

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

UNITED STATES OF AMERICA : CIVIL ACTION  
 :  
 v. : 96-cr-217-01  
 :  
 NICOLAS VASILIADES : 01-cv-4925

**MEMORANDUM**

Giles, C.J.

July \_\_\_\_\_, 2002

**I. INTRODUCTION**

On April 26, 1996, Petitioner Nicolas Vasiliades was arrested by complaint and warrant charging him with possession with intent to distribute phenyl-2-propanone (“P2P”), to manufacture methamphetamine, and being a felon in possession of a firearm. On May 22, 1996, a grand jury in this district charged Vasiliades with these same offenses. On April 2, 1997, the grand jury returned a 56-count superseding indictment charging Vasiliades and thirteen co-defendants with drug trafficking and related charges. Vasiliades was charged in 29 counts, including: conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. § 846; twelve (12) counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1); three (3) counts of using a telephone for drug trafficking, in violation of 21 U.S.C. § 843(b); possession of P2P with intent to manufacture methamphetamine, in violation of 21 U.S.C. § 841(a)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); nine (9) counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and criminal forfeiture under 21 U.S.C. § 853.

On November 12, 1997, Vasiliades conditionally pled guilty to all 29 counts. Vasiliades reserved his right to appeal issues raised in his pretrial motions. On December 14, 1998, Vasiliades was sentenced to concurrent mandatory life imprisonment on Counts 1, 10, 21, and 23; concurrent terms of 28 months for Counts 23 and 25; 10 concurrent years for Count 34; and 20 concurrent years for each of Counts 35-43. (See Sentencing Hearing, Transcript of Proceedings, December 14, 1998 (“Sentencing Transcript”), at 20.)

Vasiliades’ December 21, 1998 appeal to the third circuit was denied on August 1, 2000.

Petitioner timely filed this pro se motion on September 28, 2001, which this court construes as a petition for correction of illegal sentence, alleging ineffective assistance of counsel essentially on the following grounds: (1) counsel allowed this court to sentence petitioner to life imprisonment on Count 22, a count petitioner was not charged in; (2) counsel allowed the court to impose a life sentence on count 23, which has a statutory maximum penalty of eight years; (3) counsel allowed petitioner to be sentenced twice under count 23, in violation of the Double Jeopardy clause, as the court first imposed a life sentence and then imposed a 28-month sentence on that same count; (4) petitioner’s sentence of 20 years on each of counts 35-43 exceeds the Sentencing Guidelines’ (“Guidelines”) statutory maximum of 162 months for these offenses; (5) counsel allowed the court to impose a sentence for violation of 21 U.S.C. § 841(b)(2)(A), where petitioner was not charged by a grand jury for violating that statutory provision, in violation of the grand jury “indictment clause;” (6) petitioner’s indictment failed to set forth probable cause as to every essential element of the offense, for a violation of 21 U.S.C. § 841(b)(1)(A), possession and conspiracy to possess a “Schedule II non-narcotic” controlled substance; (7) 21 U.S.C. § 841(b)(1) is unconstitutional because it removes from the jury’s consideration facts

which determine the maximum possible sentence applicable for the offense, and counsel failed to challenge its constitutionality. For the reasons that follow, petitioner's motion is granted in part, and denied in part.

## **II. DISCUSSION**

In order to establish ineffective assistance of counsel, a petitioner must demonstrate first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Supreme Court held in Strickland "that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. The petitioner's burden is heavy in overcoming a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because the right to effective assistance of counsel does not guarantee an error-free or flawless performance by counsel. Government of Virgin Islands v. Bradshaw, 726 F.2d 115, 119 (3d. Cir.), cert. denied, 469 U.S. 829 (1984).

Even if petitioner meets the first prong of Strickland, that counsel's performance was deficient, his burden to show prejudice is equally heavy. "Prejudice" in this context is not whether the outcome would have been different "but for" counsel's error. Rather, defendant must also establish that the result of the proceeding was "fundamentally unfair or unreliable." Lockart v. Fretwell, 506 U.S. 364, 368-70 (1993).

Therefore, pursuant to Strickland, this court must ask whether "counsel's representation fell below an objective standard of reasonableness and, if so, whether there is a "reasonable certainty that counsel's ineffectiveness prejudiced petitioner, that is, "that, absent the errors, the

fact finder would have had a reasonable doubt respecting guilt.”

A. Ineffective Assistance of Counsel Claims

*1. Count 22*

Petitioner first contends that counsel was ineffective for allowing the court to impose a life sentence on Count 22. The sentencing transcripts as well as the clerk of court’s minute entry for the sentencing hearing establishes, however, that petitioner was not sentenced on this count. The court docket sheet also reflects this sentence, as well as the Judgment and Commitment Order. The docket entry of the Judgment and Commitment Order, however, contains a clerical error reporting that a life sentence was imposed on this count. (Docket # 594.) The court thus orders that this entry be corrected, pursuant to Fed. R. Crim. P. Rule 36.<sup>1</sup>

*2. Count 23*

Petitioner contends that counsel was ineffective for allowing the court to impose both a life sentence and a sentence of 28 months on Count 23. Petitioner is correct. According to the sentencing transcript, petitioner was sentenced to both life and 28 months on Count 23, for violation of 21 U.S.C. § 843(b). As the plea agreement and the remainder of the record indicate, the court intended only to sentence petitioner to 28 months on this count, not life imprisonment, which is not an option under the statute. Accordingly, the record shall be corrected pursuant to Rule 36 to reflect that petitioner is sentenced to 28 months, and not life imprisonment, on Count

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<sup>1</sup>Rule 36 provides, “Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.”

23.<sup>2</sup>

*3. Counts 35-43*

Petitioner further claims that counsel was ineffective for failing to object to the sentence imposed on the money laundering counts, Counts 35-43. On each of these counts, petitioner received a sentence of 20 years incarceration to run concurrent to each other and the other sentences imposed. (Sentencing Transcript, at 20.) Petitioner asserts that this sentence exceeds the Guidelines' statutory maximum of 162 months for these offenses. The Presentence Investigation Report ("PSI") prepared in this case shows that petitioner's offenses were grouped together pursuant to sections 3D1.2(c) and (d) of the Guidelines. The offense level used was the guideline for the count which had the highest offense level, in this case § 2D1.1, the guideline for violations of 21 U.S.C. §§ 841 and 846. (PSI ¶ 34.) Under the grouping rules, the total offense level was 42 (PSI ¶ 69.) With a criminal history category of VI (PSI ¶ 52), the sentencing guideline range was life imprisonment (PSI ¶ 69).

Under § 5G1.2(b), the court was required to impose on each count the total sentence as determined by the guidelines. On each count, the court is limited by the statutory maximum. For a violation of 18 U.S.C. § 1956, that maximum is 20 years incarceration. Therefore, the sentence imposed by this court was correct. As the commentary to § 5G1.2 states,

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<sup>2</sup>Although petitioner does not raise these issues, the court notes that petitioner was not sentenced on the following counts, to which he pled guilty: Counts 11-20, 26-28, and 33. Counts 11-21 and 33 each carry a mandatory sentence of life imprisonment. The court invites the Government to file a motion to complete the sentencing of petitioner, if it deems that to be appropriate at this time.

The combined length of the sentences (“total punishment”) is determined by the adjusted combined offense level. To the extent possible, the total punishment is to be imposed on each count . . . . Usually at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence.

The court’s sentence on these counts is consistent with the guideline.

#### B. Constitutionality of 21 U.S.C. § 841 under *Apprendi*

The court construes petitioner’s remaining arguments as challenges to the constitutionality of 21 U.S.C. § 841 in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioner contends that 21 U.S.C. § 841 is unconstitutional because it removes from the jury’s consideration facts which determine the maximum possible sentence applicable for the offense, and thus counsel was ineffective for failing to challenge its constitutionality.

In *United States v. Kelly*, 272 F.3d 622, 624 (3d Cir. 2001), the third circuit rejected this argument and held,

It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as § 841 does), or even whether they are scattered across multiple statutes (see 18 U.S.C. §§ 924(a), 1963). *Apprendi* holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decision maker (unless the defendant elects a bench trial), and the reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil that requirement is a subject to which the Constitution does not speak.

(quoting *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001)). Because petitioner pled guilty to these offenses, he waived his right to a jury determination of the amount of the

controlled substance he possessed.

### C. Petitioner's Supplemental Motion and Affidavit

Petitioner has filed a "Motion to Amend or Supplement § 2255 Motion," not on proper forms, but which this court will consider for reasons of judicial economy. The court construes the contentions in this motion, and the supplemental affidavit filed with it, as follows: 1) petitioner's counsel was deficient because he was counseled to enter a guilty plea without knowing that he could have a jury determine the amount of the methamphetamine he possessed, and if he had known that, petitioner would not have entered a guilty plea; and 2) petitioner's counsel was deficient because they failed to research whether all of petitioner's prior convictions, which served to enhance his sentence on the instant conviction, were constitutional. The court finds that both contentions lack merit.

#### *1. Application of Apprendi*

Petitioner's first argument makes reference to Apprendi, which the third circuit has held applies retroactively to cases that were still pending on direct review at the time it was decided on June 26, 2000.<sup>3</sup> See United States v. Barbosa, 271 F.3d 438, 453 (3d Cir. 2001). It is undisputed that petitioner's counsel did not make an objection on Apprendi grounds. The Supreme Court had not yet decided Apprendi. Thus, while Apprendi was determined to apply retroactively, petitioner's counsel could hardly have known at the time of sentencing in 1998 that

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<sup>3</sup>The court notes that petitioner's conviction became final on or about November 1, 2000, or 90 days after the third circuit denied his appeal, on August 1, 2000.

their client may have had a constitutional right to have drug amounts determined by a jury. The standard of review under these circumstances is plain error. Fed. R. Cr. P. 52(b). “Under that doctrine, ‘before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights.’” Barbosa, 271 F.3d at 453 (quoting Johnson v. United States, 520 U.S. 461, 466-67 (1997)).

Petitioner’s Apprendi argument fails for two reasons. First, Apprendi applies where a defendant has received a sentence beyond the statutory maximum, and even then excludes enhancements made by the judge in light of a prior conviction.<sup>4</sup> Second, petitioner pled guilty to all elements of the counts of the superceding indictment to which he was sentenced, and the court at petitioner’s sentencing hearing adopted all of the findings and conclusions in the PSI report, following petitioner’s affirmation of their accuracy. (Sentencing Transcript, at 3.) If petitioner had pled guilty to possessing a controlled substance, but the court had made the findings as to the type of substance and the amount he possessed, then Apprendi would apply. Accord United States v. Campbell, 2002 WL 1426534 (3d Cir. July 2, 2002).<sup>5</sup> However, Apprendi does not

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<sup>4</sup>“Other than the fact of a prior conviction, 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.” Apprendi, 530 U.S. at 490.

<sup>5</sup> In Campbell, unlike the instant case, the defendant did not plead guilty, nor did he stipulate in writing to the amount of drugs in the indictment. 2002 WL 1426534, at \*3. The district court did not submit the question of amount to the jury, as required by Apprendi, which was decided one month after defendant’s sentencing hearing. The court of appeals held that under Apprendi, the district court’s failure to submit the amounts to the jury constituted plain error, but could not satisfy the “substantial rights” prong of the plain error test because the evidence presented at trial established beyond a reasonable doubt that the defendant distributed in excess of the minimum amount of cocaine base required for him to have received his sentence. Id. at \*5 (citing United States v. Vazquez, 2001 WL 1188250, at \*8 (3d Cir. Oct. 9, 2001) (en banc)).

entitle a petitioner to jury determination of the type and amount of the substance possessed when he has already knowingly and voluntarily pled guilty to the type and amount of substance possessed. Since the latter is the relevant scenario here, Apprendi is inapposite.

## *2. Relevance of Constitutionality of Petitioner's Prior Convictions*

Petitioner next argues that counsel was deficient because they failed to research whether all of petitioner's prior convictions, which served to enhance his sentence on the instant conviction, were constitutional. The Supreme Court has held that if, by the time of sentencing under a federal statute, a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid and may be used to enhance the federal sentence. Daniels v. United States, 532 U.S. 374, 382 (2001) (citing Custis v. United States, 511 U.S. 485, 497 (1994)). The Court found only one exception to this rule: "If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings." Id. (citing Custis, 511 U.S. at 496).

While petitioner contends here that his prior convictions were unconstitutional because of ineffective assistance of counsel,<sup>6</sup> he never raised this challenge in his sentencing proceedings on the instant conviction. Thus, petitioner has no recourse.

If, however, a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right

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<sup>6</sup>Specifically, petitioner contends that he was never advised that he could have assistance of counsel appointed for purposes of appeal, and that he did not knowingly or voluntarily waive his right to such assistance of counsel on appeal. Since petitioner completed his sentence on that prior conviction, it is no longer open to direct or collateral attack in its own right.

because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under § 2255. A defendant may challenge a prior conviction as the product of a Gideon violation in a § 2255 motion, but generally only if he raised that claim at his federal sentencing proceeding.

Id. (citations omitted).

Further, although petitioner did not specifically argue this, the enhancement he received under 21 U.S.C. § 841 had required the Government to file an information with the court, “stating in writing the previous convictions to be relied upon. 21 U.S.C. § 851(a)(1). The Government did so on November 7, 1997. (Docket # 423.) In order for petitioner to have preserved his objection to the enhancement based on his prior conviction, he must have filed a written response to the information. 21 U.S.C. § 851(c). Petitioner did not do this. Further, “[n]o person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.” 21 U.S.C. § 851(e). Since petitioner’s prior conviction was entered in 1986, over ten years before he was sentenced in the instant case, petitioner has never had recourse under § 851.

### **III. CONCLUSION**

For the foregoing reasons, petitioner’s § 2255 motion is granted in part, and denied in part. An appropriate order follows.

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**ORDER**

AND NOW, this \_\_\_ day of July 2002, for the reasons detailed in the attached memorandum, it hereby is ORDERED that Petitioner's Motion Filed Pursuant to 28 U.S.C. § 2255 is GRANTED IN PART, with respect to the correction of the following clerical errors, pursuant to Fed. R. Crim. P. Rule 36: Docket #594 is corrected to reflect that Petitioner is sentenced to life on Counts 1, 10, and 21, and; on Count 23, that Petitioner is sentenced to 28 months, and not life.

The remainder of Petitioner's Motion is DENIED.

BY THE COURT:

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JAMES T. GILES C.J.

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