



## *Discussion*

### *A. Timeliness of the § 2255 Motion*

My first inquiry must be into the timeliness of Ellis's petition. Early on in this case there was concern about whether or not Ellis's petition was filed within the one-year statute of limitation for filing 28 U.S.C. § 2255 motions. On February 2, 2001, I issued an order directing Ellis to supplement his petition "to explain why the one-year statute of limitation is not applicable to his Petition." (Docket No. 93.) Ellis responded to this order, submitting a § 2255 form motion and a "Motion to File Out-Of-Time Appeal." (Docket No. 95.) Concerned that Ellis misconstrued my February 1, 2001, order to supplement, I entered a second order to supplement requiring Ellis to file a memorandum detailing why his § 2255 motion was not time-barred or demonstrating why he is entitled to an enlargement of the one-year limitation period. (Docket No. 96.) Ellis has complied with this order by submitting a supplemental memorandum. (Docket No. 97.) The United States has responded with a memorandum in opposition. (Docket No. 99.) It argues that Ellis's petition falls outside the one-year period of limitation.

As a rule 28 U.S.C. § 2255 allows federal prisoners to apply for habeas relief only within the year after their conviction becomes final. 28 U.S.C. § 2255 ("The one-year period of limitation shall ... run from ...the date on which the judgment of conviction becomes final."). After his partially successful appeal to the First Circuit Court of Appeal, United States v. Ellis, 168 F.3d 558 (1<sup>st</sup> Cir. 1999) (affirming in part, vacating in part, and remanding), Ellis was resentenced and an amended judgment was entered on November 16, 1999. (Docket No. 90.) Ellis did not attempt a direct appeal of this disposition.

This court has given Ellis ample opportunity to argue why his motion is timely or why he should be excused for untimeliness. Citing the prisoner mailbox rule Ellis states that he “filed” his petition on or about November 30, 2000. (Docket No. 97, Def. Mem. Supp. Habeas Pet. at 6 & n.3.) I have no confirmation that this is so. See 28 U.S.C. § 1746 (describing requirement for unsworn declarations under penalty of perjury); Fed. R. App. P. 4(c)(1) (provision for appeals by confined inmates, stating that a notice of appeal “is timely filed if it is deposited in the institution’s internal mail system on or before the last day for filing,” indicating that, if available at the institution, the inmate must use the institution’s system for legal mail to receive the benefit of the rule and must, in all cases, provide a declaration compliant with 28 U.S.C. § 1746, or provide a notarized statement, that indicates the date of deposit and states that first-class postage payment was made).

This infirmity aside, and assuming that his 28 U.S.C. § 2255 habeas petition is properly deemed filed on November 30, 2000, when Ellis allegedly deposited his 28 U.S.C. 2241 petition into the institution’s mail system, I cannot conclude that it is timely. The calculations required by the Federal Rule of Appellate Procedure demonstrate that Ellis would need to have filed the petition by November 26, 2000. The amended judgment entered on November 16, 1999. Under Federal Rule of Appellate Procedure 4(b)(1)(A), Ellis would have had ten days to file a notice of appeal from the date of the entry of judgment. Fed. R. App. P. 4(b)(1)(A). He did not attempt to appeal this judgment. Therefore, following the rules for computing time provided in Federal Rule of Appellate Procedure 26(a), excluding November 16, because it was the day that the judgment was entered, and including November 26, which was a Friday and not a legal

holiday, Ellis had until November 26, 1999, to file his notice of appeal.<sup>1</sup> If we assume that this then is the date the Ellis's amended judgment became "final" for purposes of 28 U.S.C. § 2255, Ellis had until November 26, 2000, to file for § 2255 relief. See Rogers v. United States, 180 F.3d 349, 355 n. 13 (1<sup>st</sup> Cir. 1999) (citing rule that a year long limitation period allows the filing of an action through the anniversary date of the start of the limitation period). Ellis was four days short.

I add one caveat to this conclusion. The question of when an unappealed judgment becomes "final" within the meaning of 28 U.S.C. § 2255 does not have an entirely clear-cut answer. See Kapral v. United States, 166 F.3d 565, 577- 81 (3d Cir. 1999) (Alito, J., concurring); see also id. at 567-77 (majority discussing whether to incorporate the ninety-day period for seeking discretionary certiorari review into the limitation period when a direct appeal has been taken and denied, concluding there is, in essence, a fifteen month statute of limitation even when no petition for cert is sought). It is also defensible to conclude that when a defendant makes no effort to initiate a direct appeal then the judgment is final on the date the judgment is entered. Id. Most courts, however, that have considered the running of the 28 U.S.C. § 2255 statute of limitation period in the context of unappealed judgments have tacked-on the ten day period offered defendants for filing a notice of appeal. See, e.g., Simoiu v. United States, 2001 WL 936224, \*7 (S.D.N.Y. 2001) (ten days not counting weekends and holidays); United

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<sup>1</sup> Rule 26(a) makes it clear that unless the time period is seven days or less, intervening weekends and holidays do count in calculating the total days available. In my March 12, 2001, order I misidentified the applicable rule for computing time as Federal Rule of Criminal Procedure 45(a). (In my subsequent order to answer I made a typographical mistake and cited to Civil Rule 45 rather than my intended rule, Federal Rule of Criminal Procedure 45(a).) Using the criminal rules, this court and the United States placed the running of the ten days at December 1 or 2, respectively. Though the court regrets the confusion that this miscitation may have caused, there is ultimately no prejudice to Ellis as the question of the running of the statute of limitation is a legal question, unaffected by post-filing procedural orders, and Ellis's petition was either within it or without it.

States v. Murillo, 2001 WL 432624, \*1 (N.D. Tex. 2001) (ten days, no omissions);  
United States v. Foreman, 2001 WL 652239, \* 1 (D. Del. 2001) (ten days, no omissions);  
United States v. Hopwood, 122 F. Supp. 2d 1077, 1078-79 (D. Neb. 2000) (ten days, no omissions). As it would make no difference in the outcome of this case, I, too, accord Ellis that ten-day leeway.

I have also considered whether or not Ellis's hypothetical ability to seek relief from the ten-day time limit by filing a motion for extension of time as provided by Federal Rule of Appellate Procedure 4(b)(4) might alter these calculations to the benefit of Ellis. See Hopwood, 122 F. Supp. 2d at 1079 n.1 (raising without deciding the question of whether the potential to enlarge the ten-day period should be part of the statute of limitation equation). This rule provides: "Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Fed. R. App. P. 4(b)(4). In United States v. Rapoport, 159 F.3d 1 (1<sup>st</sup> Cir. 1998) the First Circuit Court of Appeals considered the question of whether or not it had appellate jurisdiction to consider a direct appeal of a denial of a motion to correct sentence. 159 F.3d at 2. The panel dismissed the appeal for want of jurisdiction. Id. at 3-4. It reasoned that, at most, a defendant has forty days to file a notice of appeal: the ten days allotted in Federal Rule of Appellate Procedure 4(b)(1)(A) and the potential thirty-day extension of this time period permitted by Federal Rule of Appellate Procedure 4(b)(4) if the defendant is able to demonstrate "excusable neglect" for not meeting the Rule 4(b) limitation. Id. The court stated that, "[c]ompliance with the time limits set forth in Fed.

R. App. P. 4(b) is ‘mandatory and jurisdictional,’” id. at 3 (quoting United States v. Robinson, 361 U.S. 220, 226 & n.8 (1960)), and concluded that courts are forbidden from extending the time for filing a notice of appeal beyond the forty days. Id. at 2-3. See also Fed. R. App. R. 26(b)(1) (excepting from the court’s good-cause-shown extension powers the discretion to grant an extension of the time to file a notice of appeal not otherwise authorized by Rule 4).

The outer-most limitation for jurisdiction over a direct appeal does not ineluctably answer the question of when a judgment is “final” for 28 U.S.C. § 2255 purposes. There is a distinction of importance between the Rule 4(b)(1)(A) ten-day period for considering the propriety and preparing and filing of a direct appeal provided to all criminal defendants, and the thirty-day discretionary relief from that time line that is only available upon a showing of excusable neglect. It is also distinguishable from the ninety-day certiorari period theoretically available to every defendant and a period allowed each defendant to make up his or her mind whether to ask for certiorari review or not. From the defendant’s perspective the running of the ten-day time limitation in Rule 4(b)(1)(A) will clearly define the end of the direct appeal stage of his conviction and, consequently, the beginning of time for considering and pursuing habeas relief. It would be only the unwise defendants that considered that they have forty days of repose because of the availability of the Rule 4(b)(4) extension. If a defendant actually pursues relief from the ten-day limitation via Rule 4(b)(4) then that would change the complexion of this analysis. And in the context of calculating the one-year limitation period for 28 U.S.C. § 2255 the court will always be able to look at the matter in hindsight and determine whether or not the defendant actually filed a notice of appeal or availed him or herself of

the ability to move for an extension of the time to file a notice of appeal under Rule 4(b)(4). Thus, the 28 U.S.C. § 2255 court can always factually, rather than hypothetically, determine when the particular criminal judgment actually became final and accord all defendants the one-year they are entitled to under 28 U.S.C. § 2255.

Consequently, I conclude that Ellis's amended judgment became final no later than November 26, 2000, and thus his 28 U.S.C. § 2255 is untimely.

***B. Ellis's Apprendi Claim and the Possibility of Relief From the One-year Statute of Limitation***

Ellis's third ground does present, and Ellis does raise, the possibility that he can assert his Apprendi v. New Jersey, 530 U.S. 466 (2000) claim even though his motion was filed after the 28 U.S.C. § 2255 general one-year statute of limitation ran its course. Paragraph six, subsection (3) of 28 U.S.C. § 2255 provides that a habeas petitioner can lodge an initial § 2255 motion if it is filed within one year from:

the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

28 U.S.C. § 2255 ¶ 6 (3).

In Apprendi the United States Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to and proved to a jury beyond a reasonable doubt. 530 U.S. at 490. The Court stated that a fact that increases a penalty for a crime beyond the statutory maximum that would apply absent that fact, "fits squarely within the usual definition of an 'element' of the offense." Id. at 494 n.19. The First Circuit has determined that Apprendi error can inhere to 21 U.S.C. § 841 convictions when the drug quantity applicable to the various § 841 subsections is not charged in the indictment

and/or when the jury is not given the task of determining drug quantity by a beyond a reasonable doubt standard. See United States v. Duarte, 246 F.3d 56, 59-60 (1<sup>st</sup> Cir. 2001); United States v. Robinson, 241 F.3d 115, 118-120 (1<sup>st</sup> Cir. 2001).

As of yet there is no pat answer as to whether Ellis can bring his Apprendi claim in his initial, but otherwise untimely, habeas. The United States asserts in its response that Ellis can not raise Apprendi because “the First Circuit has ruled that ‘the Supreme Court has not made the rule retroactive to cases on collateral review,’” citing Sustache-Rivera v. United States, 221 F.3d 8, 15 (1<sup>st</sup> Cir. 2000). Though, without a doubt, the Supreme Court has not yet held that Apprendi should be retroactively applied to cases on collateral review, as relevant to the inquiry under 28 U.S.C. § 2255 ¶ 8(2) for second and successive 28 U.S.C. § 2255 motions, see Tyler v. Cain, \_\_U.S.\_\_, 121 S.Ct 2478 (2001) (interpreting 28 U.S.C. § 2244(b)(2)(A) that, like 28 U.S.C. § 2255 ¶ 8(2), turns on the language, “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”), this is a different standard than animates 28 U.S.C. § 2255 ¶6(3), a point that Judge Easterbrook has recently addressed. See Ashley v. United States, \_\_ F.3d \_\_, 2001 WL 1085010, \*1-2 (7<sup>th</sup> Cir. Sept. 12, 2001) (distinguishing 28 U.S.C. § 2255 ¶ 6(3) from § 2255 ¶ 8(2)).<sup>2</sup> Though, citing Sustache-Rivera, the United States has long contended otherwise in argument before this court, the First Circuit has not yet answered the retroactivity question posed here. See United States v. Baptiste- Calixce, 2001 WL 1150412 (1<sup>st</sup> Cir.

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<sup>2</sup> There are three other important aspects of the Ashley opinion penned by Judge Easterbrook. First, the 28 U.S.C. ¶ 6(3) one-year does not run from the date of the Supreme Court decision, but from the date it is “made” retroactive. Id. at \*3. Second, the district court can, when asked by the petitioner, make the determination of whether or not the new rule applies retroactively for purposes of 28 U.S.C. § 2255 ¶ 6(3). Id. at \*3. Third, the need to clear the fog with respect to these two different provisions of § 2255 justified the Seventh Circuit’s revisit and partial overruling of its newly inked Montenegro v. United States, 248 F.3d 585 (7<sup>th</sup> Cir. 2001).

Sept. 28 2001) (“This court has not yet decided the question whether Apprendi applies retroactively to cases on collateral review, an issue on which courts are divided.”)(unpublished disposition).<sup>3</sup> Indeed, the question of whether the United States Supreme Court’s Apprendi is available on a timely initial petition or is a “newly recognized” “right” that should be made retroactively applicable to otherwise untimely first petitions has generated a wide array of answers and rationales.

At the time of this writing, three circuit courts of appeal, the Fourth, Eighth, and Eleventh, have concluded that the Apprendi rule is not available on an initial 28 U.S.C. § 2255 motion by analyzing Apprendi’s retroactivity as a new rule of criminal procedure under the United States Supreme Court’s Teague v. Lane, 489 U.S. 288 (1989). See McCoy v. United States, \_\_\_ F.3d \_\_\_, 2001 WL 1131653, \*2-9 (11<sup>th</sup> Cir. Sept. 25, 2001); United States v. Moss, 252 F.3d 993, 997-1001 (8<sup>th</sup> Cir. 2001);<sup>4</sup> United States v. Sanders, 247 F.3d 139, 146-41 (4<sup>th</sup> Cir. 2001). The Ninth Circuit has rendered a purposefully limited holding vis-à-vis the Apprendi retroactivity question for first-time 28 U.S.C. § 2254 motions. See Jones v. Smith, 231 F.3d 1227 (9<sup>th</sup> Cir. 2000). After a Teague analysis, id. at 1236-38, it concluded that “at least as applied to the omission of certain necessary elements from the state court information,” and “insofar as it effects

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<sup>3</sup> I am cognizant of the limited purpose of this unpublished disposition and the dictates of The First Circuit’s Rule 36. I do not offer it for the truth of the matter asserted but for its effect on this listener.

<sup>4</sup> Judge Arnold dissented in Moss, arguing that the Apprendi rule falls within Teague’s “watershed exception” to nonretroactivity. 252 F.3d at 1003-05. Two panels of the Eighth Circuit have followed Moss but have recognized that the question is elsewhere undecided and registered some sympathy with the Moss dissent. Jarrett v. United States, \_\_\_ F.3d \_\_\_, 2001 WL 1155003, \*2 & n.1 (8<sup>th</sup> Cir. 2001 Oct. 2, 2001); Duke v. United States, 255 F.3d 912, 913-14 & n.4 (8<sup>th</sup> Cir. 2001). More recently, an Eighth Circuit panel reversed a district court’s order for resentencing, the district court having concluded that Apprendi did pass muster under the Teague criteria for retroactive application. Murphy v. United States, \_\_\_ F.3d \_\_\_, 2001 WL 1203219 (8<sup>th</sup> Cir. Oct. 12, 2001). The Murphy panel stated: “Absent rehearing en banc or contrary word from the Supreme Court, we are bound by the Moss panel’s decision.” Id. at \*1 (citation omitted).

[sic] discrepancies between an information and jury instructions,” the Apprendi rule is not a viable means for a collateral attack. Id. at 1238.

Other voices from the circuit courts have been more equivocal about the retroactivity of Apprendi in a first habeas motion. This summer the Fifth Circuit remanded a case to the district court directing that it reconsider its ruling that an Apprendi-based amendment to an initial 28 U.S.C. § 2255 motion would be futile because of the unavailability of Apprendi on collateral review. United States v. Clark, 260 F.3d 382, 382 & n.1 (5<sup>th</sup> Cir. 2001). The majority cautioned that it was not expressing an opinion of how the district court should resolve the issue, but directed the court’s attention to the Davis v. United States, 417 U.S. 333 (1974) doctrine that permits retroactive application of a case working a substantive change in the interpretation of a criminal statute and Teague’s standard for affording retroactive collateral relief when there has been a decision mandating a change in criminal procedure. Id. at 382 n.1 (suggesting that counsel be appointed to the movant in light of the “difficulty and importance of the retroactivity issue”). The decision to remand was entered over a dissent. Judge Parker concluded that the question of Apprendi’s retroactivity was “purely legal” leaving nothing to be done by the district court. Id. at 383. This dissent reasoned that Fifth Circuit precedent that had identified substantive changes in the criminal laws dictated the conclusion that the Apprendi rule substantively redefines the elements of 18 U.S.C. § 841 and, therefore, is to be applied retroactively. Id. at 385-86.

The Seventh Circuit has also concluded that the retroactivity of Apprendi for 28 U.S.C. 2255 ¶ 6(3) inquiries is as of yet an open question within its circuit boundaries. In Ashley Judge Easterbrook remanded a 28 U.S.C. § 2255 case, reversing the district

court's determination that Apprendi was not available retroactively within the meaning of 2255 ¶6(3). 2001 WL 1085010, \*1-5. The Court stated that the question of the ¶6(3) retroactivity of Apprendi was "substantial" and justified the issuance of a certificate of appealability. Id. at \*4. "We remand," the Court concluded, "so that the retroactivity decision may be made, or at least considered." Id. It did advise that the district court might not need to make the retroactivity determination if the movant did not state an Apprendi claim given the length of his sentence and sentencing provision under which he was sentenced or if the court concluded that the movant could not demonstrate cause and prejudice for failing to raise the question on direct appeal. Id.<sup>5</sup> See also Edwards v. United States, 115 F.3d 1322, 2001 WL 1117270, \*3 (7<sup>th</sup> Cir. Sept. 24, 2001) (assuming that Apprendi applies retroactively to first-time 28 U.S.C. § 2255 motions, concluding that the movant's sentence did not "run afoul of its holding").

Passing on the question of whether the United States Supreme Court has "made" Apprendi retroactive to cases on collateral review for purposes of filing a "second or successive" habeas under 28 U.S.C. § 2255 ¶8(2), the Third Circuit has suggested that the Teague framework, particularly the second prong, would be the appropriate mode for undertaking a non-¶8(2) retroactivity inquiry for Apprendi. United States v. Turner, 2001 WL 1110349, \*4 n.4 (3d Cir. Sept. 21, 2001). The Second Circuit has expressed its relief that vis-à-vis this retroactivity of Apprendi question for first-time petitions it has not "yet

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<sup>5</sup> The victory for Ashley may well be Pyrrhic. In United States v. Smith, 241 F.3d 546 (7<sup>th</sup> Cir. 2001), in a decision also penned by Judge Easterbrook, the Seventh Circuit held that the § 2255 movant could not establish "cause" for his procedural default of his Apprendi-based claim because "the foundation for Apprendi was laid long before" the movant's 1992 conviction. 241 F.3d at 548-49. This conclusion was not unanimous in the Seventh Circuit. Writing a dissent from the denial of rehearing en banc in Smith, Judge Wood, joined by Judges Rovner and Williams, argued persuasively that, for the purposes of establishing cause for its procedural default, Apprendi was distinguishable from Bailey v. United States, 516 U.S. 137 (1995) and, thus, Bousley v. United States, 523 U.S. 614 (1998) did not control the cause inquiry vis-à-vis Apprendi. United States v. Smith, 250 F.3d 1073, 1074-77 (7<sup>th</sup> Cir. 2001). See also Sustache-Rivera, 221 F.3d at 14 n.9.

ventured where the Supreme Court has thus far feared to tread.” Santana-Madera v. United States, 260 F.3d 133, 141 (2d Cir. 2001). And, the Sixth Circuit has, likewise, been passive. See Ward v. Snyder, 238 F.3d 426 (6<sup>th</sup> Cir. 2000) (unpublished opinion). The Tenth Circuit has been silent.

The First Circuit, while not silent or passive, has, as yet, avoided deciding the Apprendi retroactivity question for first-time, out-of-time habeas petitions. It has followed a course of first identifying whether, assuming the movant could utilize Apprendi on collateral review, the defendant has a cognizable Apprendi claim factually. To date it has not reached the merits of a case that is in the same posture as Ellis’s.

***C. Assuming Apprendi Applies Retroactively to First-time Cases on Collateral Review, Ellis Can Not Establish the Prejudice Required to Relieve Him From His Failure to Press the Necessity of a Jury Determination of Drug Quantity At the Time of Trial or Appeal***

A review of the trial record and Ellis’s appeals shows that Ellis at no time challenged the fact that the jury was not asked to make a beyond-a-reasonable-doubt finding as to drug quantity. The Supreme Court has made it crystal clear in the context of a 28 U.S.C. § 2255 motion, that, “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’” Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted). If Ellis fails on either score he cannot further his Apprendi argument in this federal habeas using the cause and prejudice vehicle. Coleman v. Thompson, 501 U.S. 722, 750 (1991) (petitioner has burden of demonstrating cause and prejudice when claim is defaulted); Burks v. Dubois, 55 F.3d 712, 716 (1<sup>st</sup> Cir. 1995) (same).

It is unnecessary for me to enter the fray over whether or not the uniform understanding between the circuits that drug quantity for 21 U.S.C. § 841 purposes was a sentencing factor and not an element of the crime would constitute cause for the procedural default. See supra note 5. I conclude that even if Ellis could establish cause, he is not able to demonstrate actual prejudice, and both must be established to survive a procedural default in this manner. Bousley, 523 U.S. at 622; United States v. Barrett, 178 F.3d 34, 49 n.9 (1<sup>st</sup> Cir. 1999).

As stated above, Ellis was convicted on two independent counts. He was found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and of manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Only the 21 U.S.C. § 841(b)(1)(C) conviction generates an Apprendi concern, for to be subject to the sentencing range of that subsection Ellis must have had fifty or more kilograms of marijuana or fifty or more marijuana plants (irrespective of their weight). 21 U.S.C. § 841(b)(1)(D). Had he been armed with Apprendi Ellis could have challenged his indictment<sup>6</sup> and the jury instructions<sup>7</sup> because they failed to place the determination of drug quantity in the hands of the grand and trial juries.<sup>8</sup>

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<sup>6</sup> The Grand Jury on August 12, 1997, indicted Ellis on three counts. Count Three was the count alleging the drug offense. It reads: “That on or about June 11, 1997, in the District of Maine, defendant BOYD VANCE ELLIS unlawfully, knowingly and intentionally manufactured a quantity of marijuana, a Schedule I controlled substance; In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).” (Superseding Indictment at 4) (emphasis added). I need not inquire into whether the citation to subsection (b)(1)(C) would be sufficient to salvage the indictment for purposes of Apprendi. See United States v. Mojica-Baez, 229 F.3d 292, 307-12 (1<sup>st</sup> Cir. 2000) (rehearing en banc denied).

<sup>7</sup> The jury instructions specific to the 21 U.S.C. § 841 count can be found in Volume IV of the trial transcripts at pages 589-90. No mention is made of drug quantity.

<sup>8</sup> Though it is not a determination that I make here, at least from the face of the First Circuit’s opinion, that whether or not Ellis was subject to subsection (b)(1)(c) penalties rather than subsection (b)(1)(D) might have been a close call if the United States, the defense, the court, and the jury analyzed it. See United States v. Ellis, 168 F.3d 558, 560 (1<sup>st</sup> Cir. 1999) (“The agents located approximately sixty-five marijuana plants in a secret compartment in a detached garage.”); id. at 564 (“[T]he total amount of marijuana recovered from the cultivation operation--thirty-six-and-one-half grams--was worth approximately \$160, using the government's estimate (.0365g X 2.2 lbs./kg X \$2000/lb.).”).

But while Ellis has a theoretical Apprendi claim, the disarming reality for him is that he stands convicted of the 18 U.S.C. § 922(g)(1) offense. This conviction is in no way dependent on the proof required for conviction on the 21 U.S.C. § 841(b)(1)(C) count. I will elaborate.

Ellis aired his grievances with this conviction to the First Circuit in his direct appeal. United States v. Ellis, 168 F.3d 558 (1<sup>st</sup> Cir. 1999). As relevant to this proceeding, it concluded that there was not clear error in the district court's factual findings that Ellis "possessed" a firearm and could be enhanced under the armed career criminal guideline. Id. at 562-63. It also rejected Ellis's contention that his prior convictions were too old to trigger the armed career criminal guidelines. Id. at 563. But with respect to the guideline enhancement that applied because of the court's determination that there was a nexus between Ellis's possession of the firearms and the marijuana cultivation the First Circuit remanded the case requiring that more explicit findings be made prior to the application of this enhancement. Id. at 563-64 & n.3. And Ellis was resentenced by the district court. On Count II his sentence fell from 262 months to 188 months. (Docket Nos. 71 & 90.) As indicated in the Memorandum of Sentencing Judgment (Docket No. 89) the amended judgment did not reflect the enhancement for possessing firearms or ammunition in connection with another felony, to wit, the 21 U.S.C. § 841(a) offense. The criminal history relied on to support Ellis's Count II conviction and sentencing enhancement is unrelated to the Count III conduct.

Thus, even if the Count III sentence was reduced to 21 U.S.C. § 841(b)(1)(D) parameters, Ellis would still be subject to the 188 month sentence he must serve on the undisturbed Count II conviction. Since any relief that Ellis could achieve through this 28

U.S.C. § 2255 motion would be limited to a reduction of sentence and not a eradication of his 18 U.S.C. § 841(a) conviction, see Mojica-Baez, 229 F.3d at 308 n.9 (remedy for Apprendi problem in indictment or at trial is not reversal of the conviction but a remand for resentencing), I cannot conceive how Ellis is prejudiced by leaving the Count III sentence undisturbed.

I have found few cases in the habeas posture that stand directly for this proposition. In Bruns v. Thalacker, 973 F.2d 625 (8<sup>th</sup> Cir. 1992) the Eighth Circuit concluded that the 28 U.S.C. § 2254 petitioner could not establish prejudice to relieve him for his failure to raise his double jeopardy claim in the state courts because at most the habeas relief would be the vacatur of the shorter of two sentences. 973 F.2d at 628. Another court has reasoned in a 28 U.S.C. § 2255 collateral review that the petitioner could not establish prejudice because even if the plea and sentence were infected with an Apprendi error, there would be no impact on the remaining counts, and thus the movant would serve the same sentence, it being a “genera” sentence that was imposed concurrently vis-a-vis another count. United States v. Hunter, 2001 WL 115943 (E.D. Pa. Sept. 17, 2001).

In the context of a direct appeal, this argument has been presented to the First Circuit on an Apprendi claim at the direct appeal stage, but it declined to rest its determination on it, finding more comfort with an alternative ground. Duarte, 246 F.3d at 62 & n.4. However, several circuit courts, addressing sentencing issues that are slightly different than Ellis presents, have found prejudice wanting in unreserved Apprendi claims on direct appeal when the defendant would be subjected to at least as lengthy of a sentence absent the alleged Apprendi problem. See United States v. Smith,

240 F.3d 927, 930 (11<sup>th</sup> Cir. 2001); United States v. White, 238 F.3d 537, 542-43 (4<sup>th</sup> Cir. 2001); United States v. Page, 232 F.3d 536, 543-45 (6<sup>th</sup> Cir. 2000); United States v. Meshack, 225 F.3d 556, 577 (5<sup>th</sup> Cir. 2000) (plain error); see also United States v. Price, 75 F.3d 1440, 1446 (10<sup>th</sup> Cir. 1996) (examining under harmless error standard a sentencing error on one of two concurrent sentences, stating that whether to address the alleged error was discretionary, and electing to exercise its discretion and remand for resentencing).

The alternative mode for relief from his procedural default fails for many of the same reasons that prevent Ellis from establishing cause and prejudice. Ellis's claim is not that he is "actually innocent" of a marijuana offense as he does not contest the fact that he had some quantity of marijuana plants, as the indictment alleged and the jury found as a prerequisite to its 21 U.S.C. § 841(a) conviction. See United States v. Sanchez, \_\_\_ F.3d \_\_\_, 2001 WL 1242087, \* 10 (11<sup>th</sup> Cir. Oct. 17, 2001) (analyzing the structure of 21 U.S.C. § 841 for Apprendi purposes, observing that "when a defendant pleads guilty to, or a jury finds the defendant guilty of, an indictment charging possession with intent to distribute a 'controlled substance,' a drug quantity of some amount is already part of the underlying crime of conviction."). As stated above, at most Ellis's remedy would be a resentencing under 21 U.S.C. § 841(b)(1)(D). And it cannot be said that there was a fundamental miscarriage of justice in any alleged Apprendi error, as the prejudice discussion above demonstrates. Burks, 55 F.3d at 717-18.<sup>9</sup>

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<sup>9</sup> The "miscarriage of justice" and "actual innocence" alternative to a cause and prejudice showing necessary to relieve a procedural default has, in my eye, somewhat amorphous boundaries. See Bousley, 523 U.S. at 623; Schlup v. Delo, 513 U.S. 298, 314-15 (1995). This case does not require a greater inquiry into the qualities of prejudice that are involved in the cause and prejudice as opposed to the actual innocence/miscarriage of justice tests and whether or not there is a difference of kind and or degree. See Schlup, 513 U.S. at 327 & n.45; see also Ortiz v. Dubois, 19 F.3d 708, 714 (1<sup>st</sup> Cir. 1994).

Finally, I do recognize that if the convictions on both counts were infected with Apprendi error than my prejudice analysis would alter course. However, Ellis would make no headway by challenging his 18 U.S.C. § 922(g)(1) conviction on Apprendi grounds. Without further word from the Supreme Court, the bump in the maximum sentence achieved by dint of a prior conviction is not susceptible to an Apprendi attack. 530 U.S. at 490 (“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.”); Id. at 487 –89 (describing the exception of prior-convictions from the Apprendi rule as an “exceptional departure from the historic practice” of requiring proof of each element that increases the maximum penalty for a crime, suggesting that it is arguable that it’s precedent to this effect, Almendarez-Torres v. United States, 523 U.S. 224 (1998), was incorrectly decided).

### ***Conclusion***

For the reasons proffered above, I recommend that the Court **DENY** Ellis’s 28 U.S.C. § 2255 as to each of his claims.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated October 22, 2001

CJACNS CLOSED

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 97-CR-44-ALL

USA v. ELLIS

Filed: 06/18/97

Other Dkt # 1:97-m -00035

Case Assigned to: Judge GEORGE Z. SINGAL

ROBERT C HOWARD (0)

BRUCE A. JORDAN

Interested Party

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Terminated Counts: NONE

Complaints: NONE

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