

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>MYRNA J. HOLT WILSON,</b>	)	
	)	
<b>Petitioner,</b>	)	<b>Civil Action No. 7:00cv00423</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	<b>By: Samuel G. Wilson</b>
	)	<b>Chief United States District Judge</b>

This is a motion pursuant to 28 U.S.C. § 2255 by Myrna Wilson challenging her plea of guilty to conspiracy to distribute heroin in violation of 21 U.S.C. § 846 and her resulting 210 months sentence. She maintains that she was denied the effective assistance of counsel, that the government was guilty of prosecutorial misconduct, and that the court violated her rights to due process by not permitting her to withdraw her guilty plea and by refusing to appoint new counsel. The court finds that Wilson was not denied the effective assistance of counsel, that she defaulted her prosecutorial misconduct claim, that the court did not violate her due process rights by refusing to appoint her new counsel, and that the Court of Appeals already has decided that this court properly denied her request to withdraw her guilty plea. Accordingly, the court will deny her motion.

**I.**

Wilson, who had *eight* prior felony drug offense convictions, pled guilty on March 11, 1999 to Count One of an indictment charging her with conspiracy to distribute heroin. Wilson entered the plea pursuant to a signed written plea agreement in which the United States agreed

that it would not file an information pursuant to 21 U.S.C. § 851 to enhance Wilson’s sentence based on her prior felony drug convictions and would dismiss a second count of the indictment charging Wilson with distribution of heroin. Wilson acknowledged in the plea agreement that she understood that her sentence would be “determined from a variety of factors involved in the offense, including the amount of the drugs, [her] role in the offense, and [her] prior criminal involvement.” The plea agreement specifically provided that Wilson would be held accountable for more than three but less than ten kilograms of heroin. It also specifically provided that the United States would take no position concerning Wilson’s role in the offense. Wilson further acknowledged in the agreement that she was “knowingly and voluntarily waiving” her right to appeal her sentence “except for an upward departure from the guidelines or a factual finding that deviate[d] from the factual stipulations” contained in the plea agreement and that she was waiving the right to challenge her sentence or “the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under [28 U.S.C. § 2255].” She conceded that her counsel had effectively represented her and she waived ineffective assistance of counsel claims not raised with the court by the time she was sentenced.

The essential terms of Wilson’s plea agreement were detailed in open court before the court began its plea colloquy with Wilson. The court then questioned Wilson. In response to the court’s questions, Wilson stated that she had read the plea agreement before signing it, that she understood the agreement, that there was not anything about the agreement she did not understand, that no one had made any other or different promise or assurance of any kind in an effort to induce her to enter a plea of guilty, that she understood the collateral consequences of her plea of guilty, that she understood she was pleading guilty to Count One of the indictment

which she read and understood, that she understood that based upon the “*stipulated drug amounts*” the offense carried a sentence from ten years to life, that she had discussed the sentencing guidelines with her attorney, that she understood that the court would not be able to determine the appropriate guideline range in her case until the probation officer prepared a presentence report and she and the government had an opportunity to challenge the facts reported by the probation officer, that she understood that the court had the authority under certain circumstances to impose a sentence that was more severe or less severe than one called for by the guidelines, that she understood that she was waiving her right to appeal certain guidelines sentencing issues, that she understood that parole had been abolished and that she would not be released on parole, that she understood that if the sentence was more severe than she expected she would still be bound by her plea and not have the right to withdraw it, that she understood that the court was not bound to follow sentencing recommendations, that she understood her right to plead not guilty and all the rights associated with a not guilty plea, that she understood that she was giving up her right to trial as well as those other rights associated with a trial, and that she was pleading guilty because she was in fact guilty.

The court then heard the factual basis for the plea and asked Wilson if she heard anything with which she disagreed. She stated that she disagreed with the drug amounts the government attributed to her. At that point Wilson began to confer with her counsel and the court recessed for an hour and fifteen minutes. At the conclusion of the recess Wilson stated that the matter had been resolved and she agreed with the stipulated drug weights. The court then stated as follows:

Nobody is going to force you [to] agree with it or force you to plead guilty here. I want to make sure that you’re doing this because that is your decision based upon what you heard and what you know.

So you're telling the court that you no longer have, after having discussed the matter further with your counsel, you do not have a problem with the plea agreement?

Wilson indicated that she had no problem with the plea agreement, and she pled guilty to Count One of the indictment. Satisfied with the voluntariness of the plea the court found Wilson to be “fully competent and capable of entering an informed plea and that her plea of guilty to Count One [was] a knowing and voluntary plea, supported by an independent basis in fact, containing each [of] the essential elements of Count One.” Accordingly, the court accepted Wilson’s plea and adjudged her guilty.

Approximately four months later, Wilson renewed her claim that she did not understand her plea agreement, that she signed it simply to avoid what she thought would be an “automatic” life sentence because of her prior drug convictions, that the stipulated drug amounts were too high, that she only agreed with the stipulated drug amounts to keep from making the court “angry.” She requested to withdraw her plea and the court to assign her new counsel. The court found that Wilson had failed to articulate a “fair and just reason” justifying withdrawal of her guilty plea, denied her request, and proceeded to sentencing.

The presentence report stated that based upon the stipulated three to ten kilograms of heroin, guideline § 2 D1.1(c)(3) called for a base offense level of thirty-four, that Wilson should receive two additional points under § 3 B1.1(c) for her role in the offense, and that three points should be subtracted pursuant to §§ 3 E1.1 (a) & (b) for her acceptance of responsibility. This resulted in a total offense level of thirty-three. Wilson’s criminal history category was V (because many of her convictions were old ones) producing a guideline range of 210 to 262 months. The

court sentenced Wilson to 210 months. Despite her plea agreement waiving her right to appeal, Wilson appealed challenging the court's refusal to permit her to withdraw her guilty plea and her resulting sentence.

The Court of Appeals affirmed this court's decision refusing to permit her to withdraw her guilty plea stating:

We find this conclusion proper given that during her Rule 11 colloquy she knowingly and voluntarily pled guilty in full understanding of the plea and the amount of heroin attributed to her, that instead of arguing her innocence she repetitively admitted her culpability to family and to the District Court, and that she waited close to four months before moving to withdraw her plea.

*United States v. Wilson*, No. 99-4518, 2000 WL 338999, at \*\*1 (4th Cir. March 31, 2000). The Court of Appeals also declined "to address Wilson's claim that the District Court erroneously enhanced her sentence for her role in the drug conspiracy because she waived her right to appeal this issue." *Id.*

Wilson then filed this motion pursuant to 28 U.S.C. § 2255 alleging: (1) that, contrary to the express representation in her signed plea agreement which stated that she had discussed the terms of her "plea agreement and all matters pertaining to the charges against [her] with [her] attorney" she was denied the effective assistance of counsel because her counsel never showed her discovery relating to the amount of heroin attributed to her until after she pled guilty, she did not have an opportunity to see or read her plea agreement until after she had pled guilty, her counsel failed to explain her plea agreement to her, her counsel failed to discuss the evidence and her options with her, her counsel failed to investigate the case properly, her counsel failed to object to her role adjustment, her counsel failed to correct the court's misunderstanding that the parties had stipulated the role adjustment, and her counsel told her that she would receive life imprisonment if

she did not accept the plea agreement and plead guilty; (2) that the government failed to disclose favorable evidence pertaining to Wilson's role adjustment; and (3) that the court denied her due process when it refused to permit her to withdraw her guilty plea and to appoint her new counsel.

## II.

Claims of ineffective assistance of counsel are governed by the familiar two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant "must show that counsel's performance was deficient." *Id.* at 687. To prove deficiency, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that the deficient performance actually prejudiced him. To show prejudice in the context of a guilty plea, the defendant must show that there is a reasonable probability that but for the alleged ineffective assistance the defendant would have insisted on going to trial instead of pleading guilty. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The defendant must show that but for the unprofessional errors there is a reasonable probability that a reasonable defendant in defendant's position would have insisted on going to trial instead of pleading guilty. *See Hopper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). Wilson has met neither prong of the *Strickland* test.

A conviction of conspiracy to distribute one kilogram or more of heroin is subject to a mandatory life sentence under 21 U.S.C. § 841(b)(1)(8)(i) if the defendant has two or more prior felony drug convictions. Drug quantity is an element of the offense which the government is required to allege in the indictment and prove beyond a reasonable doubt, although prior convictions are not. Unless the drug quantity is alleged in the indictment the maximum sentence for conspiracy to distribute heroin is 30 years as provided in 21 U.S.C. § 841(b)(1)(C). When

Wilson pled guilty in 1999, however, the Supreme Court had not yet decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000) which made the charging and proof requirements clear. Before *Apprendi* it was commonly understood, and was well within the wide range of professional competence to understand, that indictments did not have to allege drug quantities. Although Wilson does not directly raise a claim under *Apprendi* she does complain that she entered into the plea agreement and pled guilty on the erroneous advice that she otherwise would receive a mandatory life sentence because of her eight prior drug felonies. Given the common understanding at the time, however, even though the indictment failed to allege the quantity of heroin Wilson allegedly conspired to distribute, her counsel's advice was objectively reasonable. Moreover, the advice did not prejudice Wilson because it is not reasonably probable that but for the alleged ineffective assistance Wilson would have insisted on going to trial and face life imprisonment instead of pleading guilty.<sup>1</sup> In fact, it is plain that none of the many unprofessional errors Wilson *alleges* was prejudicial.

Wilson has the burden of proving prejudice—that but for the unprofessional errors there is a reasonable probability that a reasonable defendant in defendant's position would have insisted on going trial instead a pleading guilty—and she has done nothing to dispel the strong presumption arising from the court's findings when it accepted her guilty plea that her plea of guilty was “knowing and voluntary.” *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992 ). The court's findings were not merely formalisms. When, for example, Wilson protested the three to ten kilograms attributed to her the court recessed for an hour and fifteen minutes to permit Wilson

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<sup>1</sup> Whatever merit a § 2255 claim might have had later, had the trier of fact found Wilson guilty of Count One the court likely would have believed that it was compelled to sentence her to life.

to confer with counsel about the stipulation. At the conclusion of the recess Wilson stated that the matter had been resolved, and she agreed with the stipulated drug weights. Nevertheless, the court pursued the matter further to insure that her agreement and plea were, in fact, both knowing and voluntary and accepted Wilson's plea only after it was so satisfied. Wilson has demonstrated nothing that dispels the force of that finding. Accordingly, the court rejects Wilson's pre-plea effective assistance of counsel claims.

At sentencing, the court mistakenly believed that the parties had stipulated a two point role adjustment. Wilson complains that her counsel was ineffective for not objecting to that adjustment and for not correcting the court's misunderstanding. Although those post plea complaints stand on a different procedural footing than her other complaints, they are equally without merit. Wilson cannot satisfy either of *Strickland's* two prongs. Wilson's presentence report assessed only two points under guideline § 3B1.1(c), the smallest role adjustment possible for "an organizer, leader, manager, or supervisor in any criminal activity." The adjustment was fully justified by a combination of the summary of the evidence the court heard to support the plea and a description of the offense conduct described in paragraphs nine through seventeen of Wilson's presentence report. According to those paragraphs, Wilson was a central contact and source of heroin shipped to Roanoke by a New York supplier. Indeed, her role in the offense may very well have warranted a three or even four level increase. It follows, that her counsel was wise, not ineffective, for not pursuing the matter and that Wilson cannot show prejudice. It follows, that the claim lacks merit.<sup>2</sup>

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<sup>2</sup> Under her plea agreement Wilson expressly agreed not to bring a collateral proceeding to attack her plea or sentence. There is a split of authority as to "whether a plea agreement that waives the right to file postconviction relief under § 2255 is enforceable when the § 2255 petition

### III.

According to Wilson's second claim, the government is guilty of prosecutorial misconduct because it withheld exculpatory evidence bearing on her two point role adjustment. The court finds that Wilson defaulted the claim because she could have but did not raise it on direct review, and she has not shown, even remotely, either cause and prejudice or actual innocence.<sup>3</sup> "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in a federal habeas proceeding only if the defendant can show both cause for and actual prejudice from the default [citations omitted], or that he is actually innocent [citations omitted]." *United States v. Harris*, 183 F 3d 313, 317 (4th Cir. 1999). Accordingly, the court will dismiss the claim.<sup>4</sup>

### IV.

Finally, Wilson claims that the court denied her rights to due process when it refused to permit her to withdraw her guilty plea and refused to appoint her new counsel. The Court of Appeals essentially decided the withdrawal issue on direct appeal when it determined that the court properly denied Wilson's motion to withdraw her plea. Wilson cannot relitigate the issue. *See Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976). The appointment of new counsel issue is inextricably intertwined with the withdrawal issue. Had this court

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claims ineffective assistance of counsel." *See United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001). Having decided Wilson's effective assistance of counsel claims adversely to her on alternative grounds this court declines to reach the question.

<sup>3</sup> Moreover, Wilson's conclusory allegation fails to raise even a colorable prosecutorial misconduct claim.

<sup>4</sup> Wilson's plea agreement also waives her right to attack her conviction and sentence in a collateral proceeding.

determined that Wilson had been denied the effective assistance of counsel and that counsel could not effectively represent Wilson this court would have appointed new counsel. Procedurally, Wilson cannot relitigate the issue now. Substantively, the claim also lacks merit.

**V.**

For the reasons stated, the court denies Wilson's motion for relief pursuant to 28 U.S.C. § 2255.

**ENTER:** this January \_\_\_\_\_, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
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**MYRNA J. HOLT WILSON,**

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	)	<b>Civil Action No. 7:00cv00423</b>
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b><u>FINAL ORDER</u></b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	<b>By: Samuel G. Wilson</b>
	)	<b>Chief United States District Judge</b>

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that Myrna J. Holt Wilson’s motion for relief pursuant to 28 U.S.C. § 2255 is hereby **DISMISSED** with prejudice. This case will be stricken from the active docket of the court.

The Petitioner is advised that she may appeal this decision pursuant to Rule 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within sixty (60) days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The clerk is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all parties.

**ENTER** this January \_\_\_\_\_, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE