App'x A

Fourth Circuit Court of Appeals Denial

US v Banks, 20-6222, Denied June 19, 2020

FILED: June 19, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6222
(2:15-cr-00007-JAG-DEM-4)
(2:16-cv-00637-JAG)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DWAYNE BANKS

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6222

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DWAYNE BANKS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. Gibney, Jr., District Judge. (2:15-cr-00007-JAG-DEM-4; 2:16-cv-00637-JAG)

Submitted: June 16, 2020 Decided: June 19, 2020

Before MOTZ and KING, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Dwayne Banks, Appellant Pro Se. Andrew Curtis Bosse, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee.

PER CURIAM:

Dwayne Banks seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2018) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (2018). 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) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Banks 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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
INFORMAL BRIEF FOR HABEAS AND SECTION 2255 CASES

No. 20-6222, US v. Dwayne Banks
2:15-cr-00007-JAG-DEM-4, 2:16-cv-00637-JAG

1. Declaration of Inmate Filing

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

- a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or
- a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 2/6/20

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Signature: Dwayne Banks, 85470-083 Date: 3/2/2020

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

2. Jurisdiction

Name of court from which you are appealing:

District Court in Norfolk, VA

Date(s) of order or orders you are appealing:

3. Certificate of Appealability

Did the district court grant a certificate of appealability? Yes [ ] No [X]

If Yes, do you want the Court of Appeals to review additional issues that were not certified for review by the district court? Yes [X] No [ ]

If Yes, **you must** list below the issues you wish to add to the certificate of appealability issued by the district court. If you do not list additional issues, the Court will limit its review to those issues on which the district court granted the certificate.

4. **Issues on Appeal**

Use the following spaces to set forth the facts and argument in support of the issues you wish the Court of Appeals to consider on appeal. You must include any issue you wish the Court to consider, regardless of whether the district court granted a certificate of appealability as to that issue. You may cite case law, but citations are not required.

Issue 1.

Supporting Facts and Argument.

Whether the District Court abused its Discretion by allowing the Gov 2yrs later to file a Response to his 2255, when "the Gov conceded it "forgot for 2yrs"? (See Gov Resp. Doc's p.240 & 240-1 & Brief Attached p. 2-4)

Issue 2.

Supporting Facts and Argument.

Whether the District Court violated US v Mohamdi, 17-7395 (4th Cir 2018) by Failing to Address all grounds prior to Issuing the Denial of his 2255, thus rendering this Court without Jurisdiction to Entertain these Issues (See Brief Attached p. 4-6)

Issue 3.

Supporting Facts and Argument.

Whether Former Counsel (T. Kelleten) was Ineffective in Light of US v Carthorne, US v Winbush, US v Allmindger, Glover v US & Strickland v Washington.
(See Brief Attached p. 4-6)

Issue 4.

Supporting Facts and Argument

N/A

5. **Relief Requested**
Identify the precise action you want the Court of Appeals to take:

N/A

6. **Prior appeals (for appellants/petitioners only)**
A. Have you filed other cases in this Court? Yes [ ] No [X]
B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

N/A

Dwayne Banks

Signature
[Notarization Not Required]

Dwayne Banks

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

****

I certify that on 3/2/2020 I served a copy of this Informal Brief on all parties, addressed as shown below:

AUSA Andrew C. Bosse
101 West Main St.
Suite 8000
Norfolk, VA 23510

Dwayne Banks, 85470-083

Signature

NO STAPLES, TAPE OR BINDING PLEASE

IN THE FOURTH CIRCUIT
COURT OF APPEALS

Dwayne Banks Appellant vs United States of America	Appeal Case No: 20-6222 Previous Case No: 2:15CR07 2:16CV637

Petitioner's Request for A Certificate of Appealability
& Request To Continue with Appeal Based Upon
The [First Impression] Issues Herein

Comes now the Appellant, Mr. Dwayne Banks, hereby pro se humbly before the Court to Timely File his [First Impression] Issues & Request to proceed on Appeal, so that the 4th Circuit Panel may "provide guidance" to the lower Courts on how to deal with the Herein Issues, which are unique in nature:

1) Whether the District Court should have "struck the Gov's 2 yr delayed 2255 response", when the Gov failed to request any extensions that would have provided "reasoning" for each extension. In this case, the Government did not request any extension but "conceded that they had forgotten". (See Gov Resp. 240 & 240-1. Both filed on 3/22/19 & (Doc 241). The Gov failed to file a timely response.)

2) The Petitioner filed "A Motion to Reduce Sentence Pursuant to Amendments 790, 794 & 811, which was later

converted as a Supplement of the "Still Open 2255". But the District Court "Never Resolved" the merits of Amendments 790 & 811, but instead focused & ruled "Only" on Amendment 794. Therefore, did the Court violate this Courts US v Mohamdi 17-7395 (4th Cr 2018) Ruling thus requiring the vacating of the 2255 Denial order so the Court may properly resolve the Additional Merits, (See Doc 243) & Doc 244 ... Banks "claim" ... is dismissed (not claims)

3) Whether the Sentencing Counsel (Trey R. Kelleter, ESQ) was Ineffective within the purview of US v Carthorne, US v Allmindger, US v Winbush & Glover v US. As well as Strickland v Washington, when the Counsel Failed to "Recognize the Legal Landscape Changes that [were passed prior to sentencing] in 2015 & took effect on Nov 1,2015" that would have reduced the 1) Drug Weight, 2) Provided a minor/mitigating role reduction and clearly reduced the Petitioner's Guideline Exposure" if they were raised by the Counsel (See Doc 240-2) & would have granted the additional Full 3 Level Reduction for the timely Acceptance. (See Doc 242 p.2 of Petitioner's response.)

I. Applicable Facts & Issues

The Petitioner was indicted in the E.D. of Virginia, Norfolk Division for various drug crimes stemming from a conspiracy. The Government, PSR & Counsel were all aware & conceded that the Petitioner "was unaware" of the various actions of others,

including his Brother's operation" & also that the Petitioner did not play a significant role (see PSR 9, 11, 13, as well as Gov's Sentencing Filing Doc 173 p.9... Banks Conduct within the Conspiracy was relatively less egerious than others & the Gov has no evidence that the Defendant possessed a dangerous weapon during the course & Doc 172).

The Court imposed 135 mths for the Petitioner on 10/30/15. (Doc 192) The Petitioner filed a 2255 & the Gov was suppossed to respond within 40 days, but instead filed 2 yrs later. (Doc 240, the Government filed a timely response to Smith's 2255 Motion but failed to file any response to the Petitioner's (Banks) 2255 Motion (see Doc 240 p.2 Sec 6-7... it was brought to the attention on 3/7/19 by a Norfolk District Court Case M.G.R. sec 8 p.2 of Doc 240) Compared to Petitioner's resp Doc 242, (Dated 4/2/19)... requesting the Court to Strike the Gov's response.)

Instead of Striking the Governments 2 yr delayed response & Granting the Petitioner's 2255 Relief & Evidentiary Hearing the Court instead ruled on the Amendment 794 & failed to address Amendments 790 & 811. The Court also ruled on the Ineffective Assistance Claim but failed to Grant the Evidentiary Hearing & failed to apply Glover v US Sentencing Ineffectiveness Standards.

Therefore, the Petitioner brings these "Unique & 1st Impression Issues to this Court" & ask the Court to provide Guidance to the Defendant's & Courts alike of how to resolve these type of Issues & to Clarify which governs, Glover Standards

or Strickland? As well as Determine the merits of the Amendment 790, 794 & 811 Applicability for those who were not yet sentenced when these Amendments were passed & how to properly apply these reductions.

II.

For years experts have blamed Stickland v Washington's "lax" Standard for assessing Trial Attorney effectiveness for many of the Criminal Justice System's problems. But the Conventional understanding of Stickland as a problem for ineffectiveness Claims gives Stickland "Too much prominence" because it "Treats Strickland as the "Test for all such claims," But that is the mistake, because when properly understood, the Sp.Ct. has recognized 4 different Constitutional forms of Ineffectiveness & Strickland's 2 prong test applies to only 1 of the 4 & not all 4. (David C. Bazelon, the Defective Assistance of Counsel, 42 O. Cin L. Rev 1,2 (1973)... what I have seen in my 23 yrs on the Bench leads me to believe that a great many, indigent Defendants do not receive the Effective Assistance of Counsel guaranteed to them by the 6th Amendment.)

In this case, it is undisputed that "prior to sentencing", the U.S. Sentencing Commission had passed the Amendments 790, 794 & 811. It is also undisputed that the Provisions took effect on Nov 1, which was 2 days after the Petitioner's Oct 30th sentencing. But it is also undisputed that the "Counsel Failed to request the Application of any of these Amendments to be applied

or even considered because he was not even aware of the changes in the Law that would have benefited his Client." While the Stickland's "cause & prejudice" prongs are met then it forces the Glover v US to be invoked due to the Counsel's ineffectiveness during the Sentencing phase.

The Petitioner (Banks) did raise each of the issues & the Gov did not respond for 2 yrs after the issues. The Court allowed the Government to respond when even the Government conceded "It had forgotten". But for 2 yrs, that is extraordinary & very unprofessional. In this case, which is rather simple but complex the only issues are "what to do about such actions":

1) When the Gov's delayed filing of 2 yrs is used to lead to a denial?
2) When the Counsel failed to "know the Law changes" or failed to mention them?
3) When the Court failed to address all the Claims in the 2255 prior to denial.
4) How should the Court craft a ruling that will Direct the Lower Court as well as provide further benefits to all District Courts on how to deal with such legal debacles?

III. Conclusion

Therefore, the COA must be granted in light of Buck v Davis 137 S.Ct 759 (Sp.Ct. 2017) the Appeal panel can "craft a 1st Impression Ruling" & vacate the District Courts Ruling with instructions of how to proceed under such circumstances as well as hold an Evidentiary Hearing.

Respectfully submitted on this ____ day on Feb, 2020 by,

S/_____

Mr.Dwayne Banks
Fed No. 85470-083
FCI Butner II
P.O. Box 1500
Butner, NC 27509

IV. Certificate of Service, 28 USC 1746

I, Dwayne Banks, do hereby swear under the penalty of perjury that a copy of the Appellant's Request for Certificate of Appealability has been sent via US Postal Mail to the 4th Circuit Court of Appeal and the AUSA of Record below:

AUSA, Andrew Bosse
101 West Main St.
Suite 8000
Norfolk, VA 23510

Submitted: 2/___/2020

S/_____
Mr. Dwayne Banks

App'x B

US DIST. COURT OF VIRGINA, NORFOLK
2255 DENIAL ORDER IN
US v BANKS, 2:15CR07
DEC 12, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. Criminal No. **2:15CR07**

DWAYNE BANKS,

Petitioner.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. The § 2255 Motion (ECF No. 224) is DENIED;
2. Banks's claim and the action are DISMISSED; and,
3. A certificate of appealability is DENIED.

Banks is advised that she may appeal the decision of this Court. Should she wish to do so, a written notice of appeal must be filed with the Clerk of the Court within sixty (60) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the ability to appeal.

The Clerk of the Court is directed to send a copy of the Memorandum Opinion and this Order to Banks and counsel for the Government.

It is so ORDERED.

Date: 12 December 2019
Richmond, Virginia

/s/
John A. Gibney, Jr.
United States District Judge

Rec 12/16/19

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. Criminal No. **2:15CR07**

DWAYNE BANKS,

Petitioner.

MEMORANDUM OPINION

Dwayne Banks, a federal inmate proceeding *pro se*, brings this motion pursuant to 28 U.S.C. § 2255 ("§ 2255 Motion," ECF No. 224). In his § 2255 Motion, Banks contends that he failed to receive the effective assistance of counsel because his counsel should have moved to continue Banks's sentencing so that Banks could receive the benefit of Amendment 794 to Sentencing Guidelines.[1] As the Court previously explained to Banks, Amendment 794 would not have altered the sentence the Court imposed on Banks. Accordingly, for the reasons stated more fully below, the § 2255 Motion will be DENIED.

I. Procedural History

Banks pled guilty to conspiracy to manufacture, distribute, and possess with intent to distribute one kilogram or more of heroin. (ECF No. 69, at 1–2; ECF No. 151, at 1.) The matter was set for sentencing on October 30, 2015. (ECF No. 154, at 1.) Banks's Base Offense Level was 30. (ECF No. 240–2, at 17.) Banks received a 2–level enhancement for obstruction of justice and 2–level reduction for acceptance of responsibility. (*Id.*) Banks's Criminal History Category

[1] Amendment 794, which became effective on November 1, 2015, "amended the Commentary to the Sentencing Guidelines at § 3B1.2, which addresses a defendant's mitigating role in the offense. Amendment 794 introduced a list of non-exhaustive factors that a sentencing court should consider when determining whether to apply a mitigating role adjustment." *Orji v. United States*, Nos 1:13–CR–79, 1:16–CV–134, 2017 WL 1091784, at *1 (E.D. Va. Mar. 22, 2017).

was IV, resulting in an advisory Sentencing Guideline range of 135 to 168 months. (*Id.*) The Court sentenced Banks to 135 months of imprisonment. (ECF No. 192, at 2.)

On August 4, 2016, Banks filed a letter asserting that he was entitled to a 2–level reduction to his Offense Level pursuant to Amendment 794, which clarifies the minor role reduction available in § 3B1.2 of the Sentencing Guidelines. (ECF No. 216.) The Court appointed counsel to file a supplemental brief on Banks's behalf with respect to his request for relief pursuant to Amendment 794. (ECF No. 217.) By Order entered on November 4, 2016, the Court denied Banks's request for relief. (ECF No. 223.) The Court concluded that Banks was not entitled to relief pursuant to Amendment 794 because: (1) the Sentencing Commission did not make Amendment 794 retroactive; and (2) "even if the Court did consider the amended §3B1.2, the defendant did not play a 'minimal' or 'minor' role in the offense." (*Id.* at 1.)

To demonstrate ineffective assistance of counsel, a convicted defendant must show first, that counsel's representation was deficient and second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the deficient performance prong of *Strickland*, the convicted defendant must overcome the "'strong presumption' that counsel's strategy and tactics fall 'within the wide range of reasonable professional assistance.'" *Burch v. Corcoran*, 273 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). The prejudice component requires a convicted defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In analyzing ineffective assistance of counsel claims, it is not necessary to determine whether counsel performed deficiently if the claim is readily dismissed for lack of prejudice. *Id.* at 697. That is the case here,

because Banks was not prejudiced by any failure of counsel to delay the sentencing proceedings so that Banks could take advantage of Amendment 794. Although Banks was not a leader or organizer in the conspiracy, he was not a minimal or minor participant. Among other things, Banks transported large amounts of high purity heroin from New York to Hampton Roads and then distributed a cut and expanded version of the heroin on streets of Hampton Roads. Additionally, Banks was involved in staking out the associates of a rival gang. Accordingly, Banks's claim will be DISMISSED.[2] The § 2255 Motion (ECF No. 224) will be DENIED. The action will be DISMISSED. A certificate of appealability will be DENIED.

An appropriate Order will accompany this Memorandum Opinion.

Date: 12 December 2019
Richmond, Virginia

/s/
John A. Gibney, Jr.
United States District Judge

[2] On April 4, 2019, Banks filed a response wherein he contends that he is entitled to relief not only under Amendment 794, but also under Amendments pertaining to "acceptance of responsibility" and "strict liability drug quantity reduction." (ECF No. 242, at 2 (capitalization corrected).) Banks fails to explain, and the Court fails to discern, the substance of his claim, much less why he is entitled to relief. The record does not suggest that Banks was entitled to a third point for timely acceptance of responsibility under § 3E1.1(b) of the Sentencing Guidelines. Banks pled guilty only days before the commencement of his scheduled jury trial, July 28, 2015. (ECF Nos. 133, 150.)

Appx C

EASTERN DISTRICT OF VIRGINIA DISTRICT
ATTORNEY'S RESPONSE & COURT ORDER
GRANTING THE 2 yr DELAYED RESPONSE
DOC 240 & 241

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. Criminal No. **2:15CR07**

DWAYNE BANKS,

Petitioner.

MEMORANDUM ORDER
(Granting Motion to File Out of Time)

The Court directed the Government to respond to Petitioner's 28 U.S.C. § 2255 Motion. The Government failed to file a timely response and now moves for an extension of time. The Motion of Government (ECF No. 240) is GRANTED and the Government's Response (ECF Nos. 240–1, 240–2) is DEEMED TIMELY FILED.

The Clerk of the Court is DIRECTED to send a copy of this Memorandum Order to Petitioner and all counsel of record.

It is so ORDERED.

/s/
Roderick C. Young
United States Magistrate Judge

Date: March 28, 2019
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

DWAYNE BANKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Criminal No. 2:15cr7
	)	Civil No. 2:16cv637
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MOTION OF THE UNITED STATES FOR LEAVE TO FILE LATE RESPONSE TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The United States of America, by and through its attorneys, G. Zachary Terwilliger, United States Attorney for the Eastern District of Virginia, and Andrew Bosse, Assistant United States Attorney, respectfully moves this Court to enter an order granting leave to file an out-of-time response to Petitioner Dwayne Banks's motion pursuant to Title 28, United States Code, Section 2255, to vacate, set aside, or correct his sentence. In support hereof, the government states as follows:

1. Petitioner pleaded guilty on July 30, 2015, to a heroin distribution conspiracy pursuant to 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). ECF Nos. 150-154. On October 30, 2015, the Hon. John A. Gibney, Jr., sentenced him to a term of 135 months' imprisonment. ECF No. 192.

2. Petitioner, who waived his right to appeal his conviction or sentence in the plea agreement he signed with the government, filed a motion on March 4, 2016, asking the Court to appoint counsel and to reduce his sentence. ECF Nos. 211-212. The Court denied his motion the same day. ECF No. 212. On August 4, 2016, Petitioner wrote to the Court to ask for a

reduction in his sentence based on the 2015 amendment to the "minor role reduction" sentencing guideline, which took effect shortly after his sentencing, asking that his letter be treated as a § 2255 application. ECF No. 216. The Court appointed the Federal Public Defender to represent Petitioner and file a supplemental brief regarding his eligibility for relief. ECF No. 217. The Federal Public Defender filed a brief on October 4, 2016. ECF No. 222.

3. On October 11, 2016, Judge Gibney denied Petitioner's motion, stating that Petitioner would not have been eligible for a minimal or minor role reduction before or after the 2015 amendments. ECF No. 223.

4. On October 31, 2016, Petitioner filed another petition, again styled as a § 2255 motion. ECF No. 224. In this filing, he argued that his counsel at sentencing was ineffective for not asking the Court to continue the sentencing until after the minor role reduction amendment went into effect.

5. On August 9, 2017, this Court ordered the government to respond to the § 2255 motion within sixty days. ECF No. 232. The same day, the Court ordered the government to respond to the § 2255 motion filed by Petitioner's co-defendant and half-brother, Christopher Smith. *See* ECF Nos. 230-231, 233.

6. The government filed a timely response to the Smith § 2255 motion, *see* ECF No. 235, but erroneously failed to file any response to Petitioner's § 2255 motion. The government's failure to file a response was unintentional; the attorneys assigned to the case, who did receive the Notice of Electronic Filing, calendared only the order to respond to Smith's § 2255 motion.

7. The government's oversight was brought to the attention of the undersigned on March 7, 2019, by a Norfolk district court case manager.

8. The undersigned contacted defense counsel on March 8, 2019, and then ordered the transcript from Petitioner's sentencing. The government has now prepared a "complete, fully briefed response" to Petitioner's motion, as this Court's order instructed. ECF No. 232.

9. The trial court is given discretion in deciding whether to grant or deny untimely motions. *See, e.g., United States v. Johnson*, 953 F.2d 110, 116 (4th Cir. 1991). Likewise, the trial court also has discretion to consider late-filed response and reply briefs. *See, e.g., DeBlasio v. Johnson*, 128 F. Supp. 2d 315, 320 n.2 (E.D. Va. 2000); *Bank of Am. Inv. Services, Inc. v. Byrd*, 2009 WL 10184606, at *1 n.2 (E.D. Va. June 15, 2009).

10. The government submits that granting this motion and accepting its late-filed brief, which outlines the somewhat complicated procedural history of the post-conviction litigation in this case and cites caselaw discussing the issue raised by the § 2255 motion, will aid the Court in deciding the pending motion. Because Petitioner raised the same issue in a recently-filed "coram nobis" petition, ECF No. 238, the government's response brief will also aid the Court in deciding that most recent petition.

11. The government's proposed response brief, along with the transcript from Petitioner's sentencing hearing, is attached to this Motion for Leave to File. Should the Court grant this motion, the government will file the response brief through CM/ECF and serve a copy of the brief on Petitioner by mail.

For the foregoing reasons, the government respectfully asks the Court to accept its late-filed response brief.

Respectfully submitted,

G. ZACHARY TERWILLIGER
UNITED STATES ATTORNEY

By: /s/

Andrew Bosse
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, VA 23510
Phone: 757-441-6331
Fax: 757-441-6689
Email: andrew.bosse@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of March, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and mailed a true and correct copy of the foregoing to the following non-filing user:

Dwayne Banks
Inmate Register No. 85470-083
FCI Butner Medium II
Federal Correctional Institution
P.O. Box 1500
Butner, NC 27509

/s/

Andrew Bosse
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, VA 23510
Phone: 757-441-6331
Fax: 757-441-6689
Email: andrew.bosse@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

DWAYNE BANKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Criminal No. 2:15cr7
	)	Civil No. 2:16cv637
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RESPONSE OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The United States of America, by and through its attorneys, G. Zachary Terwilliger, United States Attorney for the Eastern District of Virginia, and Andrew Bosse, Assistant United States Attorney, hereby responds to Petitioner Dwayne Banks's motion pursuant to Title 28, United States Code, Section 2255, to vacate, set aside, or correct his sentence. Petitioner made a similar request in his recently filed "Motion for Reduction in Sentence Pursuant to Both 18 U.S.C. § 3582(c)(2) and Coram Nobis," ECF No. 238, which is also addressed in this response. The Government respectfully submits that Petitioner's motions should be denied because the Court already explicitly rejected argument in its Order of October 11, 2016, and because his claim is in any event without merit. ECF No. 223.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Case Against Petitioner and Other Members of the Imperial Gangsta Bloods.

On April 22, 2015, the grand jury sitting in Norfolk returned a Third Superseding Indictment charging Petitioner with conspiracy to manufacture, distribute, and possess with intent to distribute one kilogram or more of a mixture and substance containing a detectable

amount of heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (Count One); and possession with intent to manufacture and distribute one kilogram or more of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (Count Two). ECF No. 69. Petitioner's co-defendants—his half brother, Christopher Smith, a/k/a "Killa," and Ricky Jackson, a/k/a "Sosa," both high-ranking members of the Imperial Gangsta Bloods, each faced an additional charge of possession with intent to distribute over 100 grams of heroin; the grand jury also charged Smith with possessing firearms in furtherance of a drug trafficking crime. *Id.*

Counts One and Two carried a mandatory minimum term of ten years' imprisonment and a maximum term of life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A). On March 25, 2015, Petitioner made his initial appearance in federal court. ECF No. 56. CJA attorney Trey Kelleter was assigned to represent him. ECF No. 60.

On July 28, 2015, less than a week before trial, Petitioner's brother pleaded guilty to Counts One and Four of the indictment. ECF Nos. 144-148. Petitioner had been scheduled to enter a guilty plea the same day, but did not go forward with the change of plea hearing on July 28. ECF No. 142. Two days later, on July 30, 2015—four days before trial—Petitioner pleaded guilty to the heroin conspiracy charge in Count One. ECF Nos. 150-154.

The Probation Office then prepared a Presentence Investigation Report (the "PSR"). *See* ECF No. 239. The PSR's recounting of the offense conduct was taken from the statement of facts signed by Petitioner at his change of plea hearing. PSR ¶ 9; ECF No. 152. According to the statement of facts, Petitioner, like all of the defendants in the case (including two who pleaded guilty before Petitioner was indicted), was a member of the Imperial Gangsta Bloods. He and other members of the gang conspired to distribute heroin in the Hampton Roads area.

Most of the heroin was imported from New York City. While Petitioner was not a leader or organizer of the conspiracy, his role included travel to New York to purchase bulk amounts of heroin; he was also a street-level heroin dealer. PSR ¶ 9. The amount of heroin the group moved was substantial. The men initially purchased the drugs locally, in $10,000 increments. *Id.* Later, the group was supplied by Ricky Jackson, a New York-based Imperial Gangsta Bloods General who was able to procure large amounts of high-purity heroin. *Id.* Petitioner and others traveled to New York twice to procure heroin from Jackson on behalf of the conspiracy. *Id.* Once the heroin was "cut," he and other members of the gang distributed it to local users. *Id.*

The gang members did not just distribute heroin. They also were involved in significant violence in the city of Portsmouth during the summer of 2014. In particular, the gang had several altercations with a rival heroin operation run by the Saunders brothers, Portsmouth-based twins who were separately prosecuted in federal court. *See* Crim. Case No. 2:15cr2. In August 2014, Smith gave an order for the Saunders brothers to be eliminated. PSR ¶ 9. On August 19, 2014, gang members ambushed one of the Saunders brothers and shot him three times (he survived). *Id.* Four days later, members of the gang attacked a stash house used by the Saunders brothers. *Id.* Shots were exchanged but no one was injured. Later that night, a member of the gang instructed Petitioner and Howard Foust, who was also prosecuted in this case, to follow the girlfriend of one of the Saunders brothers. They were pulled over before they could find her. *Id.* Petitioner later texted his half-brother Smith, "dnt let des ppl tricc u of des streets be safe n kill em all if you go to"—translated from text-speak, "Don't let these people trick you off these streets, be safe and kill them all if you got to." *Id.*

Once Smith was arrested and several members of the gang began cooperating with law enforcement, Petitioner posted on his Facebook page the following message about Smith, who

held a "Godfather" rank in the gang: "It's always consequences behind tryna fu*k ova a made-Man." *Id.* Petitioner was not the only defendant to engage in threatening conduct directed at intimidating witnesses, and his text message must be read in the context of the other obstructive conduct in the case. In particular, Smith had sent text messages threatening violence against an individual he believed was cooperating with the government, and in other text messages he bragged about the ability his rank within the gang gave him to order acts of violence in local jails. *See* ECF No. 113, Gov't Response to Motion to Reinstate Institutional Phone Privileges, at 2. He compared the attempts to kill the Saunders brothers, described above, to hunting deer. *Id.* at 3. Eventually, after he used the jail telephone to convey coded orders for violence against people he believed were cooperating with the government, his access to the jail telephone was cut off. *Id.* at 3-7.

B. Petitioner's Guidelines Calculation and Sentencing.

The PSR attributed one kilogram of heroin directly to Petitioner. PSR ¶ 11. That was a conservative estimate—it did not factor in, to avoid potential double counting, Petitioner's own heroin dealing; it also did not attribute all of the heroin involved in the conspiracy to Petitioner. In other words, on his own account—without considering the breadth of the conspiracy—Petitioner qualified for the highest chargeable threshold of heroin available in the federal code, 21 U.S.C. § 841(b)(1)(A). His guidelines range was enhanced because of his obstructive behavior, including the Facebook post threatening those who were, in Petitioner's eyes, trying to "fu*k over" Smith. PSR ¶ 14. Because of Petitioner's obstructive conduct, the probation office declined to grant the two-level reduction for acceptance of responsibility. PSR ¶ 15. Petitioner's total offense level initially was calculated at 32. PSR ¶¶ 17-25.

He had a number of prior convictions, including possession with intent to distribute drugs, heroin possession, multiple trespassing convictions, carrying a concealed weapon, recklessly handling a firearm, petit larceny, multiple failures to appear, and a surprisingly large number of traffic violations, including "driving while suspended, 6th or subsequent offense" and multiple convictions for reckless driving. PSR ¶¶ 29-44. He appears to have had a total of at least *twenty-eight* arrests or other encounters with the police, not counting the instant offenses. PSR ¶¶ 29-59. Despite his lengthy record, he was assigned a criminal history Category IV. PSR ¶ 76. The Probation Office calculated his guidelines range as 168-210 months, with a mandatory minimum of 120 months. PSR ¶ 76. The probation office did not consider a minimal role reduction, and defense counsel did not object to the lack of a minimal role reduction.

Petitioner filed his sentencing position paper on October 22, 2015. ECF No. 172. He objected to both the two-level enhancement for obstruction of justice and to the denial of an offense level reduction for acceptance of responsibility. *Id.* He also moved for a downward departure, under U.S.S.G. § 4A1.3(b), arguing that his criminal history category substantially over-represented his criminal history. Petitioner argued, as he did at sentencing, that he was a small-time dealer whose involvement in the larger conspiracy was due to the influence of his half-brother Smith.

The government, in its position paper, agreed that Petitioner should receive the two-level reduction for acceptance of responsibility. ECF No. 173 at 2-3. The government noted, in response to Petitioner's arguments, that while he was not the leader of the conspiracy, his role within it grew over time, to the point where he traveled without Smith, with only Smith's girlfriend, to New York to purchase a bulk quantity of heroin from the conspiracy's supplier. *Id.*

at 5. The government also recounted Petitioner's role in working with another gang member to search for the Saunders brothers after a gun battle in August 2014. *Id.* at 6.

On October 30, 2015, the Honorable John A. Gibney, Jr., conducted the sentencing hearing. The Court denied the two motions Petitioner filed on his own account, "for ineffective counselor" and "for violation of the sentencing guidelines order," after patiently explaining the sentencing process to Petitioner. ECF Nos. 174-175; *see* Transcript of Proceedings, Oct. 30, 2015, attached as Exhibit A, at 3-12. The Court agreed to reduce Petitioner's offense level by two points to reflect his acceptance of responsibility but upheld the two-point enhancement for obstruction of justice. Ex. A at 17. That change resulted in a lowered guidelines range of 135-168 months. *Id.*

In its sentencing argument, the government agreed with the defense that Petitioner was the lowest-ranked member of the gang charged in the conspiracy, and that he was the least culpable of the charged defendants. As it stated, however, "that's within a highly culpable group .... Saying he is least culpable here is not to minimize his conduct .... Which is extremely serious." *Id.* at 20. It noted that Petitioner was present during two of the four trips to New York to purchase bulk quantities of high-purity heroin, and that he was the only charged defendant "involved in both the bulk purchases and the street-level sales." *Id.* As the government explained, "he was not just a mule .... After [the heroin] was cut and expanded, he was out on the street dealing with street-level users .... When his brother couldn't go [to New York], he went in his brother's place." *Id.* at 20-21. The government also explained that, while Petitioner was not directly involved in gun violence during the conspiracy, "he was in the car with [a co-defendant gang member] when they were staking out the girlfriend of one of the Saunders brothers after the shooting." *Id.* at 22.

Defense counsel argued at sentencing that Petitioner should be sentenced to the mandatory minimum, arguing that he was a lower-level conspirator who would have remained only a street-level dealer were it not for the influence of Smith and suggesting that Petitioner did not play an active role during the trips to New York to purchase heroin. *Id.* at 25-26.

The Court sentenced Petitioner to 135 months' incarceration—at the low end of the recalculated guidelines range. In doing so, the Court explained that Petitioner was "part of a major, violent, lawless gang in Portsmouth" who "provided support to their ... business model," went on trips to purchase heroin, and was involved in distributing the heroin once he returned. *Id.* at 26-27. The Court agreed that Petitioner had been "in the thrall of his [half] brother when he did this," but stated that "[i]t's all very, very serious conduct." *Id.* at 29-30. The Court explicitly took into account, in sentencing Petitioner at the low end of the guidelines, that in comparison to other Bloods members Petitioner was "certainly not the worst." *Id.* at 30. While Petitioner was sentenced to 135 months—only 15 months above the mandatory minimum, and significantly less than what the government requested—Smith was sentenced to life in prison. ECF No. 192 (Banks Judgment); ECF No. 188 (Smith Judgment).

C. Post-Conviction Litigation.

Petitioner, as part of his plea agreement, waived his right to appeal his conviction "and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement." ECF No. 151 (Banks Plea Agreement), at ¶ 5.[1]

[1] While the government's primary argument is that the Court already has resolved in the government's favor the only issue raised in Petitioner's motions, it notes that other courts have held that a valid waiver of the right to appeal a sentence precludes a petitioner from attempting to attack the sentence in a collateral proceeding by claiming ineffective assistance of counsel at

On March 4, 2016, Petitioner moved to reduce his sentence and for the appointment of counsel. ECF Nos. 211-212. The Court denied his motion the same day. ECF No. 212. On August 4, 2016, Petitioner wrote to the Court to ask for a reduction in his sentence based on the 2015 amendment to the "minor role reduction" sentencing guideline, which took effect shortly after his sentencing, asking that his letter be treated as a § 2255 application. ECF No. 216. The Court appointed the Federal Public Defender to represent Petitioner and file a supplemental brief regarding his eligibility for relief. ECF No. 217.

On October 4, 2016, the Federal Public Defender filed a brief explaining that Petitioner's filing could be construed as a motion under 18 U.S.C. § 3582(c) or 28 U.S.C. § 2255. Defense counsel suggested that Petitioner was not eligible for relief under § 3582(c), and noted that, to the extent the Court construed the motion as being made under § 2255, his sentence was not illegal when imposed, was not imposed in violation of the law, and did not have "any other defects cognizable under § 2255(a)." ECF No. 222 at 5. Defense counsel stated that it was not aware of any cases holding that Amendment 794—which revised the standards for the minor role reduction in U.S.S.G. § 3B1.2, and which took effect several days after Petitioner's sentencing—could be applied retroactively on collateral review. *Id.* Counsel stated, however, that Petitioner "might have a potential ground for an ineffective assistance of counsel claim under § 2255 to potentially achieve the benefit of Amendment 794," purportedly because his prior counsel could have asked to continue the sentencing so that it would take place after Amendment 794 became part of the Sentencing Guidelines, or asked the Court to apply Amendment 794 pre-emptively. *Id.* The Federal Public Defender did not analyze whether Petitioner would have been eligible for relief under either the pre- or post-Amendment 794 version of U.S.S.G. § 3B1.2. Nor did

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sentencing. *See, e.g.*, *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (stating that every Circuit to have address the issue has so held, and collecting cases).

counsel cite any case holding that defense counsel could be found ineffective for failing to move to continue a sentencing to take advantage of a forthcoming guidelines amendment.

After reviewing defense counsel's filing, the Court denied Petitioner's motion. ECF No. 223 (Order of Oct. 11, 2016). The relevant portion of the Order reads as follows:

> The defendant seeks a sentence reduction based on Amendment 794 to the United States Sentencing Guidelines, which clarifies the mitigating role reduction available in § 3B1.2. The Sentencing Commission, however, did not make Amendment 794 retroactive. *See* U.S.S.G. § 1B1.10. Accordingly, the defendant is not entitled to a sentence reduction. **Regardless, even if the Court did consider the amended § 3B1.2, the defendant did not play a "minimal" or "minor" role in the offense. Thus, upon due consideration, the Court DENIES the defendant's motion for sentence reduction.**

ECF No. 223 (emphasis added). Thus, Judge Gibney already has held that the Petitioner's sole basis for the instant § 2255 motion and the pending motion styled as a "coram nobis" petition is invalid.

Twenty days after receiving the Court's order, Petitioner filed another handwritten petition, styled as a "Motion for Ineffective Assistance of Counsel" under § 2255. ECF No. 224. In that motion, he again asks the Court to modify his sentence based on Amendment 794, arguing that his counsel at sentencing was ineffective for not trying to continue the sentencing until after Amendment 794 went into effect. It is unclear from the docket whether the motion was referred to a Magistrate Judge. (Smith's § 2255 motion was referred to the Magistrate Judge, *see* Docket Text Entry, Aug. 8, 2017.) On August 9, 2017, Magistrate Judge Roderick Young ordered the government to respond to both Smith's and Petitioner's § 2255 motions within 60 days. ECF Nos. 232-233. The government responded to Smith's motion, *see* ECF No. 235, but failed to respond to Petitioner's motion.

The government respectfully submits that no evidentiary hearing is necessary and asks the Court to deny Petitioner's § 2255 motion and his related "coram nobis" petition filed on March 7, 2019, and docketed as ECF No. 238. The motions must be denied because the Court already has rejected the sole rationale for Petitioner's ineffective assistance claim, and in any event that claim lacks merit.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255, there are four cognizable grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues; (2) challenges to the District Court's jurisdiction to impose the sentence; (3) challenges to the length of a sentence in excess of the statutory maximum; and (4) claims that the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255. "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *Jones v. United States*, 2010 WL 451320, at *4 (E.D. Va. Feb. 8, 2010) (quoting *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)). The movant bears the burden of proving his grounds for collateral attack by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958) (per curium).

III. ANALYSIS

Petitioner asserts his lawyer provided ineffective assistance by not asking the Court to continue the sentencing hearing so that Amendment 794's edits to the minor role reduction application notes to U.S.S.G. § 3B1.2 would have taken effect by the time Petitioner was sentenced. ECF No. 224, § 2255 Motion, at 1.

Amendment 794, which took effect on November 1, 2015, two days after Petitioner was sentenced, introduced several changes to the application notes to U.S.S.G. § 3B1.2—not to the sentencing guideline itself.[2] Section 3B1.2 allows for a four-point offense level reduction if a defendant was a "minimal participant in any criminal activity," a two-point reduction if a defendant was a "minor participant in any criminal activity," and a three-point reduction if a defendant's role fell between that of a minor and a minimal participant. U.S.S.G. § 3B1.2. The application notes were edited, *inter alia*, to include several non-exhaustive factors for a court to consider in weighing whether to apply the reduction, including:

> (i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts performed and the responsibility and discretion the defendant had in performing those acts; (v) the degree to which the defendant stood to benefit from the criminal activity.

2015 Proposed Amendments at 48. The amendment also added the statement that "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment," and that "[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity." *Id.*

Proposed guidelines amendments, like Amendment 794, are submitted to Congress under 28 U.S.C. § 994(p). *See* 2015 Proposed Amendments at ii. They only become effective by

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[2] *See* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf – the "2015 Proposed Amendments" – describing, at pages 45-49, the proposed edits to the application notes, which are shown in redline.

operation of law if Congress does not act to block or amend them. *Id.* Congress can alter, change, or refuse to allow an amendment to become operative if it acts before the effective date, which in the case of Amendment 794 was November 1, 2015. In other words, the fact that a guideline amendment is proposed does not mean it will automatically become part of the Sentencing Guidelines on the effective date.

A. Defense Counsel Provided Effective Assistance.

1. Legal Standard For Claims Of Ineffective Assistance Of Counsel.

Under well-settled principles first articulated by the Supreme Court in *Strickland v. Washington*, an individual alleging ineffective assistance of counsel must demonstrate: (1) that his attorney's performance was constitutionally deficient; and (2) that he was so prejudiced by his attorney's deficient performance that there is a reasonable probability that, but for the deficiencies, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *see also Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

The "deficient performance" component of this two-pronged formulation requires a litigant to demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That is, a litigant must show that his attorney's performance fell below an objective standard of reasonableness. *Id.* at 688. Judicial scrutiny of an attorney's performance "must be highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Furthermore, in considering whether an attorney performed below the level expected of a reasonably competent attorney, it is necessary to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. As stated by the Fourth Circuit, the

standard for deficient performance is "not merely below-average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance." *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992).

The "prejudice" component of *Strickland* requires a litigant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This prong of the *Strickland* test focuses on whether an attorney's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Id.* at 687. The defendant "bears the burden of proving *Strickland* prejudice," and "[i]f the defendant cannot demonstrate the requisite prejudice, a reviewing court need not consider the performance prong." *Fields v. Attorney Gen. of State of Md.*, 956 F.2d 1290, 1297 (4th Cir. 1992).

A litigant who alleges ineffective assistance of counsel following the entry of a guilty plea, as Petitioner does here, has an even higher burden to meet. *See, e.g.*, *Hill v. Lockhart,* 474 U.S. 52, 53-59 (1985); *United States v. Dyess*, 478 F.3d 224, 237 (4th Cir. 2007), *cert. denied*, 552 U.S. 1063 (2007). In such cases, the "prejudice" prong of *Strickland* is "slightly modified. Such a defendant 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The failure of a litigant to meet *either* component of the *Strickland* test defeats an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. The court need not address both components of the test if the litigant makes an insufficient showing on one prong of the test. *Id.* at 697. Additionally, a petitioner is not entitled to a hearing on an ineffective assistance of counsel claim based on "[u]nsupported, conclusory allegations." *Nickerson v. Lee*, 971 F.2d

1125, 1136 (4th Cir. 1992), *abrog'n on other grounds recog'd, Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999). Here, Petitioner cannot satisfy either of *Strickland*'s requirements.

2. The Court Already Held that Petitioner Cannot Show Prejudice.

Because the Court's order of October 11, 2016, resolves the instant motion, the government will first discuss the prejudice prong and then explain why counsel's performance was not deficient.

Even assuming that effective assistance would have required defense counsel to move to continue a sentencing so that a guidelines amendment would take effect, defense counsel's decision not to ask for a sentencing continuance could only *potentially* be prejudicial if the guidelines amendment would have made Petitioner eligible for a minimal role reduction. This Court already has held that it would not have. In his October 11, 2016, Order, Judge Gibney stated that, "even if the Court did consider the amended § 3B1.2, the defendant did not play a 'minimal' or 'minor' role in the offense." ECF No. 223.

That Order resolved the only argument presented here, and that Order is binding on Petitioner, both through law-of-the-case doctrine and traditional estoppel principles. *Cf. Sealfon v. United States*, 332 U.S. 575, 578 (1948) (holding that the principle of res judicata "applies to criminal as well as civil proceedings"). As the Supreme Court explained in *Bravo-Fernandez v. United States*, "[i]n criminal prosecutions, as in civil litigation, the issue-preclusion principle means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." 137 S. Ct. 352, 356 (2016) (internal quotation and citation omitted).

Even if Petitioner were allowed to relitigate the same issue through what is in effect a successive habeas application, he would still lose on the merits. He was far from a minor or

minimal participant in the charged conspiracy and would not qualify, before or after Amendment 794, for a role reduction under U.S.S.G. § 3B1.2. While his actions were somewhat less egregious than those of the other gang members who took part in the conspiracy, he was not "*substantially* less culpable" than the average participant in this conspiracy, especially as this was a case in which only higher-level conspirators were charged and every charged conspirator acted egregiously. U.S.S.G. § 3B1.2, application note 3, as amended.

In fact, among the four charged defendants—excluding Smith, whose record and actions made him substantially more culpable than any other co-conspirator—only Petitioner was involved in both transporting large amounts of heroin from New York to Hampton Roads and distributing that heroin to end-users in the local area. He was personally attributed, conservatively, with one kilogram of heroin—even without considering the significantly higher amount of heroin moved by the other co-conspirators in the group, or the heroin Petitioner was selling on the street. PSR ¶ 11; *see* PSR Addendum at 23 (noting that post-"cut" weight of the heroin imported from New York was approximately 3.5 kilograms). While he was not directly involved in the shooting incidents, he and fellow gang member Howard Foust attempted to track down the Saunders brothers—via one of their girlfriends—after the last shooting in August 2014. The intent, presumably, was not to exchange pleasantries. Luckily for Petitioner, he and Foust were stopped before they found their target. Also unlike the other co-conspirators, again excluding Smith, Petitioner was the only individual who actively obstructed justice and received an enhancement for doing so. On these facts—as the Court already has held—there is no way Petitioner qualifies as a minor or minimal participant in the conspiracy. Because he cannot show any prejudice under *Strickland*'s second prong, his motion must be denied. *See Strickland*, 466 U.S. at 687-89.

3. Counsel Did Not Perform Inadequately.

Petitioner's motions fail on the first prong of *Strickland* as well. Neither Petitioner nor the Federal Public Defender cited, and the undersigned has not located, any case in which a court has found counsel ineffective for failing to move to continue a sentencing so as to potentially take advantage of a forthcoming proposed amendment to the sentencing guidelines. In fact, some courts have suggested that such a motion would be inappropriate.

As the Federal Public Defender noted in its brief on Petitioner's behalf, a sentencing court is required to use the guidelines manual in effect on the date a defendant is sentenced. ECF No. 222 at 3 (citing *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012)). Forthcoming amendments to the sentencing guidelines are not applicable until their effective date, and, in theory at least, Congress could block them at any point before they take effect. A request to continue a sentencing because a guidelines amendment *may* take effect, which *may* lead to a different guidelines range, is speculative and, as noted below, arguably improper. A holding that a defense attorney is *ineffective* for failing to attempt to game the timing of the guidelines amendments would create perverse incentives: defense attorneys would feel compelled to attempt to delay any sentencing potentially affected by a proposed—*i.e.*, a *possible*—guidelines amendment until after November 1 of any given year, when the proposed amendments typically take effect. If a court were to hold counsel ineffective for making such a request, sentencing continuance requests would become practically mandatory in any number of cases. Such a practice would destroy the district court's ability to manage its docket and the timing of sentencings.

Several courts have denied § 2255 motions premised on a similar ineffective assistance argument while pointing to the practical difficulties accepting such an argument would cause. In

Romero v. United States, the district court rejected the claim under both prongs of *Strickland.* 2017 WL 4516819, at *6 (S.D.N.Y. Sept. 21, 2017). The court noted that the Second Circuit held in *United States v. Prince*, 110 F.3d 921, 926 (2d Cir. 1997), that defense counsel's failure to request a continuance so as to take advantage of a pending amendment to the guidelines was not objectively unreasonable and did not qualify as ineffective assistance. 2017 WL 4516819, at *6. Numerous other courts have rejected a similar claim on similar reasoning. *See id.* (citing, *inter alia*, *United States v. Briceno-Rodriguez*, 47 Fed. App'x 167, 169 (3d Cir. 2002) ("The proposed amendment was just that—a proposed amendment .... There was no guarantee that Congress would approve the amendment ... we will not hold counsel accountable simply because Congress in fact did so."); *United States v. Garcia*, No. 92-50675, 999 F.2d 545, 1993 WL 263459, at *1 (9th Cir. July 13, 1993) ("[T]he opportunity for a better sentence under a new Amendment to the Guidelines is not a legitimate reason to request a continuance .... Granting a continuance on this basis would greatly inconvenience a district court's ability to impose sentence as defendants would repeatedly seek continuances and cause delays upon learning of Amendments to the Guidelines that may benefit the defendant but are yet to take effect.")).

Likewise, in *Allen v. United States*, 2010 WL 703115 (M.D.N.C. Feb. 24, 2010), the court explained:

> Although Petitioner's attorney could have perhaps made a motion to continue sentencing in hopes that the pending Guidelines amendments would reduce Petitioner's sentence, Petitioner cannot demonstrate that he was prejudiced because no such motion was made.... [M]otions to continue sentencings based on pending Guidelines amendments pose particular problems. Amendments to the Guidelines are proposed months in advance and may or may not eventually be allowed by Congress to become effective. If the rationale suggested by Petitioner were correct, numerous sentencings which could be affected by pending amendments would have to be stayed for months due to proposed amendments even though the amendments might never go into effect. This presents ample rationale for rejecting motions to continue based on pending Guidelines amendments. It also means that it would appear unlikely that the motion to

> continue that Petitioner claims his attorney should have filed would have been granted. He cannot show that his attorney provided him with ineffective assistance of counsel by not filing the motion. His claim is too speculative to proceed.

2010 WL 703115, at *2 (citation and footnote omitted).

In *Beaver v. United States*, the district court rejected a similar argument because the petitioner failed to identify which guidelines amendment would have benefited him, but also because he did not explain how an amendment would have lowered his sentence, failed to make any showing that the government or the Court would have consented to a delay in sentencing, and did not show he had any right to be sentenced under what were then-forthcoming amendments. 2017 WL 708728, at *3 (W.D.N.C. Feb. 22, 2017); *see also United States v. Lawin*, 779 F.3d 780, 781–82 (8th Cir. 2015) (finding district court did not abuse its discretion in denying a defendant's request to continue a sentencing hearing until after new guidelines amendments took effect).

Additionally, at least one court has held that it would be affirmatively improper for a judge to grant or deny a continuance so as to change the applicable sentencing guidelines. In *United States v. Tanner*, Judge Posner, addressing a similar argument, stated that the district court's "power to grant or deny a continuance is abused when it is exercised not in order to manage a proceeding efficiently but in order to change the substantive principles applicable to a case." 544 F.3d 793, 796–97 (7th Cir. 2008) (citing *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995), *overruled on other grounds in United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006) (stating that the defendant's argument would create "an ominous situation in which every attorney whose client faces sentencing would attempt to delay sentencing each time lawmakers debate a new standard or amendment. This is an outcome that we cannot allow.")).

It is arguable, then, whether it would even have been appropriate for the defense attorney to ask for a continuance, or for the Court to grant one, on the basis that amended sentencing guidelines would favor (or disfavor) Petitioner. *A fortiori*, defense counsel did not provide ineffective assistance by failing to make such a motion. And that is before taking into account the failure of Petitioner's argument that he would have benefited from the guidelines amendments. As described above, and as this Court already has held, he would not have. Under these circumstances, there can be no doubt that his counsel was not ineffective for failing to make an arguably improper motion in the hopes of achieving an impossible result. Petitioner's claim for relief is without merit, and his motions should be denied.

IV. CONCLUSION

For the foregoing reasons, the Government submits that Petitioner has no grounds for relief under 28 U.S.C. § 2255 or pursuant to a "coram nobis" petition, and that his motions, including the motion to vacate, set aside, or correct his sentence, should be denied.

Respectfully submitted,

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App'x D

PERTINENT PARTS OF MR BANKS
FILINGS & RESPONSES IN
US v BANKS, 2:15CR07

IN THE UNITED STATES DISTRICT COURT FOR THE

THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

Dwayne Banks,
Petitioner-Pro Se

vs

United States of America

Case No(s): 2:15-CR7
2:16-CV-637

PETITIONERS TIMELY RESPONSE TO ALL OF THE GOVERNMENTS FILINGS

Comes now the petitioner, Mr. Dwayne Banks, hereby pro se, to file his timely reponses to the governments [2 yrs delayed filing and responses] that this court must deny and strike from the record.

However, the petitioner has now become aware that the 2255 was still pending & therefore, request that the Court convert the subsequent filings as additional attachments to the 2255 as supplements instead of the 3582 /Coram Nobis filings and Grant the 2255 filing and Order the Resentencing of Banks based upon the counsels ineffectiveness and the subsequent clarifying amendments for the Strict Liability Reduction, Minor/Mitigating Role Reduction and the Additional Levels for the Timely Acceptance , which are all clarifying and retroactive and even came forth since the delayed filings..

Respectfully submitted on this 2 day of April, 2019 by

S/ _____
Mr. Dwayne Banks

ARGUMENTS WARRANTING RELIEF

The Court has received prior filings that show that the petitioner is entitled to be Resentenced in accordance with the clarifying laws and amendments thereof. A clarifying amendment shows the Courts "how and when " the law was and is supposed to be applied on various issues. In this case, the Commission issued and passed 3 separate amendments, which all directly affect the petitioners sentence and shows that he was incorrectly sentenced and requires the Resentencing.

1. Amendment 794 Minor / Mitigating Role reduction
2. Acceptance of Responsibilty full Reduction (Effect Nov. 1,2018)
3. Strict Liability drug quantity reduction

The Court ordered the government to repond to the petitioner's 2255 in 2016, in which the government has [now] conceded that it failed to respond to Banks, but that it did respond to the other co-defendants. Therefore, the government is requesting a "extra-ordinary action from the Court and requesting for the Court to allow the 2 yr plus delay to be overlooked and even cites some case to this position. Unfortunately , none of the cases cited by the government allowed any government officials a 2-3 yr extension. So the governments motions and responses must all be struck from the record and the government doesn't get a 2nd bite at the apple according to the new 4th circuit case law of US v Hodge 17-6054, the government has lost its right.

Next, the petitioner filed under the claim of ineffective assistance and the former counselors failure to request the mere extension of

2-3 days, which would have possibly changed the outcome of the sentence for Mr. Banks. Even the original lawyer that was appointed when I filed the motion for reduction originally conceded that this is a ground for ineffective assistance and the petitioner did raise it as that and is entitled to the reductions today and even a Evidentiary Hearing to resolve why the counsel who is suppose to stay abreast of the current changes in the laws would not have requested the miniscule delay especially when it went into effect 2 days later and also possibly shortened the sentence of their client.

The 11th Circuit has just resolved a case such as this on the 2255 forum , where the defendant raised the issues under the IAC claims and the Amendment 794 issues. (Hipp v US 740 Fed. App'x 186 ,17-13858 (11th Cir. 2018). The 11th Circuit Vacated and Remanded for the Court to properly evaluate the merits of the claims and then Grant the Relief being sought, which was the reduction based upon the clarifying and retroactive amendments, that could not be raised in the 3582 forum and could not be given the reduction, unless raised in such colorful forum as the IAC and 2255 or Direct Appeal stages.

Therefore, the petitioner is entitled to be be properly sentenced and is also entitled to the additional points off (3 points instead of 2 points) and is also entitled to to be sentenced based soley upon his own minor conduct and not the full range of conduct.

Therefore,the petitioner moves for the Court to Vacate the Sentence and to Issue the Revised PSR and Resentence the Petitioner as well as Grant the Evidentiary Hearing.

Respectfully submitted on this 2 day of April, 2019

S/ _____

Mr. Dwayne Banks
Fed NO. 85470-083
FCI Butner II
PO Box 1500
Butner, NC 27509

Certificate of Service, 28 USC 1746

I, Dwayne Banks, do hereby swear under the penalty of perjury that a copy of the 2255 Response has been sent to the E.D.V.A Norfolk Division District Court and a copy has been sent to the AUSA of Record, Andrew Bosse, 101 W.Main St., Suite 8000, Norfolk, VA 23510 on this 2 day of April, 2019 from FCI Butner II.

S/ _____
Mr. Dwayne Banks

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF VIRGINIA (NORFOLK)

Dwayne Banks
Petitioner-Pro Se

Case No. 2:15CR7

vs

United States of America

Motion for Reduction in Sentence pursuant to both 18 USC 3582(c)(2) and Coram Nobis

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Comes now the petitioner, Mr. Dwayne Banks, hereby pro se, humbly before the Court to file this Motion for Reduction in his Sentence pursuant to the Retroactive and Clarifying Amendments of Amendments 790,794 & 811 Acceptance of Responsiblity Clarifiying Amendment effective Nov. 1,2018.(See Attached)

I. FACTS WARRANTING REDUCTION

The petitioner was indicted for various drug offense violations in which the petitioner plead guilty to ct-1 ,Conspiracy to Distri-bute narcotics stemming from the 2013-2015 era.(See Doc 151) As a part of the plea, the petitioner would be given the 2-3 levels off for acceptance, but he was not given it at sentencing. Also,as part of the plea, the statement of facts clearly showed that Banks was not the leader of the organization but instead was a mere participant and at times did not even know what was going on and that Banks hada limited position in the hierarchy.(see Doc 152

p.1,parg 1..the defendant was neither the leader nor an organizer within the conspiracy).

However, after the plea, the PSR was prepared and determined that Banks "played a minor role in the conspiracy" and the PSR also found that the petitioner at times did not know about various actions that were going on in the conspiracy or on the trips.(PSR 9,11,13). In fact, the government states in its [Position of the US with Respect to Sentencing filing (DOC 173 p. 9] that."Banks conduct within the conspiracy was relatively less egerious than that of others & that the government has no evidence that the defendant possessed a dangerous weapon during the course of his drug dealings."

Both the Government and PSR showed that Banks was not to be confused with his brother,who operated at a completely different level of cuplability and that Banks role is much lower in the conspiracy.In which, even the lawyer argued that .."nothing will be accomplished by forcing Banks to stay in prison beyond 120 mths.:(Doc 172.

Therefore, because of these clear and accurate findings of culpability., I am requesting that the Court Grant the 2-4 level minor role Reduction as alotted under Amendment 794 and that the Court also Grant the Reduction of [3] levels for the timely acceptance and that the Court Grant the Amendment 790 and correct the quantity accounted for Banks...seeing that the US Sentencing Commission has now "clarified each of these things and it gives the Court the right to modify the sentence today. (Amendment 811); US v Aybar-Ulloa 15-2377 (1st Cir. 2019); US v Audain 15-13217 (11th Cir. 2018); US v Barona-Bravo 15-13024 (11th Cir. 2017)

3553 FACTORS TO BE CONSIDERED WHEN FASHIONING REDUCTION
(US v Martin & Mangual 17-6199 & 17-6200 (4th Cir. Feb. 26,2019)

The petitioner requested that the court take judicial notice of the following rehabilational classess and educational accomplishments as the Peppers and Tapia and numerous rulings require to be considered when a modification/reduction in sentence is applied for.

Since the petitioner's incarceration he has obtained his G.E.D and has been paying his fines. The petitioner has achieved a insurmountable education in various business classes, self awareness classess and real estate classes as well as finacial classes. The petitioner has not had institutional infractions and has maintained his family ties as adovacted by the BOP. (See Attached Certificates)

Therefore, as part of tne sentencing and motions for reduction,the court must now considered these significant and admirable changes that have occured in Mr. Banks and thus Grant the maximum reduction in the sentence in order to achieve a just reduction based upon these clarifying and retroactive reductions.

Conclusion

The petitioner prays that the Court Grants the maximum Reduction.

Respectfully submitted on this 2 day of MAR, 2019 by

S/ Dwayne Banks

Mr. Dwayne Banks
Fed No 85470-083
FCI Butner II
PO Box 1500
Butner,NC 27509

Certificate of Service, 28 USC 1746

I, Dwayne Banks, do hereby swear under the penalty of perjury that a copy of the Motion for Reduction has been sent along with the Certificates to the E.D.VA (Norfolk) District Court on this 2 day of MAR, 2019 by way of US Postal Mail from FCI Butner II.

S/ DwayneBanks

Mr. Dwayne Banks