

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7111
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MATIAS GUTIERREZ DE-LUNA,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR M 92 109 & CV M 92 219)

(August 18, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Matias Gutierrez De-Luna is currently serving a sixty-month sentence for possession of marijuana. Gutierrez petitioned the district court for habeas corpus relief on several grounds. Because Gutierrez's petition lacked merit, the district court dismissed his petition pursuant to Rule 4 of the Rules Governing

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Section 2254 Cases in United States District Courts. Finding no error, we affirm.

I

United States Border Patrol Agents stopped Matias Gutierrez De-Luna in LaFrulla, Texas. Gutierrez was carrying 282 pounds of marijuana in his car. In April of 1992, the government charged Gutierrez with 1) conspiracy to possess marijuana with the intent to distribute it, 2) possession of marijuana, 3) conspiracy to import marijuana, and 4) importation of marijuana. In June, Gutierrez pleaded guilty to count two. In exchange, the government agreed to 1) dismiss the remaining counts, 2) recommend that the district court adjust Gutierrez's sentence because he had accepted responsibility for his crime, and 3) recommend that the district court sentence Gutierrez to the statutory minimum of sixty months.

When the government announced that it did not intend to file a motion for a downward departure pursuant to section 5k1.1 of the Sentencing Guidelines, Gutierrez filed a motion to compel the government to file the 5k1.1 motion. In response, the government contended that the prosecutor advised Gutierrez that the information that Gutierrez provided was not substantial enough to warrant a downward departure. The government also noted that it agreed to recommend a sixty-month sentence. The government argued that such an agreement is inconsistent with an agreement to request a further downward departure. After a hearing, the district court found that the government did not breach its plea agreement with

Gutierrez. Accordingly, in August of 1992, the district court denied Gutierrez's motion to compel and sentenced him to sixty months of incarceration. Gutierrez did not appeal his sentence.

Three months later, on November 18, 1992, Gutierrez filed a pro se petition under 28 U.S.C. § 2255. Without waiting for a response from the government, the magistrate judge issued a report in which he concluded that Gutierrez did not raise cognizable claims. Gutierrez objected to the magistrate judge's report. Nevertheless, in January of 1993, the district court adopted the magistrate judge's report and dismissed Gutierrez's petition. Gutierrez filed a timely notice of appeal and brought this appeal.

II

Gutierrez contends that the district court erred when it denied his petition. Under Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts, the district court can dismiss a petition if it appears plainly on the face of the petition that the petitioner is not entitled to relief.

A

Gutierrez first argues that he is entitled to a downward departure because of the collateral consequences of his conviction. Gutierrez is a resident alien and the immigration service may deport him after he serves his sentence. In addition, Gutierrez is not eligible to serve his sentence in a minimum security facility because of his status as an alien. Relying on these facts, Gutierrez argues that the system treats him more harshly because he

is an alien. Gutierrez, thus, concludes that he is entitled to a downward departure on his sentence as compensation. Gutierrez, however, does not contend that he did not know of the possibility of deportation when he pleaded guilty. Nor does he claim that his status as a resident alien was included in the presentence report and thereby prejudiced his case.

Gutierrez's argument is without merit. To obtain habeas relief at this juncture, Gutierrez "must show a fundamental defect which inherently results in a complete miscarriage of justice." United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985). In Gavilan, the petitioner argued that his conviction was unfair because his attorney did not inform him that a guilty plea could result in deportation. We squarely rejected the petitioner's claim. Id.; see also United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991). Similarly, in Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975), a defendant challenged his drunk driving conviction on the grounds that his counsel did not inform him that he would lose his driver's license. Again, we rejected the petitioner's claim. See also Meaton v. United States, 328 F.2d 379 (5th Cir. 1964). Accordingly, the collateral consequences of Gutierrez's guilty plea do not make his sentence fundamentally unfair and, thus, he is not entitled to relief.

B

Gutierrez also contends that the government led him to believe that it would ask the district court to grant him a downward

departure. At his sentencing hearing, the district court found that the government never promised Gutierrez that it would make such a request. The district court concluded that the government had not breached the plea agreement. In the proceeding before us, both the magistrate judge and the district court also found that the government did not breach the plea agreement. The record supports these findings. We, therefore, conclude that Gutierrez's contention that the government promised to request a downward departure is baseless.

C

Gutierrez next contends that he is entitled to a one-point reduction in his base offense level pursuant to § 3E1.1(b) of the Sentencing Guidelines. Section 3E1.1(b) is a recent amendment to the Sentencing Guidelines. Under this section, a defendant is entitled to an additional one-point reduction in his base offense level if he provides the government with complete information concerning his offense. The section also grants a defendant a one-point reduction if he timely notifies the government of his intention to plead guilty, thereby permitting the government to avoid the time and expense of preparing for trial.

Gutierrez is not entitled to a reduction in his base offense level under this section. This provision became effective after the district court sentenced Gutierrez¹, and the federal courts

¹As Gutierrez notes, the United States Sentencing Commission added this section to the guidelines effective November 1, 1992.

have not applied it retroactively. United States v. Windham, 991 F.2d 181, 183 (5th Cir. 1993) (section 3E1.1 not retroactive for purposes of defining the scope of acceptance of responsibility); see also United States v. Caceda, 990 F.2d 707, 710 (2d Cir. 1993).

D

Next, Gutierrez asks us, in the name of justice, to reduce his sentence because he was a minor participant in the crime. Gutierrez contends that he was only a "mule." Under our cases, however, a "'mule' or transporter of drugs may not be entitled to minor or minimal status." United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992) (citing United States v. Buenrostro, 868 F.2d 135 (5th Cir. 1989)). Thus, Gutierrez's argument lacks merit.

D

Gutierrez also asks us to grant him a downward departure because he is the sole source of support for his family. Gutierrez has a wife and four children, one of whom is ill.

Gutierrez makes this argument in the wrong forum. To raise a claim that concerns neither a constitutional nor a jurisdictional defect in a habeas corpus petition, "the defendant must show that the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." United States v. Shaid, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (citing United States v. Capua, 656 F.2d 1033, 1037 (5th Cir.

The district court, however, sentenced Gutierrez in August of 1992.

1981). Requiring Gutierrez to serve his sentence will not result in a complete miscarriage of justice. We, therefore, reject this request for relief.

E

Finally, Gutierrez writes that he "will agree to deportation to Mexico and a five-year term of probation in place of the present sentence of incarceration." Gutierrez argues, that under the circumstances, "banishment" would best serve the interests of justice. We simply are not in a position to grant such relief.

III

For all of the foregoing reasons, the decision of the district court is

A F F I R M E D.