

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,            )  
  )  
    Plaintiff/Respondent,            )  
  )  
                  v.                    )  
  )  
JAYVONNE JOHNSON                    )  
  )  
    Defendant/Petitioner.            )  
  )

Criminal Action No. 95-28-SLR  
Civil Action No. 01-437-SLR

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Petitioner Jayvonne Johnson is an inmate in federal custody. (D.I. 35) Currently before the court is petitioner's application for habeas corpus relief filed pursuant to 28 U.S.C. § 2255. Because the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively, petitioner's motion is denied.

**II. BACKGROUND**

On May 9, 1995, petitioner was indicted on various charges, including conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(c); distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and criminal forfeiture under of 18 U.S.C. § 853. (D.I. 7) On July 18, 1995,

petitioner pled guilty to conspiracy to distribute cocaine, possession with intent to distribute cocaine base, criminal forfeiture, and money laundering in violation of 18 U.S.C. § 1956. (D.I. 18)

On November 22, 1995 petitioner was sentenced to 216 months imprisonment and judgment was entered. (D.I. 26) On December 4, 1995, petitioner filed a notice of appeal. (D.I. 27) On July 8, 1996, the Third Circuit dismissed the appeal. (D.I. 34) Petitioner's instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is dated June 26, 2001. (D.I. 35)

### **III. DISCUSSION**

Petitioner argues the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), recognizes a new right that renders his sentence unconstitutional. (D.I. 35) In Apprendi, the Supreme Court held that "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." 120 S. Ct. at 2362-63.

Petitioner argues that the government failed to allege specific amounts of cocaine in any of its charges against him. In this regard, petitioner asserts he was not informed that the government would be required to prove beyond a reasonable doubt

that he distributed more than 5 kilograms of cocaine to be convicted under § 841(b)(1)(A) and more than 500 grams of cocaine for a conviction under § 841(b)(1)(B). (Id. at ¶ 7) Petitioner argues that the government's failure to allege specific amounts of cocaine in its indictment would have been fatal to its ability to convict him of possessing a specific quantity of cocaine or cocaine mixture. (Id. at ¶ 8) Accordingly, petitioner argues that he was not properly informed of his rights when he entered into his plea agreement and, therefore, his sentence was in excess of the maximum authorized by law, or in violation of the Constitution under Apprendi. (Id. at ¶ 13)

Respondent replies that the Supreme Court's decision in Apprendi does not apply retroactively. Additionally, respondent argues that petitioner's motion is not timely filed, he waived his claim by not raising it at sentencing or on appeal, and that his Apprendi claim is meritless. Because the court concludes that the Supreme Court's decision in Apprendi v. New Jersey is not applied retroactively, it need not reach respondent's remaining claims.

The Third Circuit, as well as the majority of courts that have considered the question, including this District, have concluded that Apprendi does not apply retroactively to cases on collateral review. See United States v. McBride, 283 F.3d 612, 616 (3d Cir. 2002); In re Turner, 267 F.3d 225 (3d Cir. 2001);

United States v. Moss, 252 F.3d 993, 997, 2001 WL 637312, 10 n.4 (8th Cir. 2001) (collecting cases); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); United States v. Robinson, 2001 U.S. Dist. LEXIS 10555 (D. Del., June 20, 2001); United States v. Gibbs, 125 F. Supp. 2d 700 (E.D. Pa. 2000) (collecting cases).

In United States v. McBride, the Third Circuit stated “[w]e have held that the new rule in Apprendi was not retroactive to cases on collateral review.” 283 F.3d at 616 (citing In re Turner, 267 F.3d 225 (3d Cir. 2001)). In Turner, the Third Circuit analyzed whether or not the Supreme Court’s decision in Apprendi was retroactive. The Turner court first looked at whether the rule was substantive or procedural in nature, because “the Supreme Court has created separate retroactivity standards for new rules of criminal procedure and new decisions of substantive criminal law.” Id. at 229 (quoting United States v. Woods, 986 F.2d 669, 676 (3d Cir. 1993)). The court noted that “under the substantive retroactivity standard, the appropriate inquiry is whether the claimed legal error was a ‘fundamental defect which inherently results in a complete miscarriage of justice,’ and whether ‘it presents exceptional circumstances where the need for the remedy afforded’ by collateral relief is apparent.” Turner, 267 F.3d at 229 (citations omitted). Conversely, new rules of criminal procedure are given retroactive effect on collateral review only if they can satisfy one of two

narrow exceptions described in Teague v. Lane, 489 U.S. 288 (1989). Id.

However, the Third Circuit concluded that since the holding in Apprendi did not dictate that the rule was substantive, rather than procedural, the new rule was "merely arguably substantive." Turner, 267 F.3d at 230. Consequently, the Turner court concluded that retroactive application of Apprendi was not warranted, particularly given the Supreme Court's holding in Tyler v. Cain, 121 S. Ct. 2478, 2482 (2001) (holding that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court itself holds it to be retroactive.).

Since the law in this Circuit is that Apprendi does not apply retroactively, the court shall deny petitioner's Apprendi claim challenging the sufficiency of the information predicated his original guilty plea.

#### **IV. CONCLUSION**

At Wilmington, this 28th day of January, 2003, for the aforementioned reasons, IT IS ORDERED that:

1. Petitioner Jayvonne Johnson's above captioned application for habeas corpus relief (D.I. 35) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of

appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

Sue L. Robinson  
United States District Judge