

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 96-00540-02
v.	:	
	:	(CIVIL ACTION
JOSE JUAN ARANA	:	No. 01-2491)

**MEMORANDUM AND ORDER**

HUTTON, J.

July 15, 2001

Currently before the Court is the Petitioner Jose Juan Arana's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum in Support thereof (Docket Nos. 238, 241), the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 247) and Petitioner's Response to the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 292). For the reasons stated below, Petitioner's motion is denied.

**I. FACTUAL BACKGROUND**

On October 26, 1996, Jose Juan Arana ("Petitioner") was indicted, along with six co-defendants, for conspiracy to distribute cocaine, and possessing cocaine with intent to distribute in violation of 21 U.S.C. § 846 (Count I), and illegal use of a telephone in violation of 21 U.S.C. § 843 (Count II). On May 26, 1998, on the morning of trial, Petitioner and four of his

co-defendants pleaded guilty to Count I. Petitioner and the Government stipulated that Petitioner was a supervisor of the criminal activity charged in Count I, that he possessed a firearm in connection with a drug offense, and that he had accepted responsibility for his conduct. Petitioner, however, contested the Government's assertion that he was responsible for more than 150 kilograms of cocaine.

At the sentencing hearing, the Government produced the testimony of Special Agent Jesse L. Coleman of the Federal Bureau of Investigation and the prior trial testimony of cooperating witnesses Wilfred DeLeon, Vincent Collier and Shaun Ellis. Based on the Government's evidence, the Court concluded that Petitioner was responsible for more than 150 kilograms of powder and more than 1.5 kilograms of crack. Accordingly, the Court fixed Petitioner's base offense level at 38, which was adjusted to an offense level of 40 after the application of the sentencing stipulations mentioned above. The Court then imposed a sentence of 292 months imprisonment.

Following the imposition of sentence, Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit. On April 14, 1999, the sentence was upheld and the Third Circuit denied Petitioner's request for rehearing. See U.S. v. Jose Juan Arana, No. 98-2010, 185 F.3d 863 (table) (3d Cir. April 14, 1999). Petitioner then filed the instant motion pursuant to 28

U.S.C. § 2255 two grounds for relief based on Apprendi v. New Jersey, 520 U.S. 466 (2000). The crux of Petitioner's argument is that his conviction is invalid because the indictment did not allege an essential element of 21 U.S.C. § 846 and, therefore, the Court lacked jurisdiction over the matter. See Pet'r § 2255 Motion, Ground 1.

## II. LEGAL STANDARD

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). Accordingly, a district court may summarily dismiss a motion brought under section 2255 without a hearing where the "motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" U.S. v.

Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting U.S. v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)); Forte, 865 F.2d at 62. For the reasons outlined below, the Court finds that there is no need in the instant case for an evidentiary hearing because the evidence of record conclusively demonstrates that Petitioner is not entitled to the relief sought.

### **III. DISCUSSION**

#### **A. Statute of Limitations**

First, the Government contends that Petitioner untimely filed his Petition for Writ of Habeas Corpus, and thus the Court may not consider its merits. See Gov't Resp. to Pet'r Mot. for Writ of Habeas Corpus at 8-9. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year limitations period applies to petitions for writs of habeas corpus brought by persons in federal custody. 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 the instant case, there can be no dispute that more than one year has passed since Petitioner's conviction became final. The Third Circuit denied Petitioner's appeal of his sentence on April 14, 1999. Since Petitioner did not file a petition for a writ of certiorari with the Supreme Court, his sentence became final on July 13, 1999. 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 May 2, 2001, 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. In his Motion, Petitioner contends that his conviction and sentence must be vacated because the indictment "failed to state offenses under Section 841 and 846, because drug quantities constitute an essential element of these offense." Pet'r Mem. in Support of § 2255 Motion at 4. While Petitioner recognizes that, at the time of his indictment, plea hearing and sentencing, "it was settled law . . . that drug quantity was not an essential element of Title 21 [d]rug crimes . . .," Petitioner now claims that the "drug quantity in Section 841(b)(1)(A) and (B) cases is an essential element that must be charged in the indictment and proven beyond a reasonable doubt." Id. at 6.

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, 267 F.3d 225, 231 (3d Cir. 2001) ("Apprendi has not been 'made retroactive to cases on collateral review by the Supreme Court.'"); U.S. 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 U.S. v. Rodriguez, No. Crim. A.

94-0192-10, 2001 WL 311266, at \*6 (E.D. Pa. March 28, 2001). In the case of In re Turner, 267 F.3d 225 (3d Cir. 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. U.S., 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." 267 F.3d at 230. The court found that "Apprendi is merely arguably substantive--certainly no Supreme Court holdings 'dictate' that Apprendi establishes a substantive rule of law . . ." Id. Moreover, the Third Circuit recently affirmed its decision that Apprendi is not to be applied retroactively in U.S. v. McBride, 283 F.3d 612, 616 n.1 (3d Cir. 2002) (citing Turner, 267 F.3d 225 (3d

Cir. 2001)) ("We have held that the new rule in Apprendi was not retroactive to cases on collateral review.").

The Court notes that, even if Apprendi were applied retroactively to cases on collateral review, Petitioner has failed to establish a claim for a violation of Apprendi. 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. See Pet'r Mem. at 3. The Third Circuit has held that drug quantity is not an essential element of section 846 violation. See U.S. v. Chapple, 985 F.2d 729, 731 (3d Cir. 1993); U.S. 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 "was responsible for obtaining multi-kilogram quantities of cocaine and supplying the cocaine to other defendants and co-conspirators . . . and collecting cash proceeds from the distribution of cocaine to pay suppliers for the cocaine." Superseding Indictment, at 2. 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).

For the above stated reasons, Petitioner's section 2255 Motion is denied in its entirety. Moreover, a certificate of appealability will not issue because Petitioner has not made a substantial showing of the denial of a Constitutional right.

An appropriate Order follows.

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JOSE JUAN ARANA	:	No. 01-2491)

**O R D E R**

AND NOW, this 15<sup>th</sup> day of July, 2002, upon consideration of the Petitioner Jose Juan Arana's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum in Support thereof (Docket Nos. 238, 241), the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 247) and Petitioner's Response to the Government's Response to Defendant's Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 292), 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. 238) 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:

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HERBERT J. HUTTON, J.