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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JUSTO L. CINTRON-BOGLIO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 13-1225 (DRD)
(CRIMINAL 08-0204(DRD))

OPINION AND ORDER

“The quality of mercy is not strain’d, . . . it blesseth him that gives and him that takes.” William Shakespeare, *The Merchant of Venice*, act IV, sc. 1 (1596).
Not satisfied with the quality of the court’s mercy in modifying his sentence under the Fair Sentencing Act of 2010, petitioner, a convicted drug trafficker, now seeks federal habeas corpus relief to which he is ultimately not entitled.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2008, petitioner Justo L. Cintron-Boglio and 110 other defendants were charged in a seven-count indictment. Count One charged petitioner in that he (and the others) did knowingly and intentionally combine, conspire, confederate and agree with each other and with diverse other persons, to commit an offense against the United States, that is, to knowingly and intentionally possess with intent to distribute and/or distribute controlled substances, that is, in excess of fifty grams of cocaine base, a Schedule II

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4 Narcotic Drug Controlled Substance, and/or in excess of one kilogram of
5 heroin, a Schedule I, Narcotic Drug Controlled Substance, and/or in excess of
6 five kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance,
7 and/or in excess of one hundred pounds of marijuana, a Schedule I Controlled
8 Substance, within 1,000 feet of the real property comprising a public or private
9 school and/or housing facility owned by a public housing authority and/or a
10 playground, as prohibited by 21 U.S.C. §§ 841(a)(1) and 860. All in violation
11 of Title 21 United States Code Section 846. (Criminal 08-0204, Docket No. 3).
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13 Counts Two through Five charge violations of the corresponding substantive
14 charges related to the overall conspiracy. Count Six charged petitioner and 33
15 other defendants with knowingly and intentionally combining, conspiring,
16 confederating and agreeing with each other and with diverse other persons, to
17 commit an offense against the United States, that is, to knowingly and
18 intentionally possess firearms during and in relation to a drug trafficking crime
19 as charged in Counts One through Five, as prohibited by Title 18 U.S.C. §
20 924(c)(1)(A). All in violation of 18 U.S.C. §§ 924(o). (Id. at 35-37).
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24 Petitioner appeared before me for arraignment on July 9, 2008 and
25 entered a plea of not guilty to the charges. (Crim. No. 08-204, Docket No.
26 605). On January 15, 2010, petitioner changed his plea to one of guilty as the
27 result of a plea agreement entered into with the United States. (Criminal 08-
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4 204, Docket No. 2981.) The agreement allowed the petitioner to request no
5 less than a 121-month term of imprisonment at sentencing while the United
6 States reserved the right to recommend a sentence of 151months. (Criminal
7 08-204, Docket No. 2997). Petitioner later moved to withdraw his guilty plea
8 and after a multi-faceted motion practice, he withdrew the motion to withdraw
9 his plea of guilty. (Crim. No. 08-204, Docket No. 4171). Petitioner was then
10 sentenced on August 18, 2010 to 120 months imprisonment as to Count One
11 of the indictment. Counts Two through Seven of the indictment were then
12 dismissed. (Criminal 08-0204, Docket No. 4172). No notice of appeal was
13 filed.
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16 On March 18 and June 13, 2011, petitioner, pro se, moved to reduce his
17 sentence. (Criminal 08-204, Docket Nos. 4378 , 4428). Petitioner sought to
18 remove the three-level enhancement for a leadership role from the sentencing
19 calculus, and also sought reduction of his sentence under the Fair Sentencing
20 Act of 2010. (Criminal No. 08-204, Docket No. 4378 at 4, 7). He further
21 sought reduction specifically within the range of 63-78 months, relying on his
22 calculations of the sentencing guidelines, specifically the amendments to
23 U.S.S.G. 2D1.1(c)¹. (Crim. No. 08-204, Docket No. 4428 at 6). Then on
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27 ¹This is the Drug Quantity Table. See e.g. United States v. Aponte-Guzman,
28 696 F.3d 157, 159 (1st Cir. 2012).

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4 January 12, 2012, petitioner, now represented by the Federal Public Defender
5 of Puerto Rico, again moved to reduce sentence pursuant to 18 U.S.C. §
6 3582(c). (Crim. No. 08-204, Docket No. 4678). Petitioner reminded the court
7 that it was not bound by the statutory minimum of ten years, citing United
8 States v. Douglas, 644 F.3d 39 (1st Cir. 2011). On March 29, 2012, the U.S.
9 Probation Officer reported to the court that petitioner was not eligible for
10 sentence reduction because he had been sentenced to the statutory minimum
11 term of imprisonment applicable at the time the original sentence was
12 imposed. (Criminal No. 08-204, Docket No. 4885 at 2).
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15 Nevertheless, on May 7, 2012, the parties filed a stipulation to reduce
16 the sentence from 120 months to 97 months of imprisonment. (Criminal 08-
17 204, Docket No. 4941). The stipulation was approved and the court entered
18 an order reducing the sentence accordingly. (Criminal 08-204, Docket No.
19 4948). Three months later, on August 27, 2012, petitioner, pro se, moved for
20 reconsideration. (Criminal 08-204, Docket No. 5193). Specifically, he argued
21 that he should be sentenced to 63 months imprisonment because the new
22 sentencing range applicable after August 3, 2010 provided for a range of 63-
23 78 months. To this end, he relies on the Administrative Directive issued by the
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4 court on September 21, 2011.² Misc. No. 11-437(ADC). Petitioner moved to
5 amend the request for reduction of sentence on November 27, 2012, arguing
6 that his sentence of 97 months was calculated under the pre-Fair Sentencing
7 Act guidelines. (Crim. No. 08-204, Docket No. 5269). Relying on the stipulated
8 sentence, the court denied the motions for reduction on November 29, 2012.
9 (Criminal 08-204, Docket No. 5263). No appeal followed any of these
10 decisions.
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13 II. MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

14 This matter is before the court on motion filed by on March 18, 2013 to
15 vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (Docket
16 No. 1). The government filed a response in opposition to the motion on April
17 22, 2013. (Docket No. 7). Parties have consented to disposition before a
18 United States magistrate judge pursuant to 28 U.S.C. 636(c).
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20 Having considered the arguments of the parties and for the reasons set
21 forth below, the motion to vacate sentence is denied as time-barred.
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24 ²The Administrative Directive details the streamlined procedure to be
25 followed by the court in determining the applicability of a reduction of sentence
26 under 18 U.S.C. § 3582 (c)(2). It clearly explains that the reduction of sentence
27 process is restricted to the policy statement of U.S.S.G. § 1B1.10. *Id.* at 6. It also
28 notes that modification of sentence is not a right. *Id.* at 3. A previous
Administrative Directive was issued on February 15, 2008. Misc. No. 08-031
(JAF). It also provided a roadmap for the implementation of 18 U.S.C. § 3582
(c)(2).

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4 A. ARGUMENT

5 Petitioner claims that he was constructively denied counsel when his
6 latest attorney failed to consult with him before stipulating to imposition of the
7 reduced criminal sentence. (Docket No. 1 at 4, ¶ 12). He further argues that
8 he was constructively denied counsel during the resentencing when counsel
9 failed to prepare and submit a sentencing memorandum which would have
10 shown post-arrest rehabilitation. (Docket No. 1 at 5). Petitioner argues in his
11 third and final ground for relief that the district court erred in choosing to
12 accept a multi-prison omnibus settlement in deciding the petitioner's sentence,
13 and although understandable because of the stipulation, such decision violated
14 petitioner's right to due process of law. (Docket No. 1 at 7). Specifically, the
15 remedy he seeks is that the 97-month sentence be reduced to 67 months.
16 (Docket No. 1 at 13).

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20 On April 22, 2013, the government filed a response in opposition to the
21 petitioner's motion. (Docket No. 7). In a nutshell, the government notes that
22 petitioner was not entitled to counsel at the resentencing hearing, and that the
23 order of May 12, 2012 did not reset the one-year limitations period of the
24 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), thus rendering
25 this petition untimely.
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27 B. ANALYSIS
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4 On August 18, 2010, fifteen days after the enactment of the Fair
5 Sentencing Act of 2010, codified in 21 U.S.C. §§ 841, 960, petitioner was
6 sentenced to 120 months imprisonment.³ No appeal was taken so that the
7 conviction became final on September 8, 2010. At the time of sentencing, the
8 court used the United States Sentencing Guidelines in effect (November 1,
9 2009). Petitioner stipulated to being held responsible for at least 50 but less
10 than 150 grams of cocaine base for a base offense level of 30, plus the two
11 level enhancement to the quantity of controlled substances directly involving a
12 protected location. See U.S.S.G. §2D1.2(a)(1). This established an adjusted
13 base offense level of 32. Petitioner was depicted as a supervisor in a
14 conspiracy involving five or more participants and a three level enhancement
15 was therefore applied, offset by a three level reduction for acceptance of
16 responsibility. U.S.S.G. §§ 3B1.1(b), 3E1.1). The applicable sentencing range
17 for a total offense level of 32 was between 121 to 151 months, with the
18 parties allowed to argue for the upper and lower end of the guideline range.
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24 ³Had petitioner been sentenced prior to August 3, 2010, the Fair Sentencing
25 Act of 2010's statutory minimum requirements would not have applied to him.
26 See United States v. Goncalves, 642 F.3d 245 (1st Cir. 2011). The Fair Sentencing
27 Act raised the drug quantity thresholds of crack cocaine required to trigger the 10-
28 year mandatory minimum imprisonment term from 50 to 280 grams. See 21
U.S.C. § 841(b)(1)(A)(iii); United States v. Douglas, 644 F.3d at 40-41 (1st Cir.
2011).

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4 The revised guideline calculations contained in the stipulation filed on
5 May 7, 2012 reflected a total offense level of 30, with a sentencing range of
6 between 97 to 121 months. The parties agreed that petitioner was eligible for
7 modification of his sentence pursuant to 18 U.S.C. 3582(c) and U.S.S.G. §
8 1B1.10(c), Amendment 706 of the United States Sentencing Commission
9 Guidelines Manual. The parties stipulated a sentence at the lower end of the
10 guidelines. (Crim. No. 08-204, Docket No. 4941). Since the original guideline
11 sentencing range had been lowered and made retroactive by the United States
12 Sentencing Commission pursuant to 28 U.S.C. 994(u), the court approved the
13 stipulation and modified the sentence accordingly. (Crim. No. 08-204, Docket
14 Nos. 4942, 4948). Petitioner then waited ten months to let be known his
15 dissatisfaction with the 97-month sentence. (Crim. No. 08-204, Docket No.
16 5316).

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20 Under 28 U.S.C. § 2255, a federal prisoner may move for post conviction
21 relief if:

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23 the sentence was imposed in violation of the
24 Constitution or laws of the United States, or that the
25 court was without jurisdiction to impose such sentence,
26 or that the sentence was in excess of the maximum
27 authorized by law, or is otherwise subject to collateral
28 attack

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4 28 U.S.C. § 2255(a); Hill v. United States, 368 U.S. 424, 426-27 n.3 (1962);
5 David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). The burden is on
6 the petitioner to show his or her entitlement to relief under section 2255, David
7 v. United States, 134 F.3d at 474, including his or her entitlement to an
8 evidentiary hearing. Cody v. United States, 249 F.3d 47, 54 (1st Cir. 2001)
9 (quoting United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993)).
10

11 *Ineffective Assistance of Counsel*

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13 "In all criminal prosecutions, the accused shall enjoy the right to . . . the
14 Assistance of Counsel for his defence." U.S. Const. amend. 6. To establish a
15 claim of ineffective assistance of counsel, a petitioner "must show that
16 counsel's performance was deficient," and that the deficiency prejudiced the
17 petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). "This inquiry
18 involves a two-part test." Rosado v. Allen, 482 F. Supp. 2d 94, 101 (D. Mass.
19 2007). "First, a defendant must show that, 'in light of all the circumstances,
20 the identified acts or omissions were outside the wide range of professionally
21 competent assistance.'" Id. (quoting Strickland v. Washington, 466 U.S. at
22 690.) "This evaluation of counsel's performance 'demands a fairly tolerant
23 approach.'" Rosado v. Allen, 482 F. Supp. 2d at 101 (quoting Scarpa v.
24 DuBois, 38 F.3d 1, 8 (1st Cir. 1994)). "The court must apply the performance
25 standard 'not in hindsight, but based on what the lawyer knew, or should have
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4 known, at the time his tactical choices were made and implemented.” Rosado
5 v. Allen, 482 F. Supp. 2d at 101 (quoting United States v. Natanel, 938 F.2d
6 302, 309 (1st Cir. 1991)). The test includes a “strong presumption that
7 counsel's conduct falls within the wide range of reasonable professional
8 assistance.” Smullen v. United States, 94 F.3d 20, 23 (1st Cir. 1996) (quoting
9 Strickland v. Washington, 466 U.S. at 689). “Second, a defendant must
10 establish that prejudice resulted ‘in consequence of counsel's blunders,’ which
11 entails ‘a showing of a “reasonable probability that, but for counsel's
12 unprofessional errors, the result of the proceeding would have been
13 different.”” Rosado v. Allen, 482 F. Supp. 2d at 101 (quoting Scarpa v.
14 DuBois, 38 F.3d at 8) (quoting Strickland v. Washington, 466 U.S. at 694); see
15 Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (quoting Strickland v.
16 Washington, 466 U.S. at 688); Argencourt v. United States, 78 F.3d 14, 16 (1st
17 Cir. 1996); Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994); Mattei-Albizu v.
18 United States, 699 F. Supp. 2d 404, 407 (D.P.R. 2010).

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23 In Hill v. Lockhart the Supreme Court applied Strickland’s two-part test
24 to ineffective assistance of counsel claims in the guilty plea context. Hill v.
25 Lockhart, 474 U.S. 52, 58 (1985) (“We hold, therefore, that the two-part
26 Strickland v. Washington test applies to challenges to guilty pleas based on
27 ineffective assistance of counsel.”). As the Hill Court explained, “[i]n the
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4 context of guilty pleas, the first half of the Strickland v. Washington test is
5 nothing more than a restatement of the standard of attorney competence
6 already set forth in [other cases]. The second, or 'prejudice,' requirement, on
7 the other hand, focuses on whether counsel's constitutionally ineffective
8 performance affected the outcome of the plea process." Hill v. Lockhart, 474
9 U.S. at 58-59. Accordingly, petitioner would have to show that there is "a
10 reasonable probability that, but for counsel's errors, he would not have pleaded
11 guilty and would have insisted on going to trial." Id. at 59. Finally, the
12 Strickland standard also applies to representation at the appellate level. Dell v.
13 United States, 710 F.3d 1267, 1273 (11th Cir. 2013).

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16 The Strickland standard, however, has never been applied to adequate
17 legal representation on collateral review and indeed, petitioner does not have
18 an automatic right to counsel post conviction. See Pennsylvania v. Finley, 481
19 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987); Ellis v. United States, 313 F.3d
20 636, 652-53 (1st Cir. 2002); cf. Martinez v. Ryan, 132 S. Ct. 1309, 1315-17
21 (2012); United States v. Gonzalez-Vazquez, 219 F.3d 37, 41-42 (1st Cir.
22 2000). This is true, notwithstanding courts assigning counsel in the event an
23 evidentiary hearing is called for.⁴ In terms of enforcing the constitutional right
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27 ⁴Rule 8(c) of the Rules Governing Section 2255 Proceedings requires the
28 appointment of counsel if an evidentiary hearing is required. See Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011).

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4 to counsel, such right stops after the first appeal. See Coleman v. Thompson,
5 501 U.S. 722, 755-57, 111 S. Ct. 2546, 2567-2568 (1991), cited in United
6 States v. Reddick, 53 F.3d 462, 464 (2d Cir. 1995); Ross v. Moffitt, 417 U.S.
7 600, 616, 94 S. Ct. 2437, 2446-2447 (1974). Similarly, there is no right to
8 counsel in proceedings brought under § 3582(c)(2). United States v. Harris,
9 568 F.3d 666, 668-69 (8th Cir. 2009); United States v. Webb, 565 F.3d 789,
10 793-94 (11th Cir. 2009); United States v. Forman, 553 F.3d 585, 590 (7th Cir.
11 2009); cf. United States v. Robinson, 542 F.3d 1045, 1051-52 (5th Cir. 2008);
12 United States v. Taylor, 414 F.3d 528, 535-36 (4th Cir. 2005). After all, a
13 motion pursuant to § 3582(c) "is not a do-over of an original sentencing where
14 a defendant is cloaked in rights mandated by statutory law and the
15 Constitution." United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000),
16 quoting United States v. Tidwell, 178 F.3d 946, 949 (7th Cir. 1999). If the
17 Sixth Amendment right to counsel does not apply on collateral review, *a fortiori*
18 nor does the violation of any purported Sixth Amendment right to adequate
19 representation of counsel. In other words, the plenary constitutional right to
20 counsel diminishes to a statutory right post appeal, and only under rare
21 circumstances is it applicable in such a case. This is not that case. The
22 temptation to weigh the quality of petitioner's legal representation in an
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4 ancillary or collateral proceeding is tempered by the ultimate outcome of his
5 tardy motion. I explain further.

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7 C. LIMITATIONS

8 The Antiterrorism and Effective Death Penalty Act instituted a limitations
9 period of one year from the date on which a prisoner's conviction became final
10 within which to seek federal habeas relief. See Pratt v. United States, 129 F.3d
11 54, 58 (1st Cir. 1997). The current petition was filed well over a year from the
12 date petitioner's sentence became final and unappealable. In its pertinent
13 part, section 2255 reads:

14
15 A 1-year period of limitation shall apply to a motion
16 under this section. The limitation period shall run from
17 the latest of-

18 (1) the date on which the judgment of conviction
19 becomes final;

20 (2) the date on which the impediment to making a
21 motion created by governmental action in violation of
22 the Constitution or laws of the United States is
23 removed, if the movant was prevented from making a
24 motion by such government action;

25 (3) the date on which the right asserted was initially
26 recognized by the Supreme Court, if that right has
27 been newly recognized by the Supreme Court and
28 made retroactively applicable to cases on collateral
review; or

(4) the date on which the facts supporting the claim or
claims presented could have been discovered through
the exercise of due diligence.

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4 The petition does not describe any circumstances that fall within any of
5 the exceptions which would equitably toll the limitations period of the statute.
6 See e.g. Ramos-Martinez v. United States, 638 F.3d 315, 321-24 (1st Cir.
7 2011).⁵ Rather, petitioner relies exclusively on Magwood v. Patterson, 130 S.
8 Ct. 2788 (2010) in claiming that the petition has been filed in a timely manner.
9 The complex and fragmented procedural history in Magwood can hardly be
10 considered analogous to the background of the present case. Magwood, a
11 state prisoner sentenced to death, challenged his sentence in a motion brought
12 under 28 U.S.C. § 2254. That motion was granted in part. Magwood v. Smith,
13 608 F. Supp. 218 (D. Ala. 1985). That decision was affirmed. Magwood v.
14 Smith, 791 F.2d 1438 (11th Cir. 1986). After a new sentencing hearing, he
15 was again sentenced to death. The sentence was affirmed on appeal and
16 Magwood filed another motion under 28 U.S.C. § 2254, which was granted in
17 part. Magwood v. Culliver, 481 F. Supp. 2d 1262 (M.D. Ala. 2007). The
18 Eleventh Circuit reversed in part, finding the motion a second or successive
19 motion. Magwood v. Culliver, 555 F.3d 968, 975-76 (11th Cir. 2009). The
20 Supreme Court reversed, finding that Magwood had been resentenced, and
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26 ⁵In his own words, petitioner was well aware as early as March 18, 2011,
27 well within the limitations period, that he had some good arguments to support
28 a motion under 28 U.S.C. § 2255. (Crim. No. 08-204, Docket No. 4378 at 8, ¶ 3).

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4 that the second petition was a first application for relief from that later
5 sentence. Magwood v. Patterson, 130 S. Ct. at 2797-2801. A resentencing
6 and a modification of sentence may appear to be a distinction without a
7 difference to petitioner, but substantively such difference exists, regardless of
8 whether some courts use the word resentence or the term modification of
9 sentence interchangeably. I explain.

10
11 Title 18 U.S.C. § 3582(c)(2) states:

12
13 "The court modify a term of imprisonment once it has been imposed
14 except that—

15 (1) . . .

16 (2) in the case of a defendant who has been sentenced to a
17 term of imprisonment based on a sentencing range that has
18 subsequently been lowered by the Sentencing Commission
19 pursuant to 18 U.S.C. § 944(o) upon motion of the defendant . . . ,
20 or on its own motion, the court may reduce the term of
21 imprisonment, after considering the factors set forth in section
22 3553(a) to the extent that they are applicable, if such a reduction
23 is consistent with applicable policy statements issued by the
24 Sentencing Commission."

25 This section allows a court to modify an imposed term of imprisonment
26 "on a sentencing range that has subsequently been lowered by the Sentencing
27 Commission pursuant to 28 U.S.C. § 994(o)." Such a modification does not
28 affect the date on which the judgment of conviction becomes final "for all other
purposes". The concept and reality of finality are of essence to the limitations
redoubt. Basically, the modification of a sentence is not a full resentencing.

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4 See Dillon v. United States, 130 S.Ct. 2683, 2692 (2010). "By its terms, §
5 3582(c)(2) does not authorize a sentencing or resentencing proceeding.
6 Instead, it provides for the 'modif[ication of] a term of imprisonment' by giving
7 courts the power to 'reduce' an otherwise final sentence in circumstances
8 specified by the Commission." Id. at 2690; see United States v. Moreno, 421
9 F.3d 1217, 1220 (11th Cir. 2005). Thus, the date of final conviction remains
10 intact for purposes of § 2255 review.
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13 At best, petitioner is entitled to ask the court to seek a reduction within
14 the narrow constraints established by the United States Sentencing
15 Commission, and such entitlement does not extend to consideration of other
16 sentencing dispositions. United States v. Dunn, 631 F3d 1291, 1293 (D.C. Cir.
17 2011). Such entitlement does not include collateral relief based upon a
18 violation of the United States Constitution. See e.g. United States v. Bravo,
19 203 F.3d 778, 782 (11th Cir. 2000). The motion now before my consideration
20 was filed two and a half years after the conviction became final. The conviction
21 became no less final when petitioner filed motions to reduce his sentence under
22 the Fair Sentencing Act of 2010 and 18 U.S.C. § 3582(c).
23

24 III. CONCLUSION

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26 Because I find that the motion to vacate, set aside, or correct sentence
27 under 28 U.S.C. § 2255 is time-barred, and that there is no right to counsel in
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4 a proceeding brought under 18 U.S.C. § 3582(c), I do not reach the first prong
5 of Strickland arguably applied to a post-conviction ancillary or collateral
6 proceeding. Nor do I elaborate further on the reasoning behind petitioner's
7 argument as to resentencing. Finally, the argument that the district court
8 erred in choosing to accept a multi-prison omnibus settlement in deciding the
9 petitioner's sentence, which ultimately violated petitioner's right to due process
10 of law, is too ethereal to be weighed and is at best totally undeveloped. See
11 Nikijuluw v. Gonzales, 427 F.3d 115, 120 n.3 (1st Cir. 2005); United States v.
12 Zannino, 895 F.2d 1, 17 (1st Cir. 1990).
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15 In view of the above, petitioner's motion to vacate, set aside, or correct
16 sentence under 28 U.S.C. § 2255 is denied. The Clerk is directed to enter
17 judgment accordingly.
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19 At San Juan, Puerto Rico, this 6th day of May, 2013.
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21 S/JUSTO ARENAS
22 United States Magistrate Judge
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1 CIVIL 13-1225 (DRD)
2 (CRIMINAL 08-0204 (DRD))

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