

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
v. ) Crim. No. 89-33-P-C  
)  
ADALBERTO FRANCO-MONTOYA, )  
)  
Defendant )

***RECOMMENDED DECISION***

This matter is before the court on Adalberto Franco-Montoya's Motion for Leave to Proceed *in forma pauperis* (Docket No. 100) and petition for a writ of habeas corpus (Docket No. 100). I now **GRANT** Franco's motion to proceed *in forma pauperis* and recommend that the court **DISMISS** his petition because it is a second or successive 28 U.S.C. § 2255 motion that has not been properly certified by the court of appeals.

**Procedural Background**

The current petition and motion originated in the United States District Court for the Southern District of Florida on April 11, 2001, when Franco filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Based upon the recommendation of the United States Magistrate Judge the court ordered that in legal effect the pleading was a motion to vacate pursuant to 28 U.S.C. § 2255. Because the motion attacked a conviction entered in the United States District Court for the District of Maine, venue was ordered transferred to this court.

Franco and three other defendants were indicted in this court on June 20, 1989, charged with possession of more than five kilos of cocaine with intent to distribute and with conspiracy to do so. On April 12, 1990, the jury returned a verdict of guilty. On

September 21, 1990, Franco was sentenced to 365 months, the maximum for his sentencing range. He, along with his three co-defendants, took a direct appeal. The appeal was denied on October 18, 1991. See United States v. Rojo-Alvarez, 944 F.2d 959 (1st Cir. 1991).

Franco filed a motion pursuant to 28 U.S.C. § 2255 with this court on April 30, 1997. (Docket No. 79.) He argued that he was entitled to a sentence reduction because of an Application Note to the United States Sentencing Commission Guidelines which operated retroactively and based upon a memorandum of the Attorney General relating to downward departures when an alien defendant stipulates that he may be deported as part of an agreement to plead guilty. Both of these issuances became effective at least four years after Franco's conviction. Although the government argued that Franco was time barred, the United States Magistrate Judge recommended that the motion be considered on its merits and denied without hearing. That decision was affirmed by the district court on September 17, 1997. On June 15, 1998, Franco filed a motion to enlarge the time to file a Notice of Appeal. The district court denied that motion on June 30, 1998.

On February 28, 2001, the United States Court of Appeals for the First Circuit entered an Order denying without prejudice Franco's request to file a second or successive petition under § 2255 that would have invoked Apprendi v. New Jersey, 530 U.S. 466 (2000). (Docket No. 99.) Apparently after being rebuffed by the First Circuit Franco brought the instant motion, styled as a 28 U.S.C. § 2441 petition, in the Southern District of Florida.

## Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a prior approval provision stripping the district court of jurisdiction over a second or successive habeas petition unless the appropriate court of appeals has certified that the petition should go forward. 28 U.S.C. § 2244(b)(3)(A); United States v. Barrett, 178 F.3d 34, 40-41 (1st Cir. 1999). When confronted with an unapproved second or successive petition the district court must either dismiss it or transfer it to the appropriate court of appeals. Pratt v. United States, 129 F. 3d 54, 57 (1st Cir. 1997); accord Barrett, 178 F.3d at 41.

The first step in a district court's inquiry requires a determination of whether a *literal* second or successive filing is actually a second or successive petition. Barrett, 178 F.3d at 42-45 (discussing the various judicially created exceptions to the "second or successive" rule). Not one of those exceptions is directly applicable to this case. Rather it appears that Franco, by styling his motion as filed pursuant to § 2241, is arguing that the so-called "savings clause" of § 2255 is applicable to his situation. Id. at 49. The "savings clause" provides that resort to § 2241 (when not raising a sentence execution challenge) is only appropriate when a motion pursuant to § 2255 is "inadequate or ineffective to test the legality of his detention."<sup>1</sup>

In Barrett the First Circuit stated that simply because an individual was procedurally barred from filing a § 2255 motion does not make § 2255 an inadequate or ineffective remedy within the meaning of the statute. To hold otherwise would allow the

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<sup>1</sup> I need not discuss venue problems associated with bringing a petition pursuant to § 2241 in a court other than in the district court with jurisdiction over the prisoner's custodian. See United States v. Barrett, 178 F.3d at 50 n.10 (1st Cir. 1999). For an interesting discussion of the problems that can occur when courts in two different circuits characterize a petition differently for purposes of § 2241/ § 2255 analysis see In re Austen O. Nwanze, 242 F.3d 521 (3d Cir. 2001).

exception to swallow the rule. Id. at 50. The triumvirate of cases recognizing the availability of § 2241 relief, In re Davenport, 147 F.3d 605 (7th Cir. 1998), Triestman v. United States, 124 F.3d 361 (2d Cir. 1997), and In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), are all premised upon claims of actual innocence generated by the Supreme Court's ruling in Bailey v. United States, 516 U.S. 137 (1995) by procedurally barred petitioners. See also Wofford v. Scott, 177 F.3d 1236 (11<sup>th</sup> Cir. 1999) (providing, in a case not implicating Bailey, a thorough discussion of these three cases, the history of habeas relief via § 2241, and the legislative history surrounding the addition of § 2254 and § 2255 to the habeas repertoire). Bailey announced a rule of statutory construction, rather than a rule of constitutional law, but these three circuits agree that its application is retroactive. Thus procedurally barred prisoners who could make a showing of actual innocence under the new statutory construction could only obtain relief pursuant to § 2241, relief warranted given the exceptional circumstance of their apparently wrongful incarceration.

By contrast Franco's petition makes no claim of innocence at all and proffers no factual allegation that could serve as a basis for such a claim. Instead Franco argues that Apprendi v. New Jersey, 530 U.S. 466 (2000) has announced a new rule of constitutional law that would entitle him to a jury trial on the question of the amount of drug involved.<sup>2</sup> He does not get by the hurdle of § 2255 until and unless the United States Supreme Court makes the Apprendi rule retroactive to cases on collateral review. Sustache-Rivera v.

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<sup>2</sup> Given the statutory scheme under 21 U.S.C § 841(b)(1)(A) and the fact that Franco was indicted for possession of "more than five kilos" of cocaine it is not even clear that the maximum sentence in this case was increased by a nonproven drug amount. One would have to read the actual trial transcript to determine whether or not the fact finder found that more than 5 kilos were involved as alleged in the indictment. Indeed if the statutory maximum for the offense alleged was 40 years the so-called Apprendi issue raised by Franco evaporates in any event.

United States, 221 F.3d 8, 15 (1st Cir. 2000). It was for that very reason that the First Circuit denied Franco leave to file a second or successive petition under 28 U.S.C. § 2255. (See Docket No 99). He cannot now attempt an “end run” by styling his petition as brought pursuant to § 2241.

### **Conclusion**

Based upon the foregoing, I now **GRANT** Franco’s application to proceed *in form pauperis*. Further, I recommend that the court **DISMISS** the petition because Franco has been denied permission to file a second or successive § 2255 motion and his allegation does not state claim for relief under § 2241.

### 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 of 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.

June 8, 2001.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

670 BANGOR

U.S. District Court

District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 89-CR-33-ALL

USA v. ROJO-ALVAREZ, et al

Filed: 06/20/89

Dkt# in other court: None

Case Assigned to: JUDGE GENE CARTER

ALVARO ROJO-ALVAREZ (1) ALVARO ROJO-ALVAREZ

defendant [COR LD NTC] [PRO SE]

[term 09/21/90] Reg. No. 02767-036

FCI FORT DIX, P.O. Box 7000

FORT DIX, NJ 08640

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

ADELBERTO FRANCO-MONTOYA (2) ADELBERTO FRANCO-MONTOYA

defendant [COR LD NTC pse] [PRO SE]

[term 09/25/90] Reg. No. 02765-036

P.O. BOX 779800, MIAMI, FL 33177

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

WALTER ANTONIO PALACIO-PEREZ (3)

defendant

[term 09/21/90]

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

CARLOS AREVALO-GOMEZ (4)

defendant

[term 09/21/90]

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

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