

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 96-65-P-H
)
LUIS ARESTIGUETA,)
)
Defendant)

***RECOMMENDED DECISION ON
28 U.S.C. § 2255 MOTION***

This matter is before the court on petitioner Luis Arestigueta's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Because I agree with the United States that there is no basis for granting Arestigueta relief, I recommend that the motion be **DENIED**.

Factual Background

On September 23, 1997, Arestigueta was convicted on one count of conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 841 (b)(1)(C). He was subsequently sentenced to 144 months incarceration. He took a direct appeal, raising an issue relating to his suppression motion and also arguing that the trial court had improperly denied his motion for a new trial. The appeal was denied. United States v. Arestigueta, 201 F.3d 429 (1st Cir. 1998) (unpublished table decision). Arestigueta's petition for writ of certiorari to the United States Supreme Court likewise proved unsuccessful. United States v. Arestigueta, 529 U.S. 1078 (2000). On April 20, 2001, one year and three days after the denial of certiorari, he filed this motion.

Discussion

The United States argues that the Court should summarily dismiss this matter because: (1) it is not timely; (2) it consists solely of unsworn and conclusory allegations; and (3) there is no substantive merit to the claims.

A. *Timeliness*

In its response the United States notes the § 2255 motion was filed three days late. It complains that since it did not receive a copy of the motion it has no way of knowing whether the “prisoner mailbox rule” might apply. Arestigueta responded to that argument by filing a copy of a certified mail receipt showing that documents were mailed from his place of incarceration to the Clerk of Courts and Assistant United States Attorney Jonathan R. Chapman on April 5, 2001. A return receipt for the Chapman mailing is also provided, endorsed with the initials “MK” and date stamped April 9, 2001. Thus, the first ground raised by the United States appears ill-advised. See Morales-Rivera v. United States, 184 F.3d 109 (1st Cir. 1999).

B. *Compliance of the Pleadings with the Statutory Affirmation Requirement*

The United States’ second ground for dismissal comes closer to the mark. Arestigueta’s pro se motion, while signed under the required statutory affirmation, is within its four-corners entirely devoid of any factual substance; it merely recites, “See Memorandum of Law.” A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. United States v. LaBonte, 70 F.3d 1396, 1412-13 (1st Cir. 1995) (citing Rule 2 of Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255).

There are at least two reasons to abstain from summarily dismissing Arestigueta's motion on this ground. First, unlike LaBonte, Arestigueta has complied with the statutory affirmation on his form motion. It could be argued that his reference to his memorandum - a memorandum that does contain some general factual assertions - works an incorporation of the memorandum within the form petition and thus the factual allegations therein fall under the affirmation's umbrella. Second, Arestigueta basically asserts one ground for relief and it is a ground that turns not upon a factual dispute but upon a legal question that can be answered by reference to the court's file. This makes it quite unlike LaBonte's ineffective assistance of counsel claim in which the success of the movant's legal argument involved the weighing of contrary renditions of the fact.

C. *Substantive Merits*

I do agree with the United States that if the court were to consider this claim on its merits, it has none. Arestigueta claims that Apprendi v. New Jersey, 530 U.S. 466 (2000) entitles him to a new trial because the precise quantity of cocaine attributed to him was neither alleged in the indictment nor found by the jury by proof beyond a reasonable doubt. It seems beyond dispute that the First Circuit's United States v. Robinson, 241 F.3d 115 (1st Cir. 2001) requires summary dismissal of Arestigueta's Apprendi claim.

Arestigueta was sentenced to 144 months or twelve years. The default statutory maximum sentence for running afoul of 21 U.S.C. § 841 (b)(1)(C), the statutory provision expressly charged in Arestigueta's indictment, is twenty years. Robinson addressed a nearly identical challenge and held: "No Apprendi violation occurs when the district court sentences a defendant below the default statutory maximum, even though drug quantity, determined by the court under a preponderance-of-the-evidence standard,

influences the length of the sentence imposed.” 241 F.3d at 119. See also id. at 121-22. In the present case the sentence was eight years less than the lowest statutory maximum for cocaine related 21 U.S.C. § 841 offenses. See id. at 118 (providing clear explication of the § 841 statutory maximums formulation). There was no Apprendi violation.

Finally, I believe it is inadvisable to deny Arestigueta’s motion by way of the United States’ first-line of attack on his Apprendi claim, that is, its argument that a claim made pursuant to Apprendi in an initial § 2255 motion is foreclosed by the First Circuit’s opinion in Sustache-Rivera v. United States, 221 F.3d 8 (1st Cir. 2000).

The United States cites to page fifteen of the Sustache-Rivera opinion as support for the proposition that Apprendi cannot be utilized in a first habeas motion. (Gov. Mem. at 4.) To me, at least, it is clear that on page fifteen the First Circuit is considering its gatekeeping role regarding the grant of permission to file a second or successive petition. That issue differs from the issue confronted by this court on a timely first petition. The complexities that could attend this court’s analysis in a case involving a first petition where the issue was forced are set forth in Tyler v. Cain, __ U.S. __, 121 S.Ct. 2478, 2483-84 (2001). See also Santana-Mandera v. United States, __ F.3d __, 2001 WL 876883, at *1, *3 & n.2 (2nd Cir. Aug. 3, 2001) (leaving for another day the question of whether Apprendi can be applied retroactively in a first habeas, noting the distinction between the retroactivity determination for purposes of a first habeas petition and the retroactivity determination in a second and successive petition as addressed in Tyler); United States v. Clark, __ F.3d __, 2001 WL 845193, at *1 & n.1 (5th Cir. July 26, 2001) (remanding a § 2255 Apprendi-premised motion for the District Court to determine whether Apprendi applies retroactively in a case on collateral review, observing that the

question was difficult and important); id. at *1-7 (Parker, J. dissenting) (concluding that Apprendi is available retroactively as it is a substantive change in the interpretation of a federal criminal statute rather than a new procedural rule governed by Teague, arguing that the case should be remanded with a directive that Apprendi be applied retroactively); Dukes v. United States, ___ F.3d ___, 2001 WL 770531, at 1-2 & n.4 (8th Cir. July 11, 2001) (distinguishing the availability of Apprendi in a second or successive motion from its availability in a first). See generally Teague v. Lane, 489 U.S. 288 (1989).

This case does not force the issue. My point is only this: Sustache-Rivera does not establish the proposition that Apprendi is not available to first-time habeas movants in the First Circuit. Although the Fourth and Eighth Circuits have concluded that Apprendi is not available to first-time habeas movants on the basis of a thoroughgoing Teague analysis, see United States v. Moss, 252 F.3d 993, 997-1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001),¹ the First Circuit has yet to apply Teague to Apprendi and at least two district courts in this Circuit have recognized that the retroactivity of Apprendi is still an open question in the First Circuit, see, e.g., Vazquez v. United States, 147 F. Supp.2d 55, 57-58 (D.P.R. 2001) (collecting cases, noting that the question is still open in the First Circuit but aligning with the majority of courts that have concluded that Apprendi does not apply retroactively to first habeas petitions); Doward v. United States, 142 F.Supp.2d 169, 169 (D.N.H. 2001) (assuming without

¹ The Ninth Circuit has also undertaken a Teague analysis of Apprendi. See Jones v. Smith, 231 F.3d 1227, 1236-38 (9th Cir. 2000). Though it concluded that the § 2254 petitioner in its case could not utilize Apprendi in his initial petition, the Panel took pains to limit its conclusion to the species of Apprendi claim raised by the petitioner, who was complaining about discrepancies between the information lodged against him and the jury instruction upon which he was convicted. See id. at 1238 (“In the case at bar, the Apprendi rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial.”); id. (“We therefore decline to apply the Apprendi rule, insofar as it effects discrepancies between an information and jury instructions, retroactively to Petitioner's claim.”).

deciding that Apprendi can be applied in a first § 2255 motion); see also Bowen v. United States, 2001 WL 263306, at *1 & n.2 (D. Me. 2001) (stating that Apprendi is not available on initial collateral review, citing and relying upon Teague and Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000), a case undertaking a Teague analysis on a first § 2254 petition).

Conclusion

Based upon the foregoing, I recommend that the Court **DENY** Arestigueta's 28 U.S.C. § 2255 motion.

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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 14, 2001

CJACNS CLOSED

U.S. District Court
District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 96-CR-65-ALL

USA v. ARESTIGUETA

Filed: 10/10/96

Other Dkt # 2:96-m -00048

Case Assigned to: JUDGE D. BROCK HORNBY

LUIS ARESTIGUETA (1) JOSEPH H. GROFF, III

defendant [term 09/23/97]

[term 09/23/97] 775-7271

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Pending Counts:

NONE

Terminated Counts: Disposition

21:841(a)(1), 846 NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE - Conspiracy to possess with intent to distribute cocaine - 144 months incarceration followed by 3 years supervised release, credit for presentence detention, defendant remanded into custody of USMS

(1)

21:841(a)(1) and 18 U.S.C. 2 NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE Possession with intent to distribute cocaine and aiding and abetting

(2)

Offense Level (disposition): 4

Complaints Disposition

COUNT I, conspiracy to possess w/intent to distribute cocaine, 21:841(a)(1), 846;

COUNT II, possession w/intent to distribute cocaine, 21:841(a)(1)

[2:96-m -48]

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