

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CR 15-00125 KG/GJF
No.CV 17-01103 KG

ROMAN ENRIQUE DELGADO-MONTOYA,

Defendant/Movant.

ORDER

THIS MATTER is before the Court on the *pro se* Motion Under 8 USC § 1326 filed by Defendant, Roman Enrique Delgado-Montoya, on November 7, 2017. (Doc. 110). Defendant’s Motion Under 8 USC § 1326 asks to have Delgado-Montoya’s sentence “remanded for correction” and to “vacate, set aside, or correct’ his sentence and/or conviction.” (Doc. 110 at 8, 12). However, Defendant may only challenge his conviction and sentence by a motion under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(a) and (e); *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) (“The exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255”).

Therefore, the Court intends to recharacterize Defendant Delgado-Montoya’s Motion Under 8 USC § 1326 as a first 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

Pursuant to *Castro v. United States*, 540 U.S. 375 (2003), when

a court recharacterizes a *pro se* litigant’s motion as a first § 2255 motion . . .the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restriction on “second or successive” motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he

has.

Id. at 383. Consistent with *Castro*, the Court notifies Defendant Delgado-Montoya that it intends to recharacterize his Motion as a § 2255 motion and afford him an opportunity to withdraw the motion or to amend it to add additional claims he may have. *See* Rule 2 of the Rules Governing Section 2255 Proceedings for the United States District Courts (providing that motion to vacate, set aside, or correct sentence must “(1) specify all grounds for relief available to the moving party; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant”). If Defendant fails to timely amend or withdraw his Motion, then his Motion will be recharacterized and any subsequent § 2255 motions will be subject to the restriction on “second or successive” motions in 28 U.S.C. §§ 2244 and 2255(h).

IT IS ORDERED that Defendant Roman Enrique Delgado-Montoya is **GRANTED** leave to amend or withdraw his Motion Under 8 USC § 1326 (Doc. 110), which the Court intends to recharacterize as a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, within twenty-one (21) days of the entry of this Order.

IT IS FURTHER ORDERED that the Clerk of the Court **MAIL** a copy of this Order, together with a form § 2255 motion and instructions, to Defendant Delgado-Montoya.


UNITED STATES DISTRICT JUDGE