

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT RODRIGUEZ,)
)
 Petitioner)
)
 v.) Civil No. 04-38-B-S
)
 UNITED STATES OF AMERICA,)
)
 Respondent)

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

Robert Rodriguez is serving a 160-month career-offender sentence after he pled guilty to manufacturing cocaine base in violation of 21 U.S.C. § 841(a)(1). He has brought a motion to vacate that sentence (Docket Nos. 1 & 2) on which he requests a hearing (Docket No. 4). He has also filed a motion to stay this 28 U.S.C. § 2255 petition so that he can lodge state court challenges to two of his prior convictions upon which his career offender status was predicated. (Docket No. 5.) The United States has answered and is opposing all of the requested relief. I now **DENY** the motions for stay and for a hearing and recommend that the Court **DENY** the 28 U.S.C. § 2255 motion.

Background

The federal charges arose against Rodriguez after a juvenile served as an intermediary between Rodriguez and an undercover law enforcement agent for two sales of cocaine. (PSI at 3-4.) A subsequent search of Rodriguez's apartment disclosed cocaine base, residue of cocaine and cocaine base, and drug paraphernalia that had recently been used to manufacture cocaine base. (Id. at 4.) As a result of the seizures, 8.37 kg of marijuana equivalent was attributed to Rodriguez, generating a base offense level of 14. (Id. at 5.) After a two-level enhancement for the use of a

minor to commit the offense and then a three-level reduction for acceptance of responsibility, Rodriguez's adjusted offense level was 13. (Id. at 6.)

However, Rodriguez had a significant criminal history. In 1991, Rodriguez was convicted in the Massachusetts state courts on a total of seven counts of breaking and entering in the daytime and two counts of breaking and entering in the nighttime, all with intent to commit a felony. (Id. at 6, 9.) There was also a 1989 Massachusetts conviction for distribution of cocaine, (id. at 6, 8), for which there was a one-year prison sentence of which Rodriguez was ordered to serve six months. (Id. at 8.) In light of these two convictions, and because Rodriguez was over eighteen when the instant drug offense was committed, he was a career offender with a 32 offense level. After a three-level adjustment for acceptance of responsibility, his total offense level was 29. (Id. at 6.)

Rodriguez had three prior convictions that produced a total of ten criminal history points and eight convictions that produced no points. (Id. at 7-10.) Six points were assessed for the 1991 Massachusetts convictions. (Id. at 9.)¹ One more point was assessed for a 1996 Maine conviction for theft by unauthorized taking. Three more points were added for a 1996 Maine conviction for burglary and theft. This Maine conviction was the result of Rodriguez's plea of guilty to burglarizing a business for which he was sentenced to serve four years in jail for the burglary conviction, concurrent with a thirty-day sentence for the theft by unauthorized taking conviction. (Id. at 10.)² No points were assessed for one burglary conviction because of its age and no points were added for juvenile adjudications for armed assault with intent to rob and armed robbery, wanton destruction of property, or larceny of more than \$100. (Id. at 7-8.) Finally, no points were

¹ Rodriguez was released from custody on these convictions on July 13, 1996. (Id.)

² He was released from this sentence on May 26, 2000. (Id.)

assessed for a 1989 Massachusetts conviction for breaking and entering, 1989 and 1990 Massachusetts convictions for trespassing, or a 1989 Massachusetts conviction for receiving stolen property. (Id. at 8-9.) A new charge of burglary was pending in the Maine courts. (Id. ¶ 40.)

Absent career offender adjudication, Rodriguez's ten criminal history points -- increased by two because he had been released from custody less than two years earlier -- placed him in a criminal history category of V; however, as a result of the proposed career offender adjudication, he was in category VI. (Id. at 10.) At total offense level 29 and criminal history category VI, Rodriguez's guideline range of imprisonment was 151 to 188 months. (Id. at 12.)

Prior to sentencing, defense counsel noted two objections to the PSI. (Id. at 15-16.) One pertained to the description of the offense conduct and the second objection was to including the Maine burglary conviction as a crime of violence for career offender purposes; he argued that the burglary was not of a dwelling and thus did not qualify as a crime of violence. (Id. at 15.) Citing United States v. Fiore, 983 F.2d 1 (1st Cir. 1992) and United States v. Sawyer, 144 F.3d 191 (1st Cir. 1998), the presentence investigator disagreed. (Id. at 16.)

On November 8, 2001, Rodriguez and his attorney appeared for sentencing. (Sentencing Tr. at 2.) Rodriguez, age 30, told the court he had received his GED degree while incarcerated. (Id. at 2-3, 10.) Asked by the court whether he was withdrawing his previous objection to the career offender adjudication, defense counsel replied, "Yes, I am, Your Honor." (Id. at 5.) When the court asked Rodriguez whether the objection was being withdrawn with his consent, Rodriguez nodded in the affirmative and then said, "Yes" (Id. at 6.)

The United States argued that Rodriguez had a prolific criminal career; his crime of choice was burglary but he had also been active in distributing narcotic drugs. (Id. at 6.) In addition it

noted that the other Maine burglary charge was pending. It observed that even without the career offender adjudication Rodriguez would have been in a criminal history category of V.

Nevertheless, the United States recommended a sentence at the low end of the career offender range, in the thirteen to fourteen year range. (Id. at 7.)

For his part, defense counsel reiterated Rodriguez's claim that he never sold cocaine but was addicted to it, manufactured it for his own use, and committed burglaries to support his habit. (Id. at 8-9.) Noting that the career offender status gave Rodriguez a ten-year bump, counsel argued for the minimum guideline term of 151 months. (Id. at 9-10.) In allocution, Rodriguez admitted that he had been using drugs since he was ten and asked for help in overcoming his addiction. (Id. at 11.)

After explaining the calculations that produced an adjusted offense level of 13, the court ruled:

I find that, as set forth in paragraph 39 of the presentence investigation report, that the defendant is a career offender within the meaning of Sentencing Guidelines Section 4B1.1. The ... offense level determined under that section is therefore 32, rather than the lower level calculated above.

(Id. at 12). After a three-level adjustment for acceptance of responsibility, Rodriguez's total offense level was 29. (Id. at 12). At a criminal history category of VI, his guideline range as a career offender was 151 to 188 months. (Id. at 13.)

The Court explained its sentence:

The defendant is 30 years of age. The defendant's criminal history record goes back to age 14 with records at 16, 17, 18, 19, and when he got out of jail, 25. And I believe the defendant had been out of ... out of jail four months when this offense was [committed], and I believe there's another burglary pending ...

....

I realize that, Mr. Rodriguez, you probably do have a serious drug problem, and part of your financing of this drug problem appears to be selling drugs or breaking into people's property. At some point society is entitled to be protected from people who really don't do anything other than commit crimes.

(Id. at 13-14.) The Court concluded that, although Rodriguez was being adjudicated a career offender at the relatively young age of thirty, his record dictated against imposing the minimum guideline term. (Id. at 14). Accordingly, the court sentenced Rodriguez to 160 months in prison, recommended that he be enrolled in the 500-hour comprehensive drug treatment program, and imposed three years of supervised release. (Id. at 14-15.) Counts I through IV of the indictment – charging possession and distribution related crimes -- were dismissed on the United States’ motion. (Id. at 17.)

Rodriguez's Claims

Principally, Rodriguez claims that his attorney gave him erroneous advice which caused him to plead guilty and to waive a challenge to his enhancement as a career offender. He states that the only time he saw his attorney was during court proceedings even though he consistently requested that they have time to discuss a defense to the charges. At one of the Court proceedings his attorney informed him that the United States wanted to offer a plea agreement that would place Rodriguez in the thirty to thirty-seven month range based on drug amount. What his attorney failed to tell Rodriguez was that, per his "RAP sheet" the attorney had in his possession showing substantial conviction, the United States would seek an enhancement of that sentence. Counsel also knew prior to the plea offering that the United States also had a copy of this record.

It was not until after the plea when the pre-sentence report came back that Rodriguez came to understand that he faced enhancement as a career offender. Rodriguez asked for an explanation from counsel as to why he had not been earlier informed of this susceptibility but counsel offered no explanation. Rodriguez then asked counsel to attempt to vacate or expunge his prior convictions on the grounds that they were unconstitutional as Rodriguez remembered that the judge did not ask him whether he was pleading knowingly, intelligently, and voluntarily and did not advise him of his right to appeal (a right he asserts that was not abrogated by his plea). Counsel

expressed his doubt to Rodriguez about the viability of an attack on the prior convictions and indicated that he would not do so, suggesting that Rodriguez would have to undertake such a challenge on his own. He also told Rodriguez that a federal sentencing proceeding was not the proper forum in which to attack the constitutionality of prior convictions. Rodriguez states that he would not have pled guilty if he had been correctly informed vis-à-vis his exposure to career offender status.

With respect to his sentencing, Rodriguez also faults his attorney for failing to advance the argument that his criminal history category significantly overstated the seriousness of his criminal history, relying on United States v. Nishoue, 241 F.3d 214 (2d Cir. 2001.) Also with respect to his career offender classification, Rodriguez faults his attorney for not preserving for appeal the issue of whether one of his predicate offenses, burglary of a commercial building, was a violent felony. On this score, Rodriguez states that he has never possessed a dangerous instrument -- such as a gun or knife -- capable of inflicting bodily harm.

Rodriguez has two other complaints about counsel's performance not relating to sentencing. First he alleges that counsel told him that there was no defense to his charges even though the United States used a minor to facilitate a sale of narcotics. Counsel told Rodriguez that the government is immune from suit and the court would not exclude the evidence so obtained. Rodriguez claims that his attorney should have asserted this criminal violation of 21 U.S.C. § 861 by the United States as an affirmative defense and/or filed a motion to suppress on the grounds of "fundamental unfairness." His second non-sentencing issue is that, although requested to do so, counsel failed to conduct any pre-trial investigations. He did not file a request for funds to conduct independent testing of the substance discovered, even though Rodriguez has maintained from the beginning that he did not have cocaine base, but had only cocaine hydrochloride, in his residence.

Discussion

In general, Rodriguez must demonstrate, one, that counsel's performance fell below an objective standard of reasonableness, and, two, that but for the error or errors, the outcome of his case would likely have been different, Strickland v. Washington, 466 U.S.668, 687 (1984).

The First Circuit has explained with respect to claims based on guideline calculations:

Although the language of 28 U.S.C. § 2255 is quite general, the Supreme Court has restricted collateral attack for claims that do not allege constitutional or jurisdictional errors; such claims are said to be cognizable only where the alleged error presents “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). Thus, a guideline violation alone is not automatically a basis for relief under 28 U.S.C. § 2255. Knigh v. United States, 37 F.3d 769, 772-73 (1st Cir.1994).

However, if the claim is repackaged as one of ineffective assistance of counsel, as [the § 2255 movant's] is here, it becomes a constitutional claim. Not every error amounts to ineffectiveness. See Lema v. United States, 987 F.2d 48, 51 (1st Cir.1993). An ineffective assistance of counsel claim will succeed only if the defendant--who bears the burden on both points, Scarpa v. DuBois, 38 F.3d 1, 8-9 (1st Cir.1994)--shows (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for the error or errors, the outcome would likely have been different, Strickland, 466 U.S. at 687.

Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002). And in Hill v. Lockhart, the Supreme Court held that a claim that the ineffective assistance of counsel rendered a plea not voluntary and intelligent must be evaluated under the general test for ineffective assistance set forth in Strickland. 474 U.S. 52, 58 (1985).

Sentencing claims

Counsel's performance regarding challenges to prior convictions

"A defendant is a career offender if,"

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B.1.

Rodriguez would have had counsel argue at sentencing that his pleas to the two predicate offenses were not knowing and intelligent and that he was not informed of his right to appeal.

The problem of whether to adjust federal sentences when a federal defendant asserts that the state convictions were constitutionally invalid presents a number of issues. One was the issue of where a claim that the state conviction was invalid should first be heard. In Custis v. United States, 511 U.S. 485, 493-97 (1994), the Supreme Court held that the federal prisoner could not attack the validity of his prior conviction which raised his penalty from a maximum of 10 years to a mandatory minimum of 15 years in prison pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), during the federal sentencing proceedings, unless the attack was based on a deprivation of the right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963). Custis was animated by two policy interests: ease of administration and finality of judgments. Custis, 511 U.S. at 496-97. Custis noted that it is easier to administer cases in which Gideon claims are made than cases that claim ineffective assistance of counsel or failure to assure a voluntary guilty plea. Id. at 496. In addition, finality is especially important where a defendant challenges a previous conviction because "the defendant is asking a district court 'to deprive [the] [state- court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment[t].'" Id. at 497 (quoting Parke v. Raley, 506 U.S. 20, 30 (1992) (alterations in original)). Naturally, the Custis ruling applies whether the sentence enhancement was imposed because of ACCA or because of the Sentencing Guidelines. United States v. Arango-Montoya, 61 F.3d 1331, 1336 (7th Cir.1995); United States v. Garcia, 42 F.3d 573, 581 (10th Cir.1994).

Brackett v. United States, 270 F.3d 60, 65 -66 (2001). As relayed by Rodriguez, counsel's advice that the federal sentencing proceeding was not the proper forum for such challenge was right on target in view of Brackett.

While Rodriguez claims that he would not have plead guilty if he knew that his criminal history exposed him to such a high sentence, such a choice would have meant that the United States could go ahead on all five counts, not just the one to which he pled, and Rodriguez would have imperiled his three level reduction for acceptance of responsibility. See United States v. Hanson, 339 F.3d 983, 991 (D.C. Cir. 2003).

There is record evidence that Rodriguez was aware before he changed his plea that he could face up to twenty years in jail on Count V. On July 11, 2001, a day before the change of plea hearing, Rodriguez signed a plea agreement in which the parties agreed that the maximum statutory penalty was twenty years. (Plea Agreement at (Id.), Docket No. 27.) This document directly contravenes Rodriguez's assertion that his attorney told him that the plea agreement provided that his sentence would fall in the range of thirty to thirty-seven months. Furthermore, as the United States points out, during the change in plea hearing, Rodriguez indicated to the Court that his attorney had explained the penalties that could be imposed (Rule 11 Tr. at 5) and then this exchange took place:

The Court: Mr. Rodriguez, you're charged in a five-count indictment. Count 5 charges you with manufacturing cocaine base and aiding and abetting commission of that crime. Do you understand that?

Rodriguez's Attorney: Excuse me, Your Honor.

Prosecutor: You Honor, I believe I should have amended that. We did not file a prior conviction. So it should only be 20 years and a fine not to exceed \$1 million.

The Court: Thank you.

The Prosecutor: I apologize for that.

The Court: Let me – let me correct that for you. You can start breathing again, Mr. Rodriguez. You are subject to a term of imprisonment for not more than 20 years and a fine not to exceed \$1 million. Do you understand that?

Rodriguez: Yes, Your Honor.

(Id. at 6.) The Court expressly informed him that it did not have to accept the recommendations of counsel for the defense or prosecution and that Rodriguez's ultimate sentence would be based on the sentencing guidelines and the presentence report. (Id. at 13-14.) Rodriguez was clearly aware at the time he plead guilty that he could receive a sentence in excess to the sentence he actually received.

Counsel's failure to advance argument that Rodriguez's criminal history category was an overstatement of his criminal history

Rodriguez's complaint concerning his attorney's failure to advance an argument that his criminal history category overstated the seriousness of his criminal history is barebones. It is also without merit.

United States Sentencing Guideline § 4A1.3(b)(1) provides:

Standard for Downward Departure.--If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

U.S.S.G. § 4A1.3(b)(1). With respect to this provision, the First Circuit:

has held that § 4A1.3 departures are available to career offenders in some cases. United States v. Lindia, 82 F.3d 1154, 1165 (1st Cir.1996). To be entitled to such a departure, however, the defendant must demonstrate that his case is so exceptional that it is set apart from typical cases. See United States v. Perez, 160 F.3d 87, 90 (1st Cir.1998) (en banc) (per curiam) ("Under Koon, if an encouraged factor (e.g., criminal history under § 4A1.3) is already taken into account by a Guideline (as is criminal history in the career offender guideline), 'the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.' "); see also United States v. Pearce, 191 F.3d 488, 497 (4th Cir.1999) (recognizing that § 4A1.3 departures for career offenders "are reserved for the truly unusual case").

According to these cases, then, [a defendant] would be eligible for a departure only if he could prove that his criminal background was so over-represented by his designation as a career criminal as to put him beyond the normal case in which the career-offender classification comes into play.

United States v. Gendraw, 337 F.3d 70, 72 -73 (1st Cir. 2003).

As the Court knows firsthand, see United States v. McGill, 11 F.3d 223, 225 (1993) (observing that, when, a "petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing."), this Court was very concerned by the extent of Rodriguez's criminal history and concluded that it was not appropriate to sentence Rodriguez on the low end of his guideline range. In light of this

conclusion, it cannot be said that counsel's decision not to press for the § 4A1.3(b)(1) adjustment was deficient or prejudicial.

Counsel's decision to withdraw challenge to the burglary as violent felony conviction

As for Rodriguez's third sentencing related complaint, the First Circuit's decision on direct appeal forecloses any 28 U.S.C. § 2255 relief. The First Circuit did first conclude that Rodriguez had waived this argument by withdrawing the PSI objection. United States v. Rodriguez, 311 F.3d 435, 436-37 (1st Cir. 2002). However, the Court went on, at greater length, to discuss how a challenge to his Maine conviction on this ground had no merit under settled First Circuit precedent, most notably United States v. Fiore, 983 F.2d 1 (1st Cir. 1992), and declined Rodriguez's invitation to repudiate its precedent. 311 F.3d at 438-49. The Panel concluded that under a plain error review, Rodriguez could not demonstrate that an error occurred. Id. at 437. As there was no error, there is no Strickland prejudice in counsel's decision not to continue to pedal this objection (in contravention of First Circuit law) to the sentencing court.

Non-Sentencing Related Claims

Apropos counsel's indication that there was no defense to his charges even though the United States used a minor to facilitate a sale of narcotics, I cannot see how this advice was deficient within the meaning of Strickland. Section 861 of title 21 provides:

It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally--

- (1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this chapter;
- (2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this chapter by any Federal, State, or local law enforcement official; or
- (3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

21 U.S.C. § 861(a). The statute provides for enhanced criminal penalties. Id. § 861(b),(c).

Rodriguez claims that his attorney should have asserted this criminal violation of 21 U.S.C. § 861 by the United States as an affirmative defense and/or filed a motion to suppress on the grounds of "fundamental unfairness." I agree with the United States that, if agents involved in Rodriguez's arrest engaged "in illegal activity ... beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." Hampton v. United States, 425 U.S. 484, 490 (1976). Relying on Hampton and other Supreme Court precedents, the First Circuit has made it clear that it is only in:

rare and extreme circumstances, [that] a federal court has the authority to dismiss criminal charges as a sanction for government misconduct. United States v. Russell, 411 U.S. 423, 431-32 (1973); United States v. Mosley, 965 F.2d 906, 911 (10th Cir.1992); see also Hampton v. United States, 425 U.S. 484, 491-95 (1976) (affirming the existence of the outrageous governmental misconduct doctrine articulated by the *Russell* Court) (dictum). But the law frowns on the exoneration of a defendant for reasons unrelated to his guilt or innocence, and, accordingly, the

power to dismiss charges based solely on government misconduct must be used sparingly. See United States v. Santana, 6 F.3d 1, 10 (1st Cir.1993) (warning that "[p]otent elixirs should not be casually dispensed"). It follows that the outrageous government misconduct doctrine is reserved for the most appalling and egregious situations. See United States v. Barbosa, 271 F.3d 438, 469 (3d Cir.2001). At the very least, the defendant must show that the challenged conduct violates commonly accepted norms of fundamental fairness and is shocking to the universal sense of justice. Russell, 411 U.S. at 432, 93 S.Ct. 1637; Nunez, 146 F.3d at 38; United States v. Matiz, 14 F.3d 79, 82 (1st Cir.1994).

United States v. Guzman, 282 F.3d 56, 59 (1st Cir. 2002). The use by the government of an informer to catch Rodriguez in already ongoing criminal activity may shock Rodriguez's conscience but it does not rise to the level of appalling, egregious, or shocking to the universal sense of justice.

Finally, Rodriguez's second non-sentencing issue is that, although requested to do so, counsel did not file a request for funds to conduct independent testing of the substance discovered, even though Rodriguez has maintained from the beginning that he did not have cocaine base, but had only cocaine hydrochloride, in his residence. The United States has not responded to this claim. However, the claim has absolutely no merit for, in view of Rodriguez's status as a career offender the fact that his base offense level might have been 12 if only cocaine were attributed to Rodriguez had absolutely no bearing on his ultimate sentence. There simply would have been no point for counsel to insist on independent testing or for the Court to approve the funds.³

³ The Government's Version of the Offense indicated that seized from Rodriguez's residence was a glass vial containing a residue consistent with cocaine and the manufacture of cocaine base and rocks of white powder consistent with cocaine base. (Gov't Version at 1, Docket No. 28.) It also indicates that the testimony of a special agent for the Maine Drug Enforcement Agency would be that the seized rocks of white powder were recently manufactured from cocaine powder using the glass vial, water, butane lighter as heat source, and baking powder (all also seized). (Id.) The agent would testify the base was recently manufactured because it was still wet. (Id. at 1-2.) The evidence would also include the testimony of a certified chemist with the Maine Department of Human Services Drug Laboratory who examined the glass vial and the rocks of white powder and the chemist's conclusion that the residue inside the glass vial contains cocaine and the powder contains cocaine free base. (Id. at 2.) At sentencing Rodriguez admitted that he had a problem specifically with crack. (Sentencing Tr. at 11.) As indicated above the presentence report treated this as 8.37 kg of marijuana equivalent, breaking it out as 19.175 grams of cocaine and .227 grams of cocaine base, resulting in a base offense level of 14, rather than level 12 for under 20 grams of cocaine.

Motion for an evidentiary hearing

Based upon my conclusions above, I deny Rodriguez's motion for an evidentiary hearing. United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984). The records and files in the case conclusively resolve the substantial issues of material fact and there are no credible allegations, see McGill, 11 F.3d at 225 ("In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets.")(citations omitted), made by Rodriguez that, if true, would require relief, Butt, 731 F.2d at 77 (citing R.Gov. Sec. 2255 Proceedings 8(a), United States v. Fournier, 594 F.2d 276, 279 (1st Cir.1979), DeVincent v. United States, 602 F.2d 1006, 1009 (1st Cir.1979), and United States v. Crooker, 729 F.2d 889 (1st Cir.1984)).

Motion to Stay

I deny the motion to stay these proceeding until Rodriguez has a chance to challenge his prior convictions in the state courts. Rodriguez would have to be on the cusp of getting a final determination from the state courts for me to consider this request. Furthermore, the grounds Rodriguez cites for challenging the conviction are based on his memory that the judge did not apprise him of certain rights at the time he pled guilty. This is the kind of information long known to Rodriguez; it is not the sort of newly discovered evidence that might satisfy the applicable "due diligence" requirement of Brackett. 270 F.3d at 64-70. The First Circuit recognized in Brackett the bind faced by federal prisoners seeking to pursue this type of attack on their federal convictions. Id. at 67-68.⁴

⁴ The United States contends that the Massachusetts and Maine offenses are no longer open to collateral attack. It is possible that there are no avenues remaining to Rodriguez to attack his predicate convictions. See

Conclusion

For these reasons I **DENY** the motions for a stay and for an evidentiary hearing and I recommend that the Court **DENY** Rodriguez'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) (1988) 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 10, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

RODRIGUEZ v. USA

Assigned to: JUDGE GEORGE Z. SINGAL

Date Filed: 03/19/04

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK Jury Demand: None

Demand: \$

Nature of Suit: 510 Prisoner: Vacate

Daniels v. United States, 532 U.S. 374, 382 (2001) ("If, however, a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under § 2255. "). This may well be true but it is not necessary for this court to make such a determination.

Lead Docket: None
Related Cases: 1:00-cr-00088-GZS
Case in other court: None
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Sentence
Jurisdiction: U.S. Government
Defendant

Petitioner

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