefore determine whether, considering as true all ‘nonfrivolous’ factual claims, the petitioner ‘states a colorable claim for relief’ under Strickland []---that is, that counsel’s

⁷ While the Third Circuit has not explicitly addressed the question of whether a challenge to a restitution order couched as an ineffective assistance claim, as it is here, is cognizable under § 2255, I find the reasoning of other circuits – which have found that such a claim is not cognizable – to be persuasive. See Mamone v. United States, 559 F.3d 1209, 1211 (11th Cir. 2009) (“Despite the presence of claims challenging his custody and requesting release from custody, the restitution claim [which included an ineffective assistance claim] did not seek release from custody and was rightly denied by the district court.”); United States v. Thiele, 314 F.3d 399, 402 (9th Cir. 2002) (stating that the “focus [is] on the relief sought in the claim itself,” such that a restitution claim couched in terms of ineffective assistance of counsel is not cognizable even if presented with cognizable claims); Smullen v. United States, 94 F.3d 20, 25-26 (1st Cir. 1996) (agreeing with the analysis of the Fifth and Sixth Circuits which “have held [] that a person in custody cannot bring an ineffective assistance of counsel claim challenging a fine because that person is not ‘claiming a right to release’ from custody,” and applying that analysis to a restitution order) (citing United States v. Segler, 37 F.3d 1131, 1137 (5th Cir. 1994); United States v. Watroba, 56 F.3d 28, 29 (6th Cir.), cert denied, 516 U.S. 904 (1995)).

performance was deficient and that this deficiency prejudiced the petitioner.” Cherys v. United States, 405 F. App’x 589, 591 (3d Cir. 2011) (citing United States v. Dawson, 857 F.2d. 923, 928 (3d Cir. 1988)). In other words, a “[d]istrict [c]ourt’s decision not to hold an evidentiary hearing will be an abuse of discretion unless it can be conclusively shown that [the petitioner] cannot make out a claim for ineffective assistance of counsel.” United States v. Lilly, 536 F.3d 190, 195 (3d Cir. 2008).

Having considered the parties’ briefs, the attachments thereto, and the entire case history, and having disposed of Petitioner’s ineffectiveness claims either for lack of sufficient prejudice or for being non-cognizable, I conclude that his claims do not constitute grounds for relief, and an evidentiary hearing is unwarranted.

III. CONCLUSION

For the reasons stated herein, Petitioner’s § 2255 motion is denied, he is not entitled to an evidentiary hearing, and a certificate of appealability shall not issue.

An appropriate Order follows.

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

UNITED STATES OF AMERICA

v.

FERNANDO PERDIGAO

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CRIMINAL NO. 11-545-1

CIVIL NO. 15-3301

ORDER

AND NOW, this 10th day of September, 2015, upon consideration of the *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (doc. no. 53), and the response thereto, it is hereby **ORDERED** that the motion is **DENIED**. It is further **ORDERED** that a certificate of appealability shall not issue.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.