

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 83-314-1
v.	:	
	:	(CIVIL ACTION
GEORGE MARTORANO	:	No. 00-3040)

**MEMORANDUM AND ORDER**

HUTTON, J.

August 8, 2001

Currently before the Court is the Petitioner George Martorano's Motion for Reconsideration (Docket No. 203), the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Docket No. 199), the Government's Memorandum in Opposition to the Petitioner's § 2255 Motion, and the Petitioner's Reply to the Government's Memorandum in Opposition to his § 2255 Motion.

**I. BACKGROUND**

On June 4, 1984, the Petitioner, George Martorano, pled guilty to charges that he had been a wholesale distributor of large amounts of cocaine, methamphetamine, methaqualone, and marijuana. On September 20, 1984, the Petitioner was sentenced to life imprisonment without the possibility of parole. After the September 20, 1984 sentencing, the Petitioner appealed his sentence to the United States Court of Appeals for the Third Circuit. The Third Circuit found that the district court had failed to comply

with certain requirements of Federal Rule of Criminal Procedure 32 at the sentencing hearing and the Petitioner's sentence was vacated.

On November 6, 1987, a new sentencing hearing was held. The Petitioner was again sentenced to life imprisonment without the possibility of parole. Because the defense contended that the Petitioner was mentally ill and of subnormal intelligence, the sentencing court ordered that a mental evaluation of the Petitioner be performed. After the sentencing court determined that the Petitioner did not suffer from a mental deficiency or mental illness, an additional sentencing hearing was held.

On April 26, 1988, the Petitioner's final sentencing hearing was held. During that hearing, the subject of the Petitioner's lack of cooperation with the authorities became an issue. After his plea of guilty, the Petitioner offered no cooperation or assistance to the Government regarding information he might have concerning ongoing criminal activity. The sentencing judge "specifically relied on his absence of cooperation in imposing the sentence he did at resentencing." United States v. Martorano, 866 F.2d 62, 71 (3d Cir. 1989). The court sentenced prisoner, yet again, to life imprisonment without the possibility of parole.

The Petitioner appealed his sentence and on January 11, 1989, the Third Circuit denied his appeal. On September 20, 1991, the Petitioner's motion for a reduction of sentence pursuant to Federal

Rule of Criminal Procedure 35(b) was denied. The Petitioner then filed his first motion to vacate, set aside, or correct sentence under § 2255 in September of 1994. On March 20, 1995, the Petitioner's motion was denied. That denial was affirmed by the Third Circuit on January 5, 1996 and the Supreme Court denied the Petitioner's petition for a writ of certiorari on June 3, 1996. Subsequently, the Petitioner filed another motion for a reduction of sentence pursuant to Rule 35(b). The motion was denied on October 28, 1996 based upon a lack of jurisdiction and that decision was affirmed on appeal. On June 15, 2000, the Petitioner filed the current motion to vacate, set aside, or correct sentence under § 2255.

## **II. DISCUSSION**

To file a second or successive motion under § 2255, a party must obtain a certification from the appropriate court of appeals that the new petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255; see also 28 U.S.C. § 2244 (2001). The instant motion was filed by the Petitioner after the Supreme Court's decision in Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307 (1999). On September 6, 2000, this Court denied the Petitioner's motion, in part, because the Third Circuit had refused to allow his claim to proceed based upon the second and successive rule contained in §§ 2244 and 2255.

Asserting that certification to file a second and successive petition had been obtained from the Third Circuit, the Petitioner filed a motion to reconsider the Court's September 6, 2000 order.

**A. Motion for Reconsideration**

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." Vaidya v. Xerox Corp., No. CIV.A97-547, 1997 WL 732464, at \*1 (E.D. Pa. Nov. 25, 1997). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also Drake v. Steamfitters Local Union No. 420, No. CIV.A97-CV-585, 1998 WL 564886, at \*3 (E.D. Pa. Sept. 3, 1998). The Petitioner correctly asserts that the Court's September 6, 2000 order dismissing his § 2255 motion with prejudice was based, in part, upon the Court's belief that he had not obtained certification from the Third Circuit to file a second or successive habeas corpus petition. In his motion for reconsideration, the Petitioner includes a copy of the Third Circuit's June 9, 2000 order granting his application to raise a second or successive § 2255 motion based upon the Supreme Court's decision in Mitchell. Because the September 6, 2000 order was based upon an error of fact, the Court will grant the Petitioner's motion for reconsideration and consider the merits of his § 2255 motion.

**B. Petitioner's § 2255 Motion**

In Mitchell v. United States, the defendant pled guilty to one count of conspiring to distribute five or more kilograms of cocaine and three counts of distributing cocaine within 1,000 feet of a school or playground. 526 U.S. at 317, 119 S.Ct. at 1310. While the defendant pled guilty, she retained the right to contest the drug quantity attributable to her under the conspiracy count at sentencing. See id., 119 S.Ct. at 1310. At the sentencing hearing, the Government presented the testimony of three former co-defendants who had become cooperating witnesses. See id. at 318, 119 S.Ct. at 1310. These witnesses testified as to the defendants involvement in the drug ring. See id., 119 S.Ct. at 1310. The defendant offered no testimony at the sentencing. See id. at 319, 119 S.Ct. at 1310.

The district court sentenced the defendant to ten years of imprisonment, six years of supervised release, and a special assessment of \$200. See id., 119 S.Ct. at 1311. In doing so, the court was persuaded to rely upon the testimony of the co-defendants by the fact that the defendant did not testify to the contrary. See id., 119 S.Ct. at 1310. The district court acknowledged that the defendant's failure to testify at her sentencing hearing was a result of her invocation of her Fifth Amendment right not to testify but stated that "as a consequence of her guilty plea, [the defendant] had no right to remain silent with respect to the

details of her crimes." See id., 119 S.Ct. at 1311. In addition, the sentencing judge made clear that he would have looked more closely at the co-defendant's testimony if he believed the defendant did have a right to remain silent. See id., 119 S.Ct. at 1311.

On appeal, the Third Circuit affirmed the defendant's sentence believing that knowingly pleading guilty acted as a waiver of the defendant's Fifth Amendment privilege. See id., 119 S.Ct. at 1311. The Supreme Court reversed holding that (1) neither a defendant's guilty plea nor statements made at the plea colloquy function as a waiver of the right to remain silent at sentencing, and (2) a court may not draw adverse inferences from a defendant's silence at sentencing in determining facts relating to the circumstances and details of the crime. See id. at 325, 328, 119 S.Ct. at 1313, 1314-15. In his § 2255 motion, the Petitioner asserts that the holding in Mitchell directly impacts on his case because his silence, manifested in a failure to cooperate, was held against him at sentencing. However, for the reasons discussed below, the Court finds that the holding of Mitchell does not implicate the facts of the Petitioner's case. As a result, the Court must dismiss the Petitioner's motion to vacate, set aside, or correct sentence under § 2255.

#### **1. Assertion of Fifth Amendment Rights**

The Fifth Amendment is the driving force behind the Supreme

Court's opinion in Mitchell. See id. at 316, 119 S.Ct. at 1309 (Court presented with "[t]wo questions relating to a criminal defendant's Fifth Amendment privilege against self-incrimination"). After discussing the settled proposition that the Fifth Amendment does not allow negative inferences to be drawn from a defendant's failure to testify at trial, the Court noted that "the concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." See id. at 329, 119 S.Ct. at 1315. While the holding of Mitchell implicates the scope of the Fifth Amendment privilege, the Petitioner never asserted his Fifth Amendment right in the instant case. See Martorano, 866 F.2d at 70 n.8. This is of paramount importance because "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing." Roberts v. United States, 445 U.S. 552, 559, 100 S.Ct. 1358, 1364 (1980).

In Roberts v. United States, the Supreme Court was faced with a situation very similar to that of the Petitioner. The defendant in Roberts pled guilty to two counts of misuse of the telephone to facilitate a drug transaction but refused to cooperate with the Government regarding other members of the drug conspiracy. See id. at 554-55, 100 S.Ct. at 1361. In sentencing the defendant to a harsh sentence, the court considered that "he was a dealer who had refused to cooperate with the Government." See id. at 555, 100 S.Ct. at 1361. The circuit court affirmed the sentence and the

defendant appealed to the Supreme Court. See id. at 556, 100 S.Ct. at 1362. At that time, the defendant asserted "that his failure to cooperate was justified by legitimate fears of physical retaliation and self-incrimination." See id. at 559, 100 S.Ct. at 1363. In addition, he asserted that the district court had "punished him for exercising his Fifth Amendment privilege against self-incrimination." See id. at 559, 100 S.Ct. at 1363.

The Supreme Court noted that the concerns addressed by the defendant in Roberts were valid and would have merited serious review if raised in the proper forum. See id. at 559, 100 S.Ct. at 1363. However, the Court found that the defendant's failure to assert his Fifth Amendment privilege despite knowing that his silence was being used against him was fatal to the his claim.<sup>1</sup> See id. at 559, 100 S.Ct. at 1364. The Court stated that "if petitioner believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." See id. at 554-55, 100 S.Ct. at 1361.

As in Roberts, the Petitioner here failed to invoke his Fifth Amendment rights. This issue has already been addressed by the

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<sup>1</sup> The Court noted that there may be exceptions to the timely invoking of the privilege where the Government had substantial reason to believe that the requested disclosures are likely to be incriminating or when some coercive factor prevents an individual from asserting the privilege. See Roberts, 445 U.S. at 560, n.6, 100 S.Ct. 1364, n.6. There is no indication that such was the case here. In addition, the Third Circuit's previous determination that the Petitioner did not invoke his Fifth Amendment privilege and was therefore precluded from raising it on direct appeal supports the contention that these exceptions did not apply. See Martorano, 866 F.2d at 70 n.8.

Third Circuit in the Petitioner's direct appeal of his sentence. See Martorano, 866 F.2d at 70 n.8. The Third Circuit noted that a sentencing court may not use a defendant's failure to waive his Fifth Amendment right and cooperate with the government as "negative evidence to penalize him in deciding upon the appropriate sentence." See id. In applying that rule, the Court stated that the Petitioner had not invoked his Fifth Amendment right in any way. See id. Nothing in Mitchell obviates a defendant's responsibility to invoke his Fifth Amendment rights.

Additionally, the Petitioner seeks relief based upon the first holding of Mitchell: "despite entering a plea of guilty, a defendant retains the Fifth Amendment privilege against compelled self-incrimination at sentencing." See Pet'r Reply at 6-7. While the Petitioner has accurately stated this portion of the Mitchell opinion, this fails to address the failure to invoke the Fifth Amendment privilege. In addition, there is no indication that the sentencing judge believed the Petitioner had waived his Fifth Amendment rights by pleading guilty. The issue was never addressed, most likely as a result of the Petitioner's failure to raise it.

Because the Petitioner did not assert his Fifth Amendment privilege, the Court finds that the rules enunciated in Mitchell do not implicate the his case.

## **2. Limited Holding of Mitchell**

The second holding of Mitchell was that a court may not draw adverse inferences from a defendant's silence at sentencing in determining facts relating to the circumstances and details of the crime. See Mitchell, 526 U.S. at 328, 119 S.Ct. at 1314-15. In the instant case, the district court did not determine any facts relating to the circumstances and details of the crime. Instead, the court considered the silence, manifested in the form of a refusal to cooperate, as evidence of a lack of contrition in imposing a sentence. See Martorano, 866 F.2d at 70 n.8. The Court in Mitchell specifically refused to decide "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment . . . ." Mitchell, 526 U.S. at 330, 119 S.Ct. at 1316; see also United States v. Rivera, 201 F.3d 99, 101 (2d Cir. 1999). While the downward adjustment is not applicable to the Petitioner's sentence, the principle remains the same.<sup>2</sup> The Petitioner's case fits more into the caveat than the rule. That is why, under factual circumstances similar to the Petitioner's, the Court of Appeals for the Second Circuit stated that "[t]he extent to which a district

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<sup>2</sup> The issue of a downward departure is not applicable to the Petitioner's case because his offense was committed prior to the sentencing guidelines. However, the district court used the Petitioner's silence (in this case a failure to cooperate) as evidence of a lack of contrition. See Martorano, 866 F.2d at 70 n.8. Therefore, the Mitchell Court's caveat that it was not considering the impact of silence on a determination of a lack of remorse is entirely applicable to the Petitioner's case. In addition, this Court sees no difference in the use of a lack of remorse in either granting a downward departure or imposing a more severe penalty. The Third Circuit has decided that a "denied benefit" is functionally the same as a penalty. See United States v. Frierson, 945 F.2d 650, 658 (3d Cir. 1991).

court may consider a defendant's silence at sentencing . . . was not determined by Mitchell." See Rivera, 201 F.3d at 101. This Court agrees.

For the foregoing reasons, the Court finds that the facts of the Petitioner's case do not implicate Mitchell.

### **III. CONCLUSION**

The Court grants the Petitioner's motion for reconsideration and vacates this Court's order of September 6, 2000. However, for the reasons discussed in this memorandum, the Court finds that the Supreme Court's decision in United States v. Mitchell does not implicate the facts of the Petitioner's case. Therefore, his motion to vacate, set aside, or correct sentence under § 2255 is dismissed with prejudice.

An appropriate Order follows.

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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
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GEORGE MARTORANO	:	No. 00-3040)

**O R D E R**

AND NOW, this 8<sup>th</sup> day of August, 2001, upon consideration of the Petitioner George Martorano's Motion for Reconsideration (Docket No. 203), the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Docket No. 199), the Government's Memorandum in Opposition to the Petitioner's Motion, and the Petitioner's Reply to the Government's Memorandum in Opposition to his Motion, IT IS HEREBY ORDERED that:

- 1) the Petitioner's Motion for Reconsideration is **GRANTED**;
- 2) the Court's September 6, 2000 Order is **VACATED**;
- 3) the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 is **DISMISSED WITH PREJUDICE**; and
- 4) a certificate of appealability is not granted as the Petitioner has not made a substantial showing of the denial of a Constitutional right.

BY THE COURT:

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HERBERT J. HUTTON, J.