

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

TIMOTHY OLANDO HOLLAND,)	
)	Civil Action 7:00CV00740
Petitioner,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
))
UNITED STATES OF AMERICA,)	
)	By: Samuel G. Wilson
Respondent.)	Chief United States District Judge

This is a motion pursuant to 28 U.S.C. § 2255 by Timothy Olando Holland claiming that the court sentenced him in violation of the rule announced by the Supreme Court in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The United States has moved to dismiss on the grounds that Holland’s motion is time-barred and that Apprendi cannot be applied retroactively in a § 2255 proceeding. The court assumes, *without deciding*, that the motion is not time-barred and that Apprendi is to be retroactively applied in a § 2255 proceedings. The court, nevertheless, denies Holland’s claim because it lacks merit.

I.

On January 30, 1997, a jury found Holland guilty of conspiracy to distribute and to possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846 and of two counts of distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). The indictment did not allege a particular quantity of cocaine base; Holland did not request and the court did not instruct the jury that quantity was an element. The court sentenced Holland to 262 months confinement but did not specify a particular sentence for a particular count. Holland did not appeal. On September

20, 2000, he filed his current petition challenging the lawfulness of his sentence.

II.

The court assumes, without deciding, that the motion is not time-barred and that Appendi is to be retroactively applied in this proceeding. Nevertheless, Holland cannot prevail. The maximum period of incarceration for each count of conviction is 20 years—720 months. The court sentenced Holland to 262 months. It is apparent, therefore, that Holland’s substantial rights were not affected by the imposition of a 262 month term of imprisonment. The outcome of the proceeding was not affected. The court did not impose a sentence that was longer than that to which Holland would otherwise be subject.

United States v. Kinter, 235 F.3d 192, 201 (4th Cir. 2000), “instructs that factual determinations that increase the defendant’s sentence under the sentencing guidelines do not implicate Appendi and may be made by the sentencing judge as long as the sentence imposed is less than the maximum permitted by statute for the offense for which defendant was convicted.” United States v. Obi, 239 F.3d 662, 667 (4th Cir. 2001). In the present case, however, the 262 month sentence exceeds the statutory maximum for any one count, and the court failed to specify a particular sentence for a particular count. But the circumstances still do not warrant § 2255 relief. “In the case of multiple counts of conviction, the guidelines instruct that if the total punishment mandated by the guidelines exceeds the highest statutory maximum, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment.” United States v. White, 238 F.3d 537, 543 (4th Cir. 2001). Thus, as long as the total period of incarceration does not exceed the maximum permissible consecutively imposed sentence, that sentence does not conflict with Appendi. See id. Such a sentence does not affect

substantial rights and, therefore, is not cognizable in a motion pursuant to § 2255. Accordingly, the court rejects Holland's Apprendi claim.

III.

For the reasons stated, the court denies Holland's § 2255 motion.

ENTER this March 28, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

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FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

TIMOTHY OLANDO HOLLAND,)	
)	Civil Action 7:00CV00740
Petitioner,)	
)	
v.)	<u>FINAL ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	By: Samuel G. Wilson
Respondent.)	Chief United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** as follows:

- (1) Holland's motion under 28 U.S.C. § 2255 is hereby **DENIED**; and
- (2) this action is stricken from the active docket of the court.

Holland is advised that he may appeal this decision pursuant to Rules 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 certified copies of this Order and accompanying Memorandum Opinion to Holland and to counsel of record for the Government.

ENTER this March 28, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

