

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD BRISCO,

Defendant.

ORDER

05-C-0139-C
02-CR-0027-C

Defendant Bernard Brisco has filed a timely motion pursuant to Fed. R. Civ. P. 59(e) to alter or amend the judgment entered in this case on May 9, 2005. The motion will be denied with one exception.

Only two of the many claims in defendant's § 2255 motion survived the initial review. The two were defendant's claims that his attorneys gave him constitutionally inadequate advice about a potential federal sentence and failed to investigate his prior drug felony convictions for constitutional errors. I stayed a final decision on defendant's motion to give him an opportunity to file an affidavit setting forth with particularity the facts supporting these two claims. Defendant timely filed his supporting materials as to the two remaining claims but failed to state with particularity the facts necessary to support his claim that both of his court-appointed attorneys gave him mistaken information about the

potential penalty he faced. Not only did defendant omit these facts but he failed to allege that the government had ever offered him a plea agreement. Therefore, I denied his motion with respect to his claims that his attorneys gave him constitutionally inadequate advice about pleading guilty. I denied the motion with respect to his second claim that his attorney failed to investigate his prior felony drug convictions after concluding that this claim was not properly raised in a § 2255 motion. In order to show that he was prejudiced by his attorneys' failure to investigate the validity of his prior state court convictions, defendant would have to show that the convictions were invalid in fact. As I explained to him in the order of May 9, 2005, if he succeeds in overturning any of his prior convictions, he may file a new § 2255 motion. I am not persuaded that it was error to dismiss his § 2255 motion as to these two claims.

In the May 9 order, I held that it was immaterial whether the government had proved that the cocaine base attributable to defendant was crack cocaine because the jury found that defendant was responsible for 5 kilograms of powder cocaine and this amount was sufficient to justify the life sentence imposed on defendant on the conspiracy charge in the indictment. Defendant does not dispute this holding but does dispute whether he should have been sentenced as he was on the non-conspiracy counts of the indictment in the absence of a jury finding that the drug involved was crack cocaine and not simple cocaine base.

Although it is unlikely to make any practical difference in the amount of time defendant will spend in prison, given his life sentence on the conspiracy charge, defendant

may be entitled to a reduction in his sentence on counts 2 and 4-7. I will direct the government to respond on this point.

ORDER

IT IS ORDERED that the judgment entered on May 9, 2005 is VACATED. Defendant's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) is DENIED except as to his claim that he was sentenced improperly on counts 2 and 4-7. The government may have until June 17, 2005, in which to respond to this issue. Defendant may have until July 1, 2005, in which to file a reply.

Entered this 2nd day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge