

OCT 25 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>CALVIN FRANK MORRIS,</p> <p style="text-align: center;">Defendant - Appellant.</p>

No. 09-16130

D.C. Nos. 2:08-cv-00462-JAT
2:04-cr-01088-JAT

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted October 19, 2010 **

Before: O'SCANNLAIN, TALLMAN, and BEA, Circuit Judges.

Federal prisoner Calvin Frank Morris appeals from the district court's judgment denying his motion for relief under 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court properly denied Morris' claim of ineffective assistance of counsel because Morris has not established deficient performance by his trial counsel's decisions not to object to the government's alleged amendment of the indictment, or to the *Pinkerton* instruction. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take a futile action is not deficient performance).

Furthermore, Morris has not established a reasonable probability that a separate jury trial on the issue of drug quantity or a request for a minor role adjustment under the Sentencing Guidelines would have produced a different result given the extensive evidence against him. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

AFFIRMED.