

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CIVIL ACTION NO. 03-3235</b>
	:	
<b>v.</b>	:	<b>CRIMINAL ACTION NO. 93-165-1</b>
	:	
<b>AINSLEY M. CHANCE</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**May 2, 2005**

Now before the Court is the pro se Petition of Ainsley M. Chance (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 challenging the constitutionality of his conviction for conspiracy, in violation of 21 U.S.C. § 846; and, attempt to possess with intent to distribute cocaine and aiding and abetting the same, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Petitioner alleges that: (1) his sentence was incorrect, as the Government did not file a U.S.S.G. § 5K1.1 departure motion for substantial assistance; and, (2) he received ineffective assistance of counsel. For the reasons that follow, the Petition will be denied.

**I. Factual Background**

Petitioner pled guilty to conspiracy and attempted possession of cocaine with intent to distribute on June 10, 1993. He initially was released on bail. However, Petitioner fled the United States, and a warrant was issued for his arrest on September 21, 1993. Bail was formally revoked and Petitioner’s property forfeited on January 25, 1994. Upon return and arrest, he was detained pending sentencing. On December 18, 2002, Petitioner was sentenced to 87 months on each count, to run concurrently.

## II. Analysis

### 1. Downward Departure<sup>1</sup>

Petitioner's guilty plea agreement provided that the Government has the "sole discretion" to determine whether or not to file a downward departure motion pursuant to U.S.S.G. § 5K1.1 for substantial assistance. See Ainsley M. Chance Plea Agreement, filed June 11, 1993. At the change of plea hearing, Petitioner acknowledged under oath that he understood that the Government could refuse to file the motion if it decided that he had "not given proper and substantial cooperation." Transcript of Plea Hearing, June 10, 1993, at 3, 16-17. Petitioner then violated his plea agreement by fleeing the country and becoming a fugitive, and by failing to appear to testify as a Government witness at the trial of co-defendant Ervin George McGleggan.

The Court does not have the authority under § 5K1.1 to grant a downward departure on its own motion. See United States v. Abuhouran, 161 F.3d 206, 209-16 (3d Cir. 1998). At the Sentencing Hearing, the Assistant United States Attorney summarized the above-stated reasons for the Government's refusal to file a § 5K1.1 motion. See Transcript of Sentencing Hearing, December 18, 2003, at 23-26; see also United States v. Isaac, 141 F.3d 477, 484 (3d Cir. 1998) (stating that the Government may rebut allegations of bad faith in refusing to file a § 5K1.1 motion pursuant to a plea agreement by explaining its reasons for the refusal). Based on the clear violation of the plea agreement by Petitioner, the Government was within its rights in refusing to file a § 5K1.1 motion.

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<sup>1</sup> Although Petitioner does not directly raise any United States v. Booker issues in this habeas petition, to the extent his arguments can be construed as challenges based on this recent decision, they will be denied as the judgment in Petitioner's case was final at the time Booker was announced. See United States v. Aikens, 2005 WL 433440, at \*8-9 (E.D. Pa. Feb. 25, 2005) (holding that the new rule of law in Booker does not retroactively apply to collateral attacks to judgments that were final at the time that the rule was announced); United States v. Clausen, 2005 WL 846198, at \*11 (E.D. Pa. Apr. 12, 2005).

Petitioner also seeks relief under Fed. R. Crim. P. 35(b). However, this rule allows for a reduction of a sentence only if made pursuant to a Government motion.

2. Ineffective Assistance of Counsel

Petitioner claims that his counsel was ineffective at sentencing because he failed to move for downward departure based upon: (1) Petitioner's voluntary stipulation as to his status as a deportable alien and consent to final order of deportation; (2) family circumstances; and, (3) substantial assistance to the Government. None of these arguments has merit. A petitioner claiming ineffective assistance of counsel must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 689-92 (1984).

First, the sentencing court lacked the authority to depart downward because of a consent by Petitioner to a final order of deportation. See United States v. Marin-Castaneda, 134 F.3d 551, 555-56 (3d Cir. 1998) (holding the district court has no authority to depart downward based on the defendant's willingness to consent to deportation). Second, Petitioner did not demonstrate exceptional family circumstances sufficient to warrant a downward departure. See United States v. Yeaman, 248 F.3d 223, 230 (3d Cir. 2001) (finding that the disruption of the defendant's relationship with family members and the family's substantial economic hardship did not warrant a downward departure); United States v. Sweeting, 213 F.3d 95, 102 (3d Cir. 2000) (stating that disintegration of family life in most cases is not enough to warrant departures). Third, based on the circumstances in this case, the Court had no authority to depart downward for substantial assistance absent a government motion. See Abuhouran, 161 F.3d at 209-16. The district court found at sentencing that it had no legal authority to depart under § 5K1.1 absent a government motion "on the basis of the law and the facts both." Sentencing Transcript at 36. Because none

of Petitioner's underlying arguments has merit, his counsel's failure to move for downward departure was not deficient.

Finally, Petitioner argues that his attorney's failure to appeal was ineffective assistance of counsel. At the Sentencing Hearing, Petitioner was informed of his right to appeal. See Sentencing Transcript at 47. Defense counsel's failure to appeal does not constitute ineffective assistance of counsel per se. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). Although a lawyer who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable, see Peguero v. United States, 526 U.S. 23, 28 (1999), Petitioner does not allege that he requested his attorney to file an appeal. See Solis v. United States, 252 F.3d 289, 293-94 (3d Cir. 2001); see also Affidavit of George Henry Newman, Esq., attached as Exhibit A to the Government's Response to Petitioner's Motion.

### **III. Conclusion**

For the foregoing reasons, Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 will be denied.

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<b>AINSLEY M. CHANCE</b>	:	

**ORDER**

**AND NOW**, this 2nd day of May, 2005, upon consideration of Petitioner's Writ pursuant to 28 U.S.C. § 2255 (case no. 93-cr-156-1, docket no. 154), and the Government's response thereto (docket no. 162), it is **ORDERED** that:

- (1) The petition for writ of habeas corpus is **DENIED**.
- (2) The Clerk of the Court shall mark Civil Action No. 03-3235 **CLOSED**.
- (3) Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

**BY THE COURT:**

S/Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**