

Farnan, District Judge.

Pending before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 61) filed by Defendant, George Robinson. For the reasons set forth below, Defendant's Section 2255 Motion will be denied.

BACKGROUND

On November 26, 1996, Defendant was indicted on various drug charges. Pursuant to the terms of a plea agreement, Defendant pled guilty to one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(2) and (b)(1)(B). Following his guilty plea, the Government dismissed the remaining charges in the Indictment. On October 1, 1997, the Court sentenced Defendant to 24 months imprisonment and 5 years of supervised release. (D.I. 80 at Exh. A). Defendant did not appeal his conviction or sentence.

Nearly two years later, on August 12, 1999, the Court revoked Defendant's supervised release, because Defendant committed another crime and illegally possessed a controlled substance during his term of supervised release. In addition, Defendant failed to notify his probation officer within 72 hours of being arrested or questioned by police. (D.I. 80 at Exh. B). The Court sentenced Defendant to three years

imprisonment. Defendant appealed the Court's sentence, and the Third Circuit affirmed the Court's Judgment. (D.I. 80 at Exh. C).

Approximately five months after the Third Circuit's decision, Defendant filed the instant Motion under Section 2255. By his Motion, Defendant contends that: (1) his due process rights were violated because the Court enhanced the penalty for his violation of supervised release based on his possession of "crack" cocaine, when he was actually in possession of a form of "cocaine base" that was not crack; (2) 21 U.S.C. § 841(b) is unconstitutionally vague because the statutory definition of the term "cocaine base" is vague; (3) the government breached the terms of his plea agreement by allowing the Court to sentence Defendant on his original conviction under 21 U.S.C. § 841(b)(1)(B) for possession of cocaine base; (4) his counsel was ineffective for failing to (i) object to the Government's breach of the plea agreement; (ii) object to the Court's sentencing of Defendant under 21 U.S.C. § 841(b)(1)(B); and (iii) assert that 21 U.S.C. § 841 is vague; and (5) his constitutional rights were violated because the Information did not plead the quantity of cocaine base pursuant to the Supreme Court's recent decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). The Government

has filed a Response To Defendant's Motion Pursuant To 28 U.S.C. § 2255 (D.I. 80), and therefore, Defendant's Motion is ripe for the Court's review.

DISCUSSION

I. Whether An Evidentiary Hearing Is Required To Address Defendant's Claims

Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings, the Court should consider whether an evidentiary hearing is required in this case. After a review of the Motion, Answer Brief, and records submitted by the parties, the Court finds that an evidentiary hearing is not required. See Rule 8(a) of the Rules Governing Section 2255 Proceedings. The Court concludes that it can fully evaluate the issues presented by Defendant on the record before it. Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989) (holding that evidentiary hearing not required where motion and record conclusively show movant is not entitled to relief and that decision to order hearing is committed to sound discretion of district court), appeal after remand, 904 F.2d 694 (3d Cir. 1990), cert denied, 500 U.S. 954 (1991); Soto v. United States, 369 F. Supp. 232, 241-42 (E.D. Pa. 1973), (holding that crucial inquiry in determining whether to hold a hearing is whether additional facts are required for fair

adjudication), aff'd, 504 F.2d 1339. Accordingly, the Court will proceed to Defendant's claims.

II. Timeliness of Defendant's Motion

In response to Defendant's Motion, the Government contends that Defendant's Section 2255 Motion is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Specifically, the Government contends that Defendant's claims relate to his original conviction, not his revocation of supervised release, and therefore, the Motion is time-barred.

Defendant opposes the Government's contention that the Motion is time-barred. According to Defendant, the Third Circuit did not rule on his appeal from the sentence imposed at the revocation hearing until March 13, 2000. Because Defendant's Motion was filed approximately five months later, in July 2000, Defendant contends that his Motion is timely.

The Government's argument is premised on their interpretation of Defendant's arguments as challenges to his original conviction. However, upon examination of Defendant's arguments, it appears to the Court, that while some of Defendant's claims are challenges to his underlying conviction, others are not. Accordingly, the Court will address the question of timeliness on a claim by claim basis.

A. Defendant's Claims Under Section 841

Construing Defendant's claims under Section 841, the Court understands Defendant's claims to be challenges to the term of imprisonment imposed by the Court as a result of Defendant's violation of supervised release. As the Third Circuit explained in addressing Defendant's appeal of the Court's sentence for Defendant's violation of supervised release, the maximum sentence the Court can impose as a result of a violation of supervised release turns, in part, on Defendant's felony offender class. (D.I. 80, Exh. C at 4). In the memorandum prepared by the probation office in connection with Defendant's revocation hearing, the probation office categorized Defendant as a Class B felony offender. The Class B categorization is based on Defendant's conviction under 21 U.S.C. § 841(a)(1) and (b)(1)(B) when he originally pled guilty to possession with intent to distribute cocaine base. For violations of supervised release, Class B felony offenders are subject to a maximum of three years imprisonment, while Class C felony offenders are subject to a maximum of two years imprisonment. Defendant contends that although he pleaded to a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), his conduct was not encompassed by that statute, because the term cocaine base in that statute only

refers to "crack" and the Government made no attempt to prove that Defendant possessed "crack." Thus, Defendant contends that he should have been found guilty of violating 21 U.S.C. § 841 (a)(1) and (b)(1)(C), which is a Class C felony. Then, according to Defendant, if he was found guilty of a Class C felony, the sentence imposed as a result of his violation of supervised release would have been two years, rather than three years. Because Defendant's claim has direct bearing on the term of incarceration imposed by the Court for his violation of supervised release, and Defendant's motion was filed within six months of the Third Circuit's decision denying Defendant's appeal of the sentence imposed for his violation of supervised release, the Court concludes that Defendant's Section 841 claims are not time-barred.

B. Defendant's Ineffective Assistance Of Counsel Claim and His Claim That The Government Failed to Comply With The Terms of His Plea Agreement

To the extent that Defendant contends that his counsel was ineffective at his original Rule 11 hearing and subsequent sentencing on his original conviction and that the Government failed to comply with the terms of his plea agreement at his original sentencing, the Court concludes that Defendant's claims are time-barred. Defendant's judgment of conviction is dated October 1, 1997, and Defendant did not file a direct

appeal. Thus, Defendant's judgment of conviction became final upon the expiration of the time for seeking direct review, and the one-year limitations period runs from that date. Kapral v. United States, 166 F.3d 565, 567 (3d Cir. 1999). Defendant had 10 days to file his appeal, and thus, his conviction became final October 11, 1997. Applying the one year statute of limitations, Defendant was required to file any challenges to his original conviction by October 1998. Because the Motion is deemed filed July 26, 2000, the Court concludes that Defendant's claims challenging his original sentence are time-barred.¹ Accordingly, the Court will dismiss as untimely Defendant's claim that his counsel was ineffective at his original Rule 11 hearing and sentencing² and his claim that the Government violated the terms of his plea agreement at his original sentencing.

C. Defendant's Apprendi Claim

Relying on the Supreme Court's recent decision in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), Defendant

¹ Absent proof of mailing, the date on Defendant's motion is deemed the filing date. Johnson v. Brewington-Carr, Civ. Act. No. 99-181-JJF, mem. op. at 4 (D. Del. Feb. 22, 2000).

² To the extent Defendant challenges the assistance of counsel at his revocation hearing, the Court will not dismiss as untimely Defendant's claim.

contends that the Information upon which he was originally convicted was fatally flawed, because it did not specify an essential element of the offense. Specifically, Defendant contends that the Information did not contain the quantity of cocaine base that Defendant allegedly possessed with intent to distribute. Because the Information lacked this factual information, Defendant also contends that the Court erred by determining the amount of cocaine as a sentencing factor, rather than requiring the Government to prove the amount beyond a reasonable doubt. (D.I. 71).

Although the Third Circuit has yet to rule expressly on whether the rule enunciated in Apprendi applies retroactively to cases on collateral review, the majority of courts that have considered the question have concluded that Apprendi does not apply retroactively to cases on collateral review. See United States v. Moss, 2001 WL 637312, 10 n.4 (8th Cir. June 11, 2001) (collecting cases); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); United States v. Gibbs, 125 F. Supp. 2d 700 (E.D. Pa. 2000) (collecting cases). Most often cited among courts in this Circuit is the analysis performed by the District Court for the Eastern District of Pennsylvania in United States v. Gibbs, 125 F. Supp. 2d at 702-707. Analyzing Apprendi under the standard enunciated in Teague v. Lane, 489

U.S. 288 (1989) for retroactive application of legal rules, the Gibbs court concluded that Apprendi announces a new rule because "it requires [the Government] to prove certain facts to a jury beyond a reasonable doubt when previously it needed only to prove such facts to a judge at sentencing by a preponderance of the evidence." 125 F. Supp. 2d at 703.

Having concluded that Apprendi imposed a new obligation on the Federal Government that "was not dictated by precedent existing at the time the defendant's conviction became final," the Gibbs court examined whether the new rule of Apprendi fit into one of the two exceptions described in Teague permitting retroactive application. Id.

The first exception under Teague is for new rules that forbid punishment of certain conduct or prohibit a certain category of punishment for a class of defendants. However, the new rule of Apprendi does not involve such a prohibition, and therefore, the first exception is inapplicable. Gibbs, 125 F. Supp. 2d at 703.

As for the second exception under Teague, the new rule must be a "watershed rule[] of criminal procedure" that is "implicit in the concept of ordered liberty." Id. (citing Teague, 489 U.S. at 311). Stated another way, the new rule must implicate the fundamental fairness and accuracy of the

criminal proceeding. Id. Examining whether Apprendi fits into this exception, the Gibbs courts concluded that the role of the court in determining drug quantity, rather than a jury as required by Apprendi, would not render a proceeding fundamentally unfair or unreliable so as to warrant retroactive application of Apprendi. 125 F. Supp. at 706.

The Court agrees with the analysis performed by the Gibbs court and concludes that the rule enunciated in Apprendi does not apply retroactively. Accordingly, the Court will dismiss Defendant's Apprendi claim challenging the sufficiency of the Information predicated his original guilty plea.

III. Defendant's Claim That His Conviction Should Have Been Classified As A Class C Felony, For Purposes Of Sentencing Him For Violation Of Supervised Release

By his Motion Defendant raises two arguments under 21 U.S.C. § 841 directed at his contention that his conviction should have been classified as a Class C felony. First, Defendant contends that the Government never established that Defendant possessed crack cocaine, and therefore, Defendant should have been sentenced under 21 U.S.C. § 841(a)(1) and (b)(1)(C), instead of 21 U.S.C. § 841(a)(1) and (b)(1)(B). According to Defendant if he had been sentenced under 21 U.S.C. § 841(b)(1)(C), he would have been categorized as a Class C felon eligible for only a two year term of

imprisonment for violating supervised release, rather than the three year term that the Court imposed. Second, Defendant contends that 21 U.S.C. § 841 is unconstitutionally vague and ambiguous insofar as the definition of "cocaine base" is concerned. The Court will address each of Defendant's arguments in turn.

A. Defendant's Claim That He Should Have Been Sentenced Under 21 U.S.C. § 841(b)(1)(C), A Class C Felony

By his Motion, Defendant contends that the Court erred in sentencing him to three years imprisonment for violation of his supervised release, because he should have been categorized as a Class C felony offender subject to two years imprisonment for violation of supervised release. Specifically, Defendant contends that he should not have been found guilty at his original Rule 11 hearing of a violation of 21 U.S.C. § 841(b)(1)(B), a Class B felony, because that section only pertains to crack cocaine and the Government never proved that Defendant possessed crack cocaine.

In response to Defendant's argument, the Government contends that Defendant procedurally defaulted this claim, because he failed to file a direct appeal of his original conviction and sentence. However, as the Court explained in examining whether Defendant's claim was time-barred, the Court believes Defendant's claim, although implicating his original

conviction, is directed at the sentence imposed for his violation of supervised release. As the Government recognizes in its Answering Brief, Defendant presented this claim to the Third Circuit on direct appeal from his revocation sentence. However, Defendant did not raise the issue before the Court at his revocation sentencing. Because Defendant did not raise this issue at his revocation sentencing, the Third Circuit reviewed Defendant's claim under the plain error standard of review. (D.I. 80, Exh. C at 6).

As a general matter, the Third Circuit has held that Section 2255 "may not be employed to relitigate questions which were raised and considered on direct appeal." United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993). There are four exceptions to this relitigation bar: (1) newly discovered evidence; (2) a change in the applicable law; (3) incompetent prior representation by appellate counsel; (4) other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims. United States v. Palumbo, 608 F.2d 529, 533 (3d Cir. 1979). In this case, Defendant has not offered any evidence to support the application of one of these exceptions. Accordingly, Defendant is only entitled to collateral review of this claim if he can demonstrate cause

for his failure to raise the claim and prejudice. United States v. Cornish, 1998 WL 761855, *3 (E.D. Pa. Oct. 28, 1998) (applying cause and prejudice standard to determine whether collateral review was appropriate where defendant failed to raise issue in trial court and court of appeals reviewed issue using plain error standard) (citing Moscato v. Federal Bureau of Prisons, 98 F.3d 757, 761 (3d Cir. 1996)).

In this case, the Third Circuit reviewed Defendant's claim and concluded that the Court had not committed plain error in failing to recognize Defendant's claim. Because Defendant cannot satisfy the plain error standard, the Court concludes that he cannot establish prejudice to excuse his procedural default.³ United States v. Frady, 456 U.S. 152, 166 (1982) (holding that cause and prejudice standard is more difficult to satisfy than plain error standard).

Even if Defendant could overcome the procedural default of his claim, the Court concludes that Defendant is not entitled to relief on the merits of his claim. The Third

³ To the extent that Defendant contends that his attorney's failure to raise the issue constitutes cause, the Supreme Court has held that the attorney's error must rise to the level of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 486-487, 492 (1986). For the reasons discussed in Section IV. of this Memorandum Opinion, the Court concludes that Defendant cannot establish ineffective assistance of counsel.

Circuit has not yet addressed whether the term "cocaine base" used in 21 U.S.C. § 841(b)(1)(B) includes only the "crack" form of cocaine base. However, in United States v. James, 78 F.3d 851, 858 (3d Cir. 1996), the Third Circuit recognized a circuit split between the Court of Appeals for the Eleventh Circuit and the Court of Appeals for the Second Circuit on the question of whether the definition of "cocaine base" limited to "crack" in the Sentencing Guidelines should be extended to the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b)(1)(B). Declining to address the question, the Third Circuit concluded that the defendant in James was precluded from arguing that the mandatory minimum sentence of Section 841(b)(1)(B)(iii) should not apply, because the defendant's plea agreement stated that he sold cocaine base in violation of 21 U.S.C. § 841(b)(1)(B)(iii).

Like the defendant in James, Defendant in this case pled guilty to a violation of Section 841(b)(1)(B). The information expressly charged Defendant with distributing "cocaine base" and Defendant expressly admitted at his plea hearing that he distributed cocaine base. Based on his plea agreement and his express admissions, the Court concludes that like the defendant in James, Defendant in this case is precluded from arguing that he did not distribute cocaine

base.

Further, even if Defendant's argument was not precluded by his guilty plea, the Court concludes that Defendant is not entitled to relief. In United States v. Palacio, 4 F.3d 150 (2d Cir. 1993) and again in United States v. Jackson, 59 F.3d 1421 (2d Cir. 1995), cert. denied, 517 U.S. 1139 (1996), the Second Circuit refused to apply the definition of "cocaine base" used in the amended Section 2D1.1 of the Sentencing Guidelines to the definition of "cocaine base" under the mandatory minimum statute. In so reasoning, the Second Circuit concluded that the Guideline amendment is authoritative as to the Guidelines, but cannot revise the statutory interpretation of Section 841 absent "new guidance from Congress." Jackson, 59 F.3d at 1422.

In United States v. Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994), the Eleventh Circuit reached the opposite conclusion. Relying on the Sentencing Guideline's amendment of Section 2D1.1, the Eleventh Circuit concluded that the Sentencing Guideline's amendment abrogated its previous ruling that cocaine base was not limited to "crack" cocaine. According to the Eleventh Circuit, by allowing the amendment to take effect, Congress implicitly ratified the new definition of cocaine base as including only "crack" cocaine.

However, after reviewing the Eleventh Circuit's decision in light of the Supreme Court's decision in Neal v. United States, 516 U.S. 284 (1996), the Court concludes that the Supreme Court has rejected the reasoning used by the Eleventh Circuit in Munoz-Realpe. See United States v. Barbosa, 51 F. Supp. 2d 597, 603 (E.D. Pa. 1999) (concluding that Munoz-Realpe does not survive Supreme Court's decision in Neal). In Neal, the Supreme Court unanimously rejected a claim that the Sentencing Commission's revision of Section 2D1.1 of the Sentencing Guidelines required the Court to reconsider its prior interpretation of a related statutory provision. 516 U.S. 286. Specifically, the Supreme Court addressed the meaning of the undefined phrase "mixture or substance" used in the mandatory minimum provision for LSD in 21 U.S.C. § 841(b)(1)(B)(v). In a previous Supreme Court decision, the Supreme Court concluded that the ordinary meaning of this phrase required defendants convicted under Section 841(b)(1)(B)(v) to be sentenced based upon the actual weight of the drug combined with the weight of the paper holding the drug, rather than on the weight of the drug alone. Chapman v. United States, 500 U.S. 453, 468 (1991). However, the Sentencing Commission altered the "actual weight" approach in favor of a "dose-based" approach which fixed the weight of

each dose of LSD at 0.4 milligrams. Declining to revisit its interpretation of Section 841, the Supreme Court stated “[o]nce we have determined a statute’s meaning we adhere to our ruling under the doctrine of stare decisis, and we assess an agency’s later interpretation of the statute against that settled law.” Neal, 516 U.S. at 295.

With regard to the statute at issue in this case, numerous courts including the Third Circuit concluded prior to the amendment of Section 2D1.1 that the term “cocaine base” was not limited to “crack.” Other than the enactment of the Sentencing Guideline amendment to Section 2D1.1, Congress has not spoken with regard to the definition of “cocaine base.” Moreover, the express language of the amendment to Section 2D1.1 limits the application of the revised definition of “cocaine base” to the Sentencing Guidelines only. See U.S.S.G. § 2D1.1(D) (“This amendment provides that, for purposes of the guidelines, ‘cocaine base’ means ‘crack.’”) (emphasis added). Thus, in the Court’s view, Congress’s silent ratification of this amendment, could not expand the amendment beyond its express terms. Accordingly, based upon the express language of the amendment to Section 2D1.1, the Supreme Court’s decision in Neal rejecting the Sentencing Commission’s ability to alter previous interpretations of the

mandatory minimum statute, and in the absence of Third Circuit precedent to the contrary, the Court holds that the Sentencing Commission's amendment to Section 2D1.1 of the Sentencing Guidelines did not revise the Third Circuit's interpretation of the term "cocaine base" used in 21 U.S.C. § 841(b)(1)(B) as including more than just "crack" cocaine. Barbosa, 52 F. Supp. 2d at 604.

Because the Court concludes, consistent with the Third Circuit's unaltered interpretation of Section 841(b)(1)(B), that the term "cocaine base" includes forms of cocaine base other than just crack, the Court rejects Defendant's argument that he should have been sentenced under Section 841(b)(1)(C).⁴ In turn, because Defendant was properly

⁴ To the extent that other courts have concluded that the Third Circuit adopted the reasoning of the Munoz-Realpe court in James, the Court observes that the Third Circuit limited its agreement with Munoz-Realpe to its interpretation of the Sentencing Guidelines. That portion of James adopting the Munoz-Realpe reasoning dealt with the question of whether it was permissible for the court to sentence a defendant under Section 2D1.1 of the Sentencing Guidelines where the Government failed to prove that the substance at issue was crack. For the sentencing enhancement of Section 2D1.1 to apply, the Third Circuit concluded that the Government had to prove by a preponderance of the evidence that the substance at issue was crack, because the Sentencing Commission expressly amended Section 2D1.1 to apply to crack only. However, the Third Circuit expressly reserved the question of whether the Sentencing Guideline amendment applies to 21 U.S.C. § 841(b)(1)(B), and therefore, the Third Circuit did not overrule its holding in Jones, 979 F.2d at 319, that for purposes of the mandatory minimum statute cocaine base

sentenced under Section 841(b)(1)(B), his exposure for a violation of supervised release was not limited to two years imprisonment. Accordingly, the Court concludes that it did not err in sentencing Defendant to three years of imprisonment based upon his violation of supervised release, and therefore, the Court will dismiss Defendant's claims relating to the definition of "cocaine base" under Section 841.

B. Defendant's Claim That 21 U.S.C. § 841 Is Ambiguous And Void For Vagueness

Unlike Defendant's previous claim which was presented to the Third Circuit when Defendant appealed the Court's sentence for Defendant's violation of supervised release, Defendant did not raise the question of whether Section 841 is ambiguous and void for vagueness before the Third Circuit. To overcome this procedural default, Defendant must show both "cause" for failing to raise the issue and "actual prejudice." United States v. Frady, 456 U.S. 152, 167-170 (1982); United States v. Essig, 10 F.3d 968, 976-979 (3d Cir. 1994).

In this case, Defendant has not explained why he failed to challenge the statute in his direct appeal from his revocation sentence. Accordingly, the Court concludes that Defendant has not established cause excusing his procedural

includes more than just crack. James, 78 F.3d at 858.

default.⁵

However, even if Defendant could establish cause for his default, the Court concludes that Defendant cannot establish prejudice. Numerous courts, including the Third Circuit, have considered and rejected arguments challenging the constitutionality of Section 841 on the grounds that the statute's definition of "cocaine base" is vague. See United States v. Perking, 108 F.3d 512, 518 (4th Cir. 1997); United States v. Jackson, 64 F.3d 1213, 1218-1219 (8th Cir. 1995); United States v. Jones, 979 F.2d 317, 318-320 (3d Cir. 1992).⁶ Because Defendant's challenge to Section 841 lacks merit, the Court concludes that Defendant cannot establish prejudice

⁵ To the extent that Defendant contends that his attorney's failure to raise the issue constitutes cause, the Supreme Court has held that the attorney's error must rise to the level of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. at 486-487, 492. For the reasons discussed in Section IV. of this Memorandum Opinion, the Court concludes that Defendant cannot establish ineffective assistance of counsel.

⁶ Although the definition of cocaine base as used in the Sentencing Guidelines was later amended, the Third Circuit recognized that the amendment "did not resolve a pre-existing ambiguity" in the definition of "cocaine base" used in the Sentencing Guidelines. United States v. Roberson, 194 F.3d 408, 416 (3d Cir. 1999). In other words, the Third Circuit has recognized that the definition of "cocaine base" is not ambiguous. Id. While Roberson expressly applied to Section 2D1.1(c) of the Sentencing Guidelines, the Court can find no reason to believe that the Third Circuit would find the same term to be ambiguous in the context of the mandatory minimum statute.

within the meaning of Frady. Accordingly, the Court will dismiss Defendant's claim that Section 841 is unconstitutionally vague.

IV. Defendant's Ineffective Assistance Of Counsel Claim

By his Motion, Defendant contends that counsel at his revocation hearing was ineffective. Specifically, Defendant contends that counsel failed to raise his claim concerning the definition of "cocaine base" under 21 U.S.C. § 841 and failed to challenge the constitutionality of Section 841.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). The first prong of the Strickland test requires a defendant to show that his or her counsel's errors were so egregious as to fall below an "objective standard of reasonableness." Id. at 687-88. In determining whether counsel's representation was objectively reasonable, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In turn, the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound . . . strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91,

101 (1955)).

Under the second prong of Strickland, the defendant must demonstrate that he or she was actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different.

Strickland, 466 U.S. at 692-94; Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993).

To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). Thus, a purely outcome determinative perspective is inappropriate. Id.; Flamer v. State, 68 F.3d 710, 729 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996).

As the Court discussed in the context of Defendant's Section 841 claims, Defendant's claims lack merit. The constitutionality of Section 841 was well-established, and therefore, the Court cannot conclude that counsel was ineffective for failing to challenge Section 841 as ambiguous. Holland v. Horn, 2001 WL 704493 (E.D. Pa. Apr. 25, 2001) (holding that counsel cannot be ineffective for failing to raise a meritless claim) (citing Strickland, 466 U.S. at 691). As for Defendant's claim regarding the term "cocaine base"

used in Section 841, counsel did not fail to recognize existing precedent and may have concluded that an appeal on this issue was precluded by Defendant's original guilty plea.⁷ Indeed, in sentencing Defendant, the Court expressly warned Defendant about the penalties he could receive if he violated his term of supervised release. (D.I. 80, Exh. F at 35). Accordingly, the Court cannot conclude that counsel's failure to raise this issue was objectively unreasonable.

Moreover, given the Court's holding on the substantive aspect of his claim, the Court cannot conclude that the outcome of the proceeding would have been different if counsel had raised the issue. Because Defendant cannot establish either prong of the Strickland test for ineffective assistance of counsel, the Court will dismiss Defendant's claim that his counsel was constitutionally ineffective.

CONCLUSION

For the reasons discussed, the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody filed by Defendant, George Robinson, will be denied.

An appropriate Order will be entered.

⁷ See infra Section III.A. of this Memorandum Opinion.

