NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

RICHARD M. MATHISEN

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI OF PETITIONER SEEKING CERTIFICATE OF APPEALABILITY FOR APPEAL OF DENIAL OF MOTION UNDER 28 U.S.C. SEC. 2255

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTION PRESENTED

I. Whether the Fourth Circuit erred in affirming the District Court's denial of the Petitioner's Certificate of Appealability of the District Court's denial of the Petitioner's Motion under 28 U.S.C. Sec. 2255?

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I. The Opinion of the United States District Court for the District of Maryland is attached hereto as Appendix II.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 27, 2019. This Court's

Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). (An initial Petition for Certiorari was filed with this Court on May 24, 2019.)

STATEMENT OF THE CASE

A. THE PLEA BEFORE THE DISTRICT COURT.

On January 7, 2015, Mr. Mathisen was charged in a one count Indictment with Conspiracy to Distribute and Possession with Intent to Distribute Controlled Substances, in violation of 21 U.S.C. Secs. 846 and 841, in the United States District Court for Maryland, 15CR-0003. A co-defendant, Philip R. D'Avanzo, was also indicted with the same charge in the same Indictment.

On June 5, 2015, Mr. Mathisen appeared before the District Court of Maryland (the Honorable Theodore D. Chuang), and entered a plea of guilty to Count I of the same Indictment.

The written Plea Agreement ("the Plea") (District Court Doc. 60) was not a standard Plea entered in trial courts. The Plea Agreement was a "Blind Plea" wherein Mr. Mathisen and the Government did not agree to or address a proposed analysis or recommendation of the United States Sentencing Guidelines ("USSG" or "the Guidelines"), and how the Guidelines would apply to Mr. Mathisen at sentencing. The "Blind Plea" contained no agreement or recommendation as to a Guidelines analysis and range, or any potential Guidelines departures or adjustments.

A Sentencing Hearing ("the Hearing") occurred on February 2-3, 2016. The Hearing was a crucial event for the Court and the

parties, as the Court had to make factual findings and apply the Guidelines and the 18 U.S.C. Sec. 3553(a) factors to those findings to fashion a sentence.

In conjunction with the Hearing, the parties submitted Sentencing Memoranda and related exhibits. The Government submitted a Memorandum in Aid of Sentencing ("Government Memo"). The Government's Memo included grand jury testimony and various forms of witness interviews (Reports of Interviews; ROIs), with Philip D'Avanzo, Jeremy Zamyslowski, Merrit Moore, William Greenwalt III, Kareem Ward, and Joseph D'Avanzo.

Mr. Mathisen and the Government disagreed about a series of issues, including but not limited to "relevant conduct" as alleged by the Government. In particular, Mr. Mathisen did not agree that he had any organizer, leader, manager or supervisor role in the conspiracy ("the conspiracy"), under USSG Sec. 3B1.1(a) or (b). Consistent with that position, Mr. Mathisen, while acknowledging a role in the conspiracy (a user as opposed to a distributor), disputed the amount of drugs that the Government alleged that Mr. Mathisen distributed and/or was reasonably foreseeable to Mr. Mathisen in connection with the criminal activity. Mr. Mathisen disputed the scope and degree of his involvement in the conspiracy, as alleged by the Government.

The Government alleged that the conspiracy included the following individuals: Philip D'Avanzo; T.J. Calabrese; Gwen

Hoerauf; Thomas Bradley; Wayne Hall; Jeremy Zamyslowski; Alex Allen; Greg Wimsatt; Dan Borzillieri; Mark Dove; Eric Carter; Mike Hunt; and Merrit Moore.

At the February 2, 2016 Hearing, the Government called Jeremy Zamyslowski and Merrit Moore to testify against Mr. Mathisen.

On February 3, 2016, the District Court sentenced Mr. Mathisen to 108 months of imprisonment, three years of supervised release and a fine of $60,000.00. (District Court Doc. 124.) In its Statement of Reasons, the District Court found that the base offense level under the Guidelines was 26, pursuant to USSG Sec. 2D1.1(c)(7), based on a finding that the drug quantity established at sentencing was between the equivalent of 400 and 700kg of marijuana (rejecting the analysis of the Presentence Report). The Court imposed a three (3) offense level enhancement because the Court found that evidence established that Mr. Mathisen was a manager or supervisor of the conspiracy pursuant to USSG Sec. 3B1.1(b).

The District Court determined that the Offense Level was 29, the Criminal History Category II, and a Guideline Range of 97-121 months. The Court sentenced Mr. Mathisen to 108 months of imprisonment.

B. MR. MATHISEN'S MOTION UNDER 28 U.S.C. SEC. 2255.

On February 2, 2017, Mr. Mathisen timely filed a Motion to Vacate and Set Aside Sentence and/or Plea, pursuant to 28 U.S.C.

Sec. 2255 (District Court Case No. 17CV343, Doc. 1). Mr. Mathisen moved the District Court under 28 U.S.C. Sec. 2255 to vacate his sentence and/or plea, based upon the ineffective assistance of his trial counsel. Counsel's errors were significant, and compromised Mr. Mathisen's Constitutional Rights: (1) counsel did not explain the plea process, ramifications and options to Mr. Mathisen, in violation of the Sixth Amendment/Constitutional rights and requirements under *Missouri v. Frye*, 566 U.S. 134, 140, 132 S.Ct. 1399, 1409-11 (2012); (2) counsel made virtually no effort to impeach with prior convictions several of the Government's witnesses/sources of information, in particular one of the main witnesses against Mr. Mathisen, Jeremy Zamyslowski; (3) counsel made scant use of the investigator paid for by Mr. Mathisen, Kimberly Yourick, who did not investigate the alleged co-conspirators, many of whom would have addressed and refuted the Government's allegations regarding Mr. Mathisen and his alleged role as a manager or supervisor of the conspiracy, as well as the amount of drugs Mr. Mathisen was involved with; and (4) counsel failed to produce as witnesses alleged co-conspirators, whose testimony would have undermined the Government's positions and supported Mr. Mathisen.

The Government filed a Response/Opposition to the 2255 Motion on September 28, 2017 (Doc. 154). Mr. Mathisen filed a Reply Brief on December 26, 2017 (Doc. 166). The District Court issued a

Memorandum Opinion on July 11, 2018, denying Mr. Mathisen's 2255 Motion. (Doc. 168 under District Court Case No. 15CR0003.)

C. THE DISTRICT COURT'S DENIAL OF APPEALABILITY.

On July 22, 2018, Mr. Mathisen filed a Notice of Appeal of the District Court's decision denying the 2255 Motion. (Doc. 170, 15CR0003.) On July 24, 2018, the District Court issued an Order declining to issue a certificate of appealability ("COA")under 28 U.S.C. Sec. 2253(c)(1). (Doc. 172, 15CR0003, Attachment 1.) As for its reasoning for declining to issue the COA, the District Court stated in total that "[h]ere, the Court finds that Mathisen has not made the requisite showing." (*See* District Court Order, Attachment 1.)

On September 18, 2018, Mr. Mathisen filed a Petition for review of the District Court's denial of the COA with the United States Court of Appeals for the Fourth Circuit. On February 27, 2019, the Fourth Circuit issued a two paragraph opinion denying the COA. (Fourth Circuit decision, Attachment 2.)

ARGUMENT

I. THE STANDARD OF REVIEW.

The standard for the Fourth Circuit's granting a COA is governed under 28 U.S.C. Sec. 2253(c)(1) and Fed. R. of App. P. 22(b). They require that a COA be issued before a defendant or appellant may appeal the final order of a 2255 proceeding. *See* 28

U.S.C. Sec. 2253(a); *Slack v. McDaniel*, 529 U.S. 473 (2000). A petitioner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right.'" *Slack*, 529 U.S. at 483; *Miller-El v. Cockerell*, 537 U.S. 322, 335-37 (2003); see *also Lyons v. Lee*, 316 F.3d 528, 532 (4th Cir. 2003); 28 U.S.C. Sec. 2253(c)(2).

The standard is satisfied when the "habeas petition involves issues which are debatable among jurists of reason, that another court would resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

The application for a COA does not require a showing that the proposed 2255 appeal will necessarily succeed. The application for a COA should not be denied merely because the reviewing Court believes the applicant will not prove an entitlement to relief. *See Miller-El v. Cockerell*, 537 U.S. at 337 ("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").

II. MR. MATHISEN'S 2255 MOTION WAS BASED PRIMARILY ON CONSTITUTIONAL/SIXTH AMENDMENT VIOLATIONS BY COUNSEL.

Mr. Mathisen moved the district court under 28 U.S.C. Sec. 2255 to vacate his sentence and/or plea, based upon the ineffective assistance of his trial counsel. *Mr. Mathisen's 2255 Motion and*

argument was based primarily on violations of his Constitutional, Sixth Amendment rights. Trial counsel's ("counsel") errors were significant, and compromised Mr. Mathisen's Constitutional Rights: (1) counsel did not explain the plea process, ramifications and options to Mr. Mathisen, in violation of the Sixth Amendment/Constitutional rights and requirements under *Missouri v. Frye*, 566 U.S. 134, 140 (2012); (2) counsel made virtually no effort to impeach with prior convictions several of the Government's witnesses/sources of information, in particular one of the main witnesses against Mr. Mathisen, Jeremy Zamyslowski; (3) counsel made scant use of the investigator paid for by Mr. Mathisen, Kimberly Yourick, who did not investigate the alleged co-conspirators, many of whom would have addressed and refuted the Government's allegations regarding Mr. Mathisen and his alleged role as a manager or supervisor of the conspiracy, as well as the amount of drugs Mr. Mathisen was involved with; and (4) counsel failed to produce as witnesses alleged co-conspirators, whose testimony would have undermined the Government's positions and supported Mr. Mathisen.

A. <u>INEFFECTIVE ASSISTANCE OF COUNSEL; THE APPLICABLE STANDARD</u>.

To prevail on an ineffective assistance of counsel claim, a movant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct 1399, 1409-11 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

The Supreme Court has stated that the standard for ineffective assistance of counsel is a high one. The issue is whether counsel's representation amounted to incompetence under prevailing professional norms and not whether it deviated from best practices or most common custom. *See Premo v. Moore*, 562 U.S. 115, 122 (2011).

B. COUNSEL DID NOT ADEQUATELY EXPLAIN TO MR. MATHISEN THE BENEFITS OF A STANDARD PLEA WITH A SENTENCING ANALYSIS AND RECOMMENDATION, AS OPPOSED TO THE "BLIND PLEA" THAT MR. MATHISEN ENTERED.

Mr. Mathisen was almost 29 years old when he entered his "Blind Plea". Mr. Mathisen had a limited education. He had graduated from high school and attended some community college classes. Mr. Mathisen had scant contact with the criminal justice system by the age of 29, and therefore, his knowledge of the criminal process, and the plea process, in federal court no less, was virtually non-existent.

As his Presentence Report ("PSR") attests, Mr. Mathisen had a misdemeanor conviction for Driving Under the Influence, where he

received one day in jail and a Maryland Probation Before Judgment ("PBJ")disposition (PSR, Para. 24); a misdemeanor Driving While Impaired similarly resolved by a Maryland PBJ (PSR, Para. 25); and a Gambling/Money Laundering Conviction in Fairfax, Virginia, with all jail time suspended (PSR, Para. 26).

Similar to many defendants who appear in federal court *for the first time*, when Mr. Mathisen was charged in this case, he entered the sophisticated and complex world of federal statutes, the United States Sentencing Guidelines, and a complex plea and sentencing process. Mr. Mathisen was completely dependent on counsel to guide him through this complex and sophisticated legal process carefully, explaining to Mr. Mathisen his options and the potential ramifications of his decisions.

A standard written plea agreement, containing a joint recommendation of a Guidelines analysis, serves as a fairly reliable prediction and guide to a defendant about the direction of a plea and a likely sentencing outcome or range. While the Court is not a party to the plea agreement and can deviate or vary from a sentencing recommendation in a plea, generally trial courts work with and sentence within the framework of plea agreements and their sentencing/Guidelines analyses and recommendations.

By contrast, a "Blind Plea", such as the one entered by Mr. Mathisen, is dangerous and, by definition, unpredictable as to sentencing. The defendant/client has no indication or prediction as

to the direction or range of sentencing. In general, defense counsel are wary of "blind pleas", and recommending such blind pleas to clients is highly disfavored in the defense bar.

Under the Constitution, the plea process requires special efforts and attention from counsel. In 2012, the Supreme Court held in *Missouri v. Frye*, 566 U.S. 134, 140 (2012), that the Sixth Amendment right to effective assistance of counsel extends to the presentation, explanation and consideration of plea offers. The Sixth Amendment right to effective assistance of counsel applies to "all 'critical' stages of criminal proceedings". *Missouri v. Frye*, 132 S.Ct. at 1409-11(citing *Montejo v. Louisiana* 556 U.S. 778, 786 (2009), quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967)). *See also Padilla v. Kentucky,* 559 U.S. 356 (2010) (conviction set aside because counsel misinformed defendant of immigration consequences of plea); *Hill v. Lockhart* 474 U.S. 52, 57 (1985) (ineffective assistance of counsel in plea bargain process is governed by *Strickland* two part test). *See also Argersinger v. Hamlin*, 407 U.S. 25 (1972) (critical stage of representation includes entry of guilty pleas).

The Supreme Court stated in *Missouri v. Frye* that "[t]he reality is that plea bargains have become so central to today's criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment

requires in the criminal process at critical stages." *Frye*, 132 S.Ct. at 1409-11.

1. When He Entered His "Blind Plea", Mr. Mathisen Was Not Informed By Counsel About The Ramifications Of The "Blind Plea" On The Sentencing "Trial".

When Mr. Mathisen entered his "Blind Plea", he had no concept of or idea about the crucial sentencing "trial" that awaited him. Mr. Mathisen had no idea that the sentencing "trial" would proceed under the preponderance of the evidence standard of proof, *see United States v. Brooks*, 957 F.2d 1138, 1148 (4th Cir. 1992), as opposed to the beyond a reasonable doubt standard available at a formal trial. Mr. Mathisen had no idea that at his sentencing "trial", the Court could consider information from various or any sources, *see United States v. Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993), including hearsay evidence, as opposed to being subject to the evidentiary requirements and restrictions at a trial, pursuant to the Federal Rules of Evidence. Evidence could come into the sentencing "trial" without regard or application of the Federal Rules of Evidence. *See* Fed. R. Evid. 1101(d)(3). (*See* Richard M. Mathisen Statement/Affidavit, Paras. 7-18, filed with the District Court.)

Indeed, the Fourth Circuit has succinctly stated that "[t[he types of information to be considered by a sentencing judge is unlimited." *United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991).

Accordingly, when Mr. Mathisen entered his "Blind Plea", the following occurred:

* Mr. Mathisen, along with the Government, provided no agreement, recommendation or analysis to the Court regarding sentencing in the Plea;

* Mr. Mathisen had no guide, prediction or analysis of what sentencing range he may have been sentenced in;

* Mr. Mathisen was going to have to try the *same* issues related to drug quantity, his role in the conspiracy, the death of the girl at his home, and weapons issues, *anyway in the sentencing "trial"*; and

* by entering the "Blind Plea", and yet still having to try the issues of drug quantity, role, and other issues in the sentencing "trial", Mr. Mathisen *lost the protections and rights under the Federal Rules of Evidence, lost the evidentiary standard of beyond a reasonable doubt, lost the trial by jury, and opened the door to any and all information from any source, most of it not subject to cross-examination.*

The District Court based its denial of the 2255 Motion on its assertion that "[c]rucially, the jury would not have been called upon to decide questions relating to sentencing enhancements, such as quantity of drugs for which Mathisen could be held responsible, his role in the conspiracy, whether the distribution caused a death, and whether the he obstructed justice by trying to hide

evidence relating to Gavida's death or by arranging for someone to kill his co-defendant." (District Court Memorandum Opinion, p. 3, Attachment 1.)

The District Court was incorrect about this seeming bifurcation of trial issues (guilt on the Conspiracy to Distribute charge) and sentencing issues (identified above). As the District Court also observed, the sentencing issues identified above would have been part of a Superseding Indictment if Mr. Mathisen declined the "Blind Plea", and the Government would have adduced evidence at a standard trial in support of the new charges in a Superseding Indictment which implicated the sentencing issues. The District Court stated "During [trial counsel's] discussions with the Government, [trial counsel] also learned that if Mathisen did not plead guilty to the original indictment, the Government would seek a superseding indictment to add counts for obstruction of justice and possibly a count for distribution of a controlled substance resulting in death, based on Gavida's death ...." (District Court Memorandum Opinion, p. 3, Attachment 1.)

As the District Court conceded, there would not have been a bifurcation of trial and sentencing issues under a Superseding Indictment. Nevertheless, trial counsel did not explain these ramifications as well as the lost Constitutional and other rights of the "Blind Plea" to Mr. Mathisen, as opposed to a jury trial with its Constitutional and evidentiary standards and protections.

Mr. Mathisen now wonders why he didn't go to trial on the same charges and issues that he pled to in the one count Indictment, and thereby he could have contested the Government's Superseding Indictment and related issues *but under the beyond reasonable doubt standard, with the limitations and protections of the Federal Rules of Evidence, under a far more demanding evidentiary burden on the Government, and before a jury.* (*See* Mathisen Statement, Paras. 7-18.)

Further, the Government sought to prove "relevant conduct" (i.e., weapon possession; death of girl at his home, alleged murder plot) at the sentencing "trial" anyway, as part of its effort to have Mr. Mathisen receive a sentence of *240 months*.

As Mr. Mathisen eventually determined well after his sentence was imposed, he gained nothing from the "Blind Plea". In fact, he lost evidentiary, standard of proof rights and protections, as well as the right to a jury trial. His trial counsel *did not explain these ramifications of the "Blind Plea" to Mr. Mathisen prior to his decision to either accept the "Blind Plea" or go to trial*. If trial counsel had done so, Mr. Mathisen would have rejected the "Blind Plea", and gone to trial. (*See* Mathisen Statement, Para. 16, Attachment 1.) In opting for trial, Mr. Mathisen would have lost nothing and gained evidentiary, jury trial, and other rights and protections, while having to litigate *the same issues at a trial under the Superseding Indictment as were litigated in the*

sentencing "trial". Instead, under the "Blind Plea", Mr. Mathisen was forced to defend himself *anyway about the same issues, albeit without the beneficial evidentiary standards and rules, and other trial protections*.

The Supreme Court stated in *Missouri v. Frye*, 132 S.Ct. at 1409-11, that the Sixth Amendment "right to counsel is the *right to effective assistance of counsel* ... criminal defendants require effective counsel during plea negotiations ... Anything less might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" (Citations omitted.) (Emphasis added.)

III. <u>THE EVIDENTIARY SENTENCING HEARING</u>.

Despite counsel's and the Government's (echoing counsel's Affidavit) claims that counsel explained the Blind Plea/Evidentiary Sentencing Hearing Process to Mr. Mathisen, so that Mr. Mathisen could enter a knowing and voluntary Plea, the Record contains no evidence whatsoever that counsel in fact explained the Blind Plea/ Evidentiary Sentencing Hearing Process to Mr. Mathisen, and the Constitutional and evidentiary rights that would apply at the Sentencing Hearing. When Mr. Mathisen followed counsel's guidance and accepted the Blind Plea, he did not understand the Constitutional and evidentiary rights and protections that would *not* apply at the Evidentiary Sentencing Hearing, thus making the Government's task far easier at the Evidentiary Sentencing Hearing.

The client meeting memos and handwritten notes produced by counsel do not show that, prior to Mr. Mathisen entering his Blind Plea on June 5, 2015, that counsel explained to Mr. Mathisen, *as he considered his Blind Plea or Trial options, that by opting for the Blind Plea, Mr. Mathisen would still have to litigate and try at the Sentencing Hearing the very same issues (role in the conspiracy, weight of drugs, death of girl, alleged murder plot, weapon) that would be part of the evidence adduced in a formal Trial, albeit without a unanimous Jury, without the right to confront and cross-examine witnesses, without the application and protections of the Federal Rules of Evidence, and with all types of hearsay and information placed in the record, not subject to cross-examination.*

Indeed, the District Court acknowledged the trial-like nature of the Evidentiary Sentencing Hearing. The Court stated at the conclusion of the two (2) day Evidentiary Sentencing Hearing on February 2-3, 2016, that "...where we have not had to go through a trial, *although we went through something that was close to one.*" (February 3, 2016 Transcript, p. 27.) (Emphasis added.)

Counsel acknowledged that the February 2-3, 2016 Evidentiary Sentencing Hearing, following the Blind Plea, was "not the normal fashion for a sentencing hearing...." (February 3, 2016 Transcript, p. 40.) Counsel claimed in his Affidavit that he "reviewed with Mathisen how pleading to the indictment would likely lead to *a*

mini-trial at his sentencing hearing...." (Counsel's Affidavit, p. 12.) (Emphasis added.) Unfortunately, counsel's client meeting memos and notes, presumably written prior to Mr. Mathisen's June 2015 Plea, do not support or corroborate counsel's claims of effective representation set forth in his August 2017 Affidavit about the essential information counsel gave (or did not provide) to Mr. Mathisen about the Evidentiary Sentencing Hearing.

The questions for this Court in its consideration of the appealability of the Fourth Circuit's denial of the COA are:

(1) Was counsel's representation of Mr. Mathisen effective under the Sixth Amendment and *Missouri v. Frye* in explaining the Blind Plea-Evidentiary Sentencing Hearing Process so that Mr. Mathisen could make a knowing and voluntary decision about the Blind Plea or going to Trial, as evidenced by the record, and common sense;

(2) Did counsel's ineffective assistance of Mr. Mathisen prejudice Mr. Mathisen; and

(3) Most importantly, has Mr. Mathisen demonstrated "a substantial showing of the denial of a constitutional right." *Slack*, 529 U.S. at 483; *Miller-El v. Cockerell*, 537 U.S. 322, 335-37 (2003); has the COA standard been satisfied when the "habeas petition involves issues which are debatable among jurists of reason, that another court would resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed

further." *Slack*, 529 U.S. at 484.

The answers to these questions, as established by the record, are simple. First, would Mr. Mathisen have accepted the Blind Plea or gone to trial under he Superseding Indictment, if counsel had adequately explained to Mr. Mathisen that he would be tried at the Evidentiary Sentencing Hearing on the same issues subject of evidence at a jury trial (and the Government still seeking 15-20 years of incarceration in the Evidentiary Sentencing Hearing), albeit without a unanimous jury, the right of cross-examination and more stringent evidentiary standards and rules? The answer is obviously no. Mr. Mathisen would have opted for a jury trial, and its greater Constitutional and evidentiary protections, *where the Government was proposing its Superseding Indictment implicating the same issues at the Evidentiary Sentencing Hearing*. (*See* Mathisen Statement, Paras. 7-18.)

Second, Mr. Mathisen, by waiving his Constitutional and evidentiary rights without the knowledge of what he faced at the Evidentiary Sentencing Hearing, was obviously prejudiced, where he could have been acquitted at a trial, and/or where the Court made findings about and applied Guidelines enhancements and a departure at Mr. Mathisen's sentencing that a standard trial jury's verdict may have undermined by its findings and verdict, or at least would have been subject to stricter evidentiary standards at atrial.

Third, the Constitutional/Sixth Amendment issues raised herein

by Mr. Mathisen unquestionably implicate and satisfy the COA standards under *Slack*, 529 U.S. at 483, and *Miller-El v. Cockerell*, 537 U.S. at 335-37.

Counsel and the Government overlook three crucial factors. First, Mr. Mathisen may have succeeded at trial, with a unanimous Jury requirement, the right of cross-examination, and the evidentiary standards (beyond a reasonable doubt on every element of every charge) and rules applied in a jury trial. The jury may have returned a verdict negating or undermining potential Guidelines enhancements and departures.

Second, how can Mr. Mathisen make an informed, knowing and voluntary decision about accepting the Blind Plea, or going to trial, when counsel failed to inform Mr. Mathisen about the loss of Constitutional and evidentiary rights at the Evidentiary Sentencing Hearing? Consistent with *Missouri v. Frye*, 566 U.S. 134, 140, (2012), such information was *essential* for Mr. Mathisen to understand and consider, as he chose between a jury trial or the Blind Plea.

Third, under the Sixth Amendment, it is *Mr. Mathisen's decision to accept a Plea, no less a Blind Plea, or go to Trial, not counsel's and certainly not the Government's.*

Counsel's ineffective representation deprived Mr. Mathisen of his Constitutional right to make an *informed,* knowing and voluntary decision about his Blind Plea or trial options.

IV. COUNSEL'S AND THE GOVERNMENT'S ASSERTIONS/ADMISSIONS.

A. The Failure To Effectively Advise Mathisen About The Evidentiary Sentencing Hearing And His Loss Of Rights.

Counsel, with the Government citing his Affidavit, makes certain claims and assertions worth reviewing. Counsel acknowledged that Mr. Mathisen rejected the Government's First Plea Offer (Counsel's Affidavit), which contained at least some analysis under the Sentencing Guidelines, although the Total Offense Level was not agreed to.

Further, regarding Mr. Mathisen's rejection of the First Plea Offer, the Government acknowledged that the "Defendant adamantly refused to agree to the Government's characterization of the facts, including his role in the offense, the quantity of drugs involved, and whether he obstructed justice ... The Government, however, maintained its firm position as to these issues and did not offer Defendant a revised 'standard' plea." (Government Response, pp. 2-3.)

Accordingly, this Court must wonder how counsel proposed and encouraged Mr. Mathisen to accept the Blind Plea, where all the underlying facts related to the sentencing factors in dispute (i.e., drug quantity, role in offense, weapons, obstruction of justice, role in death of girl) would be tried without a unanimous jury, without the right to confront and cross-examine witnesses, and without jury trial evidentiary rules and standards?

Counsel actually acknowledged that he proposed and recommended

the Blind Plea to Mr. Mathisen, and counsel apparently solicited the Blind Plea from the Government. (Counsel's Affidavit, pp. 4-5.) Counsel states that under the Blind Plea he advised Mr. Mathisen that he would admit "to involvement in the charged conspiracy but reserved [sic] his right to object [to] the applic[ation] of the government's proposed guidelines as to the drug quantity, role and obstruction." (Counsel's Affidavit, pp. 4-5.)

The Court should understand counsel's representation of Mr. Mathisen. Counsel advised Mr. Mathisen to plead to the underlying conspiracy charge, waive his jury trial and related Constitutional and evidentiary rights and protections, but try the *very same issues at the Sentencing Hearing, albeit without the Constitutional rights and evidentiary standards and rules* available at a jury trial. Even where certain sentencing issues would ultimately be reserved for the Court at sentencing, a jury decision and acquittal on certain charges (i.e., conspiracy, role in the offense, obstruction of justice, death of girl, weapons charge, murder plot) would have significantly impacted the Court's decision-making about sentencing and enhancements.

Counsel claims that he had "extensive discussions with Mathisen as to how a sentencing proceeding would occur if he agreed to" the Blind Plea. (Counsel's Affidavit, p. 7.) However, the record does not support counsel's claim that he explained the loss of jury trial rights, and evidentiary rules and protections, with

Mr. Mathisen, as part of counsel's presentation and explanation of the Government's Blind Plea Offer and the Evidentiary Sentencing Hearing.

* Counsel cites the following testimony from Mr. Mathisen at the Sentencing Hearing, in response to counsel's question.

Q: And you and I have had extensive discussions about how we intended to proceed and how you wanted to proceed in this manner to tell the judge your side of what occurred and what did not occur. Correct?

A: Yes, sir.

(Counsel's Affidavit, p. 14.)

This question and answer refer to Mr. Mathisen wanting to tell his view of the facts to the Court at the Evidentiary Sentencing Hearing. (Of course, Mr. Mathisen would have had the same opportunity to testify at a jury trial.) It does not address any notion that counsel explained the loss of Constitutional and evidentiary rights that would occur in a sentencing hearing.

* Counsel claims that he discussed with Mr. Mathisen the Government's "burden of proof at a sentencing hearing as to the sentencing factors ... The Court at such a sentencing hearing would be governed by the preponderance of evidence standard." (Counsel's Affidavit, p. 8.) However, counsel does not provide any evidence from his memos, notes, or the record, to support this claim that he so informed Mr. Mathisen prior to the Blind Plea.

Even in his Affidavit, counsel concedes that he did not address with Mr. Mathisen that the Court would be the finder of fact, as opposed to a jury; the waiver of the beyond a reasonable doubt standard; and the waiver of all of the Federal Rules of Evidence, including but not limited to the Hearsay Rule and Constitutional rights of cross-examination. (The Government's claim on Page 4 of its Response, citing counsel's Affidavit, p. 9, that counsel so advised Mr. Mathisen of these Sentencing Hearing waivers is inaccurate. On page 9 of counsel's Affidavit, he discusses these issues generally, but does not specifically state that he so advised Mr. Mathisen prior to his Plea.)

The Government argues that Mr. Mathisen's Blind Plea Agreement stated that he understood and voluntarily agreed to the Plea Agreement. (Government Response, p. 4.) The Government cites the June 5, 2015 Plea Hearing where the Court informs Mr. Mathisen that the Government "may seek to introduce evidence on those issues at your sentencing which could have an impact on your sentencing potentially." (Government Response, p. 5.)

However, nowhere does counsel, the written Plea Agreement itself, or the Court explain to Mr. Mathisen the loss of Constitutional rights and evidentiary standards and rules *as would be applied in an Evidentiary Sentencing Hearing*. Once again, the Court must distinguish Plea Notice and Waivers of *trial rights* in a standard Plea, versus this unusual and rare Blind Plea.

* Counsel further asserts that "The decision to proceed via [the Blind Plea] was, in Counsel's opinion, then and now, clearly the best decision under the difficult circumstances facing Mathisen." (Counsel's Affidavit.)

Attorneys educate clients, and explain the law, the Plea Process, and the Evidentiary Sentencing Process to their clients. To provide effective assistance of counsel, attorneys make sure that the clients understand these matters, so that the clients can make informed and voluntary decisions about *their legal decisions and fates*. While attorneys can make recommendations to clients, at the end of the day, the attorney's opinion is not important, or even relevant. Attorneys provide and explain options to the client. The client, after being duly educated and informed by the attorney about *all aspects of a Plea Offer and ramifications thereto*, is then prepared to make a knowing, intelligent and voluntary decision.

The quote from counsel above shows that he imposed *his views and decisions* on Mr. Mathisen, as opposed to informing Mr. Mathisen about what he faced in the Evidentiary Sentencing Hearing, and then let Mr. Mathisen decide whether to accept the Blind Plea, or go to trial.

Moreover, the District Court stated the following. "The choice, however, was not between a jury trial and a sentencing hearing, but between a jury trial and a plea." (Memorandum Opinion,

p. 9, Attachment 1.) In fact, as discussed by the District Court, the Government, and trial counsel at the Plea Hearing, a substantial Evidentiary Sentencing Hearing would follow the Plea Hearing. The Plea and the Evidentiary Sentencing Hearing go hand-in-hand, and indeed, the Evidentiary Sentencing Hearing was part of *trial counsel's strategy*.

* Counsel provides a series of handwritten notes and memos of meetings he had with Mr. Mathisen, prior to the June 2015 Plea Hearing. Counsel offers a typewritten March 23, 2015 Memorandum of a meeting he had with Mr. Mathisen, along with handwritten notes. It is unclear whether the typed Memo was completed on March 23, 2015, or later. (Counsel's Affidavit.)

In the end, it doesn't matter. Neither the typewritten memo nor the notes address the issue in this Motion and before the Court. Indeed, nowhere in the memo does counsel address the Constitutional and evidentiary waivers involved in an Evidentiary Sentencing Hearing, as opposed to a jury trial.

Counsel offers handwritten notes of an April 13, 2015 meeting he had with Mr. Mathisen. (Counsel's Affidavit.) Once again, nowhere in the notes does counsel address the Constitutional and evidentiary waivers involved in an Evidentiary Sentencing Hearing. Indeed, counsel does not state that he did. (Counsel's Affidavit, p. 12.)

Counsel offers a typewritten May 12, 2015 Memorandum of a

meeting he had with Mr. Mathisen. (Counsel's Affidavit.) Once again, counsel does not address the Constitutional and evidentiary waivers involved in an Evidentiary Sentencing Hearing, as opposed to a trial.

In fact, counsel states in this May 12, 2015 memo that "We had some *initial* discussion about how we would approach the sentencing hearing, the issues that we would challenge and the investigation and evidence that we would need." (Counsel's Affidavit.) (Emphasis added.)

Counsel offers one page of handwritten notes from a May 26, 2015 meeting he had with Mr. Mathisen. (Counsel's Affidavit.) Once again, counsel does not address the Constitutional and evidentiary waivers involved in an Evidentiary Sentencing Hearing, as opposed to a trial, nor does he suggest that he did. (Counsel's Affidavit, p. 13.)

Finally, despite the memos and notes of client meetings and other documents produced by counsel, there are documents *missing* from counsel's submission that normally are part of effective counsel's representation of a client in the plea process. Typically, *in order to educate the client and help the client understand the Plea Offer*, counsel provide clients with copies of the pertinent statutes which are charged in the indictment, and copies of all potential pertinent sections of the United States Sentencing Guidelines (i.e., offense level section, all potential

enhancement and departure sections, acceptance of responsibility, substantial assistance, the Sentencing Table), and 18 U.S.C Sec. 3553(a). In addition, as to this Blind Plea offer, counsel should have reviewed and given copies of the pertinent sections of the Federal Rules of Evidence, including but not limited to FRE 801, *et seq.*, the Hearsay Rule.

There is no indication in counsel's submission that he provided copies of *any* of these documents, no less explained them, to Mr. Mathisen.

V. CONCLUSION

This Court stated in *Missouri v. Frye* that "[t]he reality is that plea bargains have become so central to today's criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye*, 132 S.Ct. at 1409-11.

Under that stringent Constitutional standard, Mr. Mathisen has demonstrated "a substantial showing of the denial of a constitutional right.'" *Slack*, 529 U.S. at 483; *see also Miller-El v. Cockerell*, 537 U.S. at 335-37.

Mr. Mathisen does not have to establish in this Petition that he will ultimately succeed in his appeal before the Fourth Circuit. Instead, the COA standard is satisfied when the "habeas petition

involves issues which are debatable among jurists of reason, that another court would resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

The application for a COA should not be denied merely because the Fourth Circuit believes the applicant will not prove an entitlement to relief. *See Miller-El v. Cockerell*, 537 U.S. at 337 ("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").

Counsel relied on his experience and client case file to argue that he effectively represented Mr. Mathisen. Resumes and a general quantity of work do not constitute effective assistance of counsel. A general quantity of work is not a substitute for the qualitative and requisite representation of fully informing a client about the issues and process related to the Blind Plea-Evidentiary Sentencing Hearing.

The careful presentation of the Blind Plea Offer and the related Evidentiary Sentencing Hearing process to the client were called for, and indeed required, for counsel to meet his obligations to represent Mr. Mathisen effectively.

The record shows that counsel did not do so. Instead, counsel solicited from the Government this rare and problematic Blind Plea. Counsel did not effectively and adequately educate and explain the

Evidentiary Sentencing Hearing Process to Mr. Mathisen, so Mr. Mathisen could make a knowing, informed and voluntary decision to either go to trial, or to accept the Blind Plea.

As a result, Mr. Mathisen, much to his shock, found himself in the relaxed and free flowing Evidentiary Sentencing Hearing, absent Constitutional and evidentiary rules and protections. Mr. Mathisen was prejudiced as enhancements and a departure were imposed by the Court. At the Evidentiary Sentencing Hearing, Mr. Mathisen lost fully or partially on every enhancement and departure issue.

CONCLUSION

WHEREFORE, Mr. Mathisen moves the Court to issue a Certificate of Certiorari and to accept for full briefing and argument the denial by the Fourth Circuit of his Petition for a COA related to his Motion under 28 U.S.C. Sec. 2255.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, a copy of this Petition was served via First Class Mail, postage prepaid, on: the Solicitor General of the United States, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5614, Washington, D.C. 20530-0001.

/S/
Peter L. Goldman

APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6907

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD MICHAEL MATHISEN,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:15-cr-00003-TDC-1; 8:17-cv-00343-TDC)

Submitted: February 22, 2019 Decided: February 27, 2019

Before GREGORY, Chief Judge, and WYNN and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Peter Linn Goldman, O'REILLY & MARK, P.C., Alexandria, Virginia, for Appellant. Joseph McFarlane, Elizabeth G. Wright, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Michael Mathisen seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Mathisen has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX II

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

RICHARD M. MATHISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal Action No. TDC-15-0003
Civil Action No. TDC-17-0343

MEMORANDUM OPINION

Petitioner Richard M. Mathisen has filed a Motion to Vacate, Set Aside, or Correct Sentence and/or Plea, pursuant to 28 U.S.C. § 2255. In his Motion, Mathisen argues that he received ineffective assistance of counsel because his trial counsel inadequately explained the ramifications of agreeing to the "open" plea agreement he signed, consisting of a plea agreement with a barebones factual stipulation in which he acknowledged only that his conduct met the elements of the crime and with no agreement on the proper application of the United States Sentencing Guidelines ("Guidelines"). Mathisen further argues that his counsel failed adequately to impeach the Government's witnesses at the sentencing hearing and failed to call defense witnesses who would have confirmed Mathisen's limited role in the charged conspiracy. Having reviewed the submitted materials, the Court finds that no hearing is necessary. *See* Rule 8(a), Rules Governing Section 2255 Proceedings for the United States District Courts; D. Md. Local R. 105.6. For the reasons set forth below, the Motion is DENIED.

BACKGROUND

On January 7, 2015, Mathisen and co-defendant Philip Rice D'Avanzo were charged in a one-count indictment with Conspiracy to Distribute and Possession with Intent to Distribute Controlled Substances in violation of 21 U.S.C. § 846. The indictment arose out of an alleged conspiracy in which Mathisen arranged for co-conspirators to obtain magnetic resonance imaging scans ("MRIs"), had another co-conspirator alter those MRIs to depict injuries, and then had others use the altered MRIs to secure prescriptions by which they obtained oxycodone, which Mathisen and D'Avanzo would then use themselves or sell.

Mathisen retained Robert Bonsib as his attorney. Bonsib is an experienced criminal defense lawyer who has tried over 300 criminal jury trials in state and federal court and who has previously served as both an Assistant State's Attorney for Prince George's County, Maryland and an Assistant United States Attorney for the District of Maryland.

On March 17, 2015, the Government made a plea offer to Mathisen. The offer proposed that Mathisen agree to a Guidelines base offense level of no less than 24, to be determined based on the quantity of oxycodone involved in the conspiracy, with an additional four-level increase for having a leadership role in the conspiracy pursuant to U.S.S.G. § 3B1.1(a) and a two-level increase for obstruction of justice pursuant to U.S.S.G. § 3C1.1 based on allegations that Mathisen had asked a co-conspirator to harm D'Avanzo after they had both been charged. The Government agreed not to oppose a three-level reduction for acceptance of responsibility, resulting in a total offense level of no less than 27. Because there was no agreement regarding the amount of drugs for which Mathisen would be held responsible, the total offense level could have been increased above 27 based on findings by the Court after the presentation of evidence at the sentencing hearing regarding drug quantity.

According to an affidavit submitted by Bonsib, Mathisen refused throughout their discussions to agree to the Government's assertions that he had been a leader of the conspiracy, that he had distributed a large amount of oxycodone, and that he had obstructed justice by seeking to have D'Avanzo harmed. Bonsib counseled Mathisen not to accept the Government's first plea offer because he expected the Government still to seek the maximum penalty, 20 years. Bonsib proposed, instead, an "open plea," through which Mathisen would plead guilty to the charged conspiracy but would remain free to contest at the sentencing hearing the Government's assertions regarding Mathisen's role in the conspiracy, the drug quantity at issue, and the alleged obstruction of justice, which included the Government's contention that Mathisen had sought to cover up the death of a woman, Cecilia Gavidia, who had died in Mathisen's home after ingesting a controlled substance. Bonsib asserts that he explained to Mathisen that his disagreements with the Government on these matters were sentencing issues, not trial issues, as Mathisen at no point denied that he was involved in a conspiracy to distribute oxycodone and was prepared to plead guilty to that charge.

With Mathisen's permission, Bonsib successfully negotiated with the Government for an open plea agreement. During his discussions with the Government, he also learned that if Mathisen did not plead guilty to the original indictment, the Government would seek a superseding indictment to add counts for obstruction of justice and possibly a count for distribution of a controlled substance resulting in death, based on Gavidia's death, in violation of 21 U.S.C. § 841(b)(1)(C). Such a charge would have carried a 20-year mandatory minimum sentence. *See id.*

According to Bonsib, he advised Mathisen that by accepting the open plea agreement, he preserved his ability to challenge the Government on these sentencing issues, preserved the

possibility of receiving the reduction for acceptance of responsibility, and avoided a superseding indictment that would have exposed Mathisen to higher penalties. Bonsib also asserts that he told Mathisen that the Government has a lower burden of proof at sentencing hearings—preponderance of the evidence, rather than beyond a reasonable doubt—but noted that even with a trial, issues such as drug quantity, role in the offense, and obstruction of justice would not be decided by the jury but would be resolved at sentencing under the preponderance standard. Mathisen denies that Bonsib advised him of the different burden of proof at a sentencing hearing and asserts that he did not know that hearsay evidence is admissible at a sentencing hearing.

Mathisen accepted the open plea agreement and pleaded guilty on June 5, 2015. The plea agreement provided that, while Mathisen would plead guilty to the elements of the charged crime, there was no agreement as to the application of the Guidelines. The Government agreed not to seek additional charges against Mathisen based on the alleged plot to harm D'Avanzo or Gavidia's death, but it reserved the right to present evidence at the sentencing hearing regarding these events in support of its proposed sentencing enhancements. At the guilty plea hearing, the Court informed Mathisen that if he did not plead guilty he would have the right to a trial by jury, that the Government would be required to prove guilt beyond a reasonable doubt, and that he would have the right to have all witnesses testify in court, in his presence. Mathisen acknowledged that he understood that by pleading guilty he would be giving up these rights. Mathisen also stated, under oath, that he had discussed the terms of the plea agreement with his attorney, that he understood them, and that he was fully satisfied with his attorney's advice.

The sentencing hearing was held on February 2 and February 3, 2016. The Government called as witnesses Jeremy Zamyslowski, who testified that he participated in the drug-distribution conspiracy, that he was present when Mathisen requested that an associate remove

items from his house after Gavidia's death before the police arrived, and that he had been part of a plot to kill D'Avanzo at Mathisen's behest, and Merrit Moore, who testified that he had purchased drugs from Mathisen. The Government also relied on the grand jury testimony of several witnesses, including Kareem Ward, who described the events surrounding Gavidia's death, and on investigative reports from witness interviews, including of D'Avanzo. Further, the Government presented documentary evidence, including text messages between Mathisen and D'Avanzo and records from Mathisen's computer showing the location of multiple facilities that perform MRIs.

The Government argued for a base offense level of 30, based on its calculation that at least 326 grams of oxycodone were involved in the conspiracy and reasonably foreseeable to Mathisen. The Government sought a two-level increase because Mathisen possessed a firearm, pursuant to U.S.S.G. § 2D1.1(b)(1); a four-level increase because Mathisen was an organizer or leader of the conspiracy, pursuant U.S.S.G. § 3B1.1(a); a two-level increase for obstruction of justice based on the attempted cover-up relating to Gavidia's death and Zamyslowski's agreement to kill D'Avanzo, pursuant to U.S.S.G. § 3C1.1; an upward departure based on Gavidia's death, pursuant to U.S.S.G. § 5K2.1; and the denial of the acceptance-of-responsibility reduction pursuant to U.S.S.G. § 3E.1.1, because Mathisen had opted for the open plea and had not admitted specific facts relating to the crime. Combined, these positions resulted in a recommended total offense level of 38. With Mathisen's criminal history category of II, this recommendation would result in a Guidelines range of 262–327 months, above the statutory maximum of 240 months. In the end, the Government recommended a sentence of 240 months. In the Presentence Investigation Report ("PSR"), the United States Probation Office agreed with

the Government's proposed Guidelines calculations, except that it recommended a two-level reduction for acceptance of responsibility, leading to a total offense level of 36.

On behalf of Mathisen, Bonsib offered the testimony of Erik Carter, who testified that Mathisen did not possess a firearm; Phyllis Bredice, Mathisen's grandmother, who testified that she paid for all of Mathisen's expenses and that Mathisen suffered from a severe back injury that required pain medication; Kimberly Yourick, a private investigator, who testified that after interviewing numerous witnesses, she did not find evidence that Mathisen had sought to have D'Avanzo harmed or that Mathisen had cleaned up his home after Gavidia's death in order to hide evidence; and Mathisen himself, who testified about his drug addiction and admitted to dealing drugs to feed his habit, but denied that he had any leadership role in a conspiracy to distribute illegal substances or that he had obstructed justice. Bonsib recommended that the Court find a drug quantity corresponding to a base offense level of 24 and that Mathisen receive no upward adjustments for his role in the conspiracy, possession of a firearm, Gavidia's death, or obstruction of justice, all of which would result in a Guideline range of 57–71 months. Bonsib recommended that Mathisen receive a sentence of 57 months.

At the close of the hearing, the Court imposed a sentence of 108 months, less than half of the Government's proposed sentence. The Court ruled that the Government had only proven by a preponderance of the evidence a drug quantity resulting in a base offense level of 26. Although the Court granted the two-level enhancement for possession of a firearm, the Court concluded that the Government, having relied primarily on interview reports of statements by D'Avanzo, had not established that Mathisen was an organizer or leader of the conspiracy and thus applied only a three-level role adjustment under U.S.S.G. § 3B1.1 based on the finding that Mathisen was a manager or supervisor of the operation. The Court also rejected the two-level

enhancement for obstruction of justice, finding that the proven conduct of Mathisen during the aftermath of Gavidia's death and in discussing a possible hit on D'Avanzo did not constitute obstruction of justice within the meaning of U.S.S.G. § 3C1.1. As the Court granted Mathisen a two-level reduction for acceptance of responsibility, it found that the total offense level was 29, producing a Guideline range of 97–121 months. In addition to the 108-month sentence, the Court imposed three years of supervised release and a $60,000 fine.

On February 2, 2017, Mathisen filed the present Motion in which he alleges ineffective assistance of counsel. The Court ordered both the Government and Bonsib to respond to the Motion. The matter is now fully briefed and ripe for decision.

DISCUSSION

In his Motion, Mathisen identifies three grounds for his claim of ineffective assistance of counsel. First, he argues that Bonsib inadequately explained the ramifications of agreeing to an open plea agreement, which caused Mathisen to undergo a mini-trial at his sentencing hearing without the benefit of the procedural and evidentiary protections of a jury trial. Second, Mathisen argues that Bonsib failed adequately to impeach the Government's witnesses at the sentencing hearing. Finally, Mathisen claims that Bonsib should have more fully utilized a private investigator and called additional defense witnesses who would have corroborated his position that his role in the charged conspiracy was limited.

I. Legal Standard

A prisoner in federal custody may move to vacate, set aside, or correct his sentence on the basis that: (1) "the sentence was imposed in violation of the Constitution or laws of the United States"; (2) the sentencing court lacked jurisdiction; (3) the sentence exceeded the maximum authorized by law; or (4) the sentence is "otherwise subject to collateral attack." 28

U.S.C. § 2255(a) (2012). The prisoner bears the burden of proof and must establish the claim by a preponderance of the evidence. *See Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

The Sixth Amendment to the United States Constitution affords a criminal defendant the right to "Assistance of Counsel." U.S. Const. amend. VI. A prisoner alleging ineffective assistance of counsel in violation of the Sixth Amendment must ordinarily meet the standard established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this standard, the prisoner must show both deficient performance and prejudice—that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. Regarding prejudice, when counsel's alleged ineffectiveness relates to a defendant's choice to plead guilty, the prisoner "must demonstrate 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Fugit*, 703 F.3d 248, 259 (4th Cir. 2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The standard is objective, rather than subjective, in that the prisoner must show that "proceeding to trial would have been objectively reasonable in light of all the facts." *Fugit*, 703 F.3d at 260.

II. Open Plea Agreement

Mathisen's primary argument is that he received ineffective assistance of counsel because Bonsib did not fully explain to him what would happen at the sentencing hearing, and that Bonsib's failure to do so caused his performance to fall "below an objective standard of reasonableness' measured by 'prevailing professional norms.'" *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

Mathisen further contends that, had he known that sentencing hearings provide fewer procedural and evidentiary protections for criminal defendants, he would have elected to proceed with a trial before a jury.

Mathisen and Bonsib disagree on whether Bonsib adequately explained that the Government carries a different burden of proof at sentencing than at trial, or that the Court may consider hearsay evidence at sentencing that may not be considered at trial. The Court notes that at the guilty plea hearing, it specifically informed Mathisen, and Mathisen stated under oath that he understood, that by pleading guilty he would be giving up the rights to have all witnesses testify in court and to require the Government to prove his guilt beyond a reasonable doubt. However, the Court need not resolve this factual dispute because even if this Court were to credit Mathisen's version of events and assume that Bonsib had provided no such guidance, Mathisen cannot succeed on the Motion.

Mathisen fundamentally misunderstands the role of the sentencing hearing, as demonstrated by this passage from his affidavit:

> Prior to my accepting and entering the Plea, Mr. Bonsib did not explain to me that I had a choice: a trial with a jury, the burden would be on the Government to prove each element of the charges beyond a reasonable doubt, and the Federal Rules of Evidence would apply, or a Sentencing Hearing, where I would have to defend against the same charge in the Indictment, the same allegations, but without the benefit of a jury, the Federal Rules of Evidence, the lesser preponderance of evidence standard would apply, and the Government could submit any evidence or information, much of it not subject to cross-examination.

Mathisen Aff. ¶ 14, ECF No. 140.

The choice, however, was not between a jury trial and a sentencing hearing, but between a jury trial and a guilty plea. At a trial, the only question the jury would have been called upon to resolve under the beyond-a-reasonable-doubt standard was whether Mathisen committed the crime of conspiracy to distribute or possess with intent to distribute oxycodone. Mathisen has

made no persuasive argument that had he gone to trial, he would not have been convicted of this crime. Crucially, the jury would not have been called upon to decide questions relating only to sentencing enhancements, such as the quantity of drugs for which Mathisen could be held responsible, his role in the conspiracy, whether the distribution caused a death, and whether he obstructed justice by trying to hide evidence relating to Gavidia's death or by arranging for someone to kill his co-defendant. Indeed, evidence relating to some of these issues would likely have been excluded as irrelevant to a conviction and unduly prejudicial to Mathisen. The sentencing hearing would have taken place either way and would have proceeded in much the same manner as it did, with the Government able to present hearsay evidence and with the Court deciding sentencing enhancement issues under a preponderance of the evidence standard. *See United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008) ("Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict."). Thus, even assuming that Bonsib did not fully explain how a trial and sentencing hearing differ, such an omission would not have caused his performance to fall "below an objective standard of reasonableness" because those differences would not have affected the way in which the sentencing enhancements were determined. *Higgs*, 663 F.3d at 735.

More importantly, Mathisen has not shown prejudice from the allegedly omitted guidance. Where conviction is not at issue, sentencing issues would have been resolved under the same evidentiary rules and under the same burden of proof, and a guilty plea would, and did, allow Mathisen to receive a downward adjustment to his offense level for acceptance of responsibility, Mathisen cannot show that with a more detailed explanation of the procedural

impact of an open plea, it would have been objectively reasonable for him go to trial rather than to plead guilty. *See United States v. Trice*, 484 F.3d 470, 475 (7th Cir. 2007) (rejecting an ineffective assistance of counsel claim that the defense attorney should have told the defendant during plea negotiations about the sentencing disparity between distribution of crack cocaine and distribution of powder cocaine on the grounds that "[t]his lack of information could not have rendered [defendant's] plea involuntary, because the crack/cocaine powder issue is a sentencing matter and would have been irrelevant to a trial on whether [defendant] conspired to distribute a controlled substance"). Indeed, particularly where, by pleading guilty, Mathisen avoided a superseding indictment in which the Government would have exposed him to additional charges arising from the alleged plot to kill D'Avanzo and Gavidia's death, which carried the potential for a mandatory minimum 20-year sentence, it would not have been objectively reasonable for Mathisen to go to trial even after a more fulsome explanation of the different standards applied at trial compared to sentencing. The Court therefore rejects Mathisen's claim that Bonsib provided constitutionally inadequate assistance of counsel relating to the decision to accept the open plea agreement.

III. Sentencing Hearing

Mathisen further argues that Bonsib performed ineffectively as counsel during the sentencing hearing. The Court will address each of the alleged inadequacies in turn.

First, Mathisen contends that Bonsib did not sufficiently impeach Jeremy Zamyslowski, a Government witness, who testified about the drug conspiracy and the alleged obstruction of justice relating to Gavidia's death and the plan to kill D'Avanzo. In support, Mathisen identifies several of Zamyslowski's prior convictions with the following primary charges—escape, possession of counterfeit traveler's checks, conspiracy to possess counterfeit obligations of the

United States, and burglary. He asserts that Bonsib should have confronted Zamyslowski with the case names, case numbers, courts, charges, dates of conviction, and sentences associated with these convictions, and he should have introduced certified copies of the convictions into the record. In fact, all of these convictions were disclosed during Zamyslowski's testimony, either by the Assistant United States Attorney on direct examination or by Bonsib during cross examination. The proposed additional details about these convictions were unnecessary, as the Court, which was the factfinder at the hearing, was aware from the evidence already presented of the gravity of Zamyslowski's criminal conduct and the fact that some of his convictions involved conduct relating to truthfulness. Finally, the Court notes that while Zamyslowski's testimony was most relevant to the proposed obstruction of justice enhancement, the Court denied the Government's request for that enhancement. Mathisen has therefore failed to satisfy *Strickland*'s first or second prong on this claim.

Second, Mathisen asserts that Bonsib should have offered evidence of numerous drug-related convictions of Kareem Ward, whose grand jury testimony was offered by the Government as an exhibit to its sentencing memorandum. Ward's testimony, however, was primarily about Gavidia's death. Because Ward's testimony was materially consistent with Mathisen's own on the subject, Bonsib opted to use Ward to bolster Mathisen's defense, a strategic decision that made it reasonable, and not ineffective assistance of counsel, to refrain from impeaching Ward with his prior convictions. *See Rose v. Lee*, 252 F.3d 676, 692–93 (4th Cir. 2001) (concluding that a strategic decision to avoid the introduction of certain evidence was not ineffective assistance of counsel). Moreover, Mathisen has not established prejudice. After considering Ward's grand jury testimony, the Court declined to grant an obstruction-of-justice enhancement. Its finding that Mathisen's drug distribution led to the death of Gavidia was based

on the testimony of multiple witnesses, not just Ward, and in any event the Court declined the Government's request that it give an upward variance based on her death. Mathisen therefore has not shown either that Bonsib's decision to refrain from referencing Ward's criminal record was unreasonable or that Mathisen was prejudiced by it.

Third, Mathisen asserts that when the Government relied on the grand jury testimony of D'Avanzo, Mathisen should have offered evidence that D'Avanzo had once pleaded guilty to simple assault, destruction of property, and possession of a controlled substance, even though those charges were later dismissed after D'Avanzo completed a deferred sentencing program. Where the charges were ultimately dismissed, it would not have been reasonable for Bonsib to seek to impeach D'Avanzo with them. *See United States v. Truslow*, 530 F.2d 257, 265 (4th Cir. 1975) (stating that generally "evidence of other offenses and charges and acquittals are not" admissible). Even if the initial guilty plea to these charges could be deemed to constitute a conviction, Mathisen has not shown, and indeed has offered no argument, how the failure to identify these charges prejudiced him. Rather, by the time of sentencing, D'Avanzo had already pleaded guilty to conspiracy to distribute oxycodone in the same case, such that the Court was already aware that D'Avanzo had a more serious criminal conviction than the charges referenced by Mathisen.

Finally, Mathisen argues that Bonsib should have used Yourick, the private investigator, more effectively and called additional defense witnesses at the sentencing hearing to corroborate his claim that he played only a limited role in the drug distribution conspiracy. "'[T]he decision whether to call a defense witness is a strategic decision' demanding the assessment and balancing of perceived benefits against perceived risks, and one to which [the Court] 'must afford . . . enormous deference.'" *United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004)

(quoting *United States v. Kozinski*, 16 F.3d 795, 813 (7th Cir. 1994)). Bonsib asserts in his affidavit that he chose not to call these additional witnesses because he wanted to minimize testimony from any witness who had knowledge about Mathisen's drug distribution activities, as such testimony could be used to support an increase in the amount of drugs for which Mathisen would be held responsible at sentencing. Because this strategy was reasonable, Mathisen has not satisfied *Strickland*'s first prong. *See Rose*, 252 F.3d at 692–93. Moreover, Mathisen has failed to satisfy *Strickland*'s second prong because he has provided no explanation for how the testimony of additional witnesses would have changed the outcome of the case and thus has not shown how he was prejudiced by Bonsib's failure to call them to testify. Indeed, a pre-sentencing hearing email from Yourick to Bonsib states that she spoke to Mark Dove and Thomas Bradley, two of Mathisen's proposed additional witnesses, but does not reveal any material facts that either witness could offer other than as general character witnesses. Mathisen has provided no basis to conclude that any additional activities by Yourick, such as additional witness interviews, would have changed the outcome of the sentencing hearing. The Court will therefore deny the Motion regarding Bonsib's effectiveness at the sentencing hearing.

CONCLUSION

When considered more broadly, Mathisen's claims of ineffective assistance of counsel fail for another reason: Bonsib's representation was extremely effective. There has been no claim that Mathisen could have avoided conviction. By pursuing Bonsib's chosen strategy, and benefiting from his capable advocacy, Mathisen received a significantly lower base offense level based on the Court's finding of a lower drug quantity than that proposed by the Government, no enhancements for obstruction of justice, a lower enhancement for his role in the offense than that proposed by the Government, and a two-level downward adjustment for acceptance of

responsibility that had been opposed by the Government. In the end, the Court found that his total offense level was 9 levels lower than that proposed by the Government, and he received a 108-month sentence, far below the 240-month sentence recommended by the Government. Mathisen was indeed well-served by his experienced and able counsel.

For the foregoing reasons, Mathisen's § 2255 Motion is DENIED. A separate Order shall issue.

Date: July 11, 2018

THEODORE D. CHUANG
United States District Judge

ATTACHMENT 2