

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
v. ) Crim. No. 98-7-B-H  
) Civil No. 01-30-B-H  
JOHN W. SCHLAGENHAUF, )  
)  
Defendant )

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

John Schlagenhauf has filed a motion pursuant to 28 U.S.C. § 2255 asserting that his conviction must be vacated as a result of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). (Docket No. 56). The United States has filed a motion to dismiss the petition because it is time barred (Docket No. 58). I now recommend that the court **DENY** the pending petition.

**Factual Background**

Schlagenhauf waived indictment and pleaded guilty to an information on March 12, 1998 (Docket Nos. 44 and 45) charging him in two counts: violation of 21 U.S.C. § 841, possession with the intent to distribute marijuana and violation of 18 U.S.C. § 922(g), possession of a firearm by a felon. Ultimately he was sentenced to 100 months on each count to be served concurrently. (Docket No. 51). Schlagenhauf filed a notice of appeal, but on his request the First Circuit dismissed his direct appeal on September 30, 1998. (Docket No. 55.) Some two years and nine months later he filed the instant motion pro se pursuant to § 2255 (Docket No. 56).

After Schlagenhauf filed this motion the United States responded with its motion to dismiss arguing principally that his habeas motion is patently time-barred. (Docket No.

58.) Subsequently counsel entered an appearance on Schlagenhauf's behalf and filed a response to the United States' motion to dismiss.

### **Discussion**

#### **A. *Constitutionality of 21 U.S.C. § 841(b)***

Schlagenhauf's primary line of attack on his Count I conviction is that any statute of limitations concerns are "irrelevant" because 21 U.S.C. § 841(b) is unconstitutional, citing as authority United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001). (Docket No. 61.) He asserts that Apprendi has disrobed this court of its jurisdiction to sentence defendants pursuant to 21 U.S.C. § 841(b)(1)(A),(B), or (C). The United States replies to this argument by noting that Buckland is scheduled for en banc review and the Ninth Circuit has ordered that in the interim it is not to be cited as precedent in that circuit. (Docket No. 62.) See United States v. Buckland, 2001 WL 1091167 (9th Cir. 2001). The United States also stresses that Buckland is not binding precedent for this court.

The reasoning of Buckland is novel. As the United States argues, it is far from being binding precedent in this circuit, and does not even have adhesion in the Ninth Circuit as of the en banc order. Buckland, 2001 WL 1091167. The Buckland panel, over a dissent, looked at the structure of 21 U.S.C. § 841 and concluded that Congress intended the penalty provisions of § 841(b) that turn on drug quantity to be sentencing factors not elements of the offense. 259 F.3d at 1165. Under Apprendi, the Ninth Circuit reasoned, the drug quantity must be an element of the § 841 offense because the drug quantity finding exposes the defendant to greater punishment than that authorized by the jury's guilty verdict. Id. The differential between the punishment authorized by the jury's verdict and the punishment based on the judge's finding of drug quantity is

“unquestionably of constitutional significance,” id. (quoting Apprendi, 530 U.S. at 495), and, therefore, the panel was “unable to avoid the conclusion that § 841(b) is unconstitutional.” Id. The panel went on to conclude that the penalty provision of § 841 was severable from the remainder of the statute and, thus, Buckland’s § 841(a) conviction stood, with his remedy being limited to a resentencing according to the lowest applicable statutory maximum, § 841(b)(1)(C). Id. at 1168.

I, like the Buckland dissenter, Id. at 1069 (Duplanteier, Dist. J., dissenting), conclude that the better view on this issue is articulated in the Seventh Circuit’s United States v. Brough, 243 F.3d 1078 (2001). It flatly rejected the argument that Apprendi supports the conclusion that § 841 is unconstitutional or requires severance. 243 F.3d at 1079. Observing that Congress did not specify whether judge or jury should make the drug quantity finding for § 841 offenses within the four corners of the statute, the Seventh Circuit stated:

Instead the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden. It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as § 841 does), or even whether they are scattered across multiple statutes (see 18 U.S.C. §§ 924(a), 1963). Apprendi holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decisionmaker (unless the defendant elects a bench trial), and the reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil[l] that requirement is a subject to which the Constitution does not speak.

Id. Apprendi merely changed the way that § 841 is “implemented.” Id. at 1080. I conclude that this is a more cogent interpretation of § 841 in light of Apprendi.

***B. Schlagenhauf's Apprendi Claim Fails Even Assuming Apprendi Applies Retroactively to First-time Habeas Petitions***

My conclusion that 21 U.S.C. § 841 is constitutionally sound brings Schlagenhauf back around to his statute of limitation troubles. Pursuant to 28 U.S.C. § 2255 a motion to vacate must be filed within one year of the following:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) 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;
- (4) the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6.

Schlagenhauf contends that his petition, filed long after the judgment of conviction had become final, was timely under sub-paragraph (3) because it was filed on the first anniversary of the date the Supreme Court announced the Apprendi decision. The Seventh Circuit has recently issued an opinion that clarifies the standard that animates 28 U.S.C. § 2255 ¶6(3), and distinguishes it from the standard for retroactive application for second and successive petitions harbored in § 2255 ¶8(2). See Ashley v. United States, \_\_F.3d\_\_, 2001 WL 1085010, \*1-2 (7th Cir. Sept. 12, 2001) (Easterbrook, J.). While the United States argues that the First Circuit ruled in Sustache-Rivera v. United States, 221 F.3d 8, 15 (1<sup>st</sup> Cir. 2000) that Apprendi is not available to the first-time habeas petitioners availing themselves of 28 U.S.C. § 2255 ¶6(3), I have recently

addressed the case law on this question and concluded that this is still an open question in this and several other circuits. See United States v. Ellis, Crim. 97-44-B-S, Civ. 01-22-B-S (D. Me. Oct. 22, 2001).<sup>1</sup>

For a petitioner to take any benefit from the subsection (3) exception to the one-year, somehow the requirement that the case be “made” retroactive must be met. According to Ashley, if it is to inure to Schlagenhauf’s benefit (or detriment), this retroactivity determination can either be accomplished in this case or another case if made by the First Circuit or, of course, the United States Supreme Court. 2001 WL 1085010, at \*3.

When a court is confronted with a petition seeking a retroactive application of Apprendi Ashley endorses the approach of first identifying whether the petitioner indeed has an Apprendi issue and if so, whether he can meet the cause and prejudice standard of habeas review in order to be eligible for relief. Id. at \*4. The First Circuit has taken a similar approach to Apprendi-based claims under the plain error standard on direct appeal. United States v. Duarte, 246 F.3d 56, 59-60 (1st Cir. 2001). The First Circuit has not yet encountered a claim in a procedural posture of Schlagenhauf’s on collateral review. Therefore, I assume arguendo that Apprendi is retroactively applicable to claims on collateral attack and that Schlagenhauf has a tenable Apprendi claim. It still fails.

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<sup>1</sup> Though it is not a make or break distinction in this case because this petition was filed on the anniversary date of Apprendi, Schlagenhauf’s perception of the date the ¶6(3) year begins to run overlooks the final clause of the exception, “made retroactively applicable to cases on collateral review.” Ashley views the year as running not from the “date on which the right asserted was initially recognized by the Supreme Court” but from the date that the right was made retroactive to cases on collateral review. 2001 WL 1085010, \*3 (“The one year to file under ¶ 6(3) begins, not on the date of the Supreme Court's decision newly recognizing a constitutional right, but on the date that decision is "made retroactive". Otherwise ¶ 6(3) is a mirage, for retroactivity decisions often come more than a year after opinions newly recognizing constitutional rights.”).

Schlagenhauf plead guilty to both counts. Although he contested the drug quantity attributable to him at his sentencing hearing, he abandoned his direct appeal of his sentence. Therefore, he procedurally defaulted his constitutional claim; to bring a claim in collateral review it must have been raised in a direct appeal. Bousley v. United States, 523 U.S. 614, 622 (1998). This default can only be overcome if Schlagenhauf can demonstrate both cause for the default and actual prejudice. Id. See also Coleman v. Thompson, 501 U.S. 722, 750 (1991).<sup>2</sup>

First Circuit precedent cuts squarely against Schlagenhauf. In the context of a “plain error” review on direct appeal of a procedurally defaulted Apprendi claim, the First Circuit concluded in Duarte that the defendant could not establish “prejudice” because in pleading guilty to a 21 U.S.C. § 841(a) offense Duarte signed a plea agreement in which he accepted responsibility for 1000 to 3000 kilograms of marijuana. 246 F.3d at 62. The Court stated, “This admission, which largely dictated the length of his sentence, took any issue about drug quantity out of the case.” Id. “That being so,” the Court concluded, “Duarte scarcely can claim to have been prejudiced either by the omission of specific drug quantities from the body of the indictment or by the absence of a jury determination on the point.” Id. The Court found further support for this conclusion in the facts that: even though the indictment did not mention specific drug quantities, there was an appended notice that alerted Duarte to the fact that the United States believed he dealt in large quantities of marijuana exposing him to penalties above

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<sup>2</sup> Schlagenhauf does argue that the reference in his information to the penalty provision of 21 U.S.C. § 841(b)(1)(A) was not a sufficient allegation of drug quantity to satisfy Apprendi. He asserts that this absence of a threshold amount in the charging document is a jurisdictional defect. I follow the course plotted by the First Circuit in Duarte, in which it addressed very similar argument about Apprendi error in an indictment, left the point undecided, assumed an error occurred, and proceeded to an analysis of prejudice. 246 F.3d at 60-61.

the default five-years of 21 U.S.C. § 841(b)(1)(d); the plea agreement set forth the maximum penalties on each of thirteen counts, all of which exceed five years and Duarte acknowledged that his admission of guilt would expose him to a life sentence on one of the counts due to the large quantities of marijuana; and Duarte in fact received sentence well under the maximum to which his own admissions to quantity exposed him. Id. at 62-63.

When compared to Duarte Schlagenhauf's case has a slight "twist" as this was not a straightforward guilty plea. Though at no time did he claim that the quantity determination need be made by a jury, Schlagenhauf did indeed contest drug quantity and his ultimate sentence was the result of a preponderance finding by the judge. However, the contest centered upon whether the conspiracy involved 3,500 pounds of marijuana or upwards of 20,000 pounds.

During the sentencing hearing Schlagenhauf testified extensively about his expectation about the quantity of marijuana that would be involved in the shipment he agreed to help unload in coastal Maine as part of a multi-person smuggling operation. On direct exam by his attorney Schlagenhauf stated that in negotiating his remuneration for handling the dockside unloading he was promised a percentage share of the marijuana, that "turned out to be 750 pounds." (Sentencing Tr. at 88.) He was told at some point by a co-conspirator that the quantity might be in the vicinity of 20,000 pounds, to which he responded that it was too large and that 3500 pound might be "an appropriate and manageable quantity." (Id.) Ten thousand pounds was then floated in a conversation with a co-smuggler, and Schlagenhauf responded that that figure was "still to large," "just the sheer physical size of it, 10,000 pounds in 50-pound bales is 200 bales. And I mean,

it's just a lot to lug around.” (Id. at 89.) Schlagenhauf was then told that someone else would “take away 5,000 pounds right from the offload.” (Id. at 89-90.)

On cross-examination Schlagenhauf said with respect to the anticipated marijuana quantity, “we knew it was in the thousands, okay, but at the time I believe I suggested 3,500 as a sailboat load.” (Id. at 100.) He contended that the exact quantity was “left ... open ended.” (Id.) With respect to drug quantity the United States Attorney pursued a line of questioning about a \$1 million fee to a marina owner negotiated through Schlagenhauf that was to come out of the proceeds of the sales from the shipment. (Id. at 100-04.) Though said he was surprised that such a hefty chunk would go to the marina contact, Schlagenhauf stated that despite this steep price tag he “still could have foreseen having it done for 3,500 to 5,000 pounds. ... If a pound of marijuana cost[s] a thousand dollars, a thousand pounds is a million dollars.” (Id. at 103-04.)

In his summation to the Court Schlagenhauf’s attorney argued that the figures of ten to twenty thousand pounds were clearly “beyond the capability of these individuals.” (Id. at 114.) He asserted that his client’s 3,500 was an accurate assessment. He reiterated that his client’s share was to be fifteen-percent which was to be 750 pounds. Seven hundred and fifty pounds is fifteen percent of 5,000 pounds or 2272 kilos. (Id. at 115-16.)<sup>3</sup> He stressed that “these folks could not, did not, and were not able to capably remove more than 5,000 pounds, even if they could even do that.” (Id. at 116.)

The Court ultimately used 8,500 for purposes of its guidelines computations. (Id. at 132). The Court concluded that the 5,000 pounds that Schlagenhauf admitted was to

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<sup>3</sup> The defense’s argument was framed by the figures that determine the sentencing enhancements. Schlagenhauf’s attorney stated that the “magic number is 10,000, or at least 3,000 kilos” for the higher level of enhancements. By arguing that his client was only capable of a 5,000-pound operation he was attempting to get his client into the lower level 32. (Id. at 116.)

be part of the offloaded he was responsible for arranging, but was to be immediately taken by a third party, should be added to the 3,500 Schlagenhauf admitted would be under his charge. (Id. at 131-32.)

Like the defendant in Duarte, Schlagenhauf's admitted conduct took him well beyond the default statutory minimum sentence of five years or less for a violation of §841(b)(1)(D) for offenses involving less than fifty kilograms of marihuana.<sup>4</sup> Three thousand, five hundred pounds translates into a hair over 136 kilograms, and thus situates Schlagenhauf's Count I conduct in § 841(b)(1)(C)'s scope triggering its penalty provision. The 100-month sentence on this count falls well below the statutory maximum of twenty years for subsection (C) convictions. And, like the other Apprendi-defeating factors highlighted in Duarte, Schlagenhauf acknowledged in his plea agreement "that the maximum statutory penalty which may be imposed upon conviction of count I is a term of imprisonment for not less than 10 years and not more than life." (Plea Agreement at 1, ¶ 1.) He was well aware of the stakes. Thus, Schlagenhauf, who has procedurally defaulted his Apprendi claim twice over, has not shown the requisite prejudice to obtain relief on collateral review.<sup>5</sup>

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<sup>4</sup> Schlagenhauf comes close to coming up short on his prejudice showing on another score. If he could press his Apprendi claim successfully his new sentence on Count I would have been at or under the default statutory maximum of sixty months for a violation of § 841(a). United States v. Robinson, 241 F.3d 115, 118 – 120 (1st Cir. 2001). With respect to the unchallenged penalty for Count II, the firearms violation sentence pursuant to 18 U.S.C. § 924, the statutory maximum is 120 months and Schlagenhauf received only a 100-month sentence. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (discussing the use of prior convictions to enhance sentence). Therefore even if Schlagenhauf were resentenced on Count I he would not be entitled to resentencing on Count II and he could remain incarcerated for the 100-month sentence. However, whereas Count I carries a five-year term of supervised release, Count II bears only a three-year term. Therefore, assuming there was a cognizable Apprendi problem with Count I, there would be prejudice, to the tune of two more years of supervised release, in allowing Count I to stand despite the error. See United States v. Barnes, 251 F.3d 251, 261 (1<sup>st</sup> Cir. 2001).

<sup>5</sup> There is also a considerable issue here as to whether or not Schlagenhauf would be able to meet the cause prong of the "cause and prejudice" standard. In United States v. Smith, 241 F.3d 546 (7<sup>th</sup> Cir. 2001) the Seventh Circuit held that the § 2255 movant could not establish "cause" for his procedural default of his Apprendi-based claim because "the foundation for Apprendi was laid long before" the

Finally, Schlagenhauf requests that if the Court denies him relief because Appendi has not been made retroactive to cases on collateral review, that it be done without prejudice so that he can re-petition for habeas review should the Supreme Court hold down the line that Appendi is to be given retroactive effect. I decline to recommend this approach for two reasons. First, I have concluded that even if Appendi applied retroactively Schlagenhauf does not have a viable claim for habeas relief premised on its rule. Second, if indeed the Supreme Court holds that Appendi is available retroactively then Schlagenhauf could avail himself of 28 U.S.C. § 2255 ¶8(2)'s provision for filing a second or successive habeas petition.

### **Conclusion**

Based upon the foregoing discussion I recommend that the court **DENY** the petition.

### **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.

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movant's 1992 conviction. 241 F.3d at 548. This conclusion was not unanimous in the Seventh Circuit. Writing a dissent from the denial of rehearing *en banc* in Smith, Judge Wood, joined by Judges Rovner and Williams, argued persuasively that, for the purposes of establishing cause for its procedural default, the Appendi claim was distinguishable from Bailey v. United States, 516 U.S. 137 (1995) and, thus, Bousley v. United States, 523 U.S. 614 (1998) did not control the cause inquiry vis-à-vis Appendi. United States v. Smith, 250 F.3d 1073, 1074-77 (7<sup>th</sup> Cir. 2001). Schlagenhauf has not even attempted to argue Bousley "actual innocence" and in light of his testimony at the sentencing hearing it would appear to be futile to so argue.

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.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

October 26, 2001

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 98-CR-7-ALL

USA v. SCHLAGENHAUF

Filed: 03/12/98

Other Dkt # 1:96-m -00047

Case Assigned to: JUDGE D. BROCK HORNBY

JOHN SCHLAGENHAUF (1)          JAMES MERBERG, ESQ.

aka                                    [term 08/20/98]

ZEKE                                    [COR LD NTC ret]

defendant                            66 LONG WHARF

[term 08/20/98]                      BOSTON, MA 02110, 617-723-1990

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JOHN SCHLAGENHAUF

FMC DEVENS, PO BOX 879, #8103-014, AYER, MA 01432

Pending Counts:

NONE

Terminated Counts:

Disposition

21:841B=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE (1)

100 months incarceration to be served concurrently with Count II, \$100.00 Special Assessment, 5 years Supervised Release to be served concurrently with Count II. Defendant remanded into USMS custody.

(1)

18:922G.(1) UNLAWFUL POSSESSION OF FIREARM BY A FELON - 100 months incarceration to be served concurrently with Count I, \$100.00 Special Assessment, 3 years Supervised Release to be served concurrently with Count I. Defendant remanded into USMS custody.

(2)

Offense Level (disposition): 4

Complaints	Disposition
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Conspiracy to possess with Intent to distribute and to distribute marijuana in violation of 21 U.S.C. sections 841(a)(1), 841(b)(1)(A) and 846 [ 1:96-m -47 ]	
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[term 07/31/01]

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