

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

PETER BENITEZ, a/k/a
Pedro Juan Figueroa,

Petitioner,

vs.

Case No. 2:08-cv-956-FtM-99DNF

Case No. 2:96-cr-14-FtM-99DNF

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

_____This matter comes before the Court on petitioner Peter Benitez's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Cv. Doc. #1; Cr. Doc. #331)¹ filed on December 22, 2008. The United States filed its Response in Opposition to Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, Pursuant to 28 U.S.C. § 2255 on February 6, 2009 (Cv. Doc. #6).

In an Opinion and Order (Cv. Doc. #7) filed on August 13, 2009, the Court found that two of the three issues raised by petitioner were procedurally defaulted. The Court took the petition under advisement and referred the third issue to the magistrate judge. Magistrate Judge Douglas N. Frazier conducted an

¹The Court will make references to the dockets in the instant action and in the related criminal case throughout this opinion. The Court will refer to the docket of the civil habeas case as "Cv. Doc.", and will refer to the underlying criminal case as "Cr. Doc."

evidentiary hearing and has filed a Report and Recommendation (Cv. Doc. #14) recommending that the Court find that defense counsel did not provide ineffective assistance of counsel in not filing an appeal from the sentence upon revocation of supervised release. No objection has been filed, and the time to do so has expired.

The Court has read the transcript of the evidentiary hearing (Cv. Doc. #12) and has reviewed the court file in both the underlying criminal case and the habeas case. The Court fully agrees with the findings of fact and conclusions of law made by the magistrate judge. Accordingly, the Court will adopt the Report and Recommendation, and will dismiss in part and deny in part the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by Person in Federal Custody (Cv. Doc. #1).

Accordingly, it is now


ORDERED:

1. The Magistrate Judge's Report and Recommendation (Cv. Doc. #14) is **accepted and adopted**, and it is specifically incorporated into this Opinion and Order.

2. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, and to Correct, Sentence By a Person in Federal Custody (Cv. Doc. #1) is **DISMISSED** as to the first two issues and is **DENIED** as to the claim of ineffective assistance of counsel.

3. The Clerk of the Court shall enter judgment accordingly and close the civil file. The Clerk shall place of copy of the civil Judgment in the criminal file.

DONE AND ORDERED at Fort Myers, Florida, this 1st day of December, 2009.



JOHN E. STEELE
United States District Judge

Copies:
U.S. Magistrate Judge
Clerk of Court
Counsel of record