

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

UNITED STATES OF AMERICA : **CRIMINAL ACTION**

vs. :

IFEDOO NOBLE ENIGWE : **No. 92-00257**

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 30th day of March, 1998, upon consideration of defendant's Letter of February 25, 1998 (Document No. 227, filed March 24, 1998), treated by the Court as a Motion for Reconsideration of its Orders of February 13 and February 25, 1998, for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that defendant's Motion for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that defendant's Motion for Appointment of Counsel (Document No. 221, filed February 20, 1998) is **DENIED**.

MEMORANDUM

I. Background. On May 6, 1992, defendant Ifedoo Noble Enigwe was indicted on four counts by a Grand Jury in the Eastern District of Pennsylvania for trafficking in heroin. On August 7, 1992, defendant was convicted by a jury on all four counts and, on August 13, 1993, was sentenced by this Court, inter alia, to 235 months in prison. The conviction and sentence were affirmed by the Third Circuit in an unpublished Memorandum on April 28, 1994.

On August 24, 1994, defendant filed a pro se Motion under 28 U.S.C. § 2255 seeking to vacate his sentence. After an evidentiary hearing, at which defendant also appeared pro se, his Motion was denied by Order dated September 11, 1995. See United States v. Enigwe, Crim. A. No. 92-00257, 1995 WL 549110 (E.D. Pa. Sep. 11, 1995). Defendant's Motion for Reconsideration was denied on March 1, 1996. See United States v. Enigwe, Crim. A. No. 92-00257, 1996 WL 92076 (E.D. Pa. Mar. 1, 1996). On appeal, by Order dated July 23, 1996, the Third Circuit vacated the denial of defendant's § 2255 Motion and remanded the case to this Court for appointment of counsel and further proceedings. On remand, the Court appointed counsel for defendant and conducted a second evidentiary hearing. Thereafter, defendant's § 2255 Motion was again denied and the Third Circuit affirmed that ruling. See United States v. Enigwe, Crim. A. No. 92-00257, 1997 WL 430993 (E.D. Pa. July 16, 1997), aff'd --- F.3d --- (3rd Cir. Jan 16, 1998) (Table, No. 97-1632).

The current round of litigation began when defendant filed a Letter/Motion dated January 22, 1998 to Vacate the "Judgment entered at my sentencing" under Federal Rule of Civil Procedure 60(b)(6) (Document No. 216, filed January 26, 1998). The Court treated this as a second or successive motion under 28 U.S.C. § 2255 and denied the Motion by Order dated February 13, 1998. The Court similarly denied, by Order dated February 25, 1998, defendant's Reply (Document No. 220, filed February 20, 1998) which was treated, at defendant's request, as a motion to alter

or amend judgment under Federal Rule of Civil Procedure 59(e). The Court now considers defendant's Letter of February 25, 1998, which is treated as a motion for reconsideration of its Orders of February 13 and February 25, 1998.

II. Standard. The standard for granting a Motion for Reconsideration under Federal Rule of Civil Procedure 59(e) is high. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of" or as an attempt to relitigate "a point of disagreement between the Court and the litigant." Waye v. First Citizen's Nat'l Bank, 846 F.Supp. 310, 314 n. 3 (M.D. Pa.), aff'd 31 F.3d 1175 (3d Cir.1994). The Motion may only be granted if "(1) there has been an intervening change in controlling law; (2) new evidence, which was not available, has become available, or (3) it is necessary to correct a clear error of law or prevent a manifest injustice." Burger v. Mays, No. 96-4365, 1997 WL 611582, *2 (E.D.Pa. Sept. 23, 1997). See also Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985), cert. denied 476 U.S. 1171 (1986). Although defendant does not address this standard of review in his submissions, the Court is mindful that a pro se applicant cannot be held to the same stringent standards as attorneys. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972); Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997). The Court will, therefore, address the issues raised by

defendant in the Letter/Motion dated February 25, 1998, and the submissions to which it refers.

III. Discussion of Federal Rule of Civil Procedure 60(b).

Defendant argued in his Reply - and again raises the issue in his Motion to Reconsider - that his Letter/Motion to Vacate should not have been treated as a "sham attempt to circumvent the gatekeeping" provisions the AEDPA. He submitted his Letter/Motion to Vacate pursuant Federal Rule of Civil Procedure 60(b) and contends that it is within this Court's discretion to hear his claims under that rule (presumably without regard to the provisions of 28 U.S.C. § 2255). The Court directly addressed, and rejected, this contention in its Order dated February 13, 1998. The Court again rejected these arguments when, by Order dated February 25, 1998, it denied defendant's Reply, treated as a motion under Federal Rule of Civil Procedure 59(e). The Court reiterates a third time that an inmate may not circumvent the provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996, 110 Stat. 1214, signed into law by President Clinton on April 24, 1996, by filing under Federal Rule of Civil Procedure 60(b) what is, in essence, a 28 U.S.C. § 2255 motion. See Chambers v. United States, 106 F.3d 472, 275 (2d Cir. 1997); In re Medina, 109 F.3d 1556, 1561 (11th Cir. 1997); cf. United States v. Zinner, Crim. A. No. 95-0048, 1998 WL 57522 (E.D.Pa. Feb. 9, 1998) (considering an inmate's motion filed under Rule 60(b), rather than 28 U.S.C. § 2255, which alleged the discovery of new evidence, but noting that only evidence which might have

been discovered after the defendant's initial § 2255 motion could be considered because to "do otherwise would subvert the purpose of the recent amendments to 28 U.S.C. § 2255 contained in the" AEDPA). The Court will add to its earlier orders only the fact that defendant seeks to challenge his criminal sentence: Federal Rule of Civil Procedure 60(b) is a civil procedure and while it may properly be employed to challenge a court's decision under § 2255, it is an improper vehicle for directly challenging an underlying criminal verdict or sentence. See United States v. Ortiz, Crim. A. No. 88-352, 1997 WL 733856 (E.D.Pa. Nov. 7, 1997) (denying motion under Rule 60(b)(6) because "Fed.R.Civ.P. 1 and 81(a)(2) make it clear that the Federal Rules of Civil Procedure apply only to civil proceedings"). The Court will therefore continue to treat defendant's Letter/Motion to Vacate (Document No. 216, filed January 26, 1998) as a motion brought pursuant to 28 U.S.C. § 2255.

IV. Discussion of Application of 28 U.S.C. § 2255. Defendant argues that the Court applied an incorrect legal standard in deciding his Letter/Motion to vacate the "judgment entered at [his] sentencing" (Document No. 216, filed January 26, 1998), because the Court employed the strict gatekeeping standards of 28 U.S.C. § 2255, as amended by the AEDPA. For authority, defendant cites In re Hanserd, 123 F.3d 922 (6th Cir. 1997), in which the Sixth Circuit stated that "a federal prisoner must satisfy the new requirements of 28 U.S.C. § 2255 only if he has filed a previous § 2255 motion on or after April 24, 1996 . . .

. ." Id. at 934. While this Court is not bound by a decision of the Sixth Circuit, it will nonetheless briefly discuss both the Hanser decision and the proper standard for deciding defendant's Letter/Motion.

Implicit in defendant's argument is the contention that rather than applying the AEDPA's gatekeeping provisions, the Court should have applied the pre-AEDPA "abuse of the writ" standard defined in McCleskey v. Zant, 499 U.S. 467, 494-95 (1991). Under the "abuse of the writ" doctrine, a movant filing a second or successive § 2255 motion must establish cause for failure to raise his claim in an earlier proceeding and actual prejudice arising from the alleged error. See United States v. Essiq, 10 F.3d 968, 979 (1994) (citing United States v. Frady, 456 U.S. 152 (1982)). To show cause, the petitioner must demonstrate either that "some objective factor external to the defense impeded counsel's efforts" to object during trial or on appeal, or that counsel was constitutionally ineffective. Essiq, 10 F.3d at 979 (discussing an alleged misapplication of the Sentencing Guidelines (quoting McCleskey, 499 U.S. at 493 (1991)). Additionally, a movant must demonstrate that the alleged error worked to the prisoner's "actual and substantial prejudice," such that the integrity of the entire proceeding was infected. See Frady, 456 U.S. at 169-70.

In contrast to the pre-AEDPA standard, 28 U.S.C. § 2255, as amended by the AEDPA, provides that:

A second or successive motion must be certified as

provided in section 2244 by a panel of the appropriate court of appeals to contain - (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.

In Hanser, the Sixth Circuit was addressing a second § 2255 motion in which the movant claimed an error based on the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), in which the definition of the word "use" in 18 U.S.C. § 924(c)(1) (making it a crime to use or carry a firearm "during and in relation to any . . . drug trafficking crime") was clarified and narrowed. The decision in Bailey was not a new rule of constitutional law, however, but a matter of statutory interpretation.

As noted, the AEDPA permits second or successive motions under § 2255 in few circumstances; one of those is where the Supreme Court announces a new rule of constitutional law with retroactive application. See 28 U.S.C. § 2255(2). As such, the Bailey decision does not fit within the standards established by the AEDPA for issuance of a certificate by a court of appeals. The Sixth Circuit nonetheless concluded that Bailey raised concerns of constitutional dimension because inmates might be serving sentences for offenses of which they were, in fact, innocent as a result of the Supreme Court's clarification of statutory meaning.

Because the AEDPA could prevent an inmate from raising this claim in a second or successive motion, the Sixth Circuit held that the AEDPA attached "'new legal consequences to events completed before its enactment' and would therefore have [an] impermissible retroactive effect." Hanserd, 123 F.3d at 930 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)). The Hanserd court thus concluded that an inmate presenting a Bailey claim who had filed his or her first motion before the AEDPA's effective date, would not be governed by the AEDPA's standards when a second or successive motion was filed after the effective date of the AEDPA.

Shortly after its opinion, the Sixth Circuit clarified Hanserd's scope. In In re Sonshine, 132 F.3d 1133 (6th Cir. 1997), the court stated that:

Because the Hanserd court's Landgraf analysis was based upon the retroactive effect that AEDPA had on the movant's particular claim, the Hanserd holding must be similarly circumscribed. Consequently, while Hanserd is not strictly limited to claims arising under Bailey, apart from that class of claims, there will be few other cases "in which the difference [between pre- and post- AEDPA standards governing successive motions] matters," Hanserd, 123 F.3d at 934 n. 21, and on which the gatekeeping requirement of AEDPA will thus have an impermissibly retroactive effect.

Id. at 1135. It follows then, that defendant's reliance on Hanserd is misplaced unless the "difference matters." The Court therefore turns to that issue.

Defendant suggests that there is or should be a blanket rule that the AEDPA not be applied to successive or second motions filed after the AEDPA's effective date when the first

motion was filed before that date. The Court need not, however, reach that issue if it concludes that there is no difference in outcome between pre- and post-AEDPA law. This is the same conclusion reached by the D.C. Circuit which recently surveyed the ways in which other circuits have treated the question of the retroactive application of the AEDPA:

Whether the amendments [to § 2255] would be impermissibly retroactive in . . . cases [in which second or successive motions under § 2255 were filed after the AEDPA's effective date and first motions were filed before that date is] a question of first impression for this court, and other circuits have developed different approaches. . . . [T]he Seventh and Eleventh Circuits require a showing of detrimental reliance, namely, that the defendant would not have filed the first § 2255 motion had he foreseen the tightening of the standards under AEDPA for filing a second § 2255 motion. See Alexander v. United States, 121 F.3d 312, 314 (7th Cir.1997); In re Magwood, 113 F.3d 1544, 1552-53 (11th Cir.1997); In re Medina, 109 F.3d 1556, 1562 (11th Cir.1997); Burris [v. Parke], 95 F.3d 465, 468-69 [(7th Cir. 1996)]; cf. Pratt v. United States, 129 F.3d 54, 58-59 (1st Cir.1997) (discussing detrimental reliance but denying motion on other grounds). Still other circuits, in considering application of the new § 2255 rules to defendants whose first § 2255 motions were filed before AEDPA's enactment, have either declined to discuss retroactivity, see Galtieri v. United States, 128 F.3d 33, 37-38 (2d Cir.1997); Triestman v. United States, 124 F.3d 361, 370 n. 11 (2d Cir.1997); In re Dorsainvil, 119 F.3d 245, 247 n. 1 (3d Cir.1997); In re Vial, 115 F.3d 1192, 1198 n. 13 (4th Cir.1997), or have assumed that the new rules could not, by definition, be retroactive when applied to motions filed after AEDPA's enactment, see Hatch v. Oklahoma, 92 F.3d 1012, 1014 (10th Cir.1996).

While taking different tacks, what the circuits share in their approaches is the requirement dictated by the Supreme Court that the new enactment be retroactive as applied to the particular claim before the court. See Lindh [v. Murphy], --- U.S. at ---, 117 S.Ct. [2059] at 2063 [(1997)]. Thus, the new standards and procedures under AEDPA for filing § 2255 motions . . . [can] only be improperly retroactive as applied to [a movant] if he would have met the former cause-and-prejudice standard under

McCleskey and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA.

United States v. Ortiz, 1998 WL 71968, 3-4 (D.C.Cir. Feb. 24, 1998). Because, as described below, there is no difference in outcome between pre- and post-AEDPA law applicable to this case, the Court concludes that the "difference" does not "matter" in this case, see Sonshine, 132 F.3d at 1135, and the Court need not, therefore, determine whether the AEDPA may be applied retroactively.

In his Letter/Motion dated January 22, 1998, defendant raised just one issue: the impermissibility of the enhancement of his sentence for perjury. Defendant seeks to have his sentence modified because, he argues, the Court mistakenly applied the wrong standard in enhancing his sentence under U.S. Sentencing Guidelines Manual § 3C1.1 (obstruction of justice) because of defendant's perjured testimony at trial. For support, he cites two recent Third Circuit cases holding that a sentencing court "must refrain from imposing a § 3C1.1 enhancement unless, in weighing the evidence, it is clearly convinced that it is more likely than not that the defendant has been untruthful." United States v. Arnold, 106 F.3d 37, 44 (3d Cir. 1997); see also United States v. McLaughlin, 126 F.3d 130, 140 (3d Cir. 1997). Defendant argues that at sentencing this Court applied the enhancement for perjury based on a "preponderance of the evidence" standard rather than a "clear and convincing evidence" standard. Defendant also contends that the Court did not evaluate his testimony, the basis of the

perjury enhancement, in the light most favorable to defendant.

At the outset, the Court notes that defendant's factual contentions are wrong. The Court did not utilize the "preponderance of the evidence" standard in connection with the perjury enhancement at sentencing. To the contrary, the Court subjected the evidence of defendant's perjury to something more than the preponderance of the evidence standard. Specifically, the Court stated at sentencing that "Such an enhancement [for perjury] requires that the government establish by something more than a preponderance of the evidence . . . that defendant testified falsely at trial. . . ." See Transcript of Sentencing dated August 13, 1993, 43. At a later point in the sentencing, the Court ruled "[T]he Government has established by more than a preponderance of the evidence . . . that the defendant . . . testified falsely." Id. at 46.

With respect to the question whether defendant's testimony was viewed in the light most favorable to the defendant, the Court did not make a statement to that effect at sentencing because it was unnecessary. Defendant testified at trial that he was not the individual identified by several witnesses as "Damian," the person charged with committing the crimes at issue. There was overwhelming evidence to the contrary, however, and that served as the basis for the perjury enhancement. Because of this overwhelming evidence, the Court did not specifically state at sentencing that it was evaluating defendant's testimony in the light most favorable to the defendant. Evaluating such evidence in the light most

favorable to the defendant would have made no difference in this case, and would have resulted in the same finding: defendant committed perjury.

However, even if defendant were correct, and this Court employed a standard different from that established in Arnold and McLaughlin, the use of the different standard by the Court would not be sufficient to enable defendant to meet the "cause and prejudice" standard established in McCleskey under the old "abuse of the writ" doctrine - the pre-AEDPA standard - because the rule established in Arnold and McLaughlin does not apply retroactively to defendant's sentence; his claim is thus without merit.

In Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court established a framework for examining the retroactivity of "new rules" affecting criminal cases. A "new rule" is announced by a case "when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301. In determining whether a rule is "new" for this purpose, "the habeas court considers whether a ' . . . court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' . . . If not, then the rule is new." O'Dell v. Netherland, --- U.S. ---, ---, 117 S.Ct. 1969, 1973 (1997) (quoting Lambrix v. Singletary, 520 U.S. ---, ---, 117 S.Ct. 1517, 1524 (1997)).

At the time Arnold was decided the Third Circuit "had never directly decided the question" of what standard applied under § 3C1.1 for sentence enhancements for perjury. See Arnold, 106 F.3d at 43. Thus, at the time defendant was

sentenced, this court was not "compelled by existing precedent," O'Dell, 117 S.Ct. at 1973, to conclude that the Constitution required application of a "clear and convincing standard." See Enigwe v. United States, No. 93-1806, Memo. Op. at 14-15 (3d Cir. April 28, 1994) (holding that "[b]ecause the record established that Enigwe perjured himself at trial, the district court's two level increase for obstruction of justice was proper"). In fact, there continues to be a disagreement between the circuits over the proper standard to be used in a sentence enhancement for perjury. See Arnold, 106 F.3d at 43 (describing the various standards applied in different circuits). The Court therefore concludes that the pronouncement in Arnold and McLaughlin imposes a "new obligation on the . . . Federal Government," Teague, 489 U.S. at 301, and is, therefore, a "new rule."

"[N]ew rules generally should not be applied retroactively to cases on collateral review," id. at 305, except in those narrow situations: (1) in which a new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or; (2) in which a new rule "requires the observance of those procedures that are implicit in the concept of ordered liberty." Id. at 307; see also Zettlemyer v. Fulcomer, 923 F.2d 284, 303 (3d Cir.), cert. denied 502 U.S. 902 (1991) (adopting Teague framework). The "clear and convincing evidence" standard governing § 3C1.1 enhancements for perjury is not a rule which fits within one of these narrow exceptions. It did not

"decriminalize [d]efendant's conduct" nor did the Third Circuit's pronouncement "implicate 'those procedures that are implicit in the concept of ordered liberty' such as the right to counsel which Teague offers as an example." United States v. Walker, 980 F.Supp. 144, 147 (E.D. Pa. 1997).

As a result, the standard announced in Arnold and McLaughlin is not a retroactive change in the law. See, e.g., Walker, 980 F.Supp. at 147 (holding that Third Circuit opinion clarifying burden of proof for sentencing enhancement under different Guideline provision did not apply retroactively). Even under a pre-AEDPA "cause and prejudice" analysis, therefore, defendant's claim would fail. See, e.g., Del Rio v. United States, 9 F.3d 1535 (Table), 1993 WL 470528, *2 (1st Cir. Nov. 17 1997) (holding that amendment to sentencing guidelines which "clarified" behavior which could serve as basis for an enhancement but which had no retroactive effect was not grounds for hearing a second or successive § 2255 motion under the pre-AEDPA "abuse of the writ" standard (quoting McCleskey, 111 S. Ct. at 1467)). Defendant cannot show "cause" because the Third Circuit had not yet ruled in Arnold and McLaughlin at the time of sentencing and the sentence was proper under the law in effect at the time it was imposed. See Enigwe, No. 93-1806, Memo. Op. 14-15. No "objective factor external to the defense" impeded defendant's counsel from raising the claim, therefore, see Del Rio, 1993 WL 470528, *2; Essiq, 10 F.3d at 979, and counsel cannot be ineffective for failing to object to a sentence that was proper at the time it

was imposed. Moreover, because the sentence was proper, defendant suffered no "actual and substantial" prejudice; indeed there was no prejudice whatsoever. The Court need not, therefore, go further since defendant's claim is without merit. See Ortiz, 1998 WL 71968 at *4 ("[T]he new standards and procedures under AEDPA for filing § 2255 motions . . . [can] only be improperly retroactive as applied to [a movant] if he would have met the former cause-and-prejudice standard under McCleskey and previously would have been allowed to file a second § 2255 motion.").¹

It is true that the AEDPA requires defendant to seek a certificate from the Third Circuit before proceeding (which the Court acknowledges will likely be an empty gesture under the facts of this case), but this procedural burden is not improperly retroactive; as the Court has explained, because defendant's claim is without merit under pre-AEDPA law, the AEDPA's amendments to § 2255 - regardless of their heightened procedural hurdles - do not impose an unconstitutional burden on defendant.

¹ The Court notes that a related issue - the ineffectiveness of trial counsel for failure to explain the penalties for perjury - was addressed by this Court in defendant's first motion under § 2255; that claim was denied and the Third Circuit affirmed that denial. See Enigwe v. United States, --- F.3d --- (3rd Cir. Jan 16, 1998) (Table, No. 97-1632). Pre-AEDPA law provided that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new grounds for relief and the prior determination was on the merits" 28 U.S.C. § 2254; Rule 9(b). To the extent defendant presents claims already litigated on the merits, therefore, the Court also need not reach the question of whether application of amended § 2255 to his Motion is impermissibly retroactive. See Ortiz, 1998 WL 71968 at *4.

In light of the foregoing, it is evident that defendant has not demonstrated that "(1) there has been an intervening change in controlling law; (2) [that] new evidence, which was not available, has become available, or (3) [that] it is necessary to correct a clear error of law or prevent a manifest injustice." Burger, 1997 WL 611582 at *2. Accordingly, defendant's claim does not meet the standard for a motion to reconsider under Federal Rule of Civil Procedure 59(e), and the relief requested in the Letter of February 25, 1998, treated as a Motion to Reconsider, will be denied.²

BY THE COURT:

JAN E. DUBOIS, J.

² The Court concludes that it need not "issue a certificate of appealability or state the reasons why such a certificate should not issue," Federal Rule of Appellate Procedure 22(b), because, by the within Order and Memorandum, the Court is not denying defendant's § 2255 Motion, but rather, it is denying a Letter/Motion treated as a Motion to Reconsider prior Orders dated February 13, 1998 and February 25, 1998. The Court, in a separate Order dated March 30, 1998, explained why a certificate of appealability should not issue with respect to its Order dated February 13, 1998.