

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

FRANK ARACHE

v.

Civil Action No. 93-0689  
Crim. Action No. 89-0052

UNITED STATES

MEMORANDUM & ORDER

This case is before the Court for consideration of Frank Arache's objection to a Magistrate Judges Report and Recommendation recommending denial of Arache's motion, pursuant to 28 U.S.C. § 2255 to vacate his sentence on the ground that he was deprived of effective assistance of counsel during the sentencing phase of his prosecution for drug trafficking. For reasons hereinafter stated which are different from those recited by the Magistrate Judge, the Recommendation is accepted and Arache's motion is denied.

**Background**

The facts relating to Arache's conviction are set forth in United States v. Arache, 946 F.2d 129 (1st Cir.), cert. denied, 112 S.Ct. 1507 (1992), and need not be repeated here. For present

purposes, they may be summarized as follows.

On August 23, 1990, this Court sentenced Arache to concurrent 151 month terms for conspiracy to possess cocaine with intent to distribute under 21 U.S.C. § 841(a)(1), (b)(1)(A), (b)(1)(c), and for possession of cocaine with intent to distribute. That sentence was within the applicable guideline range for the offense level determined by the Court. However, at the sentencing hearing, Arache's counsel argued strenuously that a lower offense level was applicable because Arache was only a minimal or minor participant in the offense of conviction. The Court rejected that argument based upon the evidence presented at trial. See Transcript of Sentencing Hearing, August 23, 1990, at 25-28 & 33-34. That determination was upheld by the First Circuit which held that Arache "was not substantially less culpable than the average possessor of crack or cocaine." 946 F.2d at 141.

Arache subsequently filed a motion to vacate, reduce, or set aside his sentence under 28 U.S.C. § 2255 asserting that he had not received effective assistance of counsel at the sentencing hearing. Pursuant to 28 U.S.C. § 636, the motion was referred to a Magistrate Judge, who recommended that the motion be denied for two reasons:

1. That Arache failed to pay the \$5.00 filing fee as required by 28 U.S.C. § 1914(a); and

2. That, since the "minor participant" argument was rejected by the First Circuit, it cannot be relitigated.

## Discussion

### Filing fee

Although a filing fee is required for habeas corpus petitions filed pursuant to Section 2254, the Rules Governing Section 2255 Proceedings make it clear that no filing fee is required under Section 2255. The rationale for that distinction appears to be that a Section 2254 petition brought by a state prisoner after conviction in state court is considered a new case for which a filing fee, or in forma pauperis approval, is required. See Rules Governing Section 2254 Proceedings 3(a).<sup>1</sup> In contrast, a Section 2255 motion brought by a federal prisoner after conviction in a federal court is considered a continuation of the criminal trial which occurred in the federal court. See Rules Governing Section 2255 Proceedings 3(a).<sup>2</sup> In any event, the Advisory Committee Note

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<sup>1</sup>That rule, in pertinent part, states:

**(a) Place of filing; copies; filing fee.** A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis.

<sup>2</sup>Subsection (a) of that rule, in its entirety, states:

**(a) Place of filing; copies.** A motion under these rules shall be filed in the office of

to Rule 3 of the Rules Governing Section 2255 Proceedings specifically states that "[t]here is no filing fee required of a movant under these rules." See United States v. Cook, 997 F.2d 1312, 1319 (10th Cir. 1993). Accordingly, Arache's failure to pay the \$5.00 fee is not a basis for denying his motion.

The "relitigation" issue

As already noted, the Magistrate Judge also found that Arache's motion was an attempt to "relitigate" the "minor participant" issue and, therefore, was barred by the holding in United States v. Michaud, 901 F.2d 5, 6 (1st Cir. 1990) (per curiam). (Issues raised on direct appeal cannot be relitigated on collateral review).

However, generally speaking, the principle that collateral review may not be used as a vehicle for relitigating issues decided on appeal is not applicable to ineffective assistance of counsel claims. Except in rare cases, claims of ineffective assistance of counsel are not considered on direct appeal but must be raised on collateral review. Moreover, such claims do not turn on the correctness of the substantive determinations previously made.

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the clerk of the district court. It shall be accompanied by two conformed copies thereof.

A comparison of the parallel provisions of Rule 3 of the Rules Governing Section 2254 Proceedings and Rule 3 of the Rules Governing Section 2255 Proceedings makes it clear that no filing fee is required for motions brought pursuant to Section 2255.

Rather, the question they present is whether the prior adverse determination may be attributed to the deficient performance of counsel. Therefore, the fact that the "minor participant" issue was a subject of Arache's appeal does not preclude consideration of his ineffective assistance claim.

The ineffective assistance of counsel claim

In considering Arache's ineffective of counsel claim, the first issue to be addressed is whether an evidentiary hearing is required. Under Section 2255, an evidentiary hearing is required only when the movant sustains the burden of establishing "a sufficient threshold showing that material facts are in doubt or dispute" United States v. McGill, 11 F.3rd 223, 225 (1st Cir. 1993) (quoting United States v. Panitz, 907 F.2d, 267, 273 (1st Cir. 1990)).

In determining whether this burden has been met, the Court must consider the facts, as alleged, in the light most favorable to the movant; but the Court need not credit "conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets." McGill, 11 F.3rd at 225 (citations omitted). Moreover, the Court construes the pleadings liberally in an effort to aid a pro se movant. Since this Court, presided at Arache's trial and sentencing, it is entitled to draw upon its recollection of the proceedings in determining whether an

evidentiary hearing is merited. McGill, 11 F.3rd at 225 (citation omitted); Shah v. United States, 878 F.2d 1156, 1159 (9th Cir. 1989).

Even applying this rather liberal standard Arache has failed to establish a need for an evidentiary hearing. The gist of his

claim is simply that his attorney was not sufficiently "adversarial". Arache makes no allegations that would require an evidentiary hearing. Consequently his claim will be considered in light of the existing record.

Claims of ineffective assistance of counsel are governed by the two part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, the defendant must show both that counsel's assistance was deficient and that the deficiency prejudiced the defendant. 466 U.S. at 687, 104 S.Ct. at 2064. To establish prejudice, the defendant must demonstrate the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

Arache's claim falters with respect to both prongs of the test. As already noted, Arache's counsel vigorously argued that Arache should have been considered a minor participant under U.S.S.G. § 3B1.2 but was unsuccessful because the evidence presented at trial clearly was otherwise. Neither Arache nor the Court can identify anything further that counsel could have done. Thus, there is no basis for finding that counsel's performance was deficient.

Moreover, Arache has failed to demonstrate a reasonable likelihood that a more adversarial presentation by his counsel would have altered the outcome. The evidence presented at trial, simply, was not susceptible to the interpretation that Arache was a minor participant. In short, there is no basis for concluding that if counsel had performed differently the result would have been more favorable.

For all of the foregoing reasons, Arache's motion under Section 2255 is therefore DENIED.

IT IS SO ORDERED.

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ERNEST C. TORRES  
United States District Judge

Date: \_\_\_\_\_