

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 96-00540-04
v.	:	
	:	(CIVIL ACTION
GEORGE GONZALEZ	:	No. 00-4615)

MEMORANDUM AND ORDER

HUTTON, J.

November 6, 2001

Currently before the Court is the Petitioner George Gonzalez's Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 275), the United States' Response to the Petitioner's Petition to Vacate, Set Aside or Correct his Sentence Pursuant to § 2255 (Docket No. 291), and the Petitioner's Response to the Government's Memorandum in Opposition to his § 2255 Motion (Docket No. 293). For the following reasons, the Court denies Petitioner the relief sought.

I. BACKGROUND

On May 26, 1998, George Gonzalez ("Petitioner") and four co-defendants pled guilty to conspiracy to distribute cocaine pursuant to 21 U.S.C. § 846. At sentencing on October 23, 1998, the court found that Petitioner conspired to distribute at least fifteen (15), but less than fifty (50) kilograms of cocaine. Petitioner was subsequently sentenced to 151 months imprisonment. Petitioner did not file an appeal. On September 12, 2000, Petitioner filed a

pro se motion seeking relief from judgment. Pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999), this Court then ordered the Clerk of Court to furnish Petitioner with the appropriate forms for filing a 28 U.S.C. § 2255 petition, and Petitioner was given the opportunity to amend his Motion to include all cognizable claims, or proceed with the Motion as filed. The Petitioner responded by filing a section 2255 motion on October 23, 2000. The United States filed its response to Petitioner's motion on August 27, 2001, and Petitioner filed a response to the Government's arguments the following month.

Relying on the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Petitioner now seeks to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 because he claims "[e]nhancement . . . at the sentencing on the drug quantity was not determined by a proper standard of proof, reasonable doubt." Pet.'s Mot. at ¶ 12A. Based on Apprendi, Petitioner argues that an indictment such as his "may be flawed when additional factors are not submitted within and presented to a Grand Jury." Pet.'s Resp. to Gov.'s Opp'n Mot. at 1. The Government, in turn, argues that Petitioner's claim is time barred by the one-year statute of limitations applicable to petitions under section 2255. Moreover, the Government contends that Apprendi does not apply retroactively to cases on collateral review under section 2255, nor does Apprendi apply to Petitioner's

claim.

II. DISCUSSION

A prisoner who is in custody pursuant to a sentence imposed by a federal court who believes "that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255 (West 2001). The district court is given discretion in determining whether to hold an evidentiary hearing on a prisoner's motion under section 2255. See Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the court must determine whether the petitioner's claims, if proven, would entitle him to relief and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. See Gov't of the Virgin Islands v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994).

A. Timeliness of Petitioner's Section 2255 Motion

First, the Government contends that Petitioner's section 2255 motion is barred by the applicable statute of limitations. See Gov.'s Resp. to Def.'s Pet. at 4. Section 2255 establishes a one-year period of limitations for motions brought under this section. See 28 U.S.C. § 2255. The statute provides that the limitations period begins to run from the latest of:

- (1) that date on which the judgment of conviction becomes

final;

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

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and 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.

Id.

In this case, the Court imposed sentence on October 23, 1998. Petitioner did not appeal his judgment or sentence. Accordingly, Petitioner's conviction became final ten days after the imposition of this judgment on November 3, 1998. See Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) (judgment becomes final on the date on which defendant's time for filing a timely petition for certiorari review expires). Therefore, when the Defendant filed the present motion on September 12, 2000, it was untimely under section 2255(1). Moreover, Petitioner does not contend that the

Government impeded his ability to assert his claim, and thus section 2255(2) does not apply. Nor does Plaintiff allege that he was unaware of the facts supporting his claim at the date of sentencing under section 2255(4). Therefore, the main inquiry in the instant motion is whether Petitioner asserts a right that was "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(3).

B. Retroactivity of Petitioner's Apprendi Claim

The Petitioner makes only one claim in his motion in which he relies on the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In Apprendi, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Petitioner seemingly contends that the Court erred by determining the amount of cocaine as a sentencing factor, rather than requiring the Government to prove the amount beyond a reasonable doubt. See Pet.'s Mot. at ¶ 12A. According to Petitioner, he did not raise this claim previously because such a claim only became feasible "upon the closing of the Supreme Court's 1999 term." Id. at ¶ 13.

While Apprendi clearly announced a new rule of law, courts have consistently found that Apprendi is not applicable retroactively to cases on collateral review. See In re Turner, No.

00-2660, 2001 WL 1110349, at *1 (3d Cir. Sept. 21, 2001) ("Apprendi has not been 'made retroactive to cases on collateral review by the Supreme Court.'"); United States v. Gibbs, 125 F.Supp.2d 700, 707 n.10 (E.D. Pa. 2000) (listing cases that have decided that Apprendi is not retroactive to cases on collateral review); see also United States v. Rodriguez, No. Crim. A. 94-0192-10, 2001 WL 311266, at *6 (E.D. Pa. March 28, 2001).

In the recent case of In re Turner, No. 00-2660, 2001 WL 1110349, at *1 (3d Cir. Sept. 21, 2001), the United States Court of Appeals for the Third Circuit Court joined a majority of other Circuits in recognizing that Apprendi may not be applied retroactively to cases on collateral review. See, e.g., Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000) ("[I]t is clear that the Supreme Court has not made the [Apprendi] rule retroactive to cases on collateral review."); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) (holding that the new rule announced in Apprendi does not satisfy the requirements announced in Teague for retroactivity). In Turner, the court considered arguments similar to those Petitioner raises in the instant motion. In appealing his sentence, the petitioner in Turner attempted to "characterize[] the new rule in Apprendi as a substantive rule of constitutional law because it forces the Government to treat certain facts as the equivalent of substantive offense elements (and thus submit them to a jury and prove them beyond a reasonable

doubt), which otherwise would be mere sentencing factors determined by a judge." Id. at *3. The court found that "Apprendi is merely arguably substantive - certainly no Supreme Court holdings 'dictate' that Apprendi establishes a substantive rule of law . . ." Id. at *4.

Next, the petitioner argued that Apprendi was merely an extension of the Supreme Court's ruling in In re Winship, 397 U.S. 538 (1970), in which the Court held that "a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Turner, 2001 WL 1110349, at *4 (citing Winship, 397 U.S. at 364). Since the Supreme Court held that Winship applied retroactively, the petitioner argued that Apprendi should be afforded the same treatment. Id. The court concluded, however, that the Supreme Court has not made Apprendi retroactive on collateral review, and thus denied petitioner's motion. Id.

It is well settled that a petition brought under section 2255(3) "may only be allowed if the relevant 'newly recognized' right has expressly been held retroactive by a controlling court prior to the time the petition was filed." Fluehr v. United States, Crim. No. 97-447, Civ. A. No. 01-3171, 2001 WL 1002398, at *1 (E.D. Pa. Aug 28, 2001). As noted above, the controlling court in this District has held that Petitioner's assertion of a "new right" under Apprendi is not applicable retroactively. Turner,

2001 WL 1110349, at *1. In the instant case, the Petitioner's conviction became final on November 3, 1998, two years before the issuance of the Apprendi decision on June 26, 2000. Therefore, under Turner, Petitioner may not avail himself of its benefit in the instant motion. Therefore, even if the Petitioner's facts implicated the ruling of Apprendi, the Petitioner would be unable to gain relief. While the Court concludes that Petitioner's claim is time-barred, the Court will nonetheless briefly address the merits of Petitioner's Apprendi claim.

C. Applicability of Apprendi to Petitioner's Claim

The Government also contends that Apprendi is inapplicable to Petitioner's claim since Petitioner received less than the maximum sentence. "Since the Apprendi decision last year, this District has seen many filings from inmates seeking reconsideration of their sentences, however the holding in Apprendi is narrow." Ristagno v. United States, 134 F.Supp.2d 630, 634 (M.D. Pa. 2001). The Supreme Court's holding in Apprendi requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added). In this case, Petitioner was sentenced to 151 months, a period less than the maximum 240 month sentence allowable under 21 U.S.C. § 841(b)(1)(C). "Because application of the [United States] Sentencing Guidelines in this case does not implicate a fact that

would increase the penalty of a crime beyond the statutory maximum, the teachings of Apprendi v. New Jersey, are not relevant here." United States v. Cepero, 224 F.3d 256, 268 n.5 (3d Cir. 2000) (internal citations omitted); see also United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000) ("Apprendi is not applicable to [defendant's] sentence[] because the sentence actually imposed . . . was well under the original statutory maximum of 20 years"). Since Petitioner was sentenced to 151 months, which is significantly less than 240 month maximum sentence allowable under § 841(b)(1)(C), the Court concludes that Apprendi does not provide a basis for granting the requested relief.

D. Drug Quantity as an Essential Element of a Violation of 21 U.S.C. Section 846.

Finally, Petitioner contends that the indictment in this case was defective because it did not allege a specific drug quantity, and thus the indictment failed to allege all of the essential elements of the offense. Specifically, Petitioner avers that, while he was sentenced according to 21 U.S.C. § 846, in conjunction with 21 U.S.C. § 841(b)(1)(A), "[n]o where in the Indictment does it allege or charge Petitioner with violating the provisions of 21 U.S.C. § 841(a)(1)." Pet.'s Resp. to Gov.'s Opp'n Mot. at 3. Therefore, according to Petitioner, "the Government constructively amended the indictment to arrive at its sentence . . ." Id.

Again, Petitioner's reliance on Apprendi is misplaced. The Apprendi Court declined to consider the issue of whether the United

States Constitution requires that sentencing enhancements must be alleged in the indictment. Apprendi, 530 U.S. at 477 n.3. Moreover, the Third Circuit holds that drug quantity is not an essential element of section 846 violation. See United States v. Chapple, 985 F.2d 729, 731 (3d Cir. 1993); United States v. Gibbs, 813 F.2d 597, 599-600 (3d Cir. 1986). So long as an indictment "fairly notifies [a defendant] of the charge and enables him to plead acquittal or conviction in bar of future prosecutions for the same offense," the indictment provides a defendant with sufficient notice of an enhanced penalty. Gibbs, 813 F.2d at 599.

The indictment at issue in the instant case provided Petitioner with sufficient notice that he would be subject to the enhanced penalty provision of section 841(b)(1) upon conviction. Count One of the indictment provided in part that Petitioner "worked as a cocaine distributor for Jose Juan Arana. Their activities included, but were not limited to, obtaining kilograms of cocaine, distributing cocaine and collecting proceeds from the distribution of cocaine." Superseding Indictment, at 3. As such, the indictment provided adequate notice that the Government intended to prove that Petitioner was responsible for quantities of cocaine that would likely trigger the enhanced penalties under section 841(b)(1).

III. CONCLUSION

For the foregoing reasons, the Court declines to grant

Petitioner the relief sought. No evidentiary hearing is necessary since the both the records before this Court establish that Petitioner is not entitled to relief under section 2255. Moreover, since Petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability will issue.

An appropriate Order follows.

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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 96-00540-04
v.	:	
	:	(CIVIL ACTION
GEORGE GONZALEZ	:	No. 00-4615)

ORDER

AND NOW, this 6th day of November, 2001, upon consideration of Petitioner George Gonzalez's Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 275), the United States' Response to the Defendant's Petition to Vacate, Set Aside or Correct his Sentence Pursuant to § 2255 (Docket No. 291), and the Petitioner's Response to the Government's Memorandum in Opposition to his § 2255 Motion (Docket No. 293), IT IS HEREBY ORDERED THAT:

- 1) Petitioner's Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 275) is **DENIED**;
- 2) The Court finds that there are no grounds to issue a certificate of appealability;
- 3) The Clerk of the Court shall mark this case as **CLOSED**.

BY THE COURT:

HERBERT J. HUTTON, J.