DARBERTO GARCIA, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

04-CV-0465

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 14984

August 4, 2004, Decided

DISPOSITION: [*1] Petitioner's motion under 28 U.S.C. § 2255 DENIED.

COUNSEL: Darberto Garcia, Pro se, Bradford, PA.

Miroslav Lovric, AUSA, Office of the United States Attorney, Binghamton, NY, Attorneys for the United States.

JUDGES: Thomas J. McAvoy, Senior, U.S. District Judge.

OPINIONBY: Thomas J. McAvoy

OPINION: MEMORANDUM - DECISION and ORDER

I. INTRODUCTION

Petitioner Darberto Garcia pled guilty to a superseding indictment charging him, and others, with a conspiracy to distribute and the distribution of crack cocaine. Petitioner now moves pursuant to 28 U.S.C. § 2255 to vacate his conviction on the grounds that: (1) he was denied the effective assistance of counsel; and (2) he was deprived of his Sixth Amendment rights as interpreted in Crawford v. Washington, 158 L. Ed. 2d 177, U.S. , 124 S. Ct. 1354 (2004). In his reply papers, Petitioner also argues that his sentence is in violates the Sixth Amendment, as interpreted in **Blakely v. Washington,** 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

II. BACKGROUND

Much of the background for this case is set forth in the Second Circuit's **[*2]** Summary Order affirming the Judgment of Conviction in this matter. See United States v. Garcia, 57 Fed. Appx. 486, 2003 WL 201319 (2d Cir. Jan. 30, 2003) (table). Familiarity with this Summary Order and the prior decisions of this Court in case

number 00-CR-185 is presumed.

Briefly stated, Petitioner, and others, were indicted for conspiring to distribute and the distribution of crack cocaine. All of the co-conspirators, except for Petitioner and Diogenes Rosario, pleaded guilty. The co-conspirators were going to testify at trial against Petitioner and Rosario. Shortly before the commencement of the trial, Petitioner's counsel contacted the government seeking to enter into a plea agreement. The government refused and indicated its intention to proceed to trial. The government informed Petitioner's counsel that Petitioner would have to plead guilty to all counts in the superseding indictment or proceed to trial. Petitioner decided to plead guilty.

A plea proceeding was scheduled for January 11, 2001, five days before the scheduled trial date. During the plea proceeding, Petitioner pleaded guilty to all counts in the superseding indictment. Based on Petitioner's demeanor **[*3]** and responses to the Court's questions at the plea proceeding, this Court was, and remains, satisfied that Petitioner pleaded guilty freely, knowingly and voluntarily.

In August 2001, with the benefit of new counsel, Petitioner moved to withdraw his guilty plea, raising the same ineffective-assistance arguments that he raises in support of the instant § 2255 motion. By Decision and Order dated October 24, 2001, this Court denied Petitioner's motion. By Decision and Order dated December 27, 2001, this Court denied Petitioner's motion for reconsideration. On December 27, 2001, Petitioner was sentenced to a term of imprisonment of 360 months.

Petitioner appealed to the Second Circuit, raising many of the same issues that he presents in support of the current motion, including the ineffective-assistance claims. By Order dated January 30, 2003, the Second Circuit Court of Appeals rejected each and every one of Petitioner's arguments. The Second Circuit affirmed this Court's decisions concerning Petitioner's ineffective assistance of counsel claim and the request to withdraw the guilty plea.

Petitioner now moves pursuant to 28 U.S.C. § 2255 seeking to vacate his **[*4]** conviction. For the following reasons, the motion is DENIED.

III. DISCUSSION

a. Crawford v. Washington

Petitioner claims that he was denied the right to confront persons giving testimonial statements against him during sentencing in violation of the Sixth Amendment rule recently pronounced by the Supreme Court in Crawford. This Court finds that Crawford does not apply retroactively to cases on collateral review. See Evans v. Luebbers, 371 F.3d 438, 444 (8th Cir. 2004) ("The Crawford Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to Teague v. Lane's, [489 U.S. 288, 103 L. Ed. 2d 334 (1989)] non-retroactivity doctrine."); Wheeler v. Dretke, 2004 WL 1532178, at *1 n.1 (N.D. Tex. July 6, 2004) (same).

The rule in Crawford did not "change the definition of what constitutes a 'crime'", but,

rather, "recognized a constitutional right that typically applies to all crimes irrespective of the underlying conduct, and to all defendants irrespective of their innocence of guilt." Coleman v. United States, 329 F.3d 77, 84 (2d Cir. 2003). **[*5]** As the Supreme Court itself posed the issue before it, "the question presented is whether [the] . . . *procedure* [used by the State of Washington] complied with the Sixth Amendment's guarantee that, 'in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Crawford, 124 S. Ct. at 1357 (emphasis added); see Crawford, 124 S. Ct. at 1359 (describing the Sixth Amendment confrontation clause as a "bedrock procedural guarantee."); Crawford, 124 S. Ct. at 1370 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."). A review of the decision in Crawford confirms that that case is entirely about procedure - whether testimonial statements of a witness who does not appear at trial are admissible. Id.; see Coleman, 329 F.3d at 84. Because Crawford announced a procedural, rather than substantive, rule, it does not apply retroactively on habeas review unless it fits within one of the two narrow exceptions identified in Teague. Coleman, 329 F.3d at 84. **[*6]**

The two Teague exceptions are: (1) new rules that place an entire category of primary conduct beyond the reach of the criminal law or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense; and (2) new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding. Coleman, 329 F.3d at 88. It is evident that Crawford does not implicate the first of the two Teague exceptions. That leaves the issue of whether it is a new watershed rule of criminal procedure.

As the Second Circuit has stated:

> In order to be "watershed" under Teague's second exception, a rule must not only improve the accuracy of criminal proceedings, but also alter our understanding of the bedrock procedural elements essential to the fairness of those proceedings. In short, it must be a groundbreaking occurrence.
>
> The Supreme Court has emphasized, through words and examples, that the exception is exceedingly narrow, applying only to a small core of rules requiring the observance of those procedures that are implicit in the concept of ordered liberty. To underscore **[*7]** the rarity of "watershed" rules, the Supreme Court has repeatedly invoked the sweeping rule of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that indigent defendants have the right to court-appointed counsel in all criminal prosecutions), as a quintessential watershed rule, and has repeatedly remarked that it seems unlikely that many such components of basic due process have yet to emerge. Indeed, since 1989, beginning with the rule at issue in Teague, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule at issue retroactively on habeas

review.

Coleman, 329 F.3d at 88 (internal quotations, citations and alterations omitted). Without question, the rule announced in Crawford is significant. Crawford does not, however, "alter our understanding of the bedrock procedural elements essential to the fairness" of criminal proceedings. Sawyer v. Smith, 497 U.S. 227, 241, 111 L. Ed. 2d 193 (1990). Rather, "it merely 'clarified and extended' the scope **[*8]** of [a] well-settled principle[] of criminal procedure:" the right of the accused to be confronted with the witnesses against him. Coleman, 329 F.3d at 89.

Crawford itself recognized the well-established "bedrock procedural guarantee [of the Sixth Amendment's confrontation clause]" that applies to federal and state criminal proceedings. Crawford, 124 S. Ct. at 1359. Significantly, Crawford did not announce a fundamental rule concerning the right of confrontation. As the Crawford Court stated, "our cases have . . . remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford, 124 S. Ct. at 1369. The Crawford Court continued to state:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The **[*9]** Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 1370. It is, thus, clear that Crawford did not alter our understanding of the bedrock procedural elements essential to the fairness of criminal proceedings, but, rather, clarified the mechanism by which the reliability of testimonial statements is determined by requiring an opportunity for cross-examination before it can be admitted into evidence, regardless of any other indicia of reliability surrounding the statements. Id. at 1370. Moreover, a Crawford violation is not such an affront to the concept of ordered liberty (*i.e.,* a "structural" error) that it would require automatic reversal in most situations, see Delaware v. Van Arsdall, 475 U.S. 673, 684, 89 L. Ed. 2d 674 (1986); Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003) ("A violation of a defendant's confrontation rights does not, standing alone, require reversal of a judgment of conviction. Rather, violations of the Confrontation Clause are subject to harmless error analysis. **[*10]** "), and, thus, Crawford cannot be said to establishing a watershed rule of criminal procedure. See Coleman, 329 F.3d at 89-90. Accordingly, Crawford does not apply retroactively on collateral review and Petitioner may not invoke Crawford as a basis for challenging his sentence.

b. Ineffective Assistance of Counsel

Relying on Massaro v. United States, U.S. , 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003), Petitioner next claims that even though he raised his ineffective assistance of counsel claims before this Court and the Second Circuit on appeal, he is not barred from raising them again in a motion under 28 U.S.C. § 2255. This Court disagrees.

The precise question before the Supreme Court in Massaro was whether the failure to raise an ineffective assistance of counsel claim on direct appeal, even when there is new appellant counsel, bars the claim from being brought in a later proceeding under § 2255. The Supreme Court held that it does not. That issue is not presented here because Petitioner did raise ineffective assistance claims on direct appeal.

Although the Supreme Court stated **[*11]** that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," Massaro, 123 S. Ct. at 1694, it explicitly stated that

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. . . . In those cases, certain questions may arise in subsequent proceedings under § 2255 concerning the conclusiveness of the determinations made on the ineffective-assistance claims raised on direct appeal.

123 S. Ct. at 1696.

Moreover, it should be noted that one of the Supreme Court's preferences for permitting ineffective-assistance claims to be brought under § 2255 in the first instance is that the district court is "the forum best suited to developing the facts necessary to determining the adequacy of representation. . . . The judge, having observed the earlier [proceedings], should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether **[*12]** any deficiencies were prejudicial." Massaro, 123 S. Ct. at 1694.

In the instant matter, this Court appointed new counsel for Petitioner upon his request. This was done after Petitioner pleaded guilty, but prior to sentencing. In August 2001 (prior to sentencing), Petitioner's new counsel moved to vacate the guilty plea. In support of the motion, Petitioner raised the very same claims of ineffective assistance of counsel concerning Petitioner's prior counsel that he now raises in the instant § 2255 motion. Thus, this Court previously ruled on the very same issues raised herein. Petitioner appealed this Court's determination and explicitly raised the ineffective-assistance claim before the Second Circuit. The Second Circuit affirmed this Court's decision.

Without doubt, this Court's prior rulings and the ruling of the Second Circuit conclusively determined Petitioner's ineffective assistance claim. Petitioner has presented nothing that would alter this Court's prior ruling as affirmed by the Second

Circuit. A § 2255 petition cannot be used to "relitigate questions which were raised and considered on direct appeal." United States v. Sanin, 252 F.3d 79, 83 (2d Cir. 2001) **[*13]** (quoting Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1992)); see Finley v. United State, 2003 WL 22384791, at *4 (W.D.N.Y. Sept. 22, 2003) (same). Because Plaintiff does not present any new grounds for an ineffective assistance claim, he may not relitigate issues that were squarely presented before this Court and the Second Circuit and decided against him. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Although Petitioner claims to have received the ineffective assistance of appellate counsel, he does not present any basis therefore other than to claim that his new counsel failed to include an argument of "coercion" as a basis for moving to withdraw the guilty plea. The decision not to include "coercion" in the motion to vacate and on appeal was an objectively reasonable strategic decision. As previously discussed, based on the plea proceedings before this Court, the Court was, and remains, satisfied that Petitioner freely, knowingly, and voluntarily pleaded guilty. Thus, the chances of success for such an argument were slim to none and it was perfectly reasonable not to make such an argument.

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c. Blakely v. Washington

In his reply papers, Petitioner claims that he is entitled to relief in light of the Supreme Court's recent decision in **Blakely v. Washington,** 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). It is the conclusion of this Court that Blakely does not apply retroactively to § 2255 motions.

In Blakely, the Supreme Court held that "the 'statutory maximum' for [Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435 (2000)] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* Blakely, 124 S. Ct. at 2537 (emphasis supplied). Blakely did not announce a new rule of law, but extended the rule in Apprendi. See In re Dean, No. 04-13244, 2004 WL 1534788, at *3 (11th Cir. July 9, 2004) ("Blakely . . . is based on an extension of Apprendi); Patterson v. United States, No. 03-CV-74948-DT, 2004 WL 1615058, at *4 n.3 (E.D. Mich. July 2, 2004) ("Blakely is in fact an extension of the rule announced in Apprendi v. New Jersey"); United States v. Stoltz, No. CIV. 03-5580, 2004 WL 1619131, **[*15]** at *2 (D. Minn. July 19, 2004) ("In Blakely, the Court extended its holding in Apprendi v. New Jersey."). Because Apprendi does not apply retroactively to collateral attacks and Blakely is an extension of Apprendi, Blakely is similarly limited to prospective application. In re Dean, 2004 WL 1534788, at *3; Patterson, 2004 WL 1615058, at *4 n.3. Using similar reasoning, the Supreme Court concluded on the same day that it decided Blakely that Ring v. Arizona, 536 U.S. 584 (2002), which also extended the Apprendi rule (to facts increasing a defendant's sentence from life imprisonment to death), is not retroactive to cases on collateral review. Schriro v. Summerlin, 124 S.

Ct. 2519, 2526 (2004).

As with Crawford (see discussion *supra*), Blakely implicates a procedural rule of law. Indeed, the Supreme Court held in Blakely that "the State [of Washington]'s sentencing *procedure* did not comply with the Sixth Amendment" and required a different procedure under which "the prosecutor [must] prove to a jury all facts legally essential to the punishment." Blakely, 124 S. Ct. at 2538, 2543 **[*16]** (emphasis added). In addition, the Blakely rule cannot be regarded as a substantive rule because it neither "narrow[s] the scope of a criminal statute by interpreting its terms" nor is a "constitutional determination[] that place[s] particular conduct or persons covered by the statute beyond the State's power to punish." Shriro, 124 S. Ct. at 2522. It does, however, "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise," and is thus more properly categorized as a procedural rule. Id. at 2523.

As previously discussed, a procedural rule does not apply retroactively on habeas review unless it fits within one of the two narrow Teague exceptions. Coleman, 329 F.3d at 84. Clearly, the Blakely rule does not fall within the first exception because it neither "place[s] an entire category of primary conduct beyond the reach of the criminal law" nor "prohibit[s] imposition of a certain type of punishment for a class of defendants because of their status or offense." Id. at 88. Thus, it must be determined whether it is a new watershed rule **[*17]** of criminal procedure.

In Shriro v. Summerlin, the Supreme Court held that Ring v. Arizona did not announce a watershed rule because it is not clear that judicial fact finding "so seriously diminishe[s] accuracy as to produce an impermissibly large risk of injustice." Shriro, 124 S. Ct. at 2535. Because Ring did not announce a watershed rule and is an extension of Apprendi, Apprendi similarly did not announce a watershed rule. Stoltz, 2004 WL 1619131, at *3; see also Coleman, 329 F.3d at 89 ("Apprendi did not announce a watershed rule."). It follows, then, that Blakely, another extension of Apprendi, is not a watershed rule. Id.

Blakely also does not "alter our understanding of the bedrock procedural elements essential to the fairness" of criminal proceedings. Sawyer, 497 U.S. at 241. Rather, it merely "clarified and extended" the Sixth Amendment right to trial by jury. Coleman, 329 F.3d at 89. Indeed, the Blakely Court stated that "our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible **[*18]** content to the right of jury trial." Blakely, 124 S. Ct. at 2538. Blakely extended the accused's right to a jury trial by requiring that a jury determine all facts upon which the sentence is predicated. Moreover, a Blakely violation does not offend the concept of ordered liberty such that it would require automatic reversal in most situations. The Supreme Court has stated that "the values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." Shriro, 159 L. Ed. 2d 442, 124 S. Ct. 2525-26 (quoting DeStefano v. Woods, 392 U.S. 631, 634 (1968)). Thus, Blakely cannot be said to establish a watershed rule of criminal procedure and it does not apply retroactively to cases on collateral review.

IV. CONCLUSION

For the foregoing reasons, Petitioner's motion under 28 U.S.C. § 2255 is DENIED IN ITS ENTIRETY. The Clerk of the Court shall close the file in this matter.

IT IS SO ORDERED.

Dated: August 4, 2004

Thomas J. McAvoy

Senior, U.S. District **[*19]** Judge