N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

XAVIER HURON SANDERS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Issue 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

- Prefix-

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The Petitioner, XAVIER HURON SANDERS, respectfully prays that a writ of certiorari issue to review the judgment/order of the United States Court of Appeals for the Eleventh Circuit entered on October 5, 2018, rehearing denied January 15, 2019.

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OPINION BELOW

On October 5, 2018 the Eleventh Circuit Court of Appeals entered its opinion-order denying Petitioner's Motion for Certificate of Appealability, rehearing denied January 15, 2019. A copy of the opinion and order are attached as Appendix A and B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the defendant. The respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the

Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

On September 17, 2015, a federal grand jury in the Southern District of Florida charged Petitioner and eleven co-conspirators with various drug and firearm offenses. Specifically, Petitioner was charged in two counts of an eleven-count indictment: (1) conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of Title 21, United States Code, Section 846 (Count 1); and (2) felon in possession of a firearm and ammunition, in violation of Title 18, United States Code, Section 922(g)(1) (Count 11) (Cr-DE# 13). Beginning in or around March 2014, the Federal Bureau of Investigation ("FBI") and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") began a joint investigation into the drug trafficking activities of co-defendant Terell Lorenzo Bibby and un-indicted co-

conspirator Wesley Dareus who were distributing quantities of cocaine in the Miami Gardens neighborhood of Miami. Factual Proffer (Cr-DE# 307). The investigation included various forms of surveillance including physical, video camera, and cellphone wiretaps. The investigation revealed that Bibby and Dareus utilized a house located at 1630 NW 153rd Street in Miami, Florida (the "stash house") where they stored, diluted and repackaged cocaine for distribution. Petitioner's counsel filed five pretrial motions: (1) motion to dismiss indictment; (2) motion to bifurcate forfeiture and request jury trial; (3) motion to sever Appellant; (4) motion to suppress physical evidence; and (5) motion to suppress wiretap evidence (Cr-DE## 158-162). On January 6, 2016, the district court, ruling from the bench, denied all of Petitioner's motions for relief with the exception of his motion to suppress wiretap evidence, which the district court took under advisement (Cr-DE# 197). On March 17, 2016, the district court denied Petitioner's motion to suppress wiretap evidence by written order (Cr-DE # 296). On March 23, 2016, the district court conducted a change of plea hearing wherein Petitioner entered a guilty plea to the lesser included offense of Count 1 of the indictment for conspiring to possess with intent to distribute 500 grams or more of cocaine, and

Count 11 charging him with felon in possession of a firearm and ammunition, pursuant to a plea agreement Cr-DE: 306. The plea agreement provided that as to the lesser included offense in Count 1 of the indictment, the district court must impose a statutory minimum mandatory sentence of five years. The plea agreement further stipulated that the parties would jointly recommend that the Petitioner be held accountable for at least fifteen but less than fifty kilograms of cocaine, resulting in a base offense level of 32. The parties agreed that the recommendation of 120 months did not prevent the Appellant from asking for a sentence at the "lowest end of the advisory guideline range, and the defendant may still argue for a departure or variance." The plea agreement further included an appellate waiver. On June 7, 2016, U.S. Probation issued the final PSI. The PSI calculated Petitioner's base offense level at 32, consistent with a quantity of cocaine of at least fifteen but less than fifty kilograms, pursuant to USSG § 2D1.1(c)(4). The PSI further reflected a 2- point increase in Petitioner's offense level because a firearm was possessed in the instant offense, pursuant to USSG § 2D1.1(b)(1). The PSI deducted three points for Petitioner's acceptance of responsibility, pursuant to USSG § 3E1.1(a). U.S. Probation further calculated three criminal history

points for Appellant, finding a criminal history category 2. The three points were based upon Petitioner's prior federal felony conviction in 1997 for conspiracy to possess with intent to distribute cocaine. Petitioner's counsel filed a sentencing memorandum objecting to the two point enhancement for the possession of a firearm as calculated in the PSI and also advocating various 18 U.S.C. § 3553 factors the district court should take into account in sentencing Petitioner below the adjusted offense level. On June 17, 2016, the district court sentenced Petitioner to 120 months Bureau of Prisons. Petitioner addressed the district court prior to being sentenced: MR. ZIMET: Mr. Sanders would like to address the Court, Judge. . . . THE DEFENDANT: Yes, sir. I allowed some personal circumstances to make me make bad decisions, and I regret that because I should not have put my family in this position again, and I apologize to my mother for that. She's 66 years old. I'm leaving her again, and I regret it, Your Honor. I hate it. I hate I've done this to her. But I ask that you have mercy on me today. And if you can go below my guideline range, I will greatly appreciate it. And I thank you. The district court followed the PSI calculations, finding that Petitioner's total offense level is 31, with a criminal history category 2, and a resulting guidelines range of 121

to 151 months. The Government, consistent with the plea agreement, recommended a sentence of 120 months. The district court followed this recommendation and sentenced Movant to 120 months' imprisonment. Petitioners counsel did not appeal the judgment or sentence entered in this cause. In his § 2255 motion, Petitioner asserted that he requested his counsel to appeal, but his counsel disregard his specific instructions to file a notice of appeal.

Statement of the Facts

Beginning in or around March 2014, the Federal Bureau of Investigation (FB1) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began a joint investigation into the long term drug activities of Terell Lorenzo Bibby and Wesley Dareus who were distributing quantities of cocaine in the Miami Gardens neighborhood of Miami. During the investigation, law enforcement conducted physical surveillance, video camera surveillance, and obtained judicial authorization to intercept Dareus' cellphone on two separate occasions. The investigation revealed that Bibby and Dareus utilized a house located at 1630 N.W. 153rd Steet in Miami, Florida as a stash house where cocaine would be stored, diluted, and repackaged for

distribution. A fixed surveillance device was installed to observe the house beginning in December 2014. From December 2014 through August 2015, it appeared that Bibby used the house at 1630 N.W. 153rd street as a residence as well. During that time-frame, law enforcement observed numerous people arrive at the house and meet with Bibby and Dareus. During many of those meeings, Dareus and Bibby received bags, boxes, and backpacks, and the other individuals received objects which they would like with them as they left the house. One of those individuals was Xavier Huron Sanders. One example occurred on January 3, 2015, when Dareus exited the house and entered Sanders Ford F-150. Law enforcement observed Dareus receive something from Sanders and then start counting out money while sitting in the passenger seat. Another example occurred on January 22, 2015, at approximately 11:23 P.M., when Dareus arrived on a motorcycle and entered the house. At approximately 12:23 P.M., Bibby arrived in a Corvette and entered the house. At approximately 12:30 P.M., Sanders arrived driving a dark colored sedan and parked in front of the house. Law enforcement observed Dareus exit the house and enter the passenger side of the sedan. A short time later, both Sanders and Dareus exited the sedan and went to the open trunk of the vehicle, where Dareus removed a backpack from

the trunk and walked back to the house. Sanders reentered the sedan and waited for approximately ten minutes. Dareus then exited the house again and went to the passenger side of the sedan and eventually sat in the vehicle with Sanders. Bibby and another male left the house, entered a blue Corvette, and drove away. At approximately 1:37 P.M., the blue Corvette returned and parked in front of the sedan. Dareus exited the passenger side of the sedan, while Bibby opened the trunk of the blue Corvette. Dareus brought a backpack from Sanders' vehicle and went to stand with Bibby at the open trunk of the Corvette. Dareus then reentered the house, and Dareus exited at approximately 1:43 P.M. with the backpack, which he placed in the rear passenger seat of Sanders' sedan. Based upon this sequence of events, Sanders paid Dareus for a bulk quantity of cocaine, Bibby left and retrieved the cocaine in the blue Corvette, which Dareus then loaded into the backpack and placed into Sanders' sedan. On February 16, 2015, at approximately 12:41 P.M., law enforcement observed Bibby standing by his vehicle on the street outside his residence. Dareus arrived in Honda and a white minivan arrived and parked in the street next to Dareus' Honda. Bibby went into the house, and a male exited the minivan and entered the passenger side of Dareus' vehicle. Dareus

and the other man then exited the Honda and appeared to be looking at something in the white minivan. Dareus then went into the house and returned with Bibby. Dareus then walked to the trunk of his vehicle w1th Bibby, then Dareus returned to the white minivan, while Bibby walked back to the house. Dareus then took a plastic bag out of the white minivan and walked back to the house. The plastic bag appeared to hold spherical objects. Based upon their training and experience, law enforcement believed that the plastic bag contained bulk quantities of cocaine. Dareus then exited the house without the bag and approached the unknown m ale. The white minivan was backed up to the passenger side of Dareus' Honda and Dareus and the man unloaded three blue plastic containers from the white minivan and loaded them into the rear passenger seat and the trunk of Dareus' Honda. Based upon this sequence of events, the containers contained bulk quantities of cocaine. Later on February 16, 2015, at approximately 1:55 P.M., an unknown man arrived at the residence in a white Lexus and met with Dareus at the trunk of the vehicle. At that time, Dareus removed a white ball and handed it to the unknown man. The unknown man then took a garbage bag from the container located in the trunk of the Honda and walked back to his Lexus and left the residence. At approximately

3:00 P.M., Sanders arrived at the house in a Ford F150 truck. Dareus then exited the house and met Sanders at the rear passenger door of Dareus' Honda. Dareus reached into the vehicle where the blue containers were located and pulled out a spherical object and handed it to Sanders. Sanders then looked at the object and stuck his head into the rear passenger seat area and appeared to be looking at something. Sanders also smelled the spherical object that he was still holding. Sanders then walked back to his truck and drove it beside Dareus' Honda. Bibby exited the residence and walked to Dareus' Honda waving hello at Sanders. Dareus then removed one of the blue containers from the rear passenger seat of the Honda and placed it in the bed of Sanders' truck. Sanders then drove away. On May 4, 2015, at approximately 11:45 A.M., 1aw enforcement observed Dareus in front of the house when Sanders arrived in a Ford F-150. Dareus entered the driver's side of a silver minivan that was parked in the street. Sanders exited the truck and opened the rear passenger door of the truck retrieved a bag which appeared to have something in it, and entered the passenger side of the minivan. A short time later, Sanders exited the minivan and walked back to his truck w1th a different soft-sided bag, which appeared to have something in it. Sanders then returned to the

passenger side of the minivan and gave the bag, which appeared to be empty, back to Darius in the minivan. Sanders then returned to the truck and Dareus exited w1th the soft-sided bag, which appeared to have something in it, and entered the house. Sanders then appeared to be moving items in the rear of the truck before leaving. Based upon this sequence of events, Sanders paid Dareus for a bulk quantity of cocaine, brought the cocaine to his truck in the soft-sided bag, returned with the empty soft-sided bag and gave it to Dareus, who then placed the money in the soft-sided bag and returned to the house. There were several additional dates where Sanders was observed meeting with Dareus and bags were exchanged. On July 28, 2015, Dareus and Sanders were intercepted having a text message exchange. Sanders sent a text message (Session 819). Sanders later sent another text message to Dareus (Session 823). On August 21, 2015. Sanders and Dareus had intercepted conversations where Dareus agreed to deliver a kilogram of cocaine to Sanders. At approximately 5:30 P.M 1aw enforcement observed Dareus and Crystal Latoya Little meet outside the house at 1630 N W 153* Street in Miami. Dareus brought a black bag from the house and placed it inside Little's vehicle then drove away in his vehicle, followed by Little in her vehicle. Law enforcement observed

Dareus and Little arrive in the area of Sanders' house in Belle Glade, Florida at approximately 8:06 P.M . Dareus parked in the middle of the street in front of the house, and Sanders exited house and met with Dareus. Based upon the sequence of events, Sanders received a kilogram cocaine that was transported by Little in her vehicle. On August 26, 2015, 1aw enforcement executed a search warrant at Sanders' house in Belle Glade. During the search, law enforcement recovered approximately $12,300 and documents in Sanders' name. Law enforcement also recovered two scales and a strainer that a11 had cocaine residue on them, as well as numerous bags and rubber bands that are consistent with drug packaging and the packaging of drug proceeds. A search of the Ford F-150 truck reveled a loaded Glock 26 pistol inside a small bag on the floorboard behind the driver's seat. The truck was registered to Sanders. A criminal history check revealed that Sanders was a previously convicted felon who was not authorized to possess a firearm or ammunition. A further analysis of the firesrm and ammunition revealed that both had travelled in interstate commerce. (Cr-DE # 307-1-7)

REASONS FOR GRANTING THE WRIT

Issue 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

A Certificate of Appealability (COA) must issue upon a "substantial showing of the denial of a constitutional right" by the Appellant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further."' *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might

agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264,1268. Accordingly, the Court held that a COA should issue.

The magistrate court and district court, via adoption, erroneously held as follows: "The movant did not ask counsel to file a notice of appeal at the sentencing hearing or at any time before or after sentencing. The Undersigned found Zimet's testimony to be credible in all respects. Petitioner and Zimet decided to pursue a Rule 35 motion. As a result, Petitioner met with Federal Agents and the AUSA for a debriefing. If Petitioner had filed a direct appeal, any chance at a Rule 35 motion would come to an end. The Undersigned did not find the Petitioner's testimony that he expressly requested Zimet to file a notice of appeal to be credible. It made no sense for Petitioner to file an appeal after he had begun to cooperate with the government and hoped that the AUSA would filed a Rule 35 motion. On redirect examination, Petitioner conceded that he was under the impression that a direct appeal would interfere with the cooperation process. He clearly believed that pursuing a Rule 35 motion was a priority. This was his mind set at the sentencing hearing, as a result, it is not believable that he asked his lawyer to file a direct appeal. Based on the foregoing, it is reasonable to conclude that the movant did not expressly ask Zimet to file a notice or appeal more charges.

Specifically, that he was dealing drugs while on supervised release. Zimet concluded that challenging any facts further in open court, could cause the AUSA to decide to file a superseding indictment. Petitioner appeared on board for the 120-month sentence, and submitted an allocution at the sentencing hearing. (Civ.D.E. 16:29). As a result, Zimet decided not to re-raise all the issues which he raised in the written sentencing memorandum." The evidence accepted by the court established that Appellant's plea agreement and factual proffer allowed for a plea to a lesser included offense and penalty range of any prison sentence from 5 years (60 months) to 40 years. This range was reduced from the original indictment range of 10 years to life. Further, Appellant's factual proffer included a change in facts deleting a finding that Appellant had trafficked in 5 kilograms of cocaine. In light of the reduced penalties and reduced quantity of cocaine settled upon at the time of sentencing, it is reasonable that Appellant had an expectation that his counsel would at least argue for a variance sentence below the 120 months he received. The Governments position that Appellant received the benefit of his plea agreement due to the 1 month reduction in his sentence from the low end of 121 months to 120 months and should be satisfied with this sentence is weak. Any

reasonable defendant, such as Petitioner, would desire to at a minimum approach the District Court with a request for a downward variance greater than 1 month. The fact that the court ordered the variance establishes that a variance was warranted and it was not reasonable to abandon the PSI objections and not request a variance. It was not reasonable that movant would simply accept a guideline sentence which was twice his minimum mandatory sentence of 5 years, particularly where his statutory and guideline exposure was reduced in his plea agreement and factual proffer. This finding can be reasonably debated by jurists.

The court further erroneously held as follows: "The movant did not ask counsel to file a notice of appeal at the sentencing hearing or at any time before or after sentencing. The Undersigned found Zimet's testimony to be credible in all respects. Petitioner and Zimet decided to pursue a Rule 35 motion. As a result, Petitioner met with Federal Agents and the AUSA for a debriefing. If Petitioner had filed a direct appeal, any chance at a Rule 35 motion would come to an end. The Undersigned did not find the movant's testimony that he expressly requested Zimet to file a notice of appeal to be credible. It made no sense for Petitioner to file an appeal after he had begun to cooperate with the government and hoped that the AUSA would

filed a Rule 35 motion. On redirect examination, Petitioner conceded that he was under the impression that a direct appeal would interfere with the cooperation process. He clearly believed that pursuing a Rule 35 motion was a priority. This was his mind set at the sentencing hearing, as a result, it is not believable that he asked his lawyer to file a direct appeal. Based on the foregoing, it is reasonable to conclude that the movant did not expressly ask Zimet to file a notice or appeal and/or the movant did not make any statements which would have triggered his attorney's duty to consult him regarding the filing of a direct appeal. The testimony which this court found credible does not establish that (1) a rational convicted defendant would want to appeal, or (2) the convicted defendant reasonably demonstrated to counsel an interest in appealing. Thus, the court finds that counsel was not ineffective and the movant is not entitled to an out-of-time appeal" (Civ.D.E. 16:29-30) Petitioner testified that he instructed his counsel to file an appeal both before and after his sentencing hearing. Petitioner was a litigant who would want to appeal his sentence, after he received the same sentence he would have received under the original indictment (10 years) before his plea agreement and factual proffer were changed to lower his exposure. The court's

conclusion that it would not make sense to appeal while cooperating with the government is not supported by the facts. In fact, there was never any cooperation benefit. There were no promises made to Petitioner regarding the substantial assistance. Petitioner was debriefed, pled guilty, was sentenced and never saw his lawyer or the prosecutor again and after nearly a year had passed discovered there was no appeal and no substantial assistance which prompted the filing of his motion. There was never any serious possibility of a cooperation benefit. After sentencing Petitioner went to prison and there was no additional case activity. The one sided correspondence between Petitioner and his counsel established that there was no serious possibility of a cooperation benefit. In the end, Petitioner received nothing from his plea agreement. He received the same sentence he originally faced (10 years), his counsel did not even request a variance downward variance beyond 1 month which cannot be regarded as a significant benefit. The promised cooperation stalled. He never saw his lawyer, the prosecutor, the agents or anyone after his sentencing hearing. He was denied his right to appeal as well as his right to be consulted regarding his right to appeal. It could certainly be debated on appeal whether or not his

sentence was reasonable under 3553(a) or proportional to his co-defendants if nothing else.

The court additionally held as follows: "The testimony which this court found credible does not establish that (1) a rational convicted defendant would want to appeal, or (2) the convicted defendant reasonably demonstrated to counsel an interest in appealing. Thus, the court finds that counsel was not ineffective and the movant is not entitled to an out-of-time appeal." DE 16:30 Counsel had a duty to consult with Appellant regarding his right to an appeal. Appellant did not receive a minimum mandatory sentence, in fact, his sentence was double the minimum mandatory term of 5 years. Appellant did not receive any benefit from the plea agreement hand written modifications and hand written proffer changes and received the same sentence available had he pled guilty to the original indictment and thrown himself on the mercy of the court. Appellant was advised that a cooperation benefit was forthcoming which never materialized. Petitioner's PSI objections were abandoned without explanation except that counsel speculated that litigation would make things worse than the double the minimum sentence Petitioner received. There is nothing to be lost in requesting the court to enter a downward variance sentence. Counsel admitted that he never again

spoke with Petitioner after the sentencing hearing, not even to review the final judgment and sentence with Appellant after filing. Appellant's only contact with counsel was months later via regular U.S. mail. Appellant was a defendant who would reasonably wish to pursue or at least discuss an appeal (notwithstanding the fact that he did request an appeal) triggering a duty by counsel to consult with Appellant regarding an appeal which was never filed. Had counsel at least visited Appellant with the judgment after sentencing Appellant would have a proper opportunity to consult regarding his next moves including the appeal he desired.

The court further held as follows: In light of the foregoing, Petitioner's claim under counts 1 and 2 are without merit. It follows that counsel was not ineffective for failing to raise the arguments contained in counts 1 and 2. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (counsel is not ineffective in failing to raise a meritless claim). As a result, movant is not entitled to relief under claims 5b or 5f. The court describes these claims in the following terms: Under **claims 1 & 2**, the movant alleges the government unlawfully secured the indictment by presenting perjured testimony to the grand jury (Cv DE# 1:7-12). Specifically, movant claims the

Government failed to present to the grand jury evidence of movant's "buyer-seller relationship" with Dareus wherein he purchased "marijuana and personal use [amounts of] cocaine," as well as his gambling relationship with Dareus, which the Government knew about. (Id.:8). movant also argues that he was not in "actual, sole, joint, [or] constructive" possession of the firearm and ammunition found in the 2007 Ford F-150. (Id.:10). Similarly, Petitioner argues in **claims 5b** that his counsel was ineffective for failing to provide discovery to the Government evidencing his buyer-seller and gambling relationship with Dareus and in **claim 5f**, movant argues that counsel was ineffective in failing to correct the erroneous factual proffer to state that movant bought marijuana and cocaine from Dareus for personal use and bet on gambling tickets. (Id.:22, 24-25). (Civ.D.E. 16:35)

The court determined that these claims related to defense evidence were refuted by stipulated facts included in Appellants factual proffer, however the factual proffer was induced pursuant to the plea agreement and factual proffer settlement which Appellant relied upon in settling his case and ultimately contained no benefits to Appellant and which Appellant would not have signed had he realized that he would receive no benefit from his plea agreement.

The Court further held as follows: Under **claim 3**, the movant argues the government presented an invalid plea agreement (Cv DE# 1:13-16). Under **claim 4**, the movant argues that the court lacked jurisdiction because the plea agreement was invalid (Cv DE# 1:16-20). Finally, under **claim 5e**, movant alleges ineffective assistance of counsel for failing to file a motion to correct the invalid plea agreement; (Cv DE# 1:24). In all three claims, Movant alleges that his plea agreement was invalid because of an inherent contradiction regarding the quantity of cocaine. Specifically, movant claims that the plea agreement was invalid because while he pled to the lesser included offense of possessing and distributing 500 grams or more of cocaine, he was held responsible for possessing and distributing at least fifteen kilograms but less than fifty kilograms of cocaine. These arguments are without merit. The court determined that these claims were also refuted by stipulated facts included in movants factual proffer, however the factual proffer was induced pursuant to the plea agreement and factual proffer settlement which movant relied upon in settling his case and ultimately contained no benefits to movant and which movant would not have signed had he realized that he would receive no benefit from his plea agreement. The court points out that: movant

now argues that by crossing out the "five kilograms" language in connection with the July 2015 drug exchange with Dareus, it follows that he was not responsible for more than 500 grams of cocaine. His argument is refuted by the record. In crossing out "five kilograms" he was not held responsible for that specific amount during that isolated exchange with Darius. The factual proffer listed multiple drug exchanges with Dareus over the course of several months. Furthermore, he did not insist that the other language, indicating his responsibility for at least fifteen kilograms of cocaine, be crossed out. At no time did he challenge his responsibility for more than fifteen but less than fifty kilograms of cocaine. (Civ.D.E. 16:37)

Petitioner was not a lawyer and his expectations as a reasonable layman regarding the impact of the modifications in his plea agreement and factual proffer documents; that he would receive a sentence or at least argue for a sentence lower than 10 years is a reasonable expectation under these circumstances. If he was satisfied with 10 years then why negotiate for a lesser included sentence. If cooperation came into play the minimum sentence would go away be it 10 or 5 years thus it is unreasonable to now hold Appellant to the letter of his agreement and deny him relief in reliance upon the advice of his counsel who also

advised him he would be in line for a substantial assistance benefit which was a dead end.

The court erroneously held as follows: Under **claims 5g, 5h, and 5i**, movant argues that his counsel was ineffective for failing to make certain objections to the PSI regarding enhancements and for failing to raise his alleged entitlement to a minor role reduction. With respect to claim 5g, movant argues that his counsel should have objected to the offense level in the PSI. He asserts that his base offense level should have been a 24 (instead of 32) because he was responsible for between "500 grams but less than 2 kilograms of cocaine" (Cv-DE #1:25). As is explained above, the movant expressly stipulated during the change of plea proceedings that he was responsible for at least fifteen, but less than fifty, kilograms of cocaine. The base offense level of 32 was the result of this stipulation. Counsel had no basis to object to the PSI on these grounds. Counsel's performance was neither deficient nor can movant show any prejudice for counsel's failure to raise this non-meritorious PSI objection. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001). Movant expected his counsel to object to the PSI report findings based upon his understanding of his conversations with counsel. Obviously movant wanted a lower guideline range as his

counsel did actually object to the PSI report although said objection was abandoned at sentencing. Again movant relied upon the modified plea agreement and factual proffer which was reasonable and he never waived his right to file objections to the PSI report. Movant would have no basis to seek a lower sentence absent guideline objections or a downward variance request beyond the one month given.

The Court erroneously held as follows: Petitioner is also not entitled to relief on any of the grounds raised as it is apparent from the review of the record above that movant's guilty plea was entered freely, voluntarily, and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as appears to now be suggested. (Civ.D.E. 16:35-45). Again, Petitioner testified that he believed he would receive a sentence below 10 years. His minimum sentence was lowered to 5 years for the lesser included offense. The 5 kilogram amount was reduced to 500 grams (coincidentally the triggering weight for the then available 5 year mandatory sentence.) Petitioner was advised that objections would be filed to lower his sentence which were filed then abandoned. Petitioner was advised that he was in line for a cooperation benefit which was likewise abandoned. The court determined that a downward variance was called for

albeit a minimal 1 month variance, thus it is reasonable to assume that he expected a larger variance. Under these circumstances Petitioners claim that he feels he was misadvised is not speculative and should have been accepted.

Petitioner submits that reasonable jurists could debate the merits of his claims raised in his Motion to Vacate and that a Certificate of Appealability should be ordered in this case. The appeal of a federal conviction was a matter of right to Appellant. *Rodriquez v. United States*, 395 U.S. 327, 329-30, 89 S. Ct. 1715, 1717 (1969). Further, assistance of counsel in pursuing such an appeal is a matter of right to Appellant. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 836 (1985). "The accused has the ultimate authority to make certain fundamental decisions regarding the case," including whether to "take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). To ensure that this decision is informed, "counsel generally has a duty to consult with the defendant about an appeal." *Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007). To consult means to "advise the defendant about the advantages and disadvantages of taking an appeal, and make a reasonable effort to discover the defendant's wishes." *Roe v. Flores-*

Ortega, 528 U.S. 470, 478, 120 S. Ct. 1029, 1035 (2000). "A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477, 120 S. Ct. at 1035. Even when a defendant has not specifically instructed counsel as such, counsel has a constitutional duty to consult where the defendant "reasonably demonstrated to counsel that he was interested in appealing." *Id.* At 480, 120 S. Ct. at 1036. And "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken," the defendant has demonstrated the requisite prejudice, even if the appeal would not have been meritorious. *Id.* at 484, 486, 120 S. Ct. at 1039-40; *Thompson*, 504 F.3d at 1208. In *United States v. McCalla*, 16-15623 (11th Cir. 2018) this Court determined that counsel's duty consult had been breached by counsel where McCalla stated he told counsel that he wanted to challenge his sentence. This statement "reasonably demonstrated to counsel that McCalla was interested in appealing." See *Flores-Ortega*, 528 U.S. at 480, 120 S. Ct. at 1036. As a result, counsel was duty-bound to advise McCalla "about the advantages and disadvantages of taking an appeal, and mak[e] a reasonable effort to discover [his] wishes." See id. at 478, 120 S. Ct. at 1035. But, according

to McCalla, counsel did not. If counsel had upheld his constitutional duty, McCalla "would have instructed counsel to appeal the sentence." Therefore, McCalla has alleged facts that, if true, would establish a "successful ineffective assistance of counsel claim entitling him to an appeal." See *id.* at 484, 120 S. Ct. at 1039. The fact that his appeal may not have been successful does not alter this conclusion. See *id.* at 486, 120 S. Ct. at 1040. In the present case, Appellant directed his counsel to appeal. Counsel admitted that he never saw Appellant again after his sentencing hearing. Under the foregoing circumstances reasonable jurists could debate the merits of the courts denial of Appellants Motion to Vacate.

Finally, on February 27, 2019 this Court recently, held that when a defense lawyer decides not to file an appeal of a guilty plea despite his client's request, he renders ineffective assistance of counsel, even if the client waived his right to appeal in the plea agreement, holding that the decision whether to appeal ultimately lies with the client, not the lawyer. "filing a notice of appeal is, generally speaking, a simple, non-substantive act that is within the defendant's prerogative". Garza v. Idaho, ___U.S.___(2019). Clearly, reasonable jurists could debate

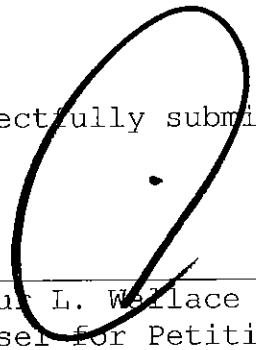
the merits of Petitioners claim requiring the issuance of a Certificate of Appealability in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 11th day of April, 2019.

Respectfully submitted,



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