

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

IVAN GONZALEZ :
 :
 v. : CIVIL ACTION NO. 97-4981
 : (CRIMINAL NO. 96-365-2)
 :
 UNITED STATES OF AMERICA :

MEMORANDUM ORDER

Petitioner was sentenced to imprisonment for 37 months for conspiracy to distribute heroin, to be followed by supervised release for eight years or until such earlier time as petitioner is deported from the United States. He has filed a Petition under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence.

Petitioner argues that he was a minimal participant and thus should have received a four offense level reduction pursuant to U.S.S.G. § 3B1.2(a).¹ He also contends that the government violated the parties' plea agreement when it failed to make a motion for a downward departure pursuant to § 5K1.1 and 18 U.S.C. Section 3553(e).²

¹ In his petition, petitioner refers to a reduction for being a "minor or minimal" participant. In his supporting memorandum petitioner repeatedly refers to a four point reduction for "minimal" participation.

² At the sentencing proceeding, petitioner never objected to the absence of a departure motion. Petitioner did argue for a role in the offense reduction which the court addressed and rejected. Petitioner did not appeal his sentence. A § 2255 petition is not, of course, a substitute for an appeal. United States v. Frady, 456 U.S. 152, 165 (1982); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, (3d Cir. 1985); Kikumura v. United States, 978 F. Supp. 563, 574 (D.N.J. 1997).

Petitioner's counsel acknowledged at sentencing that he "is not entitled to a four point minimal role (reduction) because that clearly is not applicable here, and I am not going to ask for something that is not applicable at all." Petitioner's counsel did argue that he was a minor participant compared to his codefendant and thus should receive a two level reduction. Based on the record the court concluded that defendant was not less culpable than his criminal associate, Mr. Acosta.

The government's failure to file a motion for a downward departure pursuant to 18 U.S.C. § 3553(e) had no effect. The court found that petitioner satisfied the criteria of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, and thus petitioner avoided the statutory mandatory minimum sentence in any event.

The plea agreement provides for the filing of a § 5K1.1 motion "if the government, in its sole discretion, determines that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."

Petitioner contends that by timely describing his role in the offense and identifying others who supplied the drugs, he provided substantial assistance.³

Petitioner provides no basis for a finding that the government declined to file a substantial assistance motion for an unconstitutional reason or one not rationally related to any

³ It was this conduct which enabled petitioner to avoid a lengthy mandatory prison term. see U.S.S.G. § 5C1.2(5).

