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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION NO. 01-374-1
	:	
DIODAYAN LEDESMA-CUESTA	:	

DIODAYAN LEDESMA-CUESTA	:	
	:	
v.	:	CIVIL ACTION NO. 05-155
	:	
UNITED STATES OF AMERICA	:	

MEMORANDUM

Dalzell, J. August 11, 2005

On June 2, 2001, crewmen of the Trojan Star, a merchant ship underway from Columbia to Philadelphia, discovered Diodayan Ledesma-Cuesta, a Colombian citizen, stowed away in a small room. Intermingled among Ledesma's personal belongings were four kilograms of cocaine. Upon the Trojan Star's June 4, 2001 arrival in Philadelphia, U.S. Customs agents arrested Cuesta, who had been deported from the United States in 1997.[1]

On June 28, 2001, a grand jury returned a single-count indictment charging Cuesta with reentry after deportation. On August 2, 2001, the grand jury returned a superseding indictment that was itself superseded on October 11, 2001 by four counts: Count One, possession and attempted possession with intent to distribute more than 500 grams of cocaine, in violation of 21

1. For a more comprehensive account of this case, see United States v. Ledesma-Cuesta, 347 F.3d 527, 528-29 (3d Cir. 2003).

U.S.C. § 841(a)(1); Count Two, importation and attempted importation of more than 500 grams of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a), and 963; Count Three, possession and attempted possession with intent to distribute more than 500 grams of cocaine on a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 1903(a), (c)(1)(D), and (j); and Count Four, reentry and attempted reentry to the United States after deportation, in violation of 8 U.S.C. §§ 1326(a) and (b)(2).

On December 19, 2001, a jury convicted Cuesta on all counts, and, on March 22, 2002, we sentenced him. Under U.S.S.G. § 4B1.1, based on his 1985 conviction for robbery in Tampa, Florida and his federal 1988 conviction for possession with intent to distribute cocaine, Cuesta was a career offender. We thus sentenced him to 360 months incarceration followed by an eight-year period of supervised release, a $2,500 fine, and a $300 special assessment.

We denied his post-trial motions for a new trial and dismissal of the second superseding indictment but vacated the conviction on Count One because it was a lesser included offense of Count Two. On appeal, Cuesta argued that the evidence was insufficient to sustain his conviction, and he also claimed we erred in admitting a narcotic expert's testimony and finding that we had jurisdiction over the ship at the time of Cuesta's crimes. Our Court of Appeals rejected these arguments and affirmed

Cuesta's conviction. See United States v. Ledesma-Cuesta, 347 F.3d 527 (3d Cir. 2003).

Before us is Cuesta's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Legal Analysis

In his motion, Cuesta asserts six claims: four claims of ineffective assistance of counsel (grounds one through four) and two sentencing claims arising out of his status as a career offender under U.S.S.G. §§ 4B1.1 (grounds five and six). We shall here deny relief on the fifth and sixth grounds and convene an evidentiary hearing on the remaining ones.

Under 28 U.S.C. § 2255, a prisoner may collaterally attack his federal sentence:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

Id. ¶ 1. Under § 2255 ¶ 2, we may dismiss claims without a hearing when the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

In ground five, Cuesta claims that he is innocent of his 1985 state robbery conviction; therefore, it could not

underlie his status as a career offender. This claim fails because it falls squarely within Daniels v. United States, 532 U.S. 374, 376 (2001), in which the Supreme Court held that a federal prisoner may not attack a predicate state conviction through a § 2255 motion challenging an enhanced federal sentence. In Daniels, the Court reasoned that permitting prisoners to collaterally attack their sentences by challenging state convictions would "permit challenges far too stale to be brought in their own right, and sanction an end run around statutes of limitations, and other procedural barriers that would preclude the movant from attacking the prior conviction directly." Id. at 383.[2] Because here Cuesta attempts to assert the very claim Daniels prohibited -- attacking a state conviction through a § 2255 motion that challenges an enhanced federal sentence -- Cuesta's claim is without merit.

Turning to ground six, Cuesta claims that, under Blakely v. Washington, 124 S. Ct. 2531 (2004), it was unconstitutional to sentence him as a career offender. This claim fails for two reasons. First, Cuesta procedurally defaulted it by never raising it on direct review and here pointing to no evidence that would enable us to find (1) cause

2. Daniels noted that "there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," which would enable the prisoner to use a § 2255 motion to attack the prior conviction as well as federal sentence based on it. 532 U.S. at 383-84. Like Daniels, however, Cuesta points to no circumstances that would warrant further exploration of this (theoretical) possibility.

plus prejudice or (2) actual innocence. See Bousley v. United States, 523 U.S. 614, 622 (1998). The second reason ground six fails is that Cuesta predicates it on the retroactive application of Blakely and, more useful to him, United States v. Booker, 125 S. Ct. 738 (2005). Cuesta's claim that Blakely and Booker apply retroactively contravenes our Court of Appeals's recent holding in Lloyd v. United States, 407 F.3d 608, 615-16 (3d Cir. 2005), that they are not retroactive.

Moving to grounds one through four, Cuesta asserts that his lawyer ineffectively performed by failing to (1) advise the Court that a juror was sleeping; (2) investigate and interview additional witnesses regarding the location of Cuesta's backpack; (3) investigate and interview additional witnesses about Cuesta's attempt to bribe Captain Dobson; and (4) locate Cuesta's wristwatch. We shall rule on the remainder of these claims after an evidentiary hearing. See United States v. McCoy, 410 F.3d 124, 132 (3d Cir. 2005) (holding that district court abused its discretion by not holding an evidentiary hearing in § 2255 action claiming ineffective assistance of counsel).

An Order follows.

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ORDER

AND NOW, this 11th day of August, 2005, upon consideration of the pro se motion to vacate, set aside, or correct sentence (docket entry # 81), the Government's response (docket entry # 85), Ledesma-Cuesta's pro se traverse (docket

entry # 89), and for the reasons enunciated in today's Memorandum, it is hereby ORDERED that:

1. Relief based on grounds five and six in Cuesta's motion is DENIED;

2. The Federal Defender is APPOINTED to represent Cuesta; and

3. On November 3, 2005, at 9:30 a.m., an evidentiary hearing that explores grounds one through four shall CONVENE in Courtroom 10B.

BY THE COURT:

/s/ Stewart Dalzell, J.