

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF CONNECTICUT**

AMADOR RIVERA,	:
Petitioner,	:
	: Crim. No. 3:94cr 223 (PCD)
-vs-	: Civ. No. 3:01cv76 (PCD)
	:
UNITED STATES OF AMERICA,	:
Respondent.	:

**RULING**

Petitioner moves pursuant to FED. R. CIV. P. 59<sup>1</sup> to alter or amend the judgment denying, *inter alia*, his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.<sup>2</sup> For the reasons set forth herein, the motion is **granted**.

**I. BACKGROUND**

Petitioner was convicted by a jury of violating two provisions of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c) and (d) (Counts One and Two, respectively). He was also convicted of violating the Violent Crimes in Aid of Racketeering (“VCAR”) statute by conspiring to commit VCAR murder, 18 U.S.C. § 1959(a)(5) (Count Ten), and conspiring to distribute controlled substances in violation of 21 U.S.C. § 846 (Count Thirty-Four). Petitioner

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<sup>1</sup> The *pro se* motion was received thirteen days after the date on which the ruling on the § 2255 petition issued including time spent in the mail. The motion will be reviewed as a motion for reconsideration brought pursuant to FED. R. CIV. P. 59 rather than a motion for relief from judgment brought pursuant to FED. R. CIV. P. 60.

<sup>2</sup> The ruling also resolved a motion to disqualify this Court and a motion to produce a transcript of grand jury proceedings. Petitioner does not raise either ruling in the present motion.

received a sentence of life imprisonment for each of his convictions on Counts One, Two and Thirty-Four and a sentence of imprisonment for ten years for his conviction on Count Ten.<sup>3</sup> The sentences were ordered to run concurrently, resulting in an effective life sentence.

Petitioner filed the present petition pursuant to 28 U.S.C. § 2255 alleging that his sentence of life imprisonment without the requisite findings as to predicate violations violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The petition was denied based on petitioner's failure to "allege facts explaining how he was exposed to a greater sentence than that authorized by the jury's verdict" and failure to identify, given the three life sentences imposed, how his "effective sentence would [not] be the same regardless of the sentence given for conspiracy to distribute controlled substances." Petitioner moved *pro se* to vacate the judgment, after which petitioner's counsel filed a response to the Government's opposition to petitioner's motion.

## II. DISCUSSION

Petitioner argues that the three life sentences imposed violate *Apprendi* as the requisite factual findings were not made. The Government responds that *Apprendi* may not be applied retroactively and that petitioner fails to establish either sentencing error or prejudice resulting therefrom.

### **A. Retroactive Application of *Apprendi* on Collateral Review**

The Government argues that, contrary to this Court's holding in *Parise v. United States*, 135 F. Supp. 2d 345, 349 (D. Conn. 2001), *Apprendi* may not be applied retroactively to cases on

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<sup>3</sup> Ruling on the present motion was reserved pending appellate review of this Court's decision in *Parise v. United States*, 117 F. Supp. 2d 204 (D. Conn. 2000) and its reconsideration in *Parise v. United States*, 135 F. Supp. 2d 345 (D. Conn. 2001). The decision issued November 18, 2002. See *United States v. Luciano*, 311 F.3d 146 (2d Cir. 2002).

collateral review.

In *Parise*, this Court held that *Apprendi* “may be applied to cases on collateral review because it is a watershed rule necessary to the fundamental fairness of the criminal proceeding.” *Id.* at 349. *Parise* went before the Second Circuit Court of Appeals in *United States v. Luciano*, 311 F.3d 146, *see Beatty v. United States*, 293 F.3d 627, 631 n.3 (2d Cir. 2002), but the resulting decision neither expressly or implicitly precludes the retroactive application of *Apprendi*. The appeal in *Luciano* was resolved entirely on the manner in which *Apprendi* was applied in *Parise*, *see Luciano*, 311 F.3d at 152-53, without mention of whether an *Apprendi* violation could be properly addressed through a § 2255 petition.

*Luciano*, therefore, cannot be read to preclude the retroactive application of *Apprendi*. If *Luciano* provides any indication whatsoever, it would appear to be an implicit endorsement of the retroactive application. The *Apprendi* claim in *Parise* was subject to a procedural bar as not raised on direct appeal, which was overcome by the determination that *Apprendi* could be retroactively applied.<sup>4</sup> *See Parise*, 135 F. Supp at 349-50. If such application was improper, there would be some question as to how the merits of the *Apprendi* claim were reached as “those claims, regardless of their merit, [could] never establish a basis for habeas relief.” *Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002); *see also Campino v. United States*, 968 F.2d 187, 180 (2d Cir. 1992) (“It is generally

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<sup>4</sup> Although both the original ruling and the ruling on the motion for reconsideration were considered in *Luciano*, *see Luciano*, 311 F.3d at 149, the original ruling reasoned that the procedural default was overcome by petitioner’s allegations of ineffective assistance of counsel in the appeals process. *See Parise*, 117 F. Supp. 2d at 207. On reconsideration, petitioner’s claim was reviewed on his assertion of a new right guaranteed after his time of appeal as established by the *Apprendi* decision. *See Parise*, 135 F. Supp. 2d 349-50. As two potential bases for overcoming the procedural default were reviewed on appeal, the *Luciano* decision could be construed as an implicit endorsement of either basis.

accepted that a procedural default of even a constitutional issue will bar review under § 2255, unless the defendant can meet the ‘cause and prejudice’ test”). Therefore, *Luciano* cannot be read as prohibiting the retroactive application of *Apprendi*.<sup>5</sup>

### **B. Application of *Apprendi* to Petitioner’s Life Sentences**

Petitioner argues that the life sentences imposed violate *Apprendi* as requisite facts pertinent to the sentence were not found beyond a reasonable doubt by the jury.<sup>6</sup>

The *Apprendi* arguments are based on a failure to submit factual findings necessary for the imposition of a life sentence to the jury. The RICO violations in Counts One and Two were alleged as violations of 18 U.S.C. § 1962 based on commission of the predicate acts of conspiracy to murder members of the Latin Kings in violation of CONN. GEN. STAT. §§ 53a-48 and 53a-54a and a drug conspiracy in violation of 21 U.S.C. §§ 846 and 841(a)(1). Count Thirty-Four alleged a drug conspiracy in violation of 21 U.S.C. §§ 846 and 841(a)(1).

*Apprendi* requires that a sentence not exceed the maximum allowed by statute unless facts that

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<sup>5</sup> *Forbes v. United States*, 262 F.3d 143 (2d Cir. 2001), has been cited by some courts within this district as an indication that *Apprendi* is not to be applied retroactively. Such is not the case. *Forbes*, indicating that “it is clear that *Apprendi* is not a new rule of constitutional law which has been made retroactive to cases on collateral review by the Supreme Court,” *id.* at 145, indicated as much in the context of a discussion of second or successive petitions and *Tyler v. Cain*, 533 U.S. 656, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001). *Tyler* interpreted the language in 28 U.S.C. § 2244(b)(2)(A) pertaining to when a petition is “made retroactive” for purposes of a second or successive petition. *Forbes* involved the application of the *Tyler* reasoning to the identical phrase as used in 28 U.S.C. § 2255(2). See *Forbes*, 262 F.3d at 144. *Tyler* cannot be read as somehow limiting the standard set forth in *Teague v. Lane*, 489 U.S. 288, 311-12, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), applicable to the retroactive application of decisions to cases on collateral review, thus *Forbes* may not be read as suggesting a prohibition on the application of *Apprendi* on initial § 2255 petitions.

<sup>6</sup> Petitioner does not argue that the ten year sentence imposed for the VCAR conviction violates *Apprendi*. The discussion is therefore limited to the life sentences.

may permit a more severe maximum sentence, such as drug quantity, are found by a jury beyond a reasonable doubt. *See Luciano*, 311 F.3d at 151. An *Apprendi* error may be harmless if, for example, sentences imposed on multiple counts if run consecutively would be within the sentence imposed under the Sentencing Guidelines, *see United States v. McLean*, 287 F.3d 127, 136-37 (2d Cir. 2002) (applying U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d)), or if other sentences do not violate *Apprendi* and such unaffected sentences are independently equivalent to the effective sentence imposed, *see United States v. Rivera*, 282 F.3d 74, 76-77 (2d Cir. 2000).

Applying *Apprendi* to the convictions for which the life sentences were imposed, life sentences were not appropriate under the circumstances. The maximum sentence that could be imposed for each of the two violations of 18 U.S.C. § 1962, alleged in Counts One and Two, is twenty years, unless the conviction is for a racketeering activity for which the maximum penalty is life imprisonment. *See* 18 U.S.C. § 1963(a); *see also United States v. Nguyen*, 255 F.3d 1335, 1343 (11th Cir. 2001) (finding sentence defective under *Apprendi* when predicate offenses did not permit sentence in excess of twenty years). Thus for the sentences imposed to be valid, the predicate violations would have to permit a life sentence.

The conspiracy to murder members of the Latin Kings and associates was alleged to be a

violation of CONN. GEN. STAT. §§ 53a-48<sup>7</sup> and 53a-54a.<sup>8</sup> CONN. GEN. STAT. § 53a-51 provides that “an attempt or conspiracy to commit a class A felony is a class B felony.” Murder is a Class A felony. *See* CONN. GEN. STAT. § 53a-54a(c). Thus conspiracy to commit murder would be punishable as a Class B felony. The maximum sentence for a Class B felony is twenty years. *See* CONN. GEN. STAT. § 53a-35a(5). Therefore a sentence for conspiracy to commit murder is limited to twenty years and does not carry the possibility of a life sentence. *See State v. Booth*, 250 Conn. 611, 651, 737 A.2d 404 (1999).<sup>9</sup> The life sentence, therefore, was not validly based on conspiracy to commit murder.

The second predicate act was a drug conspiracy in violation of 21 U.S.C. §§ 846 and 841(a)(1). The second predicate act also was alleged as a separate count in Count Thirty-Four. The jury found petitioner’s involvement in a conspiracy to distribute cocaine and cocaine base but made no finding as to quantity of drugs involved. Such is the paradigmatic *Apprendi* problem. *See United States v. Burrell*, 289 F.3d 220, 224-25 (2d Cir. 2002). Absent an allegation and a jury finding as to

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<sup>7</sup> CONN. GEN. STAT. § 53a-48(a) provides “A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.”

<sup>8</sup> CONN. GEN. STAT. § 53a-54a provides “ (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

\* \* \*

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony or murder under section 53a-54d.”

<sup>9</sup> CONN. GEN. STAT. § 53a-35b provides in relevant part: “A sentence of imprisonment for life shall mean a definite sentence of sixty years[.]”

a quantity of drugs beyond a reasonable doubt which would permit a sentence higher than the maximum for simple possession of an unspecified amount of drugs, the sentence imposed for a violation involving cocaine may not exceed the maximum sentence provided in 21 U.S.C. § 841(b)(1)(C) of twenty years. *See Burrell*, 289 F.3d at 224-25.

As § 841 is the only basis on which a life sentence could be imposed, the absence of allegations and findings by the jury of quantities of cocaine increasing the maximum penalty to life, beyond the maximum of twenty years for possession of an unspecified amount of cocaine, renders the sentencing on Counts One, Two and Thirty-Four defective. The sentences on Counts One, Two, and Thirty-Four are therefore modified to twenty years on Count One, twenty years on Count Two and twenty years on Count Thirty-Four. The sentences on Counts One and Ten are ordered to run concurrently to each other. The sentences on Counts Two and Thirty-Four are ordered to run concurrently to each other. The combined sentences on Counts One and Ten shall run consecutively to the combined sentences on Counts Two and Thirty-Four for an effective sentence of forty years.

### III. CONCLUSION

Petitioner's motion to alter or amend the judgment denying his § 2255 petition (Doc. No. 2214) is **granted**. The ruling (Doc. No. 2206) is hereby **vacated**. Petitioner's motion to vacate or modify his sentence (Doc. No. 2187) is **granted**. The life sentence imposed is hereby modified to a term of imprisonment as follows: twenty years on Count One concurrent to ten years on Count Ten and twenty years on Count Two concurrent to twenty years on Count Thirty-Four. The combined sentences for Counts One and Ten shall run consecutively to the combined sentences on Counts Two and Thirty-Four for an effective sentence of forty years. The term of

supervised release is modified to three years on each of the four counts to be served concurrently

and consecutively as provided above for an effective term of supervised release of six years. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, January \_\_\_\_, 2003.

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Peter C. Dorsey  
United States District Judge

Pappas & Lauria (same page-different entries), cert. denied, Oct. 2, 2000, 199 F.3d 1324 (Table)