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United States District Court,
E.D. Texas,
Beaumont Division.

Burton P. GOLB
v.
M. MARTIN.

Civil Action No. 1:09CV7. | June 13, 2011.

Attorneys and Law Firms

Burton P. Golb, Houston, TX, pro se.

Michael Wayne Lockhart, US Attorney's Office, Beaumont, TX, for M. Martin.

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

EARL S. HINES, United States Magistrate Judge.

***1** Petitioner, Burton P. Golb, a prisoner formerly confined at the Federal Correctional Complex in Beaumont, Texas, proceeding *pro se*, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Petitioner is one of twelve defendants named in a fifteen-count indictment charging numerous counts of money laundering, drug trafficking, conspiracy and forfeiture. On July 14, 1992, following a four-month trial in the United States District Court for the District of Arizona, a jury convicted petitioner of money laundering to promote unlawful activity and money laundering to conceal and disguise proceeds of unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(A)(I) and (a)(1)(B)(I) and criminal forfeiture under 18 U.S.C. § 982(a)(1). *See United States v. Golb*, 69 F.3d 1417, 1421 (9th Cir.1995). Petitioner's money laundering counts were based on brokering the purchase of various aircraft with laundered money for Colombian or Mexican drug traffickers. On October 26, 1992, the District Court sentenced petitioner to a 175–month term of imprisonment followed by 3 years on supervised release.

Petitioner joined in a co-defendant's motion for new trial, which was denied by the District Court as to petitioner on October 13, 1994. Petitioner filed a notice of appeal on October 24, 1994. Docket Entry No. 730. [1] On September 26, 1995, the Ninth Circuit denied petitioner relief. *See Golb*, 69 F.3d at 1432; Docket Entry No. 746.

On May 9, 2005, petitioner filed a motion for relief from judgment. Docket Entry No. 826. Without determining whether the motion for relief from judgment should be construed as brought pursuant to 28 U.S.C. § 2255 or pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the District Court denied the motion on October 6, 2005. Docket Entry No. 835. Petitioner, thereafter, filed a *pro se* motion to eliminate enhancements and reduce sentence. Docket Entry No. 836. Construing the motion as brought pursuant to 28 U.S.C. § 2255, the District Court denied it on January 31, 2006. Docket Entry No. 841.

On February 6, 2006, petitioner filed a motion for leave to file an out-of-time motion for reconsideration and/or notice of appeal on the grounds that he had not timely received notice of the District Court's denial of his motion for relief from judgment and that any § 2255 motion would be impermissibly second or successive. Docket Entry No. 842. The District Court granted the motion for leave to file an out-of-time motion for reconsideration and denied reconsideration of the denial of relief from judgment. Docket Entry No. 844. Petitioner then filed a notice of appeal. Docket Entry No. 845 & 851. The Ninth Circuit ultimately affirmed the District Court's order denying the motion for reconsideration on May 15, 2008. Docket Entry No. 875. Petitioner filed another motion to vacate, set aside or correct sentence, pursuant to 28

U.S.C. § 2255, which was denied as impermissibly second or successive on February 22, 2008. Docket Entry No. 863.

***2** On December 30, 2008, petitioner mailed the current petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Respondent was ordered to Show Cause on October 7, 2010. On November 9, 2010, Respondent filed a Motion to Dismiss arguing petitioner's claims were moot as he was released from custody on October 29, 2010, and serving a term of supervised release. A Report and Recommendation was entered on December 13, 2010. The undersigned recommended Respondent's Motion to Dismiss be denied as petitioner's claim was not rendered moot by the mere fact he was released from custody. A Memorandum Order adopting the Report and Recommendation was entered on March 9, 2011, ordering Respondent to answer or otherwise respond to the merits of petitioner's claims. Respondent filed a response on April 8, 2011. Petitioner filed a reply on April 20, 2011.

The Petition

In pursuing this habeas application, petitioner relies on the Supreme Court's decision in *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008). Specifically, petitioner alleges that he is 'actually innocent' of the crime of money laundering, for which he was convicted, based on the Supreme Court's new statutory interpretation that the term "proceeds" means "profits." Petitioner avers that because he was convicted of engaging in transactions involving "receipts," rather than "profits," he was convicted of an act that is actually not a crime. In addition, pursuant to the dictates of *Reyes–Requena*, [2] petitioner argues *Santos* should be considered retroactively applicable and his claim foreclosed by existing precedent had he raised it at trial, on direct appeal, or in his original § 2255 motion. Based on the foregoing, petitioner contends his claim falls within the savings clause exception of § 2255.

The Response

Respondent argues that in circuits that had previously adopted a "gross receipts" definition of "proceeds," *Santos* overrules only those decisions that have applied that definition in cases where the specified unlawful activity was the operation of an illegal gambling business. In essence, the Government contends *Santos* provided no majority opinion except in cases where the specified unlawful activity is a gambling offense. For all other specified unlawful activities, and particularly in cases involving a narcotics trafficking organization, the Government argues a "gross receipts" definition continues to apply. Given the Ninth Circuit's previous holding in *United States v. Akintobi*, 159 F.3d 401, 403 (9th Cir.1998), Respondent asks the court to apply a definition of "proceeds" as "gross receipts" and deny petitioner's request for relief pursuant to 28 U.S.C. § 2241.

Jurisdiction and the "Savings Clause"

Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir.2000). A § 2255 motion must be presented to the court which imposed the sentence. 28 U.S.C. § 2255(a).

***3** Section 2241 is correctly used to attack the manner in which a sentence is executed. *Tolliver*, 211 F.3d at 877. A petition for writ of habeas corpus is not a substitute for a motion to vacate sentence pursuant to § 2255. *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir.2001), *cert. denied*, 534 U.S. 1001, 122 S.Ct. 476, 151 L.Ed.2d 390 (2001). A prisoner may use § 2241 as the vehicle for attacking the conviction only if it appears that the remedy by motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. Petitioner bears the burden of proving the inadequacy or ineffectiveness of a motion under § 2255. *Jeffers*, 253 F.3d at 830. A prior unsuccessful § 2255 motion, or the inability to meet the AEDPA's successive motion requirement, [3] does not make § 2255 inadequate or ineffective. *Tolliver*, 211 F.3d at 878.

The Fifth Circuit has set forth two requirements petitioner must satisfy to file a § 2241 petition in connection with the savings clause of § 2255. In *Reyes–Requena v. United States*, the Fifth Circuit held that the savings clause of § 2255 applies to a claim that: (i) is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense, and (ii) was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or

first § 2255 motion. *ReyesRequena*, 243 F.3d at 904 (5th Cir.2001).

Discussion and Application

A. *Does Santos Apply Retroactively?*

Santos has been applied retroactively by the Fifth Circuit. In *Garland v. Roy*, the Fifth Circuit announced that *Santos* applies retroactively. *Garland*, 615 F.3d at 396 (5th Cir.2010). "It is not barred from having retroactive effect upon cases on collateral review under the *Teague* analysis because it is a substantive, non-constitutional decision concerning the reach of a federal statute." *Id.* In the present case, petitioner has clearly satisfied the first requirement of *Reyes–Requena.*

B. *Was Petitioner's Claim Foreclosed by Circuit Law?*

As previously mentioned, *Reyes–Requena* instructs that a petitioner cannot successfully invoke the savings clause of § 2255 unless governing circuit law prevented him from asserting a *Santos*-equivalent error at the time of his trial, direct appeal, or first § 2255 motion. In the case at bar, a review of case law in the Ninth Circuit, where petitioner was originally convicted, reveals that before *Santos*, "Ninth Circuit precedent established that gross receipts from a specified illegal activity always satisfied the "proceeds" prong of § 1956." *See United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir.2009) (citing *United States v. Akintobi*, 159 F.3d 401, 403 (9th Cir.1998). Thus, it is clear petitioner was foreclosed by governing circuit law from raising such a claim at the time of his trial, direct appeal, or first § 2255 motion. Petitioner, therefore, meets the second requirement of *Reyes–Requena.*

C. *Was Petitioner Convicted of a Nonexistent Offense?*

***4** The *Santos* decision is not straightforward in its holding and its application. Indeed, commentators and courts alike have noted the lack of clarity. *See Brown*, 553 F.3d at 783 (5th Cir.2008) ("[*Santos*] raises as many issues as it resolves for the lower courts."); Marc Fernich, *Money Laundering After 'Santos': A Supreme Mess*, 240 N.Y.L.J. 4, October 17, 2008 at 4 (describing *Santos* as having an "opaque holding" with "murky precedential implications.").

The defendants in *Santos* were operating a stand-alone illegal gambling operation, and it was this unlawful activity that generated the laundered money. After their convictions and sentences (on both money laundering and gambling offenses) were affirmed, the defendants filed motions under 28 U.S.C. § 2255. *Santos*, 128 S.Ct. at 2023. The only challenge the district court found meritorious was a challenge to their laundering convictions based on a later-decided Seventh Circuit decision which held that the term "proceeds" in the federal money-laundering statute applies only to transactions involving criminal profits, not merely criminal receipts. *Id.* Applying that holding, the district court found no evidence that the transactions on which the money-laundering convictions were based involved profits, as opposed to receipts. Specifically, the evidence showed that the laundered money was used to pay those involved in the gambling operations (runners, winners and collectors). *Id.* The district court, therefore, vacated the money-laundering convictions, and the Seventh Circuit Court of Appeals affirmed. *Id.*

Before the Supreme Court, a plurality of four justices determined that the phrase "proceeds of some form of unlawful activity," found in 18 U.S.C. § 1956(a)(1) was ambiguous. The rule of lenity, which requires ambiguous terms in criminal statutes to be construed in favor of the defendant, therefore dictated that the term "proceeds" should be defined as the "profits" of the activity, rather than merely the "receipts." *Santos*, 128 S.Ct. at 2025. According to the plurality opinion, authored by Justice Scalia, adoption of the "receipts" definition would create a so-called "merger problem," described as follows:

> If "proceeds" meant "receipts," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U.S.C. § 1955 would "merge" with the money-laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a),

> but as a result of merger they would face an additional 20 years, § 1956(a)(1).

Id. at 2026.

As described by the plurality, the money-laundering charges against one defendant were based on payments to the lottery winners and employees, and the charge against the other defendant was based on his receipt of payments. *Id.* at 2031. Neither type of transaction could be fairly characterized as involving "profits" and therefore the Seventh Circuit's decision vacating the defendants' money-laundering convictions was affirmed. *Id.*

***5** Justice Stevens wrote a concurring opinion in *Santos* that was necessary in forming a majority. *See Fernandez,* 559 F.3d at 316 (5th Cir.2009) (discussing the *Santos* opinion and its precedential implications). In Justice Stevens' view, Congress intended "proceeds" to have different meanings in different contexts. He agreed that in the context of a stand-alone illegal gambling operation, Congress must have meant "proceeds" to mean profits, rather than receipts; otherwise, the "merger problem" discussed above would exist. In other contexts, however, he believed that a merger problem would not exist, and that in those contexts the term "proceeds" could mean "receipts." *Santos,* 128 S.Ct. At 2033–34 (Stevens, J., concurring).

The precedential implications of *Santos* are unclear, given the plurality and Justice Stevens' rationale for joining in the judgment. Indeed, the opinions in the case itself disagree over those implications. For example, the plurality opinion espoused the view that the holding of the Court was that the term "proceeds" means "profits" when there is no legislative history to the contrary. *Id.* at 2031. Justice Stevens disagreed, implying instead that his conclusion that "proceeds" means "profits" was limited to the context of an unlicensed stand-alone gambling business, but that, "[i]n other applications of the statute not involving such a perverse result," he would agree with the dissent's view of the Congressional intent as to the term "proceeds ." *Id.* at 2033–34 & n. 7 (Stevens, J., concurring). Additionally, the principal dissent specifically noted that five Justices agreed with Justice Stevens' view that the term "proceeds" includes "gross revenues from the sale of contraband and the operation or organized crime syndicates involving such sales ." *See* 128 S.Ct. at 2035–36 & n. 1 (Alito, J., dissenting); *see also* 128 S.Ct. at 2032 (Stevens, J., concurring) ("I cannot agree with the plurality that the rule of lenity must apply to the definition of "proceeds" for [the sale of contraband and the operation of organized crime syndicates involving such sales]").

The Supreme Court has instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground.' " *See Marks v. United States* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citation omitted). In discussing the implications of *Santos,* the Fifth Circuit has stated that, based on the foregoing instruction from *Marks,* "Justice Stevens' concurrence controls and therefore determines the scope of the Court's holding." *See Garland v. Roy,* 615 F.3d 391, 399 (5th Cir.2010). [4]

In the context of an illegal narcotics operation, the Fifth Circuit examined the *Santos* decision in *United States v. Bueno,* 585 F.3d 847 (5th Cir.2009):

> ***6** *Santos* decided that 18 U.S.C. § 1956(a)(1), which bans laundering the "proceeds" of an unlawful activity, requires the government to show that the laundered money is profit, not simply receipts. 128 S.Ct. at 2025. But *Santos* addressed an illegal lottery operation. *Id.* at 2022. This case involves a conspiracy to launder proceeds of an illegal narcotics operation, a distinction that makes a difference. *Santos* was a splintered decision, with a four-justice plurality headed by Scalia applying the rule of lenity to require showing laundered profits for any violation of § 1956(a)(1). Justice Stevens, whose vote provided the majority, agreed with the plurality's reading concerning gambling operations, but he thought that "proceeds" included all receipts of drug operations. *Id.* at 2032 (Stevens, J., concurring).

Bueno, 585 F.3d at 849–50.

The Fifth Circuit concluded, on direct appeal, that it was not "plain error" when the district court did not require the government to show drug profits as opposed to receipts. *Id.* Similarly, in another 2009 opinion, the Fifth Circuit found that the *Santos* challenge to defendant's money laundering conviction did not present plain error. *See United States v. Fernandez*, 559 F.3d 303, 316 (5th Cir.2009). The defendant was charged with laundering money generated by a marijuana importation conspiracy. The Fifth Circuit noted that the underlying conduct in *Fernandez*—the sale of contraband and the operation of criminal organizations—were the type of offenses for which Justice Stevens concluded the gross revenues were the relevant proceeds. *Id.* Finally, the Fifth Circuit, also on direct appeal in *Huynh*, found that in applying Justice Stevens' analysis, the argument that the government was required to prove that the laundered money constituted profits from drug trafficking was foreclosed and found defendant's claim of insufficient evidence without merit. *See United States v. Huynh*, 2011 WL 989825 *7 (5th Cir., March 22, 2011) (not designated for publication) (citing to *United States v. Smith*, 601 F.3d 530, 544 (6th Cir.2010) ("opining that '*Santo* s itself makes clear that it does not apply to the present situation [*i.e.*, conspiracy to distribute cocaine], and any error in not instructing the jury that 'proceeds' means 'profits' was not plain" ')).

Thus, it is clear that neither a majority of the Supreme Court, nor the Fifth Circuit, has expressly held that "proceeds" means "profits" in the context of money-laundering charges arising out of illegal drug trafficking. In addition, neither has the Ninth Circuit. In *United States v. Webster*, the Ninth Circuit read *Santos* as holding that where "a money laundering count is based on transfers among co-conspirators of money from the sale of drugs, 'proceeds' includes all 'receipts' from such sales." 623 F.3d 901, 906 (9th Cir.2010). Finally, other courts who have addressed the scope of *Santos* have reached similar conclusions. *See, e.g., Brace v. United States*, 634 F.3d 1167, 1170 n. 3 (10th Cir.2011) ("Even if *Brace* could raise a *Santos* argument, he would not prevail because *Santos* does not hold that "proceeds" means "profits" in the context of drug sales. Justice Stevens, the critical fifth vote in *Santos*, explicitly departed from the plurality's conclusion that "proceeds" means "profits" in the context of drug sales.... Consequently, *Brace* cannot rely on *Santos* to argue that he was convicted of a nonexistent crime."); *United States v. Spencer*, 592 F.3d 866, 879 (8th Cir.2010) ("*Santos* does not apply in the drug context."); *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir.2009) (refusing to apply *Santos* to an offense involving the laundering of funds from drug trafficking), *cert. denied*, —— U.S. ——, 130 S.Ct. 421, 175 L.Ed.2d 272 (2009); *United States v. Fleming*, 287 Fed. Appx. 150 *4 (3rd Cir.2008) (unpublished) (relying on dissent's statement that "five Justices agree with the position" that "proceeds" includes gross revenues for drug sales and refusing to vacate conviction); *United States v. Quinones*, 635 F.3d 590 (2nd Cir.2011) (holding that *Santos*, as applied to the sale of contraband, permits a conviction for money laundering conspiracy even absent proof that the laundered funds were profits).

***7** Despite such an express holding by the Supreme Court, the Fifth or Ninth Circuits, petitioner, in the case at bar, appears to argue that *Santos* necessarily teaches that *all* convictions not based on laundered profits are illegal.[5] However, this court cannot entertain such a proposition in a § 2241 proceeding unless *Santos* affirmatively decriminalized petitioner's conduct. As outlined above, *Santos* did not decriminalize financial transactions conducted with funds from drug trafficking. Furthermore, it is relevant to note that because petitioner was not charged with nor convicted of the underlying SUA of drug trafficking, there is no potential "merger problem." Therefore, petitioner does not satisfy the actual innocence prong of *Reyes–Requena*. That failure inevitably leads to the conclusion that this court may not entertain the present petition.

Recommendation

The above-styled petition for writ of habeas corpus should be dismissed.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within fourteen (14) days after being served with a copy of this report. 28 U.S.C. § 636(b)(1); FED.R.CIV.P 6(a), 6(b) and 72(b).

A party's failure to object bars that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen,* 857 F.2d 275, 276–77 (5th Cir.1988), and (2) appellate review, except on grounds of plain error, of unobjectedto factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n.,* 79 F.3d 1415, 1417 (5th Cir.1996) (en banc).

Footnotes

1 *See* 2:90–CR–233, U.S. District Court, District of Arizona (Phoenix Division).

2 *Reyes–Requena v. United States,* 243 F.3d 893 (5th Cir.2001).

3 The Antiterrorism and Effective Death Penalty Act (AEDPA), which became effective on April 24, 1996, amended 28 U.S.C. § 2255 by imposing requirements for bringing successive motions. As amended, § 2255 prohibits consideration of a second or successive motion unless the motion is certified by the appropriate court of appeals to contain either: (1) newly discovered evidence sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable. 28 U.S.C. § 2255.

4 *Garland,* unlike the case at bar, involved money laundering with an underlying pyramid scheme and not drug trafficking and/or the sale of contraband.

5 To the extent petitioner argues there was insufficient evidence to establish petitioner had knowledge of the underlying specified unlawful activity that gave rise to the “proceeds” in the transactions in question, this claim is procedurally barred. Petitioner raised this issue on direct appeal and it was rejected by the Ninth Circuit. *See United States v. Rocha,* 109 F.3d 225, 230 (5th Cir.1997).