

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 98-16-P-C
)	(Civil No. 00-392-P-C)
JUAN CARLOS DURAN,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION TO
CORRECT SENTENCE**

The defendant, appearing *pro se*, in a pleading entitled “Motion to Correct Sentence Pursuant to a New Rule Pursuant to Apprendi v. New Jersey” (Docket No. 1) (“Motion”), asks this court to “correct his sentence pursuant Apprendi v. New Jersey [sic], which is a new rule handed down by the United States Supreme Court.” *Id.* at [1]. In a lengthy and confusing memorandum¹ he includes arguments that have no apparent relationship to this claim. At no time does the defendant identify the rule, statute or other source of a legal basis for his claim.

Motions to correct sentence are governed by Fed. R. Crim. P. 35, but that avenue is not available to the defendant because no remand has occurred (Rule 35(a)), the government has not moved for reduction of the sentence (Rule 35(b)), and more than seven days have passed since

¹ For example, the defendant appears to state that he was sentenced in June 1996, Motion at 22, while in fact he was not even charged in this case until March 25, 1998, Docket. He states that he was indicted in December 1990 in the Southern District of Georgia on charges other than those involved in this case, and appears to base part of his argument on such charges. Motion at 25-26. He alleges that the court’s jury instructions were erroneous, *id.* at 26, when in fact he pleaded guilty on July 6, 1998, Docket. He frequently quotes directly from court opinions and then returns to his own argument, without any indication of the change to help the reader. *E.g.*, Motion at 13, 18, 22, 24, 25, 27.

sentence was imposed on the defendant (Rule 35(c)) on November 23, 1998, Docket. The defendant has already presented a petition for collateral relief under 28 U.S.C. § 2255 to this court, which was denied. Order Affirming the Recommended Decision of the Magistrate Judge. Docket No. 80. He is accordingly barred from bringing another such petition without leave of the First Circuit Court of Appeals, 28 U.S.C. § 2255, which he has not sought. Perhaps it is for this reason that the motion invokes 18 U.S.C. § 3231. Motion at [1], 2-7. That statute provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the law thereof.

The defendant asserts that section 3231 “is forever open for drugs offenses.” Motion at 2. Nothing in this statute conferring jurisdiction on the federal district courts conflicts with or overrides the limitations on post-conviction relief imposed in section 2255. If “[a] prisoner in custody under sentence of a [federal] court” claims that he is entitled to be released because the sentence was imposed in violation of the Constitution or federal law, or that the court imposing the sentence lacked jurisdiction to do so, or that the sentence was in excess of the maximum authorized by law, or that the sentence is otherwise subject to collateral attack, section 2255 provides the avenue for that relief. 28 U.S.C. § 2255. Such relief may only be sought once without authorization of the appropriate court of appeals and must be sought within a one-year period of limitation that runs from one of four alternate dates. *Id.* The defendant’s instant request, interpreted generously in his favor, cannot be construed as anything other than a request for relief within the scope of section 2255.

Even if this were the defendant’s first petition under section 2255, it would be untimely. It was filed in this court on December 11, 2000, more than one year after his judgment of conviction became final with the mandate of the First Circuit denying his appeal on June 22, 1999, Docket, and

the expiration of the following 90-day period in which he could have sought certiorari from the Supreme Court. 28 U.S.C. § 2255. If the defendant means to invoke the alternate date for the beginning of the one-year limitations period presented in that statute, “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,” *id.*, as suggested by his references to *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), in the title and body of his motion, Motion at [1], 8-9, 11, 25-27, and his discussion of retroactivity, *id.* at 8-11, the First Circuit has held that *Apprendi* is not retroactively applicable, *Sustache-Rivera v. United States*, 221 F.3d 8, 15 (1st Cir. 2000), and that holding is binding here. Were the defendant to present his motion to the First Circuit in connection with a request for leave to present a second petition, he would not be able to obtain such permission for this reason.

To the extent that the defendant means to challenge my recommended decision on his earlier section 2255 petition, as suggested by his statement that “the Magistrate never at no time address ‘either of the two points enhancements [sic],” Motion at 1, he took advantage of his opportunity to do so at an earlier time, Docket Nos. 82-84, and may not now revisit that matter.

For the foregoing reasons, I recommend that the motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 15th day of December, 2000.

David M. Cohen
United States Magistrate Judge

JUAN CARLOS DURAN

[COR LD NTC pse] [PRO SE]
Reg. No. 22019-038
1AL UNIT
P.O. Box 5000
YAZOO CITY, MS 39194-5000

U. S. Attorneys:

JONATHAN R. CHAPMAN
780-3257
[COR LD NTC]
MARGARET D. MCGAUGHEY, ESQ.
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257