

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,

§

Plaintiff/Respondent,

§

§

v.

§

Cr. No. C-08-123 (1)

§

C.A. No. C-08-221

§

§

APOLONIO GALLARDO-LUNA,

§

§

Defendant/Movant.

§

**MEMORANDUM OPINION AND ORDER  
DENYING WITHOUT PREJUDICE  
MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

Defendant Apolonio Gallardo-Luna (“Gallardo Luna”) pleaded guilty pursuant to a written plea agreement with the government (D.E. 28, 29) and was sentenced by this Court on July 3, 2008. (D.E. 40.) Final judgment was entered on July 7, 2008. (D.E. 41.) By and through appointed counsel in his criminal proceedings, Gallardo-Luna has filed a timely notice of appeal. (D.E. 39.) His appeal remains pending before the Fifth Circuit.

On July 10, 2008, the Clerk of this Court received from Gallardo-Luna a motion utilizing a form for filing motions pursuant to 28 U.S.C. § 2255. (D.E. 43.) In it, he appears to be asking for a reduced sentence based on a number of factors and to be challenging the Court’s determination of his offense level and sentence. For example, he claims that he had only a limited role within the conspiracy, and that he should not have

received an enhancement for “endangering” aliens. He also lists as grounds for relief that he is a productive member of society and that his family is heavily dependent upon his financial support. (D.E. 43.)

Even if the grounds he asserts could be brought in a § 2255 motion, the Court should not address such a motion while his direct criminal appeal is pending. As the Fifth Circuit noted in Welsh v. United States: “A motion to vacate under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, in as much as the disposition of the appeal may render the motion moot.” 404 F.2d 333, 333 (5th Cir. 1968), abrogated on other grounds, United States v. Ortega, 859 F.2d 327, 334 (5th Cir. 1988). Similarly, the outcome of Gallardo-Luna’s appeal may moot some or all of the grounds raised in his motion.

For the foregoing reasons, Gallardo-Luna’s motion (D.E. 43) is DENIED WITHOUT PREJUDICE.

It is so ORDERED this 23rd day of July, 2008.

  
HAYDEN HEAD  
CHIEF JUDGE