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United States District Court, W.D. Washington,
at Seattle.

Domingo SANTANA, Petitioner,
v.
UNITED STATES of America, Respondent.

Nos. C08–1493–JLR, CR06–220–JLR. | May 4, 2009.

Attorneys and Law Firms

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Opinion

ORDER DENYING § 2255 MOTION

JAMES L. ROBART, District Judge.

***1** The Court, having reviewed petitioner's § 2255 motion, the government's response, the Report and Recommendation of the Honorable Mary Alice Theiler, United States Magistrate Judge, the objections thereto, and the remaining record, does hereby ORDER:

(1) The Court adopts the Report and Recommendation;

(2) Petitioner's § 2255 motion (Dkt. No. 1) is DENIED and this action is DISMISSED with prejudice; and

(3) The Clerk is directed to send a copy of this Order to petitioner, to counsel for respondent, and to Judge Theiler.

REPORT AND RECOMMENDATION

MARY ALICE THEILER, United States Magistrate Judge.

Petitioner Domingo Santana, proceeding *pro se*, moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Dkt.1.) Mr. Santana contends that *United States v. Santos*, —— U.S. ——, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), renders involuntary his guilty plea to conspiracy to engage in money laundering because the decision narrows the scope of what constitutes sufficient evidence of "proceeds." Even applying the most expansive reading of the *Santos* plurality opinion, the Court finds that Mr. Santana pleaded guilty to facts that support a conviction on the money-laundering count. The Court therefore recommends that Mr. Santana's § 2255 motion be denied and his petition be dismissed with prejudice.

BACKGROUND

On March 23, 2007, Mr. Santana entered guilty pleas to Count 1, Conspiracy to Distribute Methamphetamine, and Count 6, Conspiracy to Engage in Money Laundering, of the Second Superseding Indictment. [1] (CR Dkts. 174, 276.) For Count 1, the Honorable James L. Robart sentenced Mr. Santana to 120 months of imprisonment. (CR Dkt. 257, at 2; CR Dkt. 277, at 21.) For Count 6, Judge Robart sentenced Mr. Santana to 120 months of imprisonment to run concurrently with Count 1. (CR Dkt. 257, at 2; CR Dkt. 277, at 21.) Judgment was entered on September 4, 2007. (CR Dkt. 257.)

Although Mr. Santana timely appealed on September 17, 2007, he voluntarily dismissed this appeal upon advice of counsel. (CR Dkts. 258, 289; Dkt. 9, at 11.) The Ninth Circuit issued its mandate for the dismissed appeal on August 20, 2008. (Dkt.289.) Shortly thereafter, on October 8, 2008, Mr. Santana brought his *pro se* § 2255 petition, contending that the June 2, 2008 decision in *United States v. Santos*, —— U.S. ——, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), rendered involuntary his guilty plea to the money-laundering charge. (Dkt.1.)

DISCUSSION

Mr. Santana contends that his guilty plea to conspiracy to engage in money laundering was involuntary because *United States v. Santos* demands proof of having laundered "profits" rather than "receipts" and, had he known this, he never would have pleaded guilty. The government responds that although *Santos* may be applied retroactively on collateral review,

Mr. Santana's petition should be procedurally barred, *Santos* cannot be read so broadly, and under even the most expansive reading of the *Santos* plurality opinion Mr. Santana admitted to laundering the profits of a methamphetamine-distribution business to fund a new marijuana-growing business. [2]

***2** In *Santos,* the Supreme Court split 4–1–4 on whether "proceeds" in the federal money-laundering statute means only "profits" of specified criminal activities, or whether the term includes all "receipts." In an illegal lottery run by Santos, the transactions that formed the "proceeds" element of his conviction were payments made by Santos to lottery winners and his "runners." The four-Justice plurality, led by Justice Scalia, invoked the rule of lenity in light of statutory ambiguity and held that the term "proceeds" includes only the profits of unlawful activity, not all receipts. *Santos,* 128 S.Ct. at 2025. The Court determined that "[t]he money-laundering charges brought against Santos were based on his payments to the lottery winners and his employees, and the money-laundering charge brought against Diaz was based on his receipt of payments as an employee. Neither type of transaction can fairly be characterized as involving the lottery's profits." *Id.* at 2031. It therefore affirmed vacating the money-laundering convictions.

Mr. Santana and the government dispute whether *Santos* implies that the term "proceeds" means "profits" only in the context of an illegal lottery or in all of the more than 250 predicate offenses for the money-laundering statute. Although Justice Stevens cast the deciding fifth vote, he did so because there was no legislative history regarding how the money-laundering statute should apply to lottery operators and Congress could not have intended the term "proceeds" be defined to lead to a perverse result. *Id.* at 2033. Justice Stevens advocated for a context-sensitive interpretation of "proceeds" in which the term sometimes means "profits" and other times —such as in the context of the sale of contraband or the operation of organized crime syndicates—means "receipts." *Id.* Neither the plurality nor the dissent accepted Justice Stevens's position that the same word in the same statute could have different meanings depending on how Congress meant to approach each underlying crime. *Id.* at 2031 ("Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent."); *id.* at 2035–36 ("I cannot agree with Justice Stevens's approach insofar as it holds that the meaning of the term 'proceeds' varies depending on the nature of the illegal activity that produces the laundered funds ....") (Alito, J., dissenting). In a four-Justice dissent, Justice Alito argued that the term "proceeds" in the money-laundering statute always means receipts, not just profits. *Id.* at 2035.

Given Mr. Santana's factual admissions, there is no reason to determine whether *Santos* implies that the term "proceeds" always means profits in the federal money-laundering statute. [3] Even accepting that the term "proceeds" means "profits," Mr. Santana pleaded guilty to laundering the profits of his methamphetamine business in order to fund a new marijuana business. In the Second Superseding Indictment, Mr. Santana admitted to the following:

Manner and Means of the Conspiracy

***3** It was part of the conspiracy that DOMINGO SANTANA and ANDRES VIZCARRA, a.k.a. ANDRES VIASCARRA, a.k.a. ANDRES VIZCARRA MORENO, and MIGUEL GARCIA–HERNANDEZ, using proceeds of their drug trafficking, opened and operated automobile after-market parts supply stores in Visalia, California, and Des Moines, Washington, and through which they channeled additional drug trafficking proceeds.

> It was part of the conspiracy th[at] DOMINGO SANTANA and MICAELA IBARRA purchased real property in Eastern Washington. It was part of the conspiracy that DOMINGO SANTANA and MICAELA IBARRA divided the down payment for the purchase of real property into several separate cashiers checks and money orders which they and others, at their direction and for their use, purchased. It was part of the conspiracy that DOMINGO SANTANA, MIGUEL GARCIA–HERNANDEZ and MICAELA IBARRA used proceeds of trafficking in controlled substances to pay for the purchase of real property. It was part of the conspiracy that DOMINGO SANTANA and MICAELA IBARRA purchased real property for its possible use as a marijuana grow operation.

Overt Acts in Furtherance of the Conspiracy

> The defendants rented, stocked and operated automobile after-market parts supply stores using and channeling drug proceeds into and through the stores.

> The defendants purchased, or caused to be purchased, one or more of the following money orders and cashiers checks; and presented, or caused to be presented, one or more of the following money orders, cashiers checks and cash payments for the purchase of, and in furtherance of the ownership of real property, all of which but not limited to the following, were overt acts in furtherance of this conspiracy: ....
>
> [Table of 22 entries that show the date purchased, financial institution, purchaser, and amount of the financial instrument.]
>
> All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(A)(ii), 1956(h) and 2. [4]

(CR Dkt. 95, at 12–13.) That is, Mr. Santana took the profits from his methamphetamine business and, rather than paying his employees or for methamphetamine supplies, disguised it through funneling the money through stores and financial instruments issued to co-conspirators, then used the profits to purchase property he intended to use for a new marijuana-growing venture. The plea agreement confirms that the laundered profits from Mr. Santana's methamphetamine business were not used on expenses to be deducted from gross receipts, but on purchasing real property in furtherance of a new illegal venture:

> Domingo Santana and co-defendant Mic[ae]la Ibarra purchased a 100 acre vineyard in Yakima County, Washington. They paid nearly $150,000 down on the purchase contract. Since the money came from the sale of controlled substances, Santana and Ibarra needed help concealing the source and nature of the cash. In this district, Garcia Hernandez and others converted cash into separate money orders and cashiers checks on behalf of Santana and Ibarra. The cashiers checks and money orders were delivered to the seller at the real estate closing. Domingo Santana intended to grow marijuana on this land and his brother, Adrian Santana, was in Wapato[,] Washington to help establish the grow.

***4** (CR Dkt. 176, at 6.)

The *Santos* plurality and concurrence were concerned about a "merger problem" that would arise from charging a defendant for laundering the expenses of an illegal lottery because nearly every violation of the illegal-lottery statute would also violate the money-laundering statute. *Santos*, 128 S.Ct. at 2026 (plurality), 2033 (concurrence). No such merger problem exists with respect to Mr. Santana's charges for conspiracy to distribute methamphetamine and conspiracy to engage in money laundering. Mr. Santana placed a $150,000 down payment on a 100–acre vineyard, using throughly lathered and rinsed cash from his illegal methamphetamine business, in order to enter the illegal marijuana business. According to Justice Scalia, it was rational for Congress to limit "proceeds" to "profits" in order to punish more harshly exactly this kind of criminal activity:

> If "proceeds" means "profits," one could say that the statute is aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime. A rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater risk to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties.

Santos, 128 S.Ct. at 2025. Mr. Santana was not charged twice for a single "merged" crime involving methamphetamine distribution, but for drug trafficking and attempting to leverage the profits of that illegal venture into the next one.

Whether examined in terms of procedural default or on the merits, Mr. Santana's factual admissions preclude his invocation of *Santos* to support his § 2255 petition. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), provides a useful template for addressing his claims. In *Bousley*, a habeas petitioner challenged his guilty plea to using a firearm, invoking the Court's explication in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501,

133 L.Ed.2d 472 (1995), of what the "use" prong of the statute required. *Bousley*, 523 U.S. at 616. Although the Court noted that the substantive rule announced in *Bailey* could be applied retroactively on collateral review, the Court held that petitioner would be procedurally defaulted from bringing his habeas petition unless he could show "cause" and "prejudice" or "actual innocence" to excuse his choice not appeal his conviction. *Id.* at 621–24. The Court rejected petitioner's attempt to establish "cause" based on novelty and futility because other courts had been wrangling with the same issue for years. *Id.* at 622–23. The Court remanded for further proceedings on the question of "actual innocence." It noted:

> "[A]ctual innocence" means factual innocence, not mere legal insufficiency. In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in *Bailey*. In cases where the Government has foregone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges.

***5** *Id.* at 624 (citation and footnote omitted).

Mr. Santana can show neither cause and prejudice nor actual innocence for choosing not to challenge the voluntariness of his guilty plea on direct review. At the time of Mr. Santana's appeal in 2007, it was neither novel nor futile to have argued that the money-laundering statute demanded that the term "proceeds" be equated with "profits." *See Bousley*, 523 U.S. at 622–23 (noting that in numerous cases parties challenged the "use" prong of using a firearm and that " 'futility cannot constitute cause if it means simply that a claim was "unacceptable to that particular court at that particular time." ' ") (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n. 35, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)); *see also Reed v. Ross*, 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) (holding that a constitutional claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for procedural default). In 2002, the Seventh Circuit held that the federal money-laundering statute's prohibition of transactions involving criminal "proceeds" applies only to transactions involving net rather than gross income. *United States v. Scialabba*, 282 F.3d 475, 478 (7th Cir.2002). It was on this basis that the district court in *Santos* granted habeas relief, a decision affirmed both by the Seventh Circuit and the Supreme Court. *Santos*, 128 S.Ct. at 2023; *Santos v. United States*, 461 F.3d 886, 889–94 (7th Cir.2006); *United States v. Santos*, 342 F.Supp.2d 781, 794–99 (N.D.Ind.2004); *see also United States v. Grasso*, 381 F.3d 160, 166–69 (3d Cir.2004) (rejecting claim that "proceeds" in money-laundering statute included only profits, not gross receipts), *vacated*, 544 U.S. 945, 125 S.Ct. 1696, 161 L.Ed.2d 518 (2005). Mr. Santana cannot show prejudice because he entered guilty pleas to two offenses in exchange for the dismissal of four others, and he received the same sentence of 120 months for each count to be served concurrently. [5]

If, as in *Bousley*, there was an open question about whether Mr. Santana was factually innocent of the money-laundering charge, the Court would recommend remanding for further development of the record. [6] *See Bousley*, 523 U.S. at 623–24. Such is not the case here. Mr. Santana has admitted that his remarkably lucrative methamphetamine business enabled him to leverage laundered "proceeds" to purchase a vineyard for use in a new marijuana-growing business. By anyone's estimation—lawyer or layperson—the proceeds that wended their way through illegally funded auto businesses and banks constituted "profits." [7] Mr. Santana cannot show actual innocence that would excuse the procedural default from choosing not to appeal his conviction directly.

The Court finds Mr. Santana's § 2255 motion to be procedurally defaulted because he chose not to appeal his conviction for conspiracy to engage in money laundering and has shown neither cause and prejudice nor actual innocence that might excuse the default. Alternatively, the Court finds that his § 2255 motion fails on the merits because even according to an expansive reading of the *Santos* plurality opinion Mr. Santana has admitted to laundering the profits of one illegal business to fund another one.

CONCLUSION

***6** For the reasons set forth above, the Court recommends that Mr. Santana's § 2255 motion be DENIED. No evidentiary hearing is required as the record conclusively shows that Mr. Santana is not entitled to relief. A proposed Order of Dismissal accompanies this Report and Recommendation.

DATED this *4th* day of February, 2009.

Footnotes

1 Mr. Santana notes that the Plea Agreement refers to the money-laundering charge as Count 5, which would have been true had the original indictment been used, though in the Second Superseding Indictment Count 5 is actually the dismissed charge of Conspiracy to Structure Financial Transactions. (Dkt. 1, Addendum at 1–2; *compare* CR06–220JLR (CR) Dkt. 176, at 1 (Plea Agreement) *with* Dkt. 95 (Second Superseding Indictment), at 5–16 *and* CR Dkt. 1 (Indictment), at 3–4.) The Court takes judicial notice that there has never been any confusion about the fact that Mr. Santana pleaded guilty to conspiracy to engage in money laundering, not conspiracy to structure financial transactions. Mr. Santana repeatedly assented to the charge of conspiracy to engage in money laundering during his change-of-plea hearing. (CR Dkt. 276, at 7–12, 25.) The government apologized in its Sentencing Memorandum for the typographical error that led to Count 6 being referred to as Count 5 in the Plea Agreement. (CR Dkt. 253, at 1 n. 1.) The sentencing court properly referred to Count 6 at the sentencing hearing (CR Dkt. 277, at 21), and the judgment lists Counts 1 and 6 (CR Dkt. 257, at 1). Furthermore, Mr. Santana's habeas petition relies entirely upon an argument about the evidence necessary to prove money laundering.

2 The government concedes that *Santos* may be retroactively applied on collateral review because it sets forth a substantive rule that conceivably narrows the scope of the federal money-laundering statute. (Dkt. 8, at 14–15); *see Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) ("New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms ...."); *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (holding that decision holding that a substantive federal criminal statutes does not reach certain conduct may be applied retroactively on collateral review).

3 Justice Scalia acknowledged that because Justice Stevens' vote was necessary to the Court's judgment, the holding was limited to the "finding that 'proceeds' means 'profits' when there is no legislative history to the contrary." *Id.* at 2031. Justice Scalia noted, however, that the presence of a contrary legislative history in certain contexts would not necessarily produce a different outcome given that both the plurality and dissent rejected Justice Stevens's approach. *Id.* Justice Alito suggested that the concurrence meant that five Justices agreed that "proceeds" means "receipts" in the context of the sales of contraband and the operation of organized crime syndicates. *Id.* at 2035 n. 1. Perhaps the Northern District of California best summarized the *stare decisis* effect of *Santos:*

> The government appears to be correct that *Santos* does not have a common denominator and that the Court should view its stare decisis effect as limited to the specific result. And the government is correct that five of the Justices said that Congress intended that "proceeds" should mean "gross receipts" in drug trafficking cases. But the bottom line is that five Justices said that, but they did not vote that. The specific result of *Santos* is that five Justices voted that "proceeds" means "profits" in 18 U.S.C. § 1956(a)(1)(A)(i).

United States v. Hedlund, 2008 WL 4183958, at *6 (N.D.Cal. Sept.9, 2008); *see United States v. Brown*, 553 F.3d 768, 2008 WL 5255903, at *8–*10 (5th Cir. Dec.18, 2008); *United States v. Yusuf*, 536 F.3d 178, 185–86 (2008); *Bull v. United States*, 2008 WL 5103227, at *8 (C.D.Cal. Dec.3, 2008); *United States v. Todd*, No. CR07–395JLR, Dkt. 151 (W.D.Wash. Sept. 4, 2008) (amended order); *see generally* Marc Fernich, *Money Laundering After 'Santos': A Supreme Mess*, 240 N.Y.L.J. 4 (Oct. 17, 2008).

4 Subsection 1956(a)(1)(A)(i) is the same charge of money-laundering promotion analyzed in *Santos.* Subsection 1956(a)(1)(A)(ii) involves laundering proceeds with the intent to violate the Internal Revenue Code. Subsection 1956(h) refers to money-laundering conspiracy, while section 2 defines who is considered a "principal" for purpose of the criminal statutes.

5 Given the drug quantity, the methamphetamine conviction called for a ten-year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A); (CR Dkt. 95, at 2; CR Dkt. 254, at 1).

6 On remand the government would not only have the opportunity to present additional evidence that Mr. Santana laundered the profits of his methamphetamine business, it could also present evidence of the dismissed charges and of other sub-varieties of money laundering alleged in Count 6, e.g., that Mr. Santana laundered proceeds with an intent to avoid a transaction reporting requirement under state or federal law. 18 U.S.C. § 1956(a)(1)(B)(ii); *see* (CR Dkt. 176, at 2; CR Dkt. 95, at 11).

7 To the extent Mr. Santana asserts a claim of ineffective assistance because counsel did not raise *Santos* (Dkt. 9, at 3), given the admitted facts there is no indication that counsel's choice not to do so fell below the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).