

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

|                          |   |                 |
|--------------------------|---|-----------------|
| UNITED STATES OF AMERICA | : |                 |
| Plaintiff,               | : | CIVIL ACTION    |
|                          | : | NO. 01-4268     |
| v.                       | : |                 |
|                          | : | CRIMINAL ACTION |
| ALI MORRIS               | : | NO. 98-133-01   |
| Defendant.               | : |                 |
|                          | : |                 |

**MEMORANDUM AND ORDER**

YOHN, J.

FEBRUARY \_\_\_\_\_, 2002

Ali Morris (“Morris”) plead guilty to drug charges and was sentenced to 190 months imprisonment and five years supervised release on November 19, 1999. Morris filed a timely appeal, which the Third Circuit denied on August 16, 2000.

On August 22, 2001, Morris filed a pro se motion under 28 U.S.C. § 2255 to have his sentence vacated, set aside or corrected. Morris amended his § 2255 motion on October 12, 2001. In his amended § 2255 motion, Morris argues that he was denied effective assistance of counsel in contravention of the Sixth Amendment to the Constitution. Morris advances two arguments in this regard.<sup>1</sup> First, Morris claims that his trial counsel was ineffective when he

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<sup>1</sup> In Morris’ original § 2255 motion, Morris asserted a third ground for his counsel’s ineffectiveness. (Doc. No. 59). Morris claimed that he had insufficient notice of the charge brought against him because he was only charged with § 841(a)(1) and not § 841(b)(1)(A)-(C) and that his counsel was ineffective for failing to raise this “constitutional” claim. As this argument was neither raised nor briefed in Morris’ amended § 2255 motion (Doc. 61), I will consider it waived.

allowed the court to misstate the mandatory minimum term of supervised release that attached to Morris's drug offenses. Morris also claims that his appellate counsel was ineffective by not raising this issue on appeal. Second, Morris argues that under the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the quantity of drugs possessed is an element of the drug trafficking offense to which he plead guilty. In light of *Apprendi*, Morris claims that the district court erred in omitting drug quantity from its recitation of the elements of the drug trafficking offense with which Morris was charged, and that his appellate counsel was ineffective in not raising this error on appeal.

For the reasons set forth below, I find Morris' claims of ineffectiveness to be without merit. As a result, Morris' motion will be denied.

## **BACKGROUND**

A federal grand jury indicted Morris on charges that he possessed "crack" cocaine with intent to distribute on two occasions in violation of 18 U.S.C. § 841(a)(1), and that certain of his property that was seized from him at the time of his arrests should be forfeited pursuant to 21 U.S.C. § 853(a)(1), (a)(2) and (p). On September 18, 1998, Morris entered into a plea agreement with the government. This plea agreement, signed by the defendant, set forth the statutory maximum and minimum sentences that the court was able to impose for the offenses with which Morris was charged. According to the plea agreement, each drug offense to which Morris was pleading guilty carried a maximum penalty of 40 years imprisonment and "a mandatory four years of supervised release up to lifetime supervised release." Doc. 63, Ex. B at ¶ 6. In fact, the mandatory minimum supervised release term applicable to the drug offenses with which Morris

was charged was five years.

On October 1, 1998, Morris appeared before the Honorable Joseph L. McGlynn and plead guilty to the indicted charges. Before accepting Morris' plea, Judge McGlynn conducted a full guilty plea colloquy as required by Federal Rule of Criminal Procedure 11.<sup>2</sup> During the course of the Rule 11 plea colloquy, the judge repeated the statement in the plea agreement that misinformed Morris that a violation of the controlled substance statute carried a four year mandatory minimum term of supervised release. Doc. 63, Ex. E at 6.

Morris' sentencing was initially scheduled for January 21, 1999. However, Morris filed a pro se motion to withdraw his guilty plea on that same day. Prior to this date, the United States Probation Office prepared a Presentence Investigation Report (PSR) which correctly stated that Morris faced a five year mandatory minimum term of supervised release. Despite the fact that Morris was now accurately informed of the mandatory minimum period of supervised release, Morris' motion to withdraw his plea did not take issue with the misinformation that he received at his plea hearing. On August 31, 1999, this court denied Morris' motion to withdraw.

Following the submission of a revised PSR, which again correctly stated that Morris faced a supervised release term of not less than five years, Morris was sentenced on November 16, 1999 to 190 months imprisonment, five years supervised release, a \$1,500 fine and a \$200 special assessment. Morris filed a timely appeal which the Third Circuit denied on August 16, 2000. On August 22, 2001, Morris filed a motion to vacate, set aside or correct his sentence

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<sup>2</sup> Federal Rule of Criminal Procedure 11 provides that before accepting a plea of guilty, "the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the maximum possible penalty provided by law, including the effect of any supervised release term." Fed.R.Crim.P. 11.

pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel. Morris amended this motion on October 12, 2001. It is this amended motion that is presently before this court.<sup>3</sup>

## DISCUSSION

### *I. Ineffective Assistance of Counsel: Failure to Object to the Court's Misstatement of the Applicable Supervised Release Period.*

At Morris' guilty plea colloquy, the presiding judge misinformed Morris that the drug offenses with which he was charged carried a mandatory minimum supervised release term of four years, when in fact, the minimum term was five years. *See* 21 U.S.C. § 841(b)(1)(A). Because Morris' trial counsel did not correct the judge's misstatements, Morris claims that he was denied effective assistance of counsel. Morris also claims that his appellate counsel was ineffective for failing to raise this issue on appeal.

To succeed with this claim for ineffective assistance of counsel, Morris must show (1) that his attorney's performance was objectively deficient and (2) that his attorney's deficient performance caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In considering whether the attorney's performance was objectively deficient, the court must defer to counsel's tactical decisions, must not employ hindsight, and must give counsel the benefit of a strong presumption of reasonableness. *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994). In the context of a guilty plea, prejudice results when defendant has shown "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would

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<sup>3</sup> Although the government has styled its response to Morris' § 2255 motion as a motion to dismiss, the government has not asserted the grounds on which it contends that dismissal is warranted. As a result, I will treat the government's motion to dismiss as an answer to Morris' habeas petition.

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

The misinformation that Morris received about the mandatory minimum supervised release term must be considered in light of what Morris was correctly told about the sentence that could accompany his guilty plea. Morris was aware that each count of possession with intent to distribute cocaine to which he plead guilty carried a maximum penalty of 40 years imprisonment and a mandatory minimum imprisonment term of 10 years. In addition, Morris knew that his prison term would be followed by a period of supervised release. Although Morris was misinformed as to the minimum statutory period of supervised release applicable to his charges, Morris was properly informed that his supervised release sentence could be as long as a lifetime. Although the five year term of supervised release to which Morris was sentenced is one year more than what Morris had been told was the minimum term to which he could be sentenced, it is well-within the possible lifetime maximum term. Because Morris knew that the sentencing court had discretion to enter any appropriate sentence within the statutory range, there was no guarantee that he would receive the mandatory minimum period of supervised release. As a result, Morris cannot reasonably claim that had he known that the minimum supervised release period was five years, instead of four, he would have gone to trial instead of pleading guilty.

In *United States v. Powell*, 269 F.3d 175 (2001), the Third Circuit was presented with a factual situation similar to the situation here. In *Powell*, the defendant was misinformed in his guilty plea agreement and Rule 11 colloquy that he was exposed to a minimum of three years of supervised release, when the actual statutory minimum term, to which he was sentenced, was five

years. *Id.* at 180. The defendant alleged that this mistake constituted a violation of Rule 11.<sup>4</sup> The Third Circuit found it to be a harmless error because under the circumstances the defendant “would not have done anything differently had he known that he was exposing himself to five years of supervised release as opposed to three years.” *Id.* at 186.

The circumstances that persuaded the court in *Powell* to find that the misstatements of the mandatory minimum supervised release period did not impact the defendant’s decision to plead guilty are equally present here. *Powell*, 269 F.3d at 186 (discussing the factors that weighed in the court’s determination that the defendant’s decision to plead guilty was not impacted by the misinformation he received as to the minimum supervised release term to which he could be sentenced). As with the defendant in *Powell*, Morris understood that the government was able to make whatever sentencing recommendation it deemed appropriate. Doc. 63, Ex. C. at 10. Morris also knew that he faced a maximum sentence of 80 years imprisonment for his two counts of drug distribution, and that the court had to impose at least a 10 year prison sentence and some period of supervised release. Doc. 63, Ex. B. at ¶ 6. Morris further understood that the court was not bound by the plea agreement, and that he could not withdraw his plea even if the court

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<sup>4</sup> Admittedly, the procedural posture in *Powell* is distinct from the present action. In *Powell*, the defendant alleged a direct violation of Rule 11, while here Rule 11 is only indirectly implicated, as Morris’ claim is that his counsel was ineffective for failing to object to the judge’s misstatements at his Rule 11 guilty plea colloquy. In the context of *Powell*, the burden was on the government to establish that a Rule 11 error “was unlikely to have affected a defendant’s willingness to waive his or her rights and enter a plea of guilty.” 269 F.3d at 185. Here, Morris must show that “but for” his counsel’s ineffectiveness he would not have pleaded guilty. *Hill*, 474 U.S. at 58-9. Thus, in both procedural contexts, although the party with the burden of proof differs, the ultimate inquiry is the same, namely whether the defendant’s guilty plea was affected by an error that occurred during the Rule 11 colloquy. Because of this similarity, despite the procedural differences, the Third Circuit’s decision in *Powell* instructs this court’s consideration of Morris’ ineffectiveness claim.

declined to follow the agreement of the parties. Id. at ¶¶ 7, 9. Morris was also informed that by pleading guilty and accepting responsibility, instead of going to trial, he was entitled to a sentence reduction under the sentencing guidelines. Id. ¶ 9.b. Like the Third Circuit in *Powell*, which found this knowledge sufficient to indicate that the defendant would not have changed his plea had he known of the correct supervised release period, I am convinced that given this knowledge Morris would not have acted differently had he known that the mandatory minimum supervised release period was five and not four years

Although Morris now focuses on the one extra year of supervised release for which he had not planned, I am satisfied that the misstatements at Morris' Rule 11 plea colloquy regarding the mandatory minimum supervised release term did not affect Morris' decision to plead guilty. As a result, Morris cannot prove the kind of prejudice required to satisfy the second prong of the *Strickland* ineffectiveness test. Accordingly, this ground for asserting ineffectiveness of counsel must be rejected.

## II. *Ineffective Assistance of Counsel: Application of Apprendi v. New Jersey*

Morris reads *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as transforming drug quantity from a mere sentencing factor to a fundamental element of the drug trafficking offense. As a result, Morris claims that his appellate counsel was ineffective in not raising on appeal the court's failure to advise Morris that drug quantity was an element of the charge to which he plead guilty.

Morris has misunderstood the holding in *Apprendi*, and therefore this claim of ineffectiveness is without legal merit. The Supreme Court in *Apprendi* held that "any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. In the context of drug trafficking crimes in violation of 21 U.S.C. § 841(a)<sup>5</sup>, what *Apprendi* decided is that if the government desires to take advantage of a sentence in excess of the twenty year statutory maximum term provided for in § 841(b)(1)(C)<sup>6</sup>, the issue of the higher quantity of drugs must be submitted to the jury. *United States v. Vazquez*, 271 F.3d 93, 99 (3rd Cir. 2001). Thus, contrary to Morris’ assertion, *Apprendi* did not make drug quantity an element of the underlying offense, but it only required that when drug quantity increases a defendant’s sentence beyond the statutory maximum of twenty years, the issue of drug quantity must be presented to a jury and proven beyond a reasonable doubt.<sup>7</sup> Because the judge correctly informed Morris of the elements of the drug trafficking offense with which he was charged, there was no error for Morris’ appellate counsel to raise on appeal. As such, this ground for asserting ineffectiveness must be rejected.

Moreover, applying the holding in *Apprendi* provides no relief for Morris. The Third Circuit has held that there cannot be an *Apprendi* violation where the defendant’s sentence is under the statutory maximum. *United States v. Williams*, 235 F.3d 858, 863 (3d Cir. 2000). In

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<sup>5</sup> Section 841(a) provides that “it shall be unlawful for any person knowingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”

<sup>6</sup> Section 841(b) prescribes the penalties for violations of section 841(a). The catch-all provision is contained in section 841(b)(1)(C). This section contains no drug quantity requirement and provides for a maximum possible sentence of 20 years imprisonment.

<sup>7</sup> In his traverse, Morris notes that in a concurring opinion in *Vazquez*, Judge Becker stated that “drug quantity is *always* an element of an offense under § 841.” 271 F.3d at 108 (emphasis in original). However, this position was joined by only one other judge among the thirteen judges who heard the case.

this case, the maximum statutory penalty applicable to the crime of cocaine distribution to which Morris plead guilty is 20 years imprisonment. 21 U.S.C. 841(a), (b)(1)(C). Morris, however, was sentenced to a prison term of only 190 months.<sup>8</sup> Thus, in light of the Third Circuit's decision in *Williams*, there is no violation of *Apprendi* in Morris' case.

### CONCLUSION

For all the foregoing reasons, Morris has failed to establish the ineffectiveness of his trial and appellate counsel. Because Morris has not provided a legitimate ground upon which this court may vacate, set aside or correct his sentence, Morris' § 2255 motion will be denied.

An appropriate order follows.

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<sup>8</sup> In addition, even if drug quantity had enhanced Morris' sentence beyond the statutory maximum, there can be no *Apprendi* violation here because the issue of drug quantity was not improperly determined by a judge, rather than a jury. In fact, a determination of drug quantity was not required, as Morris had stipulated to the quantity of drugs that he possessed.

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: NO. 01-4268  
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**ORDER**

And now, this \_\_\_\_\_ day of February 2002, upon consideration of defendant's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255; the government's response; and defendant's reply thereto; it is hereby ORDERED that defendant's motion is DENIED. As there has been no substantial showing of the denial of a constitutional right, it is further ORDERED that no certificate of appealability shall issue.

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William H. Yohn, Jr., Judge