UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ERIC WARREN,	:	
Movant,	:	
v.	:	Criminal No. 3:97CR115 (AWT)
	:	Civil No. 3:01CV179 (AWT)
UNITED STATES OF AMERICA,	:	
Respondent.	:	

RULING ON MOTION TO VACATE, SET ASIDE
AND CORRECT SENTENCE PURSUANT TO TITLE 28 U.S.C. § 2255

Defendant Eric Warren ("Warren" or "Movant") moves to vacate, set aside or correct his sentence. He claims that his attorney provided ineffective assistance because he permitted the Movant's sentencing guideline range to be calculated under the crack cocaine and career offender guidelines, and he also claims that his sentence was imposed in violation of the rule of Apprendi v. New Jersey. For the reasons set forth below, the court concludes that an evidentiary hearing is not required and that the Movant's § 2255 motion should be denied.

I. BACKGROUND

On June 24, 1997, a grand jury sitting in New Haven, Connecticut returned a one-count indictment charging Warren with possession with intent to distribute more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). A warrant was issued for Warren's arrest following the return of the indictment.

On June 26, 1997, Warren was arrested. Warren was originally represented by retained counsel, Attorney Richard Silverstein. During the course of his representation of Warren, Attorney Silverstein filed a motion to suppress evidence seized pursuant to a search warrant. On

November 5, 1997, following an evidentiary hearing, Warren's motion was denied. At that hearing, counsel for the government summarized, in Warren's presence, the information in support of the search warrant that had been conveyed to law enforcement officials by confidential informants. Counsel for the government stated at one point that a confidential informant "had observed Eric Warren retrieve crack cocaine from apartment B-9 at 1427 Ella Grasso Boulevard." (Tr. 11/5/97 (Doc. No. 36) at 6, lines 15-16.)

On November 12, 1997, Warren pled guilty to possession with intent to distribute more than 5 grams of cocaine base. On that day, Warren was asked by the court to state what he had done that made him guilty of the crime charged. In response, Warren stated, "I purchased 5 grams--more than 5 grams of base cocaine with intent to distribute it, to sell it." (Tr. 11/12/97 (Doc. No. 67) at 21, lines 3-5.) Immediately thereafter, Warren was informed by the court that the prosecutor was going to summarize what Warren had done that made him guilty of the charge to which he intended to plead guilty and summarize the government's evidence as to the charge against him. Warren was instructed to listen carefully because when the prosecutor was finished, he would be asked whether he agreed with the prosecutor's summary of what he had done and whether there was anything with which he disagreed. At that point, the prosecutor summarized why the government contended the defendant was guilty as charged and the government's evidence as to the charge.

In at least three instances, it was made clear that Warren was charged with possession of crack cocaine with the intent to distribute it. First, the prosecutor stated that there had been an investigation regarding Warren and an operation he was believed to be responsible for "which was distributing crack cocaine in the New Haven area." (Id. at 22, line 7.) The prosecutor then

described the execution of the search warrant, which had been at issue in connection with the motion to suppress, and the items seized pursuant to the search warrant. The prosecutor stated "I believe it's approximately somewhere -- I did the calculations -- I think approximately 20 grams of crack cocaine or cocaine base seized from the 1427 Ella Grasso Boulevard. In addition, your Honor, in tying Mr. Warren directly into the crack cocaine . . . the fact that a crutch was found there was very significant . . . ." (Id. at 24, lines 8-15.) Finally, the prosecutor made the following statement:

> And then finally, Your Honor, the government would have offered evidence showing that Detective Brunetti, who is a fingerprint expert, did in fact, lift from one of the seven bags of crack cocaine which, in turn, contained 25 packets of crack cocaine the fingerprints which matched positive to be the fingerprints of Eric Warren.

(Id. at 24, lines 21-25, to 25, line 2.) Almost immediately thereafter, the court asked Warren whether he agreed with the prosecutor's summary of what he did, and Warren responded "Yes, Your Honor." (Id. at 25, line 10.) Then Warren was asked whether there was anything the prosecutor said with which he disagreed, and he replied, "No, Your Honor." (Id. at 25, line 13.)

Subsequently, Warren's counsel, Attorney Silverstein, was permitted to withdraw his appearance, and the Federal Public Defender was appointed to represent Warren.

In March 1998, Assistant Federal Public Defender Terrence Ward filed a motion by Warren to withdraw his previously entered guilty plea, arguing that that plea had been induced by a representation, made by his prior counsel, that he would receive a 60-month sentence when, in fact, under the sentencing guidelines, the range was 262 months to 327 months. Warren's motion to withdraw his guilty plea was granted, over the government's objection.

Thereafter, on September 22, 1999, Warren pled guilty to possession of more than five grams of cocaine base with intent to distribute. At that time, Warren executed a plea agreement, which he informed the court he had read and understood. (See Tr. 9/22/99 (Doc. No. 74) at 15, lines 10-14.) The plea agreement stated that:

> [The defendant] understands that in order to be guilty of this offense the following essential elements of the offense must be satisfied:
>
> 1. That the defendant possessed more than 5 grams of cocaine base/crack;
>
> 2. That the defendant knew that he possessed cocaine base/crack; and
>
> 3. That the defendant intended to distribute cocaine base/crack.

(Plea Agreement Letter (Doc. No. 59) at 1.)

It was made clear in at least four instances during the guilty plea proceeding that the crime charged was possession with intent to distribute cocaine base in the form of crack cocaine. First, at the beginning of the proceeding, the prosecutor was asked to describe the charge against Warren, and the prosecutor stated that the charge was "possession with intent to distribute and -- possession with intent to distribute and distribution of 5-grams or more of cocaine base or crack." (Tr. 9/22/99 (Doc. No. 74) at 3, line 24, to p. 4, line 1.) Later in the proceeding the prosecutor was asked to summarize the terms of the plea agreement, and at that time he stated that the elements of the offense included "that the defendant possess 5 grams of cocaine base or crack; that he knew that he possessed that; and that he intended to distribute that cocaine base or crack." (Id. at 16, lines 19-22.) Subsequently, the court reviewed for Warren the elements of the offense. The court informed Warren that the government would have to prove, as the first and second elements, that you "possessed narcotic drugs containing cocaine base" and "that you knew that

you possessed narcotic drugs containing cocaine base." (Id. at 24, lines 4-6.) The court did not specifically allude to "crack cocaine."

Almost immediately thereafter, when Warren was asked to describe what he did that made him guilty of the charge to which he intended to plead guilty, Warren stated:

> On June 14th, 1996, I possessed more than 5-grams of crack cocaine base with the intent to distribute it.

(Id. at 24, lines 20-22 (emphasis added).)

The court then informed Warren that the prosecutor was going to summarize what Warren had done that made him guilty of the charge to which he intended to plead guilty and summarize the government's evidence as to the charge against him. Warren was instructed to listen carefully because when the prosecutor was finished, Warren would be asked whether he agreed with the prosecutor's summary of what he had done. (See id. at 24, line 24, to p. 25, line 6.) The prosecutor then proceeded to give that summary.

In discussing the execution of the search warrant for Apartment B-9 at 1427 Ella Grasso Boulevard, the prosecutor stated:

> More than 5-grams, I believe approximately 17-grams net weight of crack, were found in all different parts of the house, including a bag which contained a large number of sandwich bags within it. And within the sandwich bags would be 25 packets of crack cocaine apparently in little zip lock bags for street sale. One of those sandwich bags was later processed by John Brunetti (phonetic) of the West Haven Police Department along with a number of other items that had been seized. He determined that there were, in fact, fingerprints that could be identified on that package containing the crack. They were compared with a number of person's prints, including Mr. Warren's, and there was a positive identification of three fingerprints of Mr. Warren's on that bag, which, in turn, contained 25 packets of crack cocaine.

(Id. at 26, line 16, to p. 27, line 6 (emphasis added).)

A short while later, the prosecutor stated the following:

> In addition to the items found there indicative of distribution of crack cocaine, there were two scales seized from that location. I would say estimate thousands of bags which would be used to hold a street quantity or street sale quantity of crack cocaine, two firearms, residue on many of the kitchen items and implements throughout the apartment.
>
> So the packaging, the quantity and the implements, many of which are tools of the trade of distribution of crack cocaine or cocaine, were found there and all would have been offered as evidence to show the distribution of crack cocaine. And as I said, the three finger prints directly on the bag which contained crack cocaine, that expert testimony would have been offered to the jury if this matter had gone to trial.
>
> I believe there were 186 packets of actual crack cocaine found throughout the apartment. And then as I indicated, a huge number of empty bags that would be used in a similar way for the packaging of the crack cocaine or cocaine.
>
> There would also be, I'm sorry, be testimony from a DEA forensic chemist who analyzed all the substances and residue that was taken from 1427 Ella Grasso Boulevard and his reports and testimony would reflect that many of the items had residue of crack cocaine, and the substance, the rock like substance that was seized did come to approximately 17.44-grams of crack cocaine.

(Id. at 28, line 3, to p. 29, line 4 (emphasis added).)

Immediately thereafter, Warren was asked whether he agreed with the prosecutor's summary of what he had done, and he replied, "Yes, Your Honor." (Id. at 29, line 7.) Then Warren was asked whether there was anything the prosecutor said with which he disagreed, and he replied, "No, Your Honor." (Id. at 29, line 10.) At that point, the court ordered Warren's petition to enter a plea of guilty be filed. In the petition, Warren wrote in his own hand the following:

> On June 14, 1996 I possed [sic] moor [sic] then [sic] 5 gram of crack with the intent to distribute it.

(Pet. to Enter Guilty Plea (Doc. No. 58) at 1.)

After the September 22, 1999 guilty plea, the United States Probation Office prepared a Presentence Report. The Presentence Report reflected that the Probation Officer had interviewed the Petitioner on two separate occasions, once in 1997 and then again in 1999, and that on each occasion Warren had admitted to selling large quantities of crack cocaine. (See Presentence Report ¶ 15.) At the sentencing hearing on February 7, 2002, the court inquired whether Warren had read the Presentence Report or it had been summarized for him, and defense counsel reported that Warren had read the Presentence Report. (See Tr. 2/7/00 (Doc. No. 65) at 3, line 9.)

At the sentencing hearing, Warren's counsel reported that prior to meeting with Warren for the first time, counsel had had access to and read the entire file, including all of the police reports. (See id. at 6, lines 4-7.)

In connection with his argument for a downward departure, Warren's counsel also reported on the extra steps that his office had been required to take in order to track down payroll officers and various people at the home office of Warren's most recent employer after learning that the employer had informed the government that Warren had never worked there. At the insistence of defense counsel's investigator that the company go to the paper file as opposed to relying on its computer records, it was established that Warren had in fact worked for the company. This was an important point in support of defense counsel's argument for a downward departure.

The Presentence Report reflected that Warren had ten criminal history points, which would have placed him in Criminal History Category V. However, because Warren was classified as a career offender pursuant to U.S.S.G § 4B1.1, his Criminal History Category was

VI. Defense counsel made an extensive argument about Warren's efforts in terms of rehabilitation and there being a low likelihood of recidivism, and he persuaded the court to depart downward to Criminal History Category IV and use the bottom of the applicable range.

Defense counsel also persuaded the court to depart downward an additional five months based on the fact that Warren would not receive credit for the lengthy period of time he had been held prior to sentencing.

Thereafter, the court imposed a sentence of 146 months, a five-year term of supervised release and a mandatory $100 special assessment. Warren never took a direct appeal of the sentence imposed.

Although the court held oral argument on Warren's § 2255 motion, it declined to hold the evidentiary hearing requested by Warren. (See Traverse (Doc. No. 78) at 8.)

II. LEGAL STANDARD

There are four grounds upon which a federal prisoner may move to vacate or set aside a conviction and sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. See Hill v. United States, 368 U.S. 424, 426-27 (1962) (citing 28 U.S.C. § 2255). Section 2255, however, does not provide a remedy for "all claimed errors in conviction and sentencing." United States v. Addonizio, 442 U.S. 178, 185 (1979). Rather, it is intended to redress only "fundamental defect[s]" which result in a miscarriage of justice and "omission[s] inconsistent with the rudimentary demands of fair procedure." Hill, 368 U.S. at 428. "[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final

judgment." United States v. Frady, 456 U.S. 152, 165 (1982) (internal quotation marks and citation omitted).

In addition, there is the rule of procedural default. "[H]abeas petitioners . . . cannot assert claims they failed to raise at trial or on direct appeal unless they can show 'cause' for the default and 'prejudice' resulting from it." Ciak v. United States, 59 F.3d 296, 302 (2d Cir. 1995) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)). See also Reed v. Farley, 512 U.S. 339, 354 (1994) ("Where the petitioner--whether a state or federal prisoner--failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice from the alleged . . . violation.'" (quoting Wainwright, 433 U.S. at 87)); Campino v. United States, 968 F.2d 187, 190 (2d Cir. 1992)(failure to raise constitutional issue on direct appeal is itself default with general appellate procedure which can be overcome only by showing cause and prejudice).

Section 2255 provides that the district court should grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (2004). This language "does not strip the district courts of all discretion to exercise their common sense." Machibroda v. United States, 368 U.S. 487, 495 (1962). To be entitled to a hearing, the movant must allege specific facts to support his or her claim. "The petitioner must set forth specific facts which he is in a position to establish by competent evidence." Dalli v. United States, 491 F.2d 758, 761 (2d Cir. 1974).

A § 2255 motion may be dismissed without a hearing if, after a review of the record, the court determines that the motion is without merit because the allegations are insufficient as a matter of law. See Johnson v. Fogg, 653 F.2d 750, 752 (2d Cir. 1981). In making its

determination regarding the necessity of a hearing, the district court may draw upon its personal knowledge and recollection of the case. See United States v. Aiello, 900 F.2d 528, 534 (2d Cir. 1990); Machibroda, 368 U.S. at 495.

III. DISCUSSION

The Movant argues that he was prejudiced by ineffective assistance of counsel, contending principally that his counsel failed to object when his sentencing guidelines were calculated under the crack cocaine and career offender guidelines. He also argues that his sentence was imposed in violation of the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000).

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel can be raised for the first time in a § 2255 motion. However, a person challenging his sentence on the basis of ineffective assistance of counsel bears a heavy burden. First, he must show that counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984); United States v. Torres, 129 F.3d 710, 716 (2d Cir. 1997). In making such an evaluation, great deference is to be given to counsel's judgment:

> Because of the difficulties inherent in making the evaluation [of effectiveness], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (quotation marks omitted). See United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992). In fact, such strategic choices "are virtually unchallengeable." Strickland, 466 U.S. at 690.

Second, a movant must show that the errors, if any, prejudiced his defense. "[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993); Torres, 129 F.3d at 716.

A movant must satisfy both prongs of the Strickland test to demonstrate ineffective assistance of counsel. If the movant has failed to satisfy one prong, the court need not consider the other. Strickland, 466 U.S. at 697.

In the case of a challenge to a guilty plea based on ineffective assistance of counsel, the movant must show, first, that counsel's representation fell below an objective standard of reasonableness, which is determined by the range of competence demanded of attorneys in criminal cases, and second, that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); United States v. Coffin, 76 F.3d 494, 498 (2d Cir. 1996); Panuccio v. Kelly, 927 F.2d 106, 108 (2d Cir. 1991).

In order to satisfy the prejudice element of the Strickland test, the movant "must make more than a bare allegation" of prejudice. United States v. Horne, 987 F.2d 833, 836 (D.C. Cir. 1993). While determinations of cause and prejudice "may turn on factual findings that should be made by a district court," Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980), the allegations must be "plausible" to merit an evidentiary hearing, United States v. Tarricone, 996 F.2d 1414, 1418 (2d Cir. 1993).

In his initial memorandum, the Movant argued that his counsel gave ineffective assistance because "[h]e failed to object to the imposition of sentence using the crack guidelines when his client specifically pled guilty to the indictment, which charged possession of cocaine base and did not mention crack cocaine." (Mem. in Supp. of Sec. 2255 Mot. (Doc. No. 71) at 6.)

However, the Movant's counsel had reviewed an indictment which charged the Movant with possessing cocaine base with the intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). From reading the indictment, defense counsel knew that his client was charged with possession of cocaine base, which could have been crack cocaine base or non-crack cocaine base, and that the statutory maximum penalty was the same for both forms of cocaine base, even though the sentencing guidelines treated offenses involving crack cocaine base more severely. See United States v. Jackson, 59 F.3d 1421, 1422-23 (2d Cir. 1995); U.S.S.G. § 2D1.1, Note (D) to Drug Quantity Table ("'Cocaine base,' for the purposes of this guideline, means 'crack'."). Defense counsel also knew, from having reviewed the file, that it was the government's contention that the offense charged involved crack cocaine, and that the government had evidence linking the Movant to crack cocaine. Defense counsel knew that the government had made its position on this point clear to the court at the suppression hearing and that, at the time of the Movant's November 1997 guilty plea, the prosecutor had made it clear that the offense charged involved crack cocaine, and the Movant had agreed with the prosecutor's summary of what the Movant had done. Further, defense counsel was aware that he had negotiated a plea agreement which had been reviewed by his client and expressly stated that the Movant understood that the elements of the offense involved "cocaine base/crack." Most significantly, defense counsel heard his client state at the September 1999 guilty plea proceeding,

and saw that he had written in his own hand in his petition to enter a guilty plea, that he had possessed more than 5-grams of crack cocaine base with the intent to distribute it. Finally, defense counsel heard the prosecutor summarize the government's evidence against the Movant, making numerous references to crack cocaine and then observed as the Movant stated that he agreed with the prosecutor's summary of what he had done. In light of the foregoing, an objection by the Movant's counsel to application of the crack cocaine guidelines in connection with the sentencing would have been frivolous.

The Movant includes three additional contentions in his submissions, which appear calculated to persuade the court not to rely on the facts outlined above. None has merit.

First, the Movant argues that "[t]he Government's assertions should be disregarded as the unsworn statements of an AUSA." (Traverse (Doc. No. 78) at 4.) Second, citing United States v. Bryce, 208 F.3d 346, 355 (2d Cir. 1999), for the proposition that "prosecutors cannot rely on a defendant's statements to prove a case," the Movant argues that his admissions have no effect. (See Pet'r's Suppl. Mem. (Doc. No. 81) at 12-13.) However, this is not a case where a defendant's conviction rests solely on either the mere assertions of the prosecutor or solely on a defendant's statements. Here there is a significant quantum of evidence not challenged by the Movant (except for his unavailing argument discussed below as to the laboratory reports), which was summarized by the prosecutor and agreed to by the Movant, and, in addition, a clear and unequivocal admission by the Movant during his guilty plea proceeding.

Third, the Movant argues that the laboratory reports indicate that the substance tested was cocaine base but not that the substance was crack cocaine, and that, in addition, the laboratory reports are, on their face, not creditworthy because they indicate that the drugs increased in

quantity between the date of seizure and the date of the analysis. (See id. at 15.) However, as noted by the government in its supplemental response, the laboratory reports reflect that the substance was a beige rock substance, and the items seized included items containing sodium bicarbonate (see id. attach. C, DOJ Drug Report completed 10/3/96, Exs. 13, 14.), and the sentencing guidelines recognize that crack is "usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appear[s] in a lumpy, rocklike form." U.S.S.G. § 2D1.1, Note (D) to Drug Quantity Table. Also, as to the assertion that there is a discrepancy between the weight of the drugs seized and the weight of the drugs analyzed, the Movant ignores the fact that the amount as measured by the officers at the time of seizure is listed as the "approximate gross quantity" and the other figure cited by the Movant is the weight as determined during the laboratory analysis. Most significant, however, is the fact that nothing in the laboratory reports suggests that the Movant somehow had more crack cocaine attributed to him than was appropriate.

Accordingly, the court finds unpersuasive the Movant's argument that his counsel gave him ineffective assistance because he failed to object to the use of the crack cocaine guidelines.

The Movant also claims that defense counsel gave ineffective assistance because he failed to object to the Movant being classified as a career offender. The Movant initially argued that his narcotics conviction does not qualify as a "controlled substance offense" pursuant to U.S.S.G. § 4B1.1, but he now appears to concede that his career offender status is based on his two prior felony convictions for crimes of violence, i.e., his August 10, 1990 conviction for assault with a firearm and his February 22, 1996 conviction for attempted assault on a police officer. The Movant does not dispute the fact that his conviction for assault with a firearm constitutes a

predicate for career offender status, but he argues that his conviction for attempted assault on a police officer does not.

The major thrust of the Movant's argument appears to be that while the Presentence Report states that Warren pled guilty to assault on a police officer and that he swung a chair at a police officer and assaulted him, in fact, Warren pled guilty to attempted assault on a police officer. Although he swung a chair at a police officer, he did not actually hit or injure the officer. This distinction is not material to his status as a career offender, nor is it material to the court's assessment of Warren. A "crime of violence" includes any offense that has as an element the attempted use of physical force. See U.S.S.G. § 4B1.2(a)(1). The record is clear that this conviction involved the attempted use of physical force.

The Movant also argues that it is likely that this court would have departed below Criminal History Category IV had the court been aware that the conviction was for attempted assault and that no police officer was injured. (See Gov't's Supp. Resp. to § 2255 Mot. (Doc. No. 84) at 4-5.) This assertion is simply not correct. Once the court concluded that Warren was a career offender and was in Criminal History Category VI, this particular aspect of his offense was not material to the court's analysis. Rather, what the court considered in determining what criminal history category best reflected Warren's likelihood of recidivism as of the time of sentencing was the degree to which Warren appeared to have changed between the date of the commission of the offense of conviction and the time of sentencing. (See Tr. 2/7/00 (Doc. No. 65) at 38-40.)

In addition, it is noteworthy that prior to the day of sentencing the court had conveyed to counsel that it was not inclined to look favorably on a departure from Criminal History Category

VI to a lower category. (See id. at 23, lines 1-6.) However, as a result of the diligent efforts of defense counsel, the court departed downward from Criminal History Category VI and to the bottom of the applicable range.

Accordingly, the court finds unpersuasive the Movant's contention that his counsel provided him ineffective assistance of counsel because he failed to object to the Movant being classified as a career offender. Also, the court notes that because the court would have in no event departed below Criminal History Category IV and did in fact depart down to Criminal History Category IV as a result of the efforts of defense counsel, it is not apparent how the Movant suffered any prejudice as a result of any claimed ineffective assistance of counsel in this area.

Finally, it should be noted that the government's arguments in opposition to Warren's notice to withdraw his November 1997 guilty plea had merit, but due to the advocacy of the defense counsel about which the Movant now complains, the court not only granted the motion but also subsequently departed downward from the new range. Thus, as a result of the efforts of the counsel he now claims gave him ineffective assistance, the Movant received a sentence of 146 months of imprisonment, as opposed to a sentence in the range of 262 months to 327 months. There is no reasonable probability here that, but for the alleged errors on the part of defense counsel asserted by the Movant, the Movant would have not pled guilty and would have insisted on going to trial.

B. *Apprendi* Claims

The Movant makes several arguments based on Apprendi v. New Jersey, 530 U.S. 466 (2000). These arguments fail because Apprendi does not apply retroactively to initial § 2255 motions.

Warren was sentenced on February 7, 2000, and the judgment was filed the next day. He did not appeal or even file a notice of appeal. Thus, the judgment in his case became final well before June 26, 2000, the date the Supreme Court decided Apprendi. As discussed in Coleman v. United States, 329 F.3d 77, 82-88 (2d Cir. 2003), Apprendi announced a new rule of law and that new rule was procedural, not substantive. Thus, because neither of the two exceptions under Teague v. Lane, 489 U.S. 288 (1989), is applicable, the rule of Apprendi is not to be applied retroactively in criminal cases on habeas review. See Coleman, 329 F.3d at 82-90. Nor is the Movant afforded relief in this area by the more recent Supreme Court decisions in Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, Nos. 04-104, 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005). See Carmona v. United States, 390 F.3d 200, 202 (2d Cir. 2004) ("To date, the Supreme Court has not, in any other case, announced Blakely to be a new rule of constitutional law, nor has the Court held it to apply retroactively on collateral review." (footnote omitted)); Booker, 2005 WL 50108, at *29 ("As these dispositions indicate, we must apply today's holdings--both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act--to all cases on direct review.").

The Movant also argues that 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) are unconstitutional in the wake of Apprendi. (See Pet'r's Suppl. Mem. (Doc. No. 81) at 11.)

However, this argument has been rejected by the Second Circuit. See United States v. Outen, 286 F.3d 622, 634-36 (2d Cir. 2002).

IV. CONCLUSION

For reasons set forth above, the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28, United States Code, Section 2255 (Doc. No. 70) is hereby DENIED.

Because the Movant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253 (c)(2).

It is so ordered.

Dated this 25th day of January, 2005, at Hartford, Connecticut.

/s/

Alvin W. Thompson
United States District Judge