

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

SAMUEL ROMAN, and,	:	
OSCAR ROMAN,	:	CRIMINAL ACTION
	:	
Petitioners,	:	NOS. 98-2772
	:	98-2773
v.	:	
	:	
UNITED STATES OF AMERICA.	:	
Respondent.	:	

MEMORANDUM

R.F. KELLY, J.

NOVEMBER, 12 1998

Samuel Roman and Oscar Roman (collectively "Petitioners"), proceeding pro se, have filed two sets of pleadings requesting a hearing to determine whether their petitions for habeas corpus were properly brought under § 2241 or should have been brought pursuant to § 2255. For the reasons that follow, Petitioners' requests for a hearing are denied and Petitioners' Motions to Vacate Sentence, properly treated as brought pursuant to § 2255, are denied.

I. FACTS.

Petitioners both pled guilty to possession with intent to distribute crack cocaine. 21 U.S.C. § 841(a)(1). Oscar Roman also pled guilty to distribution of crack cocaine, 21 U.S.C. § 841(a)(1), and carrying a firearm in connection with a drug-trafficking crime, 18 U.S.C. § 924(c). The initial indictment specifically charged Petitioners with offenses involving "crack cocaine," however, a superseding indictment changed the

controlled substance at issue to "cocaine base."

On October 16, 1996, both Petitioners were sentenced to 188 months of imprisonment. Oscar Roman received an additional 5 year sentence to run consecutively. Petitioners filed direct appeals from their convictions and in an opinion filed on August 15, 1997, the United States Court of Appeals for the Third Circuit affirmed the convictions. United States v. Roman, 121 F.3d 136 (3d Cir. 1997). Thereafter, the Petitioners filed petitions for certiorari to the United States Supreme Court. Those petitions were denied on January 12, 1998. Petitioners then began their post-conviction efforts to challenge their convictions.

On May 29, 1998, each Petitioner filed a pleading denominated "Petition for Habeas Corpus," and asserting that the petition was filed pursuant to 28 U.S.C. § 2241. By Orders entered on June 4, 1998 this Court found that the Petitions were in reality filed pursuant to 28 U.S.C. § 2255, and directed that Petitioners file the correct forms for such petitions. The Petitioners did not do so and instead filed motions claiming that the petitions were properly brought under 28 U.S.C. § 2241. By Order dated July 8, 1998, the Court again found that the petitions were § 2255 petitions and again directed the Petitioners to complete the appropriate forms by July 31, 1998. Thereafter, on July 23, 1998, Petitioners filed the present

Motions requesting a hearing to determine whether their petitions were properly brought under § 2241 or § 2255. They also completed the § 2255 forms, but rather than listing the grounds for their motions, simply incorporated their original briefs.

II. DISCUSSION.

Apparently Petitioners are attempting to cast their post-conviction motions as brought under 28 U.S.C. § 2241, rather than under § 2255, because they believe that the Motions were filed outside the one year statute of limitations for § 2255 created by the Antiterrorism and Effective Death Penalty Act of 1996. Pub.L. No. 104-132, 110 Stat. 1214. Presumably, Petitioners are under the impression that their convictions became final when they were sentenced on October 16, 1996. The Petitioners' convictions did not become final until the United States Supreme Court denied their petitions for certiorari on January 12, 1998. Therefore, the May 29, 1998 Motions were timely.

Generally, post-conviction motions challenging a conviction or sentence will be construed as brought under § 2255. Relief under § 2241 is available only if the petitioner can show that a § 2255 motion is inadequate or ineffective to test the legality of his detention. In re Dorsainvil, 119 F.3d 245, 249 (3d. Cir. 1997). For example, in Dorsainvil, the Third Circuit Court of Appeals found that a § 2255 motion was inadequate

because the rules on successive § 2255 motions barred the petitioner from filing a second § 2255 motion, but the petitioner had a facially legitimate challenge to his conviction based on a new statutory interpretation announced by the United States Supreme Court and so was entitled to seek relief under § 2241. Id. Here, Petitioners assert, without authority, that § 2255 relief is inadequate. That contention is incorrect. Section 2255 relief is adequate, however, as discussed below, each of the grounds raised by Petitioners is without merit.

Petitioners allege that they are entitled to relief because United States v. Collado, 975 F.2d 985 (3d Cir. 1992), should be applied retroactively. Petitioners claim to have been improperly sentenced under Collado because their sentencing guidelines were calculated on the basis of all drugs distributed by the members of the conspiracy. Their argument is incorrect. The conspiracy charge in the original indictment against the Petitioners was dropped from the superseding indictment and each defendant was sentenced on the basis of drugs for which he was directly accountable, therefore, no Collado issue is presented by this case.

Petitioners next contend that they received ineffective assistance of counsel in four ways: (1) counsel did not raise the Collado relevant conduct issue at sentencing; (2) counsel did not adequately consult with the Petitioners before they entered their

guilty pleas; (3) counsel did not allow the Petitioners to testify in their own defense; and (4) counsel did not object to the Presentence Investigation reports. First, as discussed above, Collado does not apply to this case. Second, it is unclear how counsel failed to consult with Petitioners before they pled guilty, however, both Petitioners did so pursuant to written plea agreements which explained all the consequences and penalties of such a plea and the Court conducted plea colloquies. Third, since there was no trial, Petitioners did not have an opportunity to testify. Finally, Petitioners fail to specify what is inaccurate in the Presentence Investigation Reports, simply claiming that the Reports are "so full of superfluous accusations, inaccurate facts and unsubstantiated allegations that it would take a dozen or so page to rebut them." Thus, the Court is unable to respond to this allegation. Petitioners did not receive ineffective assistance of counsel.

Next, Petitioners claim that their prior convictions were improperly used to increase their sentences, yet they fail to specify any attack which could have been successfully mounted to challenge the validity of the prior convictions. Similarly, Petitioners claim, without specificity, that the statutes under which they were sentenced are ambiguous. The Court is unable to respond to these vague allegations.

Petitioners dispute the governments' decision not to

move for a downward departure for either Petitioner and contend that the government failed to establish that the controlled substance at issue was crack cocaine. These two issues were litigated on direct appeal and may not be relitigated here. United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

Finally, Petitioners challenge the superseding indictment on the ground that it was not presented to a grand jury and was not based on new testimony. This is incorrect. The grand jury voted on the superseding indictment which merely dropped the conspiracy count and clarified the charging language in the § 924(c) count, and additional testimony was presented.

Additionally, Oscar Roman alone contends that an unidentified statutory maximum applicable to him should have been 20 rather than 30 years. This difference is irrelevant because Oscar Roman's sentence was will within the total statutory maximums for the counts of conviction.

For these reasons, Petitioners' Requests for a hearing are denied and their Petitions to Vacate Sentence, properly treated as brought pursuant to § 2255, are denied. An Order follows.

