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

Woody M. RIPPETOE
v.
Keith ROY.

Civil Action No. 5:08–CV–210. | June 9, 2011.

Attorneys and Law Firms

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Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

CAROLINE M. CRAVEN, United States Magistrate Judge.

***1** Petitioner, Woody M. Rippetoe, a federal prisoner confined at the Federal Correctional Institution in Texarkana, 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

On July 12, 2006, petitioner was charged with Conspiracy to Possess with Intent to Distribute and Distribute Methamphetamine and Marijuana (21 U.S.C. § 846) (Count One), Possession with Intent to Distribute and Distribution of Methamphetamine (21 U.S.C. § 841(a) (1)) (Count Two), Conspiracy to Launder Money (18 U.S.C. §§ 1956(h), 1956(a)(1)(B), 1957(a) & (b)(2), and 31 U.S.C. §§ 5324(a)(3) & (b)(3)) (Count Three), two counts of Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity (18 U.S.C. § 1957) (Counts Four & Five), Use of Communication Facility in Causing or Facilitating the Commission of Felonies Under the Controlled Substances Act (21 U.S.C. § 843(b)) (Count Six), Felon in Possession of Firearm (18 U.S.C. § 922(g)(1)) (Count Seven), and Drug Forfeiture (21 U.S.C. § 853) (Count Eight). *See* Criminal Record (CR) Docket Entry No. 17. [1] Petitioner pled guilty to the money laundering conspiracy (Count Three), and to both counts of Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity (Counts Four & Five). *See* CR Docket Entry No. 48. Under the terms of the plea agreement, the government dismissed Counts One, Two, Six, Seven and Eight of the Indictment.

On January 30, 2007, petitioner was sentenced to 240 months in prison on Count Three, and 120 months each for Counts Four and Five. *See* CR Docket Entry No. 50. Twenty-two months of the term for Count Four were to run consecutively to the term for Count Three. The remaining ninety-eight months of Count Four and the entire 120 month sentence imposed on Count Five were to be served concurrently with Count Three. The resultant total sentence was 262 months.

Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 in the Eastern District of Oklahoma on January 31, 2008. *See* Civil Docket Entry No. 53. [2] Petitioner claimed the government had breached the plea agreement by not filing a Rule 35 motion within a year after his sentencing. He further maintained that his sentence was in excess of that warranted under the sentencing guidelines, and that he had ineffective assistance of counsel. The government filed a motion to enforce the plea agreement which included a waiver of appellate rights. On May 5, 2008, the district court granted the government's motion and denied petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Petitioner filed a request for a Certificate of Appealability which was denied by the Tenth Circuit Court of Appeals on September 10, 2008. Petitioner was notified by the Tenth Circuit Court of Appeals on January 15, 2009, that his Petition for Writ of Certiorari was denied.

The Petition

***2** 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 pled guilty, based on the Supreme Court's new statutory interpretation that the term "proceeds" means "profits." Petitioner avers that because he pled guilty to engaging in transactions involving "gross receipts," rather than "profits," he pled to an act that is actually not a crime. In addition, pursuant to the dictates of *Reyes–Requena*, [3] 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 contends petitioner's habeas petition pursuant to 28 U.S.C. § 2241 should be denied as petitioner cannot meet his burden that he was convicted of a nonexistent offense. In essence, the government argues that where the specified unlawful activity (SUA) is a drug trafficking offense, as in the present case, *Santos* does not "decriminalize" financial transactions conducted with funds from drug trafficking. The government cites two Fifth Circuit cases in support of this proposition: *United States v. Bueno*, 585 F.3d 847, 850 (5th Cir.2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 2359, 176 L.Ed.2d 563 (2010), and *United States v. Fernandez*, 559 F.3d 303, 317 (5th Cir.2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 139, 175 L.Ed.2d 36 (2009). In addition, the government argues that there is no potential "merger problem" as petitioner pled guilty only to money laundering. Finally, the government concedes that the Fifth Circuit has applied *Santos* retroactively, citing *Garland v. Roy*, 615 F.3d 391 (5th Cir.2010).

The Plea Agreement

The plea agreement signed by petitioner includes a waiver of his rights to any post-conviction proceedings and any habeas corpus proceedings. *See* Civil Docket Entry No. 7. As the government has not asserted that this waiver bars any of petitioner's present claims under 28 U.S.C. § 2241, the Court does not reach the effect of such waiver in ruling on petitioner's present § 2241 petition. *Cf. United States v. Del Torro–Alejandro*, 489 F.3d 721, 722 (5th Cir.2007) (holding that district court could enforce the terms of a waiver of right to pursue collateral relief in dismissing a § 2255 motion sua sponte prior to government answer, but acknowledging that if government answers and fails to invoke such a waiver, it forgoes such contractual right). The Court, therefore, proceeds to the merits of petitioner's claim.

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, [4] 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. *Reyes–Requena*, 243 F.3d at 904 (5th Cir.2001).

Discussion and Application

A. *Does Santos Apply Retroactively?*

As the government concedes, *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, the answer to this question is less than clear. A review of case law in the Tenth Circuit, where petitioner was originally convicted, reveals no case directly on point as to whether the Tenth Circuit adopted a "gross receipts" definition of proceeds and thus foreclosed petitioner from raising his instant claim. Proceeding on the assumption that petitioner was foreclosed by governing circuit law from raising such a claim, and has thus met the second requirement of *Reyes–Requena*, the Court must next inquire as to whether petitioner was, in fact, convicted of a nonexistent offense.

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). [5]

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 '*Santos* 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. 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); *United States v. Webster*, 623 F.3d 901, 906 (9th Cir.2010) ("We ... read Santos as holding that where, as here, 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."), *cert. denied*, —— U.S. ——, 131 S.Ct. 1836, 179 L.Ed.2d 774 (2011). Despite such an express holding by the Supreme Court or Fifth Circuit, petitioner, in the case at bar, appears to argue that *Santos* necessarily teaches that *all* convictions not based on laundered profits are illegal. 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 pled guilty only to the money laundering charges, [6] and not to the underlying SUA of distribution of controlled substances or conspiracy to possess with intent to distribute methamphetamine and marijuana, 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

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

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the

findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(c).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Associatio* n, 79 F.3d 1415, 1417 (5th Cir.1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

Footnotes

1 Case No. 6:06–CR–39, Eastern District of Oklahoma.

2 Case No. 6:08–CV–041, Eastern District of Oklahoma.

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

4 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.

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

6 Petitioner pled guilty to conspiracy to launder money and engaging in monetary transaction in property derived from specified unlawful activity under 18 U.S.C. § 1956 and § 1957. *Santos* concerned money laundering under § 1956 only. The question of whether *Santos* applies with equal force to transactions involving § 1957 is not wholly clear. In the present case, the court has proceeded on the assumption that *Santos* applies in the § 1957 context for purposes of this report and recommendation and notes the following opinions: *U.S. v. Bush,* 626 F.3d 527, 536–37 (9th Cir.2010) (noting the statutory symmetry between § 1956 and § 1957 and that the *Santos* merger problem is not just limited to § 1956); *see also U.S. v. Kratt,* 579 F.3d 558 (6th Cir.2009).

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