UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALFRED W. TRENKLER,	)	
Petitioner	)	
	)	
v.	)	**Civil Action No. 06-12072-RWZ**
	)	
UNITED STATES OF AMERICA,	)	
Respondent	)	

GOVERNMENT'S OPPOSITION
TO TRENKLER'S MOTION TO STRIKE
THE GOVERNMENT'S OPPOSITION AND MOTION FOR RECONSIDERATION

The petitioner Alfred Trenkler ("Trenkler") has moved the Court to strike the Government's Opposition to Trenkler's *Coram Nobis* Petition and Motion for Reconsideration of the Court's February 20, 2007 Memorandum and Order Granting A Writ of *Coram Nobis* ("opposition"). The government opposes this motion.

1. Trenkler asserts that the government's opposition was filed in "bad faith," [Motion to Strike, page 2] and that the Court should not only "strike it in its entirety," [Motion to Strike, page 8], but also "admonish" the government that it has an obligation to do justice. [Id.]. While we believe this hyperbole is unhelpful to the Court with respect to the legal issues it must resolve, we feel we must respond to avoid any confusion about the government's position. [*See* Opposition to Government's Untimely and Futile Motion to Stay Order of February 20, 2007, pages 3-4 (letting the government respond to the *coram nobis* petition after

the government's initial silence and the Court's grant of the petition would be a "blow beyond all conscience" to Trenkler)].

Trenkler accuses the government of bad faith because it has taken a "hard line position on deadlines." [Motion to Strike, page 2]. If we have taken a hard line, it is not one of our creation. Recognizing "the profound societal costs that attend the exercise of habeas jurisdiction," the Supreme Court itself imposed some of the significant limits on collateral relief discussed in the government's opposition. Calderon v. Thompson, 523 U.S. 538, 554 (1998). And one of Congress's main purposes in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was to further ensure the finality of judgments by compelling petitions under 28 U.S.C. §2255 to be filed promptly after conviction and direct review. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000); Duncan v. Walker, 533 U.S. 167, 179 (2001). To accuse the government of bad faith in invoking these judicially created and Congressionally mandated limitations on collateral relief is both wrong and unfair.

The limitations discussed in the government's opposition mean, of course, that some claims, even those that may have proved fruitful had they been timely made, cannot be remedied. *See, for example*, Dodd v. United States, 545 U.S. 353, 359 (2005) (even though the defendant was sentenced to 360 months after a Continuing Criminal Enterprise ("CCE") conviction which was obtained without

jury agreement on each of the specific violations that constituted the CCE, as required by Richardson v. United States, 526 U.S. 813 (1999), the Supreme Court held that the defendant's Richardson claim was time-barred under AEDPA, noting that "[a]lthough we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); Schriro v. Summerlin, 542 U.S. 348 (2004)(wherein the Supreme Court rejected the defendant's Ring v. Arizona, 536 U.S. 584 (2002), claim. Ring applied Apprendi v. New Jersey, 530 U.S. 466 (2000), to hold that aggravating factors that made a defendant eligible for the death penalty under Arizona law must be found by a jury, not by a judge at sentencing. The Court found that Ring announced a new procedural rule which did not apply retroactively on collateral review and thus it reversed the Ninth Circuit, which had invalidated the defendant's death sentence). Still, these limitations are constitutional, *see, e.g.*, Delaney v. Matesanz, 264 F.3d 7, 12 (1st Cir. 2001)("Even assuming, for purposes of our inquiry, that the Suspension Clause applies, reasonable limits on the use and application of the habeas remedy do not work an unconstitutional suspension of the writ"), and it is the government's obligation to society to invoke them.

Trenkler is also wrong in suggesting that the government has violated an ethical obligation by advancing an argument that has not been adopted by any circuit court of appeals, *i.e.*, the

government's argument that the Court did not err when it did not ask the jury for permission to impose a life sentence. Equally wrong is his statement that the government's statutory argument is "without citation to any authority." [Motion to Strike, pages 4 and 8]. The government's statutory argument is based on the statute and legislative history discussed in its brief and is not precluded by controlling circuit (*i.e.*, First Circuit) precedent; indeed, none of the extra-circuit cases that the government found address the government's legislative history argument. Certainly the government, just like any defendant, is entitled to seek to have the Court rule on what it believes to be the correct interpretation of the law. After all, it was a defendant's advocacy in the face of adverse circuit precedent that resulted in United States v. Booker, 543 U.S. 220 (2005). The government is equally entitled to advance arguments that it believes will yield a correct interpretation of the law.

The government filed its opposition to Trenkler's petition for a writ of *coram nobis* with this Court's express permission and there is no colorable basis for striking it or admonishing the government with respect to its ethical obligations. Trenkler's motion to strike should be denied.

2. With respect to the merits, Trenkler is also wrong when he claims that United States v. Barrett, 178 F.3d 34, 55 (1st Cir. 1999), authorizes his *coram nobis* petition. [Motion to Strike, page

3]. After finding that the defendant's Brady claim was not cognizable given AEDPA's successive petition gatekeeping rules, the First Circuit in Barrett explicitly rejected the petitioner's argument that he could present his claim as a writ of error *coram nobis.* It did not matter that the petitioner could not obtain relief because of the successive petition requirements; §2255 – and, by necessity, the "savings clause" and *its* limitations - still controlled. 178 F.3d at 54.[1]

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[1]Notably, Trenkler recognized the inapplicability of *coram nobis* in the petition for a writ of *certiorari* that he filed in the Supreme Court after the First Circuit denied his mandamus request:

> In this case, the trial court imposed two illegal life sentences, a fact not addressed but ultimately not disputed by the Court of Appeals in addressing the mandamus petition. However, the Appeals Court denied the petition "because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive [28 U.S.C.] §2255 petitions." In effect, the court elevated procedure over substance and condemned the petitioner to spend his life in prison notwithstanding the unlawfulness of the two sentences. The safety valves that would have enabled the lower courts to correct these sentences have been methodically removed from the system, and ***the petitioner's request for mandamus relief was his last chance*** to rectify what is clearly a grave injustice. ***By refusing to exercise its discretion on procedural grounds, the Court of Appeals has eliminated the last safety valve and precluded any court from ever correcting the illegal sentences***. In doing so, the court deprived the petitioner of his right to due process under the Fifth Amendment to the United States Constitution and allowed a sentence to stand

3. While the Court's lack of jurisdiction to consider Trenkler's petition is dispositive, Trenkler is also wrong when he says that the government "essentially admitted" in its opposition that he has shown cause and prejudice. [Motion to Strike, pages 4-5]. We put the discussion of Hardy v. United States, 691 F.2d 39 (1st Cir. 1982), in a footnote because it has been all but overruled by subsequent First Circuit precedent. Even if that were not so, Hardy would not aid Trenkler. Hardy did not involve a successive petition, nor did the First Circuit have to contend with AEDPA. The bottom line is that Trenkler's *coram nobis* petition is a successive §2255 petition in disguise and it is barred by AEDPA because it is both untimely and involves neither newly-discovered evidence that would establish Trenkler's innocence of the offense nor a new rule of constitutional law made retroactive by the Supreme Court.

4. Trenkler asserts that his lawyers' failure to advance his present interpretation of 18 U.S.C. §§34 and 844 must be considered ineffective assistance of counsel and establishes cause under Bousley v. United States, 523 U.S. 614, 622 (1998), and United States v. Frady, 456 U.S. 152, 166 (1982). He says that it was the

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> that violates his Sixth Amendment rights, as well as the prohibition of cruel and unusual punishment set forth in the Eighth Amendment.

In Re Alfred Trenkler, No. 04-1533, 2005 WL 1170250 (March 14, 2005)(***emphasis added***).

government's burden to seek a jury finding and the idea that he had some responsibility for how the Court decided the sentencing issue is "ludicrous." [Motion to Strike, page 5]. But defense counsel did not merely fail to bring Trenkler's present §844 argument to the Court's attention at trial or sentencing. Counsel, rather, advocated affirmatively prior to trial that sentencing issues were for the Court to decide after any conviction. Given the state of the law at the time of trial and very good reasons for steering the sentencing issue away from the jury which would hear the details of Trenkler's crime, defense counsel's actions at trial and sentencing and on appeal cannot be found constitutionally ineffective.[2]

5. Trenkler disputes the relevance of the 1994 change to §844, which clarified the ability of a court to impose a life sentence without the involvement of a jury, on the ground that the

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[2]In at least one limited situation on direct appeal, the First Circuit has said that a defendant does not have to alert the Court to a possible error if the objection would be inimical to his interests. *See* United States v. Nelson-Rodriguez, 319 F.3d 12, 47 (1st Cir. 2003)(a defendant is not required to ask for an Apprendi instruction at the time of trial since doing so would be inimical to the defendant's position and because the defendant will not know whether there is an Apprendi error until sentencing). *But see* United States v. Edelkind, 467 F.3d 791, 796 (1st Cir. 2006), *petition for certiorari filed* (No.06-9793)(Feb. 28, 2007)(where the First Circuit rejected the notion that the defendant was not obligated to object to the jury instruction which on appeal he claimed did not identify the federally-insured entity that he allegedly defrauded because, in the defendant's view, doing so was inimical to his interests). Cases involving the mere failure to object, however, are inapposite to the situation here, where Trenkler affirmatively embraced a course of action during the criminal case that is contrary to the one advocated in this collateral proceeding.

provision would not apply to him because he was initially sentenced before the change occurred. [Motion to Strike, page 6]. This argument misses the government's main point: since the 1994 amendment would have applied to him on any remand after direct review, he cannot show that any error was fundamental.

As the government noted in its opposition, the First Circuit did not decide Trenkler's direct appeal until nine months *after* Congress enacted the change in §844. Under the principle that defendants "should be sentenced under the law in effect at the time of sentencing," United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998), any resentencing after the appeal would have applied the revised procedures. *Cf.* See United States v. Fagan, 996 F.2d 1009, 1018 (9th Cir. 1993)(collecting cases holding that rule requiring courts to use Sentencing Guidelines in effect at time of sentencing applied equally to use of Guidelines in effect at time of resentencing); *see also* Restrepo-Contreras v. United States, 99 F.3d 1128, 1996 WL 636560 (1st Cir. Nov. 4 1996)(unpublished disposition)(noting with approval cases adopting the same view).[3] Thus, even a successful appeal would not have prevented Trenkler from receiving a life sentence. *See* United States v. Salameh, 261 F.3d 271, 275-76 (2nd Cir. 2001)(any error in sentence for "term of

[3]While these cases make an exception where imposition of later-enacted provisions would create an *ex post facto* problem, the amendment to §844 presents no such barrier. *See* United States v. Joyner, 201 F.3d 61, 80 (2nd Cir. 2000); Grimes, 142 F.3d at 1353.

years" under §844 that made it "tantamount to life sentence" was harmless because under revised statute court could impose a life sentence). Trenkler can hardly claim as fundamental error the use of a procedure that – if error at all – would have been harmless even at the time of direct review. *Cf.* Washington v. Murray, 952 F.2d 1472, 1480 (4th Cir. 1991)(holding on habeas review that defendant could not rely on alleged violation of then-existing Supreme Court requirements for capital proceeding where subsequent decision of the Court eliminated those requirements and would apply in any resentencing).

The cases cited by Trenkler are not to the contrary. In only one of them, United States v. Tocco, did the court address whether the amended statute might apply. *See* 135 F.3d 116, 131 (2nd Cir. 1998). While Tocco stated that it would not, its reasoning was *dicta* that was later disavowed by the Second Circuit in Joyner. Contrary to Trenkler's suggestion, Joyner undeniably constitutes the Second Circuit's current position on this issue. *See* United States v. Yousef, 327 F.3d 56, 162 (2nd Cir. 2003)(referring to Joyner as "control[ling]" on this issue).[4]

Finally, the *ex post facto* cases are dispositive for another reason not addressed by Trenkler in his Motion to Strike. Grimes

[4]Nor does Trenkler's citation to 18 U.S.C. §§§3742(f)(1) and (g)(1) affect the foregoing analysis. The provisions to which he cites, added in 2003, by their terms address only the Guidelines applicable on remand after a successful appeal.

and Joyner confirm that the jury provision in §844 (as interpreted by Trenkler) was a procedural provision that gave the jury a limited role in the decision-making process, not a substantive one that modified the elements of the offense. The procedural nature of the provision establishes that regardless of whether the First Circuit would have directed the application of the 1994 amendments on direct appeal, any error cannot be deemed to implicate the fundamental fairness of Trenkler's criminal proceeding such that the extraordinary step of collateral relief is required. *Cf*. Bousley v. United States, 523 U.S. 614, 620 (1998)(discussing distinction between substance and procedure for purposes of Teague v. Lane, 489 U.S. 288 (1989)); Schriro v. Summerlin, 542 U.S. at 353 ("Ring altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules"); Cirilo-Munoz v. United States, 404 F.3d 527, 533 (1st Cir. 2005)("the use of judge-made findings at sentencing does not undermine "accuracy" (in terms of substantially different outcomes) or undermine fundamental fairness"; petitions under 28 U.S.C. §2255 are unavailable to advance Booker claims in the absence of a Supreme Court decision rendering Booker retroactive); Sepulveda v. United States, 330 F.3d 55, 59 (1st Cir.2003)(Apprendi does not apply retroactively because,

inter alia, it is not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding).

Conclusion

Accordingly, for the reasons set forth here and in the government's opposition, the government respectfully requests that the Court dismiss Trenkler's petition for a writ of *coram nobis* for lack of jurisdiction or, in the alternative, deny it on the merits.[5]

Respectfully submitted,

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[5]Trenkler appears to quibble with the court's decision to address his claims in a new civil action. [Motion to Strike, page 1, n.1]. We think the court was correct to open a civil case. *See* Rule 4(a)(1)(C)("An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a)).

Certificate of Service

I hereby certify that on March 27, 2007, this Opposition was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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