IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

97-CR-0047-C-02

v.

ELIGIO BACALLAO,

Defendant.

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Defendant Eligio Bacallao has filed a motion pursuant to 28 U.S.C. § 2255, in which he challenges the effectiveness of his counsel at the time of his resentencing and on appeal of the resentencing and contends that the government perpetrated a fraud upon the court when it utilized the Federal Rules of Evidence to object to certain documents defendant wished to introduce. Accompanying the motion is a motion to stay all proceedings in this court while defendant attacks the validity of two state court convictions that were relied on in this court to determine his criminal history category.

Defendant was charged in this court with selling and distributing narcotics in an indictment filed on June 26, 1997. On October 17, 1997, a superseding indictment was filed,

adding two charges; on November 10, 1997, the government filed a notice of its intention to seek an enhanced sentence under 21 U.S.C. § 841. On November 17, defendant entered a guilty plea to one count of the indictment. He was sentenced to a term of 168 months, but this sentence was vacated on appeal and the matter remanded for resentencing. He was resentenced on October 8, 1998; the judgment and commitment order was entered on October 15, 1998. On November 4, 1998, defendant filed a notice of appeal, which he followed up on November 25, 1998, with a motion for an extension of time in which to appeal. In an order entered on December 15, 1998, I denied the motion because defendant's counsel had shown no excusable neglect. Defendant then filed a motion pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence on the ground that he had been denied the right to take an appeal. I granted the motion; vacated the sentence and re-entered it. Defendant proceeded with his appeal, but was unsuccessful. On July 7, 1999, the court of appeals affirmed the new sentence.

Defendant filed his present § 2255 motion to vacate his sentence on June 12, 2000. Although the motion is timely, the fact that it is the second one defendant has filed since his resentencing raises the question whether it must be characterized as a second, successive petition that cannot be filed without advance certification by the court of appeals. See 28 U.S.C. § 2255. Although the answer is not crystal clear, I am persuaded that defendant's motion is not a second petition in relation to the sentence he is attacking. Defendant filed his

first § 2255 motion after he was resentenced because of his counsel's failure to file a timely notice of appeal. He has never challenged his present sentence even though it is the same one, based on the same determinations, as the first one imposed on resentencing. Technically at least, it is different because it was imposed at a different time. Beyond that is the fact that the first § 2255 motion filed after resentencing was filed only to preserve defendant's right to appeal and not to bring any collateral challenges to the sentence or to the sentencing hearing. Thus, this is not a situation in which a defendant is seeking two opportunities to bring a collateral challenge to the same events. Rather, it is closer to the situation in which a defendant has filed a collateral attack that is denied on procedural grounds. See Slack v. McDaniel, 120 S. Ct. 1595 (2000).

In addition to his motion to vacate his sentence, defendant has filed a motion to stay any proceedings under the § 2255 motion until he has had an opportunity to attack two of his state court convictions that were used to calculate his criminal history category for sentencing in this court. Defendant cannot apply for a writ of habeas corpus in this court to challenge those state court convictions. See Ryan v. United States, 2000 WL 715005 (7th Cir. 2000) (defendant cannot bring federal challenge to state conviction, even after sentencing, if he is not "in custody" on state conviction and has not taken same claims to state courts so as to meet exhaustion requirement of § 2254). However, he may be able to reopen his federal sentence

if he persuades the state courts to vacate his 1995 convictions for battery and felony bail jumping. In Ryan, the court of appeals left open the same question the Supreme Court declined to address in Custis v. United States, 511 U.S. 485, 487 (1994), which is whether a defendant can bring a collateral challenge to his federal sentence if he succeeds in having his state convictions vacated in state court after his federal sentence has been imposed. As the court of appeals noted, several circuits have answered yes to that question. See, e.g., Turner v. United States, 183 F.3d 474 (6th Cir. 1999); United States v. Pettiford, 111 F.3d 199 (1st Cir. 1996); United States v. Bacon, 94 F.3d 158, 162 n.3 (4th Cir. 1996).

At this point, it is only conjecture whether defendant can obtain the vacation of both the state sentences he is challenging. (Unless he wins on both challenges, the issue is moot because his criminal history score would keep him in the same category he was in at the time of sentencing.) Although it is statistically improbable that he can succeed, I cannot say that he has no chance at all. Wisconsin law provides a narrow remedy by writ of coram nobis that can be used by a person such as defendant who is no longer in state custody if the person can show "'the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment.'" State v. Heimerman, 205 Wis. 2d 383, 556 N.W.2d 756, 759 (Ct. App. 1996) (quoting Jessen v. State, 95 Wis. 2d 207, 214, 290 N.W.2d 685, 688 (1980)). The applicant

for the writ must be challenging a factual error in his state court proceeding and must establish both that the factual error was crucial to the ultimate judgment and that the finding based on the fact alleged to be in error was not "previously visited or 'passed on' by the trial court." See id. at 384, 556 N.W.2d at 760.

In attempting to reopen his state court proceedings, defendant is challenging the effectiveness of his counsel during those proceedings. Heimerman indicates that such a challenge can be raised on a writ of error coram nobis. In Heimerman, the court of appeals held that the challenge would not succeed, not because it was inappropriate for consideration but because Heimerman had raised the same issue when he was in custody on a motion to withdraw his plea of guilty. Thus, the issue was not one that the trial court had never "visited or passed on." See id. at 388, 556 N.W.2d 760. It does not appear that defendant has ever raised his assertion of ineffective assistance of counsel in any post-conviction proceeding and, so far as I can determine, the Wisconsin courts do not apply the doctrine of procedural default to motions for writs of habeas corpus. Theoretically then, the state court may decide to exercise its discretion to hear defendant's challenges to his state court convictions and may even decide that he did not receive constitutionally adequate assistance. Because the amendments to 28 U.S.C. § 2255 do not make it clear that defendant would be foreclosed from bringing a new motion for post-conviction relief in this court in the event he obtains relief in the state courts,

I will grant his motion for a stay and treat this motion for § 2255 relief as pending.

I turn finally to the merits of defendant's challenge to the effectiveness of his counsel at defendant's resentencing and on appeal and to the exclusion of certain evidence at the resentencing. There is no substance to any of these challenges. Defendant's ineffective assistance contention rests on his allegations that counsel neither informed the sentencing court that the Federal Rules of Evidence did not apply in sentencing hearings nor argued this issue on appeal. His objection to the rejection of his evidence is part of this same claim. In his opinion, the government perpetrated a fraud upon the court when it objected to the admissibility of certain documents, when as a matter of routine it ignores the rules of evidence itself at sentencing hearings. All of defendant's contentions derive from his attempt to introduce certain police reports summarizing statements made in 1989 by a confidential informant to a county law enforcement agency about Gale Saunders's involvement in drug dealing. Saunders was the government's primary witness at both of defendant's sentencings in early and late 1998; defendant had hoped to use the informant's statements to attack Saunders's credibility and show that it would be error to place any weight on his testimony about the amount of drugs defendant had been dealing.

Defendant is simply wrong about the admissibility of the Saunders evidence and about his counsel's obligation to object to the ruling denying its introduction at his resentencing. The

statements were clearly inadmissible, even under the relaxed rules of evidence that prevail at sentencing hearings. At best, they were thirdhand hearsay made under unknown circumstances by someone of unknown credibility. In addition, they would have added nothing to defendant's case. Saunders's lack of credibility was evident even without the informant's statements. In resentencing defendant, I advised him as I had at the first sentencing that I did not find Saunders totally honest but that I believed his testimony to the extent it was corroborated by other testimony given at the first sentencing hearing, by the seizure of cocaine in Saunders's warehouse and by the fact that defendant had tossed 75 grams of cocaine out the window of his car just before the car was stopped by the police. My decision about the use of Saunders's statements and about the amount of cocaine attributable to defendant would have been the same even if defendant had been allowed to introduce the statements of the informant to the effect that Saunders had lied about having his drug involvement in the past.

If it were not for defendant's request for a stay of proceedings to allow him to attack his state court convictions, I would deny his motion in its entirety. Because of this request, I will stay entry of judgment on the motion pending a final decision in state court on defendant's efforts to vacate his state sentences for battery and bail jumping. Because it is so unlikely that those efforts will be successful and because it may be years before defendant obtains a definitive ruling from the state courts, I will close this case administratively in the interim. In the event

that defendant obtains favorable rulings on both of the state court convictions he is attacking, this matter will be reopened and treated as if it had never been closed administratively, that is, it will be treated as the original motion for § 2255 relief rather than as a second and successive petition and the filing date will remain the date of filing of this motion.

ORDER

IT IS ORDERED that the motion for a stay filed by defendant Eligio Bacallao is GRANTED and this case is closed administratively pending reopening automatically upon notification by defendant that he has obtained the vacation of his 1995 state court convictions for battery and bail jumping in Dane County cases Nos. 93CF2094 and 94CF97.

Entered this 21st day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge