UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States of America	:	
	:	
v.	:	**Docket No. 3:95cr81(JBA)**
	:	**3:99cv2272(JBA)**
Heriberto Baldayaque	:	
	:	

Ruling on § 2255 Motion [Doc. #508 & #523][1]

Heriberto Baldayaque petitions the Court for a writ of habeas corpus, arguing that his guilty plea and conviction should be vacated because (1) he received ineffective assistance of counsel from his court appointed attorney; (2) his plea was not knowing and voluntary; and (3) the findings as to offense conduct were made in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court appointed counsel, held an evidentiary hearing, and in a ruling issued on September 6, 2002, concluded that the petition was time-barred as a matter of then-current Second Circuit law. On appeal, the Second Circuit found this conclusion too narrow a construction of its precedent, and held that "an attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year

[1]Doc. #523 is a supplement to Baldayaque's pro se motion, prepared by appointed counsel, that amplifies certain arguments made in Baldayaque's original petition.

limitations period" for filing a § 2255 petition. Baldayaque v. United States, 338 F.3d 145, 152-53 (2d Cir. 2003). The Second Circuit vacated and remanded the case for further consideration. While this Court now concludes that equitable tolling applies on the facts of this case, the petition is DENIED for the reasons that follow.

I. Background

In May of 1995, petitioner and seven other individuals were indicted by the grand jury and charged with conspiracy to possess with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 846. On November 8, 1995, petitioner Baldayaque entered a plea of guilty, pursuant to a plea agreement which included a Stipulation of Offense Conduct that "at least 10 kilograms but less than 30 kilograms of heroin is the quantity commensurate with the criminal activity of the defendant." Following several days of sentencing hearings, Baldayaque was sentenced on February 7, 1996 to 168 months in prison. Baldayaque received a three-level reduction for acceptance of responsibility and, based on the evidence presented at the sentencing hearing, a two-level role enhancement, resulting in an offense level of 35. The sentence was calculated based on the attribution to Mr. Baldayaque of 10 to 30 kilograms of heroin, and was imposed at the bottom of his guidelines range. His trial attorney filed an Anders brief in the Court of Appeals, seeking

leave to withdraw his appearance on the basis that there were no non-frivolous issues to be pursued on appeal, and the Government moved for and was granted summary affirmance. The appeal was dismissed on February 14, 1997. See [Doc. # 482].

Petitioner then obtained new counsel and on November 12, 1997 moved for modification of his sentence under Rule 35 to allow his immediate deportation to the Dominican Republic. See [Doc. # 485]. On June 9, 1998, this Court denied the motion, concluding that the Attorney General had the "sole and unfettered discretion" to deport criminal aliens prior to the completion of their sentences, and that the Court lacked jurisdiction to order the relief sought by the defendant. See [Doc. # 490] at 2. The Court also noted that Baldayaque sought, in essence, a sentencing departure, and that such a request was both untimely under Fed. R. Crim. P. 35(c) and not an appropriate basis for a departure under United States v. Restrepo, 999 F.2d 640, 646 (2d Cir. 1993). On February 11, 2000, Baldayaque filed a pro se motion to correct his sentence pursuant to Fed. R. Crim. P. 35, alleging many of the grounds subsequently raised in his habeas petition. The Court denied the motion on August 23, 2000, and forwarded to Baldayaque the forms for filing a § 2255 motion. On November 28, 2000, petitioner filed a petition for habeas corpus pursuant to 28 U.S.C. § 2255.

II. Standard

Section 2255 provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. "Because requests for habeas corpus relief are in tension with society's strong interest in the finality of criminal convictions, the courts have established rules that make it more difficult for a defendant to upset a conviction by collateral, as opposed to direct, attack." Ciak v. United States, 59 F.3d 296, 301 (2d Cir. 1995), abrogated on other grounds by Mickens v. Taylor, 535 U.S. 162 (2002). "Generally, relief is available under section 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Hardy v. United States, 878 F.2d 94, 97 (2d Cir. 1989)(quotations omitted).

III. Discussion

A. Equitable Tolling

This Court denied petitioner's § 2255 petition as untimely in a ruling issued on September 6, 2002. See United States v. Baldayaque, No. 3:95CR81 (JBA), 3:99CV2272 (JBA), 2002 WL

31094962 (D. Conn. Sept. 06, 2002). Although this Court found that Baldayaque and his family went to extraordinary lengths to file a timely § 2255 petition, and that the attorney they had retained for that purpose committed gross negligence, preventing Baldayaque from filing a timely motion, the Court concluded that controlling Second Circuit precedent prohibited equitable tolling in cases involving attorney malfeasance. See id. at *4-5 (citing Smaldone v. Senkowski, 273 F.3d 133 (2nd Cir. 2001)). On appeal, the Second Circuit clarified its earlier precedent, concluded that attorney malfeasance if sufficiently egregious may constitute an exceptional circumstance warranting equitable tolling, and found that on the facts of this case, the actions of Baldayaque's attorney, "were far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary.'". See Baldayaque v. United States, 338 F.3d 145, 152-53 (2d Cir. 2003). The Second Circuit remanded to this Court to consider whether Baldayaque "acted as diligently as reasonably could have been expected *under the circumstances*." Id. at 153 (emphasis in original). The circumstances here include (1) "Baldayaque's efforts at the earliest possible time to secure counsel for the purpose of filing a habeas petition"; (2) "Baldayaque's lack of funds to consult another lawyer"; (3) his new attorney's "assurances to Rivera and Marquez that everything had been done that could be

done [Christina Rivera is Baladayaque's wife, and Brixeida Marquez is a prison chaplain who helped Rivera obtain the new counsel] "; (4) the new attorney's "failure to communicate directly with Baldayaque at any time"; (5) "Baldayaque's lack of education and inability to speak or write English"; and (6) "Baldayaque's incarceration and attendant lack of direct access to other forms of legal assistance," id. at 153, and further include, as this Court previously found, the new attorney's erroneous advice in early 1997 that the time limit for filing such motion had passed. These circumstances provide ample grounds for this Court to conclude that Baldayaque acted as diligently as reasonably could be expected. Because Baladayaque acted reasonably diligently and filed an untimely § 2255 petition due to extraordinary attorney negligence, the limitations period here is properly tolled. Accordingly, the Court turns to the merits of Baldayaque's petition.

B. Merits

Baldayaque's pro se petition raised three principal issues: (1) that his attorney provided ineffective assistance by (a) failing to seek a downward departure based on Baldayaque's willingness to concede deportability, (b) failing to argue for safety-valve relief under the Sentencing Guidelines, and (c) stipulating to an excessive amount of heroin attributable to Baldayaque and failing to investigate the amount; (2) that his

guilty plea was involuntary or unknowing; and (3) that the finding that Baldayaque sold between 10 and 30 kilograms of heroin, which enhanced his sentence, was not charged in his indictment or agreed to by Baldayaque at his plea colloquy, and therefore was made in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). After counsel was appointed for Baldayaque, only the merits of the deportation-related basis for the § 2255 petition were pressed. Baldayaque, however, did not withdraw any of his earlier arguments.

1. Ineffective Assistance of Counsel

Baldayaque's ineffective assistance of counsel claims are evaluated under the familiar Strickland v. Washington, 466 U.S. 668 (1984) standard. "To establish a constitutional claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below the objective standard of reasonableness, and (2) that but for the deficiency, the likely outcome of the proceeding would have been different." United States v. Arena, 180 F.3d 380, 396 (2d Cir. 1999) (citing Strickland, 466 U.S. at 687-96). Thus, for example, to establish that a guilty plea was involuntary or unknowing due to ineffective assistance of counsel, petitioner must establish that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

a. Failure to Seek Downward Departure for Conceding Deportability

Baldayaque argues that his attorney's failure to seek a downward departure based on his willingness to consent to deportation constitutes ineffective assistance of counsel. Because he has not demonstrated that his counsel fell below an objective standard of reasonableness in failing to seek such a departure, Baldayaque's argument lacks merit.

At the time of Baldayaque's sentencing, the law in this circuit was settled that deportability was not itself a proper grounds for a sentencing departure. See United States v. Restrepo, 999 F.2d 640, 646-47 (2d Cir. 1993). In Restrepo, the Second Circuit found no basis to conclude that deportability was a factor not adequately taken into consideration by the Sentencing Commission, noting "it is difficult to believe that the Commission was not conscious that a large number of defendants sentenced in the federal courts are aliens. For example, in 1991, approximately 23 percent of the defendants sentenced under the Guidelines were aliens." Restrepo, 999 F.2d at 647 (citing United States Sentencing Commission, 1991 Annual report 50)).

As the Second Circuit later clarified, a limited exception exists where a defendant consents to deportation despite having a

colorable defense to deportation. See United States v. Galvez-Falconi, 174 F.3d 255, 260 (2d Cir. 1999) ("[A] defendant seeking a departure under § 5K2.0 for consenting to deportation must present a colorable, nonfrivolous defense to deportation, such that the act of consenting to deportation carries with it unusual assistance to the administration of justice. In the absence of such a showing, the act of consenting to deportation, alone, would not constitute a 'circumstance that distinguishes a case as sufficiently atypical to warrant' a downward departure."). Where such unusual assistance is found, a district court has the authority to depart regardless of whether the Government supports the departure. See id. Baldayaque has not presented any basis for finding that he had a colorable defense to deportation. His statement that he was married to an American citizen does not provide this Court with any apparent grounds for finding such a defense, given his undocumented status in the United States and his conviction under 21 U.S.C. § 846.[2]

Baldayaque instead argues that a Justice Department policy in effect at the time of his sentencing permitted United States Attorney's Offices to agree to recommend downward departures

[2]Baldayaque's pro se memorandum notes that in December 2000, years after his sentencing, Congress amended the Immigration and Nationality Act in § 245(i) to ease the adjustment of status of aliens married to U.S. Citizens. Baldayaque does not describe how, in light of his conviction, this statutory provision would provide a defense to his deportation, or why this provision should now be taken into account when it had not yet been passed at the time of his sentencing.

whenever any non-citizen defendants agreed to deportation and waived procedural rights, thereby streamlining the administrative process. Despite this policy, and the fact that such departures had been granted in this District, Baldayaque's trial attorney did not inform him of this departure, did not have him sign a stipulation to deportation, and did not raise the issue with the Court. Baldayaque, however, has not provided any basis for finding that the U.S. Attorney's office in this District had a blanket policy to support such downward departures in every case involving a deportable alien. While there is support that the U.S. Attorney's office in this District supported downward departures for consent to deportation in several cases, it is not clear whether the decisions were part of a overarching policy, or were based on particularized considerations.

In United States v. Prince, 110 F.3d 921 (2d Cir.), cert. denied, 522 U.S. 872 (1997), the Second Circuit considered a claim that a defendant's attorney had provided ineffective assistance by failing to discuss with him the possibility of agreeing to voluntary deportation in exchange for a downward departure. Six months prior to Prince's sentencing, the Attorney General's memorandum recommending that federal prosecutors agree to such a downward departure went into effect. The Second Circuit rejected Prince's ineffective assistance claim, stating:

> Prince has not, however, provided this Court with any evidence to show that such a policy was implemented in the

> Eastern District of New York at the time of his sentencing. Nor have we found any cases in this Circuit that address this issue. Under these circumstances, counsel's failure to raise the issue of a downward departure based on automatic deportation does not amount to a constitutional error. Moreover, there is no reason to believe that, had Prince been willing to stipulate to deportation, the district court would have departed further downward on that cases.

Prince, 110 F.3d at 926.

Here, as in Prince, counsel's failure to raise consent to deportation as grounds for a downward departure cannot be said to be constitutional error, given the lack of evidence of a district-wide policy implementing agreements to depart, or of the U.S. Attorney's Office's willingness to recommend a departure in this case, and the absence of authority at the time of sentencing supporting such departures in the exercise of the Court's discretion.

Baladayaque cites United States v. Zapata, 135 F.3d 844 (2d Cir. 1998), as support for the proposition that at the time of his sentencing, the Court could have granted a downward departure even without the Government's support and even if he had no colorable defense to deportation. In Zapata, however, the Second Circuit declined to decide when consent to deportation may form the basis for a downward departure under U.S.S.G. § 5K2.0. It simply noted that the circuit courts were split, that "several courts in this circuit have awarded the downward departure when recommended by the prosecution" and that "[a]t least one court has downwardly departed over the government's objection." Id. at

847-848. In light of the Second Circuit's previous limitations on the use of deportability as a basis for a downward departure, see, e.g., Restrepo, 999 F.2d at 646-47, there is no basis to conclude that failure to seek such a departure was error.[3]

b. Failure to Seek Safety-Valve

Baldayaque's contention that his attorney provided ineffective assistance by failing to argue for safety-valve relief is also without merit. Baldayaque was ineligible for this two-level reduction as a result of the Court's finding that he was a manager or a supervisor. See 18 U.S.C. § 3553(f)(4). Faced with this unambiguous statement of law, Baldayaque "asks this Court to withdraw its manager or supervisor finding to permit petitioner to qualify" for the safety valve. As the transcript demonstrates, however, this was the sole contested issue at sentencing, and the Court gave the issue "very considerable attention and thought" before imposing the enhancement. Transcript of Sentencing Hearing, Feb. 7, 1996 [Doc. # 395] at 31-32. Petitioner has provided no basis for

[3]Petitioner's reliance on United States v. Irurita, 172 F.3d 39, 1999 WL 66145 (2d Cir. 1999) (unpublished decision), is also unavailing. There, the Second Circuit stated that "we would be inclined to agree" with the argument that counsel's conduct was especially egregious because counsel had not requested a departure based on consent to deportation despite the fact that the pre-sentence report mentioned such a potential departure, the District Court raised the issue with counsel, and the District Court chastised counsel for failing to pursue the issue. None of these factors are present in this case.

reversing this conclusion.[4]

c. Stipulation of Offense Conduct

Petitioner argues that he did not agree to the amount of heroin (10 to 30 kilograms) attributable to him under his stipulation of offense conduct included as part of his plea agreement with the Government and that his attorney was deficient in failing to investigate the amount of heroin. Baldayaque now argues that during the period in which he was selling, "the total quantity that passed through him which is relevant to his conduct is less than 1000 grams of drugs." Pet. Mem. at 3. At the time of his guilty plea, however, he stipulated that "at least 10 kilograms but less than 30 kilograms of heroin is the quantity commensurate with [his] criminal activity. . . ." Plea Agreement Att. A, ¶ 6. Baldayaque maintains that his appointed trial counsel did not conduct "any meaningful investigation of the amount of drugs sold by petitioner," and that had he done so, his attorney would not have allowed him to "plead guilty to a conduct that far outweigh (sic) what he actually did." Pet. Mem. at 10. Absent the stipulation regarding the amount of heroin, Baldayaque contends that he would have plead guilty at guideline level 30 or

[4]The briefing on Baldayaque's habeas petition was completed prior to Blakely v. Washington, 124 S.Ct. 2531 (2004). The Second Circuit has directed that Blakely does not apply to the Federal Sentencing Guidelines until the Supreme Court rules otherwise, see United States v. Mincey, - - F.3d - -, 2004 WL 1794717 (2d Cir. Aug. 12, 2004).

32, and thus been subject to a lower sentencing range.

The drug guideline for determining the base offense level under U.S.S.G. § 2D1.1(c), as is true for the Guidelines generally, "is applied not merely by reference to the offense of conviction, but by including all of the defendant's 'relevant conduct.'" § 3 of the Commentary to § 2D1.1. Because the drug quantity table in § 2D1.1(c) contains several base offense levels, § 1B1.2(a)(2) informs the selection of the base level. See United States v. Schaper, 903 F.2d 890, 891 (2d Cir. 1990). Relevant conduct, for purposes of the drug quantity tables, therefore includes "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction . . . ." § 1B1.3(a)(2). The question, therefore, is whether the Government proved by a preponderance of the evidence that more than 10 kilograms of heroin were part of the 'same course of conduct or common scheme or plan' as the offense to which Baldayaque plead guilty: conspiracy to possess with intent to distribute and to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 841(a)(1).

At the sentencing hearing this Court concluded that Badlayaque negotiated with his New York source "to purchase and have delivered heroin to New Haven in an amount that the Court finds certainly justifies the plea agreement that the Government and the defendant had with respect to the quantity of heroin."

Transcript of Sentencing Hearing, Feb. 7, 1996 [Doc. # 395] at 33. According to the statement Baldayaque gave to Agent Wardrop after his arrest, he would purchase 125 grams of heroin from an individual named Lufredo in New York, and that he would pay for this heroin at Lufredo's next delivery, which was generally three or four days later. Gov. Ex. 1; see also Transcript of Sentencing Hearing, Jan. 26, 1996 [Doc. # 394] at 34 (Baldayaque testimony at sentencing hearing). By Baldayaque's own admission to Wardrop and at the sentencing hearing, therefore, he was purchasing approximately one kilogram of heroin a month. At sentencing, Baldayaque contended that he had sold heroin for "an average of nine months," but he also testified that he started selling drugs nine months after he arrived from the Dominican Republic, which was more than two years before his arrest. Id. at 44. Baldayaque's co-defendant Frank Traynham gave a statement that beginning in November of 1993 he purchased one to three "bundles" of heroin from Baldayque two to three times daily. Gov. Ex. 2. At the sentencing hearing, Baldayaque also testified that he supplied other individuals with heroin, such as Jose Ortiz, and Agent Wardrop testified that Baldayaque had informed him that he was dealing in "kilo quantities of heroin monthly." Tr. of Sentencing Hearing, Jan. 26, 1996 [Doc. # 394] at 103. Even accepting Mr. Baldayaque's limitation on the time period of his involvement, the amounts attributable to him approach ten

kilograms, and the testimony of Wardrop and Traynham, as well as Mr. Baldayaque's own inconsistencies, demonstrate that in all likelihood, Baldayaque had been dealing in such quantities since November of 1993. Id. at 99; Gov. Ex. 2. This record amply supports the amount of heroin included in the Stipulation of Offense Conduct and the Sentencing Guideline at which Baldayaque was sentenced.

The Court therefore does not credit petitioner's post-plea assertion that less than 1,000 grams was the amount properly attributable to him. Even assuming that petitioner's trial attorney was deficient in failing to further investigate the amounts of heroin properly attributable to petitioner, the petitioner has failed to show any prejudice.

2. Voluntariness and Understanding of Guilty Plea

Baldayaque's ineffectiveness assistance claims are intertwined with his Rule 11 challenge to his guilty plea. "Where the invalidity of a plea of guilty is asserted in a § 2255 proceeding, the court's duty is to examine the record of the plea proceedings to determine if the judge who accepted the plea of guilty complied with Rule 11, i.e. whether that record demonstrates that the defendant's plea was made voluntarily with an understanding of the nature of the charge and that there was a factual basis for the plea." Seiller v. United States, 544 F.2d 554, 567 (2d Cir. 1975). Rule 11 requires the district court to

(1) determine that defendant understands the nature of the charge to which a plea is offered; (2) ensure that the "plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement);" and (3) "determine that there is a factual basis for the plea." Fed. R. Crim. P. 11 (b). "A district court is not required to follow any particular formula in determining that defendant understands the nature of the charge to which he is pleading guilty. The court may describ[e] the elements of the offense in the court's own words or may provide that information by reading the indictment to the defendant where the pertinent count spells out the elements of the offense and the circumstances indicate that this will be sufficient. If defendant's recitation of his own conduct insufficiently supports the relevant charge, then Rule 11(c)(1) nonetheless is satisfied where the charging instrument plainly describes the offense and defendant acknowledges that he read, understood, and discussed with his attorney that legal document." U.S. v. Andrades, 169 F.3d 131, 135 (2d Cir. 1999) (citations and internal quotation marks omitted). As to the factual basis for the plea, the court must "assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty. The court may rely on defendant's own admissions, information from the government, or other information appropriate to the specific

case." Id. at 136 (citations and internal quotation marks omitted).

Baldayaque contends that his trial counsel advised him that the prosecutor had promised a sentence of nine years if he pleaded guilty. According to Baldayaque, the statements to the contrary in the plea agreement and at the plea allocution (that he was relying on no other promises, that he understood the maximum sentence he was subject to, and that he understood the Court was not bound by any agreements with the government) were based on his inability to speak English, his reliance of his counsel's erroneous legal advice, and his misunderstanding of the proceedings. However, an interpreter was present and translated for Mr. Baldayaque during the plea colloquy, and he stated under oath that he had had no difficulty communicating with his attorney through an interpreter. Transcript of Plea Colloquy, Nov. 8, 1995 [Doc. # 452] at 4. The Court therefore has no basis for crediting Baldayaque's assertion that his inability to speak or understand English rendered his plea involuntary.

Although Baldayaque's counsel waived the reading of the indictment at his plea colloquy, id. at 20, the Court asked the Assistant U.S. Attorney to explain the elements of the offense of conspiracy and set forth the facts that the government would offer as proof beyond a reasonable doubt of Baldayaque's guilt of participation in that conspiracy. Id. The Court has examined

the record in this case, and finds no basis for concluding that Baldayaque was not aware of what he was pleading to and the consequences of that plea. Baldayaque admitted that he bought heroin from one source, and sold that heroin to someone else. Id. at 24-25. The Assistant U.S. Attorney explained the elements of conspiracy law at the hearing, albeit with less than crystalline clarity, see id. at 21, and then outlined the government's proof as to Baladayaque's participation in the conspiracy: that it had videotapes of heroin deliveries made by Mr. Baldayaque's wife and son to Frank Traynham, a street dealer, who in turn sold to undercover police officers, that Baldayaque bought heroin from a source in New York and provided heroin to co-defendant Ortiz for distribution, and that Baldayaque had given a statement at his arrest that he had been involved in the buying and selling of heroin for a period of time. Id. at 22. The Court concludes that Baldayaque made a knowing and rational choice to plead guilty, and that the factual basis for the plea existed. The Court notes his representations at the plea hearing that no additional promises had been made to him, and that he had discussed the indictment and charges with his attorney. Id. at 7, 18. Baldayaque's second thoughts now about the deal he struck cannot change these facts, nor do they render his counsel's assistance ineffective.

3. Apprendi Issue

Petitioner's final argument regarding the amount of drugs is based on Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and is without merit. First, as Apprendi was issued after Baldayaque's conviction become final, he is procedurally barred from raising Apprendi arguments under the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989)(plurality opinion) and progeny. Under Teague, a "new rule" of criminal procedure announced by the Supreme Court applies retroactively to convictions already final upon announcement only in very limited circumstances: where they (1) "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"; or (2) create "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding." United States v. Mandanici, 205 F.3d 519, 525 (2d Cir. 2000) (quoting Sawyer v. Smith, 497 U.S. 227, 241-42 (1990)). The Second Circuit has held Apprendi does not implicate either exception, and that therefore Apprendi does not apply retroactively to initial § 2255 motions. See Coleman v. U.S., 329 F.3d 77, 87-89 (2d Cir. 2003).[5]

Moreover, on the merits Apprendi does not apply where the drug quantity does not result in a sentence above the statutory

[5]The only rule to date the Supreme Court has recognized as a "watershed" is the right to counsel rule of Gideon v. Wainwright, 372 U.S. 335 (1963). See Beard, 124 S.Ct. at 2514.

maximum.

> [A district court is not precluded] from considering drug quantity in determining a defendant's relevant conduct for sentencing purposes ... in cases where quantity is not charged in the indictment or found by the jury, so long as the resulting sentence does not exceed the statutory maximum. ... The constitutional rule of Apprendi does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction. ...
> Even if a threshold drug quantity is not charged in the indictment or found by the jury, however, drug type and quantity may be used to determine the appropriate sentence so long as the sentence imposed is not greater than the maximum penalty authorized by statute for the offense charged in the indictment and found by the jury.

U.S. v. Thomas, 274 F.3d 655, 663-64, 673 (2d Cir. 2001)(en banc). Here, Baldayaque's sentence of 168 months does not exceed the statutory maximum of 40 years imprisonment under 21 U.S.C. § 841(b).

IV. Conclusion

For the foregoing reasons, Baldayaque petitions [Docs. ## 508, 523] are DENIED. No Certificate of Appealability will issue as no "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), has been made. The Clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 28th day of October, 2004.