

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LEMORE CAMPBELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 01-714-KAJ
	)	Cr. A. No. 00-80-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

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Lemore Campbell. *Pro se* Petitioner.

Richard G. Andrews, First Assistant United States Attorney,  
United States Department of Justice, Wilmington, Delaware.  
Attorney for Respondent.

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July 14, 2004  
Wilmington, Delaware

**JORDAN, District Judge**

**I. INTRODUCTION**

Petitioner Lemore Campbell has filed with the Court the current motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 32.) Campbell is serving his sentence at the Rivers Correctional Institution in Winton, North Carolina. As explained below, the Court will dismiss Campbell's motion.

**II. PROCEDURAL AND FACTUAL BACKGROUND**

On May 2, 2001, Campbell pled guilty to using a telephone in furtherance of a conspiracy to import cocaine, in violation of 21 U.S.C. § 843(b).<sup>1</sup> (D.I. 18.) The maximum punishment for this offense is four years (48 months) incarceration, a fine of \$ 250,000, or both, three years supervised release, and a special assessment of \$ 100. (*Id.*) The plea agreement states that the "United States Attorney agrees that the Defendant should obtain a downward adjustment for acceptance of responsibility, and does not oppose a three-level reduction based on the defendant's conduct to date and his prompt entry of a guilty plea," but defendant "understands that the final determination of the sentencing guidelines will be up to the sentencing judge." (*Id.*)

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<sup>1</sup>Campbell's indictment contained five counts, charging him with various drug offenses that took place in Delaware and elsewhere. (D.I. 2.) The other four counts were dismissed upon the Government's motion. (D.I. 23.)

Prior to sentencing, Campbell filed two applications for downward departure, based on his deportable status, his family ties and responsibilities, and his first-time offender status. (D.I. 20; D.I. 22.) On August 1, 2001, this Court<sup>2</sup> denied Campbell's applications for a downward departure, and sentenced him to 48 months (4 years) of imprisonment. (D.I. 30, at 14-15.)

Campbell appealed, arguing that this Court had abused its discretion by not granting his applications for downward departure. See D.I. 43, *United States of America v. Campbell*, No. 01-3289 Opinion (3<sup>rd</sup> Cir. Dec. 6, 2002). The United States Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction because the district court "recognized that it had the power to depart, and chose not to." (*Id.* at 3, citing *United States v. Sally*, 116 F.3d 76, 78-79 (3d Cir. 1997)). Campbell did not file a petition for writ of certiorari.

However, while his appeal was pending, Campbell filed in this Court a document titled "Motion For Leave To File Defendant's Motion For Reduction-Sentence and Review Thereof." (D.I. 32.) Construing this document as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, this

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<sup>2</sup>This matter was originally assigned to the Honorable Roderick R. McKelvie, but was reassigned to the undersigned on January 6, 2003.

Court sent Campbell an "AEDPA Election Form" asking him how he wished to proceed with the case.<sup>3</sup> (D.I. 34.) Campbell returned the AEDPA Election Form, indicating that he "wish[ed] the Court to rule on [his] § 2255 petition as currently pending." (D.I. 35.) Attached to the Election Form was a document titled "Plaintiff's Memorandum Opinion And Grounds To Be Amend On the & [sic] 2255."<sup>4</sup> (*Id.*)

The Government filed a Response, contending that the Court did not have jurisdiction over Campbell's § 2255 motion due to his pending appeal. In the alternative, the Government asked the Court to dismiss the motion as meritless. (D.I. 37.)

Campbell's § 2255 motion is now ready for review.

### **III. STANDARD OF REVIEW**

After conviction and exhaustion, or waiver, of any right to appeal, courts can presume that a defendant stands fairly and finally convicted. *United States v. Frady*, 456 U.S. 152, 164 (1982). However, prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. Section 2255 cures jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage

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<sup>3</sup>This procedure was adopted pursuant to the Third Circuit opinion *United States v. Miller*, 197 F.3d 644, 652 (3d Cir. 1999).

<sup>4</sup>The argument section of Campbell's attachment is titled "Rule 28 U.S.C. 2255/or Rule 35(b) Motion." (D.I. 35 at D.)

of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

When reviewing a § 2255 motion, an evidentiary hearing is only required when the petitioner raises an issue of material fact. See *United States v. Essig*, 10 F.3d 968, 976 (3d Cir. 1993). A petitioner is not entitled to a hearing if his allegations are conclusively contradicted by the record, or if they are patently frivolous. *Solis v. United States*, 252 F.3d 289, 295 (3d Cir. 2001); see *Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). Thus, if the motions, files, and records "show conclusively that the movant is not entitled to relief," then a district court may summarily dismiss a § 2255 motion. *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992)).

As explained below, I find that the evidence of record conclusively demonstrates that Campbell is not entitled to the relief sought and that an evidentiary hearing is not required.

#### **IV. DISCUSSION**

It is well settled that, "under § 2255, the sentencing court is authorized to discharge or resentence a defendant if it concludes that it was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum

authorized by law, or is otherwise subject to collateral attack.'" *U.S. v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *United States v. Hayman*, 342 U.S. 205, 216-17 (1952)); 28 U.S.C. § 2255. If a claimed error of law or fact is not of a "'fundamental character' that renders the entire proceeding irregular and invalid," then relief is not available pursuant to § 2255. *Addonizio*, 442 U.S. at 186. Generally, a district court's alleged misapplication of the Sentencing Guidelines does not provide a basis for collateral relief. See *U.S. v. Williams*, 235 F.3d 858, 862-63 (3d Cir. 2000) ("Though the application of the Sentencing Guidelines by judges is not entirely discretionary, the Sentencing Guidelines are in effect a codification of judges' exercise of discretion in sentencing precisely in the manner described by the Court"); see also, *United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000) (en banc) ("Errors in the implementation of the Sentencing Guidelines are generally not cognizable in a collateral attack") (internal quotations omitted).

In his § 2255 motion,<sup>5</sup> Campbell contends that the Court should have applied the mandatory minimum sentence permitted under the Sentencing Guidelines, rather than the mandatory maximum sentence of 48 months, because he "was a family man with

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<sup>5</sup>The Third Circuit Court of Appeals dismissed Campbell's appeal. Thus, this Court now has jurisdiction to review his § 2255 motion

no prior criminal record" and he has demonstrated "acceptance of responsibility for his offense." (D.I. 35 at (D).) This argument fails to assert a basis for relief under 28 U.S.C. § 2255. As an initial matter, there is no applicable mandatory minimum sentence for Campbell's offense. See 21 U.S.C. § 843(d). Moreover, the sentencing guidelines for this offense required 87-108 months imprisonment, but because the statutory maximum sentence is less than the sentence guideline range, the guideline sentence became the statutory maximum sentence of 48 months. See U.S.S.G. § 5G1.1(a); *United States of America v. Campbell*, No. 01-3289 Opinion (3d Cir. Dec. 6, 2002). As such, his sentence did not exceed the maximum statutory sentence.

Additionally, Campbell's assertions do not "rise to the level of a constitutional deprivation" cognizable in a § 2255 proceeding. *Cepero*, 224 F.3d at 268 n. 6. He has not alleged a jurisdictional or constitutional issue, and he has not demonstrated that the denial of the motions for downward departure rendered the proceeding irregular and invalid. Accordingly, I will deny his § 2255 motion.

To the extent Campbell appeals to the Court's discretion under Federal Rule of Criminal Procedure 35(b), I must deny this request. Campbell asks me to reduce his sentence because he "entered a acceptance of personal responsibility in this case, and has entered a timely guilty plea, thereby permitting the

Government to avoid preparing for trial, and permitting the Court to allocate its resources efficiently.” (D.I. 32, at (B).) As explained above, these grounds do not provide a basis for relief under § 2255. See, e.g., *U.S. v. Dansker*, 581 F.2d 69, 74 n.3 (3d Cir. 1978) (discussing the difference between the available relief under Rule 35(b) and that available pursuant to a § 2255 motion).

Moreover, the former version of Rule 35(b), which permitted a federal court to reduce a sentence in its discretion, was repealed in November 1987, and it only applies to those offenses committed prior to November 1, 1987.<sup>6</sup> Campbell committed the offense for which he was convicted in 1999, and he was sentenced in August 2001. Thus, the former version of Rule 35(b) does not apply.

The current version of Rule 35(b) also fails to provide relief. Under the current Rule 35(b), a sentence can only be reduced “upon the government’s motion made within one year of sentencing” if the defendant provided substantial assistance.

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<sup>6</sup>The version of Rule 35 applicable to offenses committed prior to November 1, 1987 provides:

(a) The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked . . .



Fed. R. Crim. P. 35(b)(1). Campbell, not the Government, filed the pending motion. Campbell asks me to reduce his sentence because he "entered a acceptance of personal responsibility in this case, and has entered a timely guilty plea, thereby permitting the Government to avoid preparing for trial, and permitting the Court to allocate its resources efficiently." (D.I. 32, at (B).) This assistance alleged by Campbell is not the type required by Rule 35(b). Accordingly, Campbell's Rule 35(b) request is denied.

#### **V. MISCELLANEOUS MOTIONS**

Before closing, I must note that the docket indicates several pending motions. First, Campbell's "Motion for Downward Departure (D.I. 20; D.I. 22.) was denied at sentencing. See D.I. 30. Second, Campbell's "Notice and Motion for Leave to File a Motion for Reduction of Sentence" is denied as moot. (D.I. 31.) Finally, Campbell's "Motion[s] to Stay the Proceedings and for a Protective Order" are also denied as moot. (D.I. 38; D.I. 40.)

#### **VI. CERTIFICATE OF APPEALABILITY**

Finally, I must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. A federal district court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must "demonstrate that reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, Campbell's claim does not provide a basis for federal habeas relief under 28 U.S.C. § 2255. I am persuaded that reasonable jurists would not find my assessments debatable. Therefore, Campbell has failed to make a substantial showing of the denial of a constitutional right, and I will not issue a certificate of appealability.

#### **VII. CONCLUSION**

For the reasons stated, Campbell's 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence is dismissed. An appropriate Order shall issue.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

LEMORE CAMPBELL,	)	
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Petitioner,	)	
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v.	)	Civ. A. No. 01-714-KAJ
	)	Cr. A. No. 00-80-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**O R D E R**

At Wilmington, this 14th day of July, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Lemore Campbell's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DISMISSED, and the relief requested therein is DENIED. (D.I. 32.)

2. Campbell's "Notice and Motion for Leave to File a Motion for Reduction of Sentence" is denied as moot. (D.I. 31.)

3. Campbell's "Motions to Stay the Proceedings and for a Protective Order" are denied as moot. (D.I. 38; D.I. 40.)

4. Campbell's "Motion for Downward Departure" was denied at sentencing, thus, it is terminated. (D.I. 20.)

5. The Court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE