APPENDIX A

FOURTH CIRCUIT OF APPEAL FILING AND DENIAL ORDER

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7182

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEDRIO LEKEIS SUMMERVILLE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:15-cr-00100-RAJ-DEM-1; 2:17-cv-00205-RAJ)

Submitted: July 31, 2020 Decided: September 1, 2020

Before KEENAN and RICHARDSON, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Kedrio Lekeis Summerville, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kedrio Lekeis Summerville seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 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). 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). 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 Summerville 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

* We previously remanded this case to the district court for the limited purpose of enabling the court to determine whether Summerville had shown excusable neglect or good cause warranting an extension of the time to appeal. *See United States v. Summerville*, 767 F. App'x 529 (4th Cir. 2019) (No. 18-7182). On remand, the district court granted Summerville's motion for extension of time to file a notice of appeal. Summerville's appeal is therefore deemed timely filed.

are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: September 1, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7182
(2:15-cr-00100-RAJ-DEM-1)
(2:17-cv-00205-RAJ)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KEDRIO LEKEIS SUMMERVILLE

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

parties objected to the drug weights in this case, and since both parties objected to the drug weights, Mr. DePadilla, I think I'm simply going to start with the United States first.

I understand, from looking at your position paper, that you take the view that the drug weights should be different from what's calculated in the program. You believe that the cocaine weights and the cocaine base weights should be different, ending up with a total drug weight of 8555.86 kilograms; is that correct?

MR. DePADILLA: Yes, Your Honor, that's the government's position.

THE COURT: All right. And I take it, Mr. Taliaferro, you do not disagree with that position?

MR. TALIAFERRO: Yes, I do.

THE COURT: I also take it, Mr. Taliaferro, that you had an objection to the drug weights also; was that correct?

MR. TALIAFERRO: That's right, yes, sir.

THE COURT: Am I not also correct, Mr. DePadilla, that the United States is not prepared to support the drug weights that are in the Presentence Report?

MR. DePADILLA: No, Your Honor, only what we have in our position paper.

THE COURT: That being the case, the United States is not prepared to establish the drug weights in the Presentence Report by a preponderance of the evidence, the

And I think I bear some responsibility for where we are today, just because I was so anxious that he get up front on this thing and get to be the first in line, that I myself thought that he was probably bigger than he was.

And then once we started doing the debriefings, as I said, it became immediately apparent that he wasn't what he was thought to be. The true amounts are much less.

I would say this: If you look at -- you have got letters in there from people, it appears that the -- his children admire him and he's not out here today. He's got his children out here, he's got nieces, cousins, he's got parents -- he's got everybody out here. So he's not all bad. He's got some good things going for him.

And he has -- he has a future that, if he -- if he can get his GED finally in all of this. But you can see that he made attempts at work, and the felony conviction has always been a handicap.

He's 39 years old, he can read and write, which might not seem important, but it is important because it means he can do pretty much what he wants to do.

He's got a letter from his sister in there that says though he did not finish high school, he would read the kids' textbook. He's always been curious, always reads the newspaper. He's got a future, he's got a future if he's given a chance.

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

No. 18-7182, US v. Kedrio Summerville

2:15-cr-00100-RAJ-DEM-1, 2:17-cv-00205-RAJ

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: 9/18 /2018

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: Kedrio Summerville, Kedrio Summerville,86081-083 Date: 10/18 /2018

2. Jurisdiction

Name of court from which you are appealing:

Eastern District of Virginia , Norfolk Division

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

7/11/2018 (See App'x A of filings)

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. Whether the trial and post conviction counselors were ineffective?

Supporting Facts and Argument.

See attached brief

Issue 2. NA

Supporting Facts and Argument.

NA

Issue 3. NA

Supporting Facts and Argument.

NA

Issue 4. NA

Supporting Facts and Argument

NA

5. **Relief Requested**

Identify the precise action you want the Court of Appeals to take:

I am requesting for the Court to grant the COA and decide whether the counselors were ineffective and a newsentencing. In alternative to Restore the petitioner to the Evidentiary Hearing and Originalclaims.

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?

Kedrio Summerville

Signature Kedrio Summerville

[Notarization Not Required]

Kedrio Summerville

Kedrio Summerville

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

****

I certify that on 10/18/18 I served a copy of this Informal Brief on all parties, addressed as shown below: AUSA Andrew C. Bosse/ Joseph E. DePadilla
8000 World Trade Center, 101 West Main St.
Suite 8000, Norfolk VA 23510

Kedrio Summerville

Kedrio Summerville

Signature Fed No. 86081-083

NO STAPLES, TAPE OR BINDING PLEASE

IN THE UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

United States of America

-vs-

Kedrio L. Summerville

Case(s): 18-7182
2:17-cv-00205-RAJ
2:15-cr-00100-RAJ-DEM

PETITIONER/APPELLANTS INFORMAL BRIEF SUBMISSION

Comes now the petitioner/appellant Mr. Kedrio L. Summerville,hereby pro se, humbly before the 4th Circuit of Appeal COA Panel seeking a COA, so that the Appeal Court may hear the petitioner's meritable 5th & 6th Amendment Due Process and Ineffective Assistance Claims that were denied on the District Court level due to the Post-Convictions Counsel "abandoning them and filing his own meritless claims". (Buck v Davis 15-8049 (Sp. Ct. 2017); US v Wiggins 16-4540 (8th Cir. 2018)

In alternative, the COA panel should Grant the COA, and Vacate the Judgment with instructions to Hold the Original Evidentiary Hearing... seeing that the trial counsel conceded at sentencing that.."he was the "cause" of the higher sentencing and statutory provision being given to Summerville, thus creating the"presumed prejudice" against the petitioner.

see attached brief...

Submission date: 10/18/2018

S/ Kedrio Summerville

Kedrio L. Summerville
Fed No. 86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

ISSUES FOR APPEAL COURT

The Supreme Court has held that the Counsel is ineffective when they fail to investigate the facts prior to plea or trial. The Supreme Court has also held that the Counsel cannot "concede/stipulate" the petitioner's guilt. The Appeals Court has also held that Post conviction counsel.. can be ineffective. Then the Supreme Court has held that the guideline sentence that is based upon errors of the court may not stand even if the sentence falls between the correct and incorrect guidelines. (US v Glover 99-8576 (Sp. Ct 2000); Strickland v Washington 466 US .668 (1984); Lee v US 16-327 (Sp. Ct 2017); McCoy v Louisiana 138 S.Ct 1500 (Sp. Ct 2018); Rosales-Mireles 16-9493 (Sp. Ct 2018); Brown v Brown 847 F.3d 502 (7th Cir. 2017)

ARGUMENTS

In theory, at least, many subscribe to the "belief" that it is better to let 10 to 100 guilty persons go free rather that convict an innocent person. Indeed, the American Criminal Justice System provides criminal defendants like Summerville a "panolpy of important constitutional rights and protections", including effective assistance of counsel, in large part to ensure that the innocent are not convicted for crimes that they did not commit.

But these same lawyers are not only there to protect the innocent but also to ensure that , if the defendant is found guilty after trial or if he /she pleads guilty, that he/she will receive a fair

sentence based upon "accurate information, not hypothetical and unreliable information or quantities."

In Summerville's case, the counsel at sentencing conceded that.. it was the counsel's fault for the predicatement Summerville is in today because he failed to investigate prior to the plea and after the plea he found out that the information the government had was false & unreliable. (See sent. trans.). However, after the counsel (Taliaferro) conceded to his own ineffectiveness..he then "agreed with the government to concede and stipulate to 8000 grams without conferring with the petitioner and afterwards, it was also shown that these quantities were also incorrect, but the petitioner was sentenced upon these fabricated findings. (McCoy v Louisiana,supra).

Summerville filed a timely 2255 and raised the counsel's ineffectiveness, in which the District Court immediately Granted the Evidentiary Hearing and issued a Writ and brought the petitioner before the Court to resolve the 3 claims and the counsels ineffectiveness confession. On the day of the Evidentiary Hearing, the petitioners Evidentiary counsel asked for a Extension due to him being unprepared. (DOC 57-59), This same new counsel (Trey Kelleter) filed a new 2255 claim that was never litigated or contested and abandonded all of the petitioner's pro se claims that got him personally before the court without the petitioner's consent. Not only did he file the meritless claim, but also asked that a evidentiary hearing not be done and then the Court denied all the claims and then withdrew

the previously Granted Evidentiary Hearing as well due to the Counsel ineffective and meritless argument. Therefore, it is clear that the post conviction counsel was totally out of line and ineffective and caused the petitioner to suffer prejudice. Which warrants the COA to be Granted. (Brown v Brown 17-887, 847 F.3d 502(7thCir. 2017).

In Brown v Brown, the Appeal court reversed the district courts dismissal of the defendants post conviction petition which claimed that the trial counsel was ineffective. In making the reversal, the Appeal court held that the petitioner was also entitled to a Evidentiary Hearing to determine if his post conviction counsel provided ineffective assistance and that the trial counsels ineffective assistance can be considered as well. Summerville,the petitioner ,filed his pro se claims, was Granted the Evidentiary Hearing, the parties were there and the post conviction counsel abandonded all of the petitioner meritable claims and substituted with a frivoulous claim that was not even properly preserved or even a issue.

The law clearly established that a conspiracy may have different players and continue but the proper defense is not that he got out and came back, but that he totally withdrew and never came back.Any compentent lawyer worth his salt would see that this was a doomed argument and for the counsel to give up the conceded and meritable arguments of Summerville, it cannot be said that he was compentent and effective, but instead was deficient and his actions fell below the objectively reasonable standards and professional norms, unless the norms have also been lowered again.

RELIEF REQUESTED

The petitioner is requesting for the COA to be Granted and that he be allowed to be heard on the merits on all of his claims before the 4th Circuit of Appeal and that Oral Arguments be set and Counsel be assigned. Or in alternative, that the Court Vacate the 2255 denial, with instruction to "restore" the petitioner back to the Evidentiary Hearing point, Order the trial counsel Taliaferro to come back before Court and to renew his original claims that the post conviction counsel abandoned without consent from the petitioner.

The petitioner is also, requesting that the post conviction counsel be reprimanded for his failed strategy and meritless actions that led the Court to the immediate denial without the Hearing.

Respectfully submitted on this 18 day of Oct., 2018 by,

S/ Kedrio Summerville

Kedrio L. Summerville
Fed No. 86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

Certificate of Service, 28 USC 1746

I, Kedrio L. Summerville, do hereby swear under the penalty of perjury that a copy of the Informal Brief has been sent via US Postal Mail to the 4th Circuit Court of Appeal and a copy has been sent to AUSA's Andrew C. Bosse, Joseph E. DePadilla at 8000 World Trade Center , 101 W. Main. St., 23510 on this 18 day of Oct. 2018.

S/ Kedrio Summerville
Kedrio L. Summerville

IN THE FOURTH CIRCUIT COURT OF APPEAL

Kedrio Summerville
Appellant-Pro Se

vs

United States of America

Case No. 18-7182

MOTION TO SUPPLEMENT PENDING COA AND APPEAL

Comes now, the Appellant/Petitioner, Kedrio Summerville, hereby pro se, humbly before the Court to supplement his pending COA & Appeal with the 4th Circuit's case law of US v Slade, that supports the removal of the "leadership enhancement and the Resentencing of the petitioner."

I.

As the Court has been made aware of the actions that led to the petitioner's current filing based upon the Ineffective Assistance among other issues. The petitioner has requested that the Court do 1 or more of the following:

1. Vacate the Conviction and Sentence with INstructions to Resentence the petitioner under the corrected 5-40 statutory penalty and guidelines based upon the correct findings.
2. Grant the 2 Separate Evidentiary Hearings due the original & Evidentiary Hearings Ineffectiveness and careless mishandling of Summervilles case .

However, upon researching the 4th Circuits caselaw, the petitioner has discovered a similiar case and precedential case that surroundings the leadership enhancement of when its suppose to be applied and when it was wrongly applied. In this case, the petitioner argued in his Pro se 2255 filings on p. 7-8 that the leadership enhancement was wrongly applied because the revised PSR had removed it along with some of the drugs and it was not to be applied. Unfornately, the Court adopted the incorrect version of the PSR and applied the leadership. Therefore, in light of the US v Slade, 08-4932 (4th Cir. 2011), the petitioner request for the Court to send the case back down so that the error may be corrected. (See US v Mohamdi 17-7395 (4th Cir. 2018)

Respectfully submitted on this 01 day of April, 2019 by

S/ Kedrio Summerville

Kedrio Summerville
Fed No 86081-083
FCI Butner II
PO Box 1500
Butner, NC 27509

Certificate of Service, 28 USC 1746

I, Kedrio Summerville, do hereby swear under the penalty of perjury that a copy of the COA supplement has been sent via US Postal Mail on this 01 day of April ,2019 to the Fourth Circuit Court of Appeals Court and to AUSA(s) Andrew C. Bosse & Joseph E. DePadilla, at 8000 World Trade Center, 101 W. Main St.,Suite 8000, in Norfolk VA 23510 from FCI Butner II.

S/ Kedrio Summerville
Kedrio Summerville

APPENDIX B

EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION 2255 FILING RESPONSES AND COURT ORDER OF DENIAL

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

FROM: Rodriquez, Veronica
TO: 86081083
SUBJECT: d
DATE: 09/28/2018 05:21:05 AM

Case 2:15-cr-00100-RAJ-DEM Document 58 Filed 01/30/18 Page 1 of 1 PageID# 381

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA NORFOLK/NEWPORT NEWS DIVISION
Tuesday, January 30, 2018 MINUTES OF PROCEEDINGS IN Open Court PRESENT: THE HONORABLE RAYMOND A. JACKSON, U.S. DISTRICT JUDGE Deputy Clerk: P. Thompson Reporter: Janet Collins, OCR
Set: 11:30 a.m. Started: 11:35 a.m. Ended: 11:40 a.m.
Case No. 2:15cr100 United States of America v. Kedrio Lekeis Summerville
Joseph DePadilla, AUSA appeared on behalf of the Govt. Trey Kelleter, Ret. appeared with Kedrio Lekeis Summerville, in custody.
Matter came on for evidentiary hearing re: #42 Motion to Vacate under 28 U.S.C. § 2255 by the defendant.
Court GRANTS defendant's #57 Motion to Continue. Defendant's written response must be filed by 2/20/18, three weeks from today. Should the Government choose to reply, the response is due 3/13/18.

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

FROM: Rodriquez, Veronica
TO: 86081083
SUBJECT: d
DATE: 09/28/2018 05:21:05 AM

Case 2:15-cr-00100-RAJ-DEM Document 59 Filed 01/31/18 Page 1 of 1 PageID# 382

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Norfolk Division
UNITED STATES OF AMERICA,
V. CRIMINAL ACTION NO. 2:15crl00
KEDRIO LEKEIS SUMMERVILLE,
Defendant.
ORDER
Before the Court is Kedrio Summerville's ("Petitioner") unopposed Motionto Continue on the grounds that Petitioner's Counsel, who was retained on January 15, 2018, has not had the opportunity to prepare for the hearing set for January 30, 2018. The Court hereby GRANTS Petitioner's Motion to Continue.
Petitioner shall file any written response to Government's Opposition to Petitioner's § 2255 Motion no later than February 20, 2018. Upon receipt oftheresponse,theGovernment may,if necessary, file a replyno laterthanMarch 13,2018. Afterfilingall pleadings, the Court, in its discretion, may determine ifa hearing is necessary.
The Court DIRECTS the Clerk to mail a copy ofthisOrdertoPetitionerandtheUnited States Attorney's Office for the Eastern District ofVirginia.
IT IS SO ORDERED.
Norfolk, Virginia January^O, 2018 Raym indA. fackson Uijiled States District Judge

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

FROM: Rodriquez, Veronica
TO: 86081083
SUBJECT: d
DATE: 09/28/2018 05:21:05 AM

check

Case 2:15-cr-00100-RAJ-DEM Document 61 Filed 02/20/18 Page 1 of 10 PageID# 418

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Norfolk Division
KEDRIO L. SUMMERVILLE,
Petitioner, Criminal No.: 2:15cr100 2:17cv205
v.
UNITED STATES OF AMERICA
Respondent.
BRIEF IN SUPPORT OF PETITIONER'S 2255 MOTION
Petitioner Kedrio Summerville, by counsel, moves to vacate his conviction and sentence, or in the alternative, to schedule an evidentiary hearing if the Court determines that full relief is not warranted on the pleadings alone.
Claim I of Petitioner's pro se 2255 motion alleges, among other things, that trial counsel was deficient in his "failure to investigate prior to the plea" and that the failure to reasonably investigate prejudiced him by causing him to be sentenced based upon a greater drug weight than was justified if counsel had not been deficient in his performance. ECF 43. Counsel submits the following brief to flesh out Petitioner's claim.
Standard for Relief
Ineffective assistance of counsel is established when petitioner shows that trial counsel's representation fell below an objective standard for reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. Strickland v. Washington, 466 US 668, 104 S.Ct. 2052 (1984).
Case 2:15-cr-00100-RAJ-DEM Document 61 Filed 02/20/18 Page 1 of 10 PageID# 418
2
Under this standard, Petitioner is entitled to the relief sought because trial counsel unreasonably failed to investigate the indicted drug conspiracy that allegedly existed from 1998 to 2015, leading him to overlook a meritorious statute of limitations defense to any alleged conduct and drug weight attributable before 2012. Trial counsel's deficient performance prejudiced Petitioner, in that Petitioner would not have pled guilty to the indictment, and would have instead elected to go to trial, had trial counsel given him the correct legal advice about the statute of limitations. See Hill v. Lockhart, 474 US 52, 106 S.Ct. 366 (1985) (prejudice in guilty plea case established when petitioner reasonably would have rejected the plea offer and gone to trial in the absence of deficient performance).
Reasonable investigation before Petitioner's guilty plea would have uncovered that the original conspiracy ended in 2009 and that a second conspiracy formed in 2012. The statute of limitations for a drug conspiracy is five years. 18 USC § 3282. In light of this, reasonable investigation would have led trial counsel to conclude that the alleged conspiratorial acts from 1998 to 2009 were barred from prosecution in the indictment handed down on August 6, 2015. Had trial counsel made Petitioner aware that most of the acts alleged in the indictment were not subject to prosecution, Petitioner would not have pled guilty to the indictment and would have elected to go to trial. See Petitioner's Verification, supra. Petitioner's assertion is reasonable. In fact, it would have been unreasonable for any person in that situation not to reject the plea offer given the vast amount of charged conduct that was barred from prosecution. Once the statute of limitations bar had been brought to the government's attention, and it had acknowledged in good faith that it existed, it would have been ethically constrained from pursuing the barred charges simply as a means of forcing a plea to other charges. No defendant in that situation could reasonably have been expected to plead guilty
Case 2:15-cr-00100-RAJ-DEM Document 61 Filed 02/20/18 Page 2 of 10 PageID# 419
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to the entire conspiracy charge as indicted.
Deficient Performance
Legal Standard for Separate Conspiracies
Reasonable investigation would have uncovered that the alleged conduct from 1998 to 2009 constituted a separate conspiracy from alleged conduct from 2012 to 2015. In U.S. v. McHan, 966 F.2d 134 (4th Circuit, 1992), the defendant asserted that double jeopardy barred his prosecution for a

drug conspiracy from 1984 to 1986 because he had previously pled guilty to what he argued was the same conspiracy for activity in 1988. With roles reversed from this case, the government argued that the defendant engaged in two separate conspiracies, not one, so that double jeopardy did not apply. Although the roles of the parties differed, the legal principles in McHan are the same as here: did the conduct constitute one conspiracy or two?

The court in McHan noted that "to determine whether two charged conspiracies are in fact 'the same offense,'" the court considers the degree of overlap in:

(1) the time periods covered by the alleged conspiracies;
(2) the places where the conspiracies are alleged to have occurred;
(3) the persons charged as co-conspirators;
(4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and
(5) the substantive statutes alleged to have been violated."

966 F.2d at 137-138. It noted, however, that "these factors are not to be rigidly applied." Instead, "[t]hey provide a discipline of analysis, to be flexibly applied, to determine whether two conspiracy

counts in fact charge one offense." Thus, "other characteristics of the charged conspiracies may be relevant, such as the relationship between the activities of the conspiracies, or their method of operation." (internal citations omitted). Moreover, "no set degree of overlap need be shown, and the relative weights of the factors may vary from case to case." Id.

Applying the factors to McHan's case, the Fourth Circuit delved into unique operational details, but significantly held that "perhaps more important to showing that the 1988 activity was simply not a mutation of that begun in 1984, [is that] the hiatus between 1986 and 1988 was not merely a lull in the activities of the conspiracy, but constituted a true break." Id. at 139. McHan, it appears, announced his "retirement" from drug dealing in September 1987, and there was "no evidence of any transactions involving McHan after September 1987 until he undertook to set up a new business in March 1988." Id.

Application of McHan Standard to Petitioner's Case

Petitioner's presentence investigation report, ECF 60, Paragraphs 7 50, summarizes the government's best case against Petitioner. Paragraphs 7 30 describe conduct from 1998 to 2009; paragraphs 31 50 then jump to 2012, describing conduct starting "[i]n the summer of 2012" (¶ 31). This offense summary is consistent with Petitioner's position at sentencing that he stopped selling drugs in 2009 and tried to earn a legitimate wage at Perdue Farms from 2009-2012. See PSR ¶ 114. This constitutes a definite "break" in illicit conduct, even more so than McHan's "retirement."

A review of the personnel listed in PSR ¶¶ 7 50 supports a finding that any conduct before 2012 constituted a separate offense. The PSR describes conduct by Petitioner, 13 confidential informants ("CI"), and six unindicted co-conspirators ("UC"). Only two of these 19 persons are

mentioned in both the 1998-2009 and 2012-2015 time periods: CI#9 and UC#1. Everyone else has conduct confined to one of the two time periods, establishing that CI#9 and UC#1 are the only known purported overlap in personnel between the two periods of offense conduct.

The government alleges that CI#9 bought drugs from Petitioner in 2009 (PSR, ¶ 27) and in 2013-2014 (PSR, ¶ 37-41). Nothing suggests that CI#9 was anything more than an end customer. His limited purchase of drugs as a user does not support an inference that Petitioner's conduct in 2009 and 2013-2014 were part of the same conspiracy.

The government originally alleged that UC#1 sold powder cocaine to CI#14 in 2004-2009 at Petitioner's direction (on the word of CI#14),1 and also sold crack cocaine to CI#13 in 2012 and 2015 at Petitioner's direction (on the word of CI#13).2 If true, these allegations would provide at least some basis for asserting a continuity in operations, but even then, the supervising of a single street dealer is an extremely thin reed to support a common conspiracy. However, the government concedes that even this inference is dubious. The government now agrees that "the information received from [CI#14] was not reliable and should be removed from the [PSR]." ECF 60, PSR, Page 30, Corrections. This removal eliminates UC#1 as a common link between the 1998-2009 and 2012 2015 time periods. He is now alleged to have sold for Petitioner only in 2012 and 2015.

In sum, Petitioner's "break" was even more pronounced than McHan's (three years versus half a year) and the operational overlap extremely weak. There is virtually no known overlap in

personnel other than Petitioner himself, and there is no known commonality in drug supply or distribution. The only commonality in the McHan factors is at the highest level of generality: that Petitioner was involved, that he sold cocaine, and that it happened on the Eastern Shore.

1 See PSR ¶ 11, 24

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The above information establishes that Petitioner's alleged conduct constitute two separate offenses from 1998 to 2009 and 2012 to 2015. This information was available to trial counsel before Petitioner's plea through discovery and from Petitioner. Thus, reasonable investigation would have led trial counsel to conclude that offense conduct before 2012 was barred from prosecution and he undoubtedly would have brought this to Petitioner's and the government's attention.

Prejudice

Had he been made aware, Petitioner would not have pled guilty to the indictment, a reasonable position under the circumstances. A reasonable defendant would have asserted a meritorious legal defense to the conspiracy charge in both pretrial motions and at trial if it came to that. That the other counts in the indictment were dropped as part of Petitioner's plea does not change that conclusion.

Counts 2 5 alleged substantive drug offenses that would not have added mandatory time or affected drug weight calculations.3 Count 7 alleged possessing a firearm as a felon, which would not have carried a mandatory minimum for Petitioner. 18 USC § 922(g)(1).4 Only Count 6 carried a truly substantive effect that could affect whether a reasonable defendant would have taken a plea deal, as it alleged the possession of a firearm in the commission of a drug offense, which if proven at a trial would have carried a five year mandatory minimum. 18 USC § 924(c)(1)(A). However, this would not make Petitioner's decision to reject the plea deal unreasonable. First, ethically, the government in all likelihood would have offered the same deal plead to the conspiracy but would have simply

2 See PSR ¶ 32, 43 3 Count 2 alleged the maintenance of a drug house (21 USC § 856(a)(1); counts 2 and 3 alleged possession with intent to distribute drugs in 2015 (21 USC § 841); and count 5 alleged drug distribution in 2015 (21 USC § 841). 4 The gun charges arose from three firearms found in or around Petitioner's trailer upon his arrest.

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modified the time frame as required by law. Second, even if the government had vindictively refused to do so, which is highly unlikely, a reasonable defendant also would have factored into his decision that the allegations against him likely support only a five year mandatory minimum on the drug charges, not the ten year minimum to which he pled. This would have significantly altered any calculation by a reasonable person in deciding whether to go to trial.

The government's case for conduct after 2012 rests on two pillars: (1) seven controlled buys of crack cocaine from Petitioner5 and (2) the uncorroborated snitching of one cooperating informant labeled CI#9. The controlled buys carry of total drug weight of 124 grams of crack. If proven, this amount carries a five-year mandatory minimum, not the ten years that Petitioner receiv

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The government originally alleged that UC#1 sold powder cocaine to CI#14 in 2004-2009 at Petitioner's direction (on the word of CI#14),1 and also sold crack cocaine to CI#13 in 2012 and 2015 at Petitioner's direction (on the word of CI#13).2 If true, these allegations would provide at least some basis for asserting a continuity in operations, but even then, the supervising of a single street dealer is an extremely thin reed to support a common conspiracy. However, the government concedes that even this inference is dubious. The government now agrees that "the information received from [CI#14] was not reliable and should be removed from the [PSR]." ECF 60, PSR, Page 30, Corrections. This removal eliminates UC#1 as a common link between the 1998-2009 and 2012 2015 time periods. He is now alleged to have sold for Petitioner only in 2012 and 2015.
In sum, Petitioner's "break" was even more pronounced than McHan's (three years versus half a year) and the operational overlap extremely weak. There is virtually no known overlap in personnel other than Petitioner himself, and there is no known commonality in drug supply or distribution. The only commonality in the McHan factors is at the highest level of generality: that Petitioner was involved, that he sold cocaine, and that it happened on the Eastern Shore.

1 See PSR ¶ 11, 24

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The above information establishes that Petitioner's alleged conduct constitute two separate offenses from 1998 to 2009 and 2012 to 2015. This information was available to trial counsel before Petitioner's plea through discovery and from Petitioner. Thus, reasonable investigation would have led trial counsel to conclude that offense conduct before 2012 was barred from prosecution and he undoubtedly would have brought this to Petitioner's and the government's attention.
Prejudice
Had he been made aware, Petitioner would not have pled guilty to the indictment, a reasonable position under the circumstances. A reasonable defendant would have asserted a meritorious legal defense to the conspiracy charge in both pretrial motions and at trial if it came to that. That the other counts in the indictment were dropped as part of Petitioner's plea does not change that conclusion.
Counts 2 5 alleged substantive drug offenses that would not have added mandatory time or affected drug weight calculations.3 Count 7 alleged possessing a firearm as a felon, which would not have carried a mandatory minimum for Petitioner. 18 USC § 922(g)(1).4 Only Count 6 carried a truly substantive effect that could affect whether a reasonable defendant would have taken a plea deal, as it alleged the possession of a firearm in the commission of a drug offense, which if proven at a trial would have carried a five year mandatory minimum. 18 USC § 924(c)(1)(A). However, this would not make Petitioner's decision to reject the plea deal unreasonable. First, ethically, the government in all likelihood would have offered the same deal plead to the conspiracy but would have simply

2 See PSR ¶ 32, 43 3 Count 2 alleged the maintenance of a drug house (21 USC § 856(a)(1); counts 2 and 3 alleged possession with intent to distribute drugs in 2015 (21 USC § 841); and count 5 alleged drug distribution in 2015 (21 USC § 841). 4 The gun charges arose from three firearms found in or around Petitioner's trailer upon his arrest.

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modified the time frame as required by law. Second, even if the government had vindictively refused to do so, which is highly unlikely, a reasonable defendant also would have factored into his decision that the allegations against him likely support only a five year mandatory minimum on the drug charges, not the ten year minimum to which he pled. This would have significantly altered any calculation by a reasonable person in deciding whether to go to trial.
The government's case for conduct after 2012 rests on two pillars: (1) seven controlled buys of crack cocaine from Petitioner5 and (2) the uncorroborated snitching of one cooperating informant labeled CI#9. The controlled buys carry of total drug weight of 124 grams of crack. If proven, this amount carries a five-year mandatory minimum, not the ten years that Petitioner received under the indictment. Only CI#9, if believed, adds the great mass of weight against Petitioner that creates the ten-year mandatory minimum an added 976 grams of crack from the unverified allegation that he saw Petitioner cooking large batches of crack three different times while buying marijuana (¶ 38, 39)

and his generalized statement that he bought crack from Petitioner twice a week from January until July 2014. ¶ 40. Of note, the government agreed not to count CI#9's further allegation in PSR ¶ 41 that he bought 340 grams of crack and 500 grams of powder from Petitioner in "Spring 2014," right when he supposedly was buying crack on a twice weekly basis. Even if believed, this could double count CI#9's first claim, but more importantly it raises serious doubts about CI#9's credibility that he would claim to make regular purchases for months and then throw into the middle of that claim the allegation that he bought a massive quantity from Petitioner at one time in "the Spring" of 2014. Given these facts, a reasonable defendant could elect to go trial, just as Petitioner asserts that he would have. Under these circumstances, Petitioner has established prejudice.

5 PSR ¶ 34, 35, 45, 46, 47, 48, 49.

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Request for Relief Without a Hearing

Petitioner submits that his requested relief is warranted without the need for a hearing. First, the government should concede that the alleged offense conduct will rise no higher for the government than what is in the PSR, in which case, the existence of two conspiracies is apparent. Second, it is facially apparent that reasonably diligent trial counsel would have uncovered this fact had he reviewed the evidence to no greater extent than has undersigned counsel. Third, Petitioner affirms that he would not have pled guilty had he known of the time bar. Fourth, it is apparent that Petitioner's assertion is reasonable on its face without the need for a hearing.

WHEREFORE, Petitioner moves the Court to vacate his conviction and sentence, but requests a hearing in the alternative if the Court determines that full relief is not warranted on the pleadings alone.

Respectfully submitted, KEDRIO L. SUMMERVILLE

By /s/ Trey R. Kelleter, VSB #41606 Vandeventer Black LLP 101 West Main Street, Suite 500 Norfolk, Virginia 23510 Phone: 757/446-8600 Fax: 757/446-8670 Email Address: tkelleter@vanblk.com

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of February 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to all counsel of record.

/s/ Trey R. Kelleter Trey R. Kelleter, Esquire VSB #41606 Vandeventer Black LLP 101 West Main Street, Suite 500 Norfolk, Virginia 23510 Phone: 757/446-8600 Fax: 757/446-8670 Email Address: tkelleter@vanblk

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division
UNITED STATES OF AMERICA)) v.) Criminal No. 2:15cr100) KEDRIO LEKEIS
SUMMERVILLE,)) Petitioner.) SUPPLEMENTAL RESPONSE OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE The United States of America, by and through its attorneys, Dana J. Boente, United States
Attorney for the Eastern District of Virginia, and Joseph E. DePadilla, Assistant United States
Attorney, hereby responds to Petitioner Kedrio Lekeis Summerville's second motion pursuant to Title 28, United States Code, Section 2255, to vacate, set aside, or correct his sentence. The Government respectfully maintains that Petitioner's current motion should be denied without a hearing because the new claim, which is without substantive merit, has been conceded by the defense to be a purely legal argument that does not require a new hearing. In support thereof, the Government states as follows: I. FACTUAL AND PROCEDURAL BACKGROUND A. Indictment. On August 6, 2015, a Grand Jury of this Court returned a seven-count Indictment against
Petitioner. ECF No. 1. Count 1 charged him with conspiracy to distribute and possess with intent to distribute cocaine and crack cocaine, and to maintain a facility for the purpose of manufacturing, distributing, or using a controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), and 856(a)(1) and (b). Id. Count 2 charged Petitioner with maintaining a facility for
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the purpose of manufacturing, distributing, or using a controlled substance, in violation of 21 U.S.C. § 856(a)(1) and (b). Id. Count 3 charged him with distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Id. Count 4 charged Petitioner with distribution and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Id. Count 5 charged him with distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Id. Count 6 charged Petitioner with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). Id. Count 7 charged him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Id. B. Initial Proceedings in District Court. Before making his initial appearance on these charges, Petitioner retained William L.
Taliaferro, Jr., Esq., to represent him. On December 1, 2015, the parties entered into a plea agreement, whereby Petitioner agreed to plead guilty to Count 1 only. As reflected in the Plea Agreement, Count 1 carried a mandatory minimum term of 10 years' imprisonment. 21 U.S.C. § 841(b)(1)(A); ECF No. 21.
Petitioner signed the Plea Agreement and initialed each page, admitting his guilt to the charge in Count 1, acknowledging that he understood the possible penalties associated with the charge, waiving the right to appeal any sentence within the statutory maximum, and acknowledging that he could not withdraw his plea of guilty. ECF No. 21 at 1-3, 9. Both the Petitioner and Mr. Taliaferro agreed that they had discussed the charges and possible sentences fully and that Petitioner understood those charges and possible penalties. Id. at 12. In the Statement of Facts incorporated into the Plea Agreement, Petitioner admitted that he "entered into a conspiracy with other members of the drug trafficking organization to manufacture, distribute, and
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possess with intent to distribute over five kilograms of cocaine and over 280 grams of cocaine base . . . [and] managed at least five other individuals, who helped acquire, transport, prepare and distribute the narcotics ." ECF No. 22 at 1. The conspiracy ran from 1998 until August 2015.
During the change of plea hearing, after this Court examined Petitioner pursuant to Federal Rule of Criminal Procedure 11, Petitioner entered a plea of guilty to Count 1. ECF No. 20. During the change of plea hearing, the Court described the offense to which Petitioner was pleading guilty and explained the possible penalties. Id. Petitioner stated under oath at the hearing that he had discussed all the facts in the case with Mr. Taliaferro, that he was satisfied with Mr. Taliaferro's

counsel, and that he understood everything contained in the Plea Agreement. Id. The Court accepted the plea and found him guilty of Count 1. Id. C. Presentence Investigation Report. After the initial Presentence Investigation Report (PSR), but before the sentencing hearing, Mr. Taliaferro requested a meeting with the lead case agent to discuss the drug weights attributed to Petitioner in the PSR. ECF No. 34 at 1. Mr. Taliaferro presented Petitioner's objections to certain drug weight attributions. Id. As a result, the United States and the defense agreed to jointly dispute at sentencing certain drug weights attributed in the PSR, with some being reduced and others eliminated entirely. Id. at 2-3. Most of the individual attributions remained intact. Id. The resulting guidelines range was 292-365 months', based on a criminal history of V and total offense level of 36, reflecting the recalculated drug weight. Id. at 2. The defense "agree[d] with the government on the new drug weight attributions based on amendments to the presentence report." ECF No. 33 at 2. The defense also stated that, "[the new drug weights are] considered by all involved to be a fair, just and accurate assessment of the defendant's actual role in the conspiracy." Id.

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D. Sentencing. On April 14, 2016, the Court held a sentencing hearing. ECF No. 41. The Court asked Petitioner if he was satisfied with the advice and counsel of Mr. Taliaferro, to which he responded affirmatively. Id. at 2. The Court then considered the objections to the PSR; both parties, as discussed in the position papers filed before sentencing, agreed with the amended weight of a marijuana equivalency of 8555.86 kilograms. Id. at 3. The Court found that the equivalency weight of 8555.86 kilograms of marijuana was the correct total drug weight attributable to the Petitioner, which resulted in a total offense level of 36. Id. at 4. The PSR was amended accordingly. ECF No. 40 at 11-12. The Court next considered the defense motion challenging Petitioner's criminal history level. ECF No. 41 at 4. The Court held that Criminal History Category V overstated Petitioner's criminal history, and reduced it to Criminal History Category IV. Id. at 7. The Court found the resulting Sentencing Guideline range to be 262-327 months'. Id.

In considering the sentencing factors, the Court heard argument from both sides regarding the offense itself and Petitioner's role within the conspiracy, Petitioner's personal history and background, the potential deterrent effect of the sentence, and the need for the protection of the public. Id. at 9-15. The Court considered each factor in determining the sentence. Id. at 15-19. As to Petitioner's role in the conspiracy, the Court noted that "[Petitioner] had other people participating in the illegal distribution of drugs with [him], and so [he] ended up getting enhanced as a manager of that criminal conduct." Id. at 15.

The Court sentenced Petitioner to a total of 144 months' imprisonment, to be followed by 5 years of supervised release, on Count 1. Id. at 20. The remaining counts were dismissed on motion of the government. Id. at 23.

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E. Petitioner's First Motion Pursuant to 28 U.S.C. § 2255. In April 2017, Petitioner filed the instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, with an accompanying memorandum. ECF Nos. 42, 43. The Court ordered the United States to respond within forty-five days. ECF No. 44. The Court subsequently granted the government's motion for an extension to July 11, 2017, to complete its response. ECF No. 48. Mr. Taliaferro submitted a response to Petitioner's Motion on May 9, 2017. ECF No. 46.

Petitioner alleged three original claims that he has appeared to abandon at this time. The first was that his counsel, Mr. Taliaferro was constitutionally deficient for agreeing to the drug weights currently in the PSR. Petitioner ignored the fact that Mr. Taliaferro obtained the

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government's consent to reduce the Petitioner's attributable drug weight from a marijuana equivalency of more than 24,000 kilograms to a total of 8,555 kilograms, which also reduced Petitioner's base offense level. ECF No. 34. Mr. Taliaferro then successfully argued for a below guidelines sentence of 144 months when the agreed upon guideline range was 262-327 months. Petitioner's second claim was that Mr. Taliaferro was constitutionally deficient for failing to have the his role enhancement removed altogether from the guideline calculation when Mr. Taliaferro successfully had the enhancement reduced to three points. ECF No. 46 at 2; see USSG §3B1.1(a). The Petitioner did not argue that the facts would not support the role enhancement he received. In the Statement of Facts, which Petitioner signed and verified under oath, Petitioner admitted that he "managed at least five other individuals, who helped acquire, transport, prepare and distribute the narcotics ." ECF No. 22 at 1. As Mr. Taliaferro explained in his reply to the Motion, he negotiated for a three-point role enhancement, and "fully explained this to Mr. Summerville." ECF No. 46 at 2. As the Court found, "the record reflects that [Petitioner] didn't
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do it by [himself], [he] had other people participating in the illegal distribution of drugs with [him], and so [he] ended up getting enhanced as a manager of that criminal conduct." ECF No. 41 at 15. The Petitioner's final original claim appeared to that he was improperly sentenced for a conviction under 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); he claimed that the corrected drug weights should have led to a sentence under 21 U.S.C. 841(b)(1)(B), which carries only a five-year mandatory minimum. This claim was similarly meritless because the Petitioner agreed to drug weights far in excess of the mandatory minimum. The government considers these claims abandoned because they were not reincorporated into the Petitioner's second motion alleging constitutionally deficiency. ECF No. 61. To the extent they were not abandoned, they are each invalid for the reasons stated in the government's response to that initial § 2255 motion. ECF No. 49. E. Petitioner's Second Motion Pursuant to 28 U.S.C. § 2255. On January 30, 2018, the government was prepared to litigate the Petitioner's original
meritless claims and Mr. Taliaferro was present in the courtroom to testify. The Petitioner had obtained new counsel and filed a Motion to Continue. ECF No. 57. The Court granted that motion and directed the Petitioner to file any new papers by February 20, 2018, and gave the government until March 13, 2018, to respond if it chose to do so. The Petitioner's new filing abandoned wholesale all of his original claims and alleged a new theory of ineffective assistance by his original defense counsel, this time related to the timing of the conspiracy the Petitioner has always agreed he engaged in, until now. The government elected to respond because the allegations were new and unbriefed, and the Court agreed to extend time the government's time to respond to April 27, 2018. ECF No. 62-1.
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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) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the District Court lacked jurisdiction to impose the sentence; (3) the length of the sentence is in excess of the maximum authorized by law; or (4) 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, No. 4:09CV76, 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).
Additionally, a case resolved by a guilty plea may be attacked on collateral review only in "strictly limited" circumstances. Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting United States v. Timmreck, 441 U.S. 780, 784 (1979)). In particular, "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." Mabry v. Johnson, 467 U.S. 504, 508 (1984). Thus, when a defendant

files a Section 2255 motion to challenge the validity of a conviction pursuant to a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." United States v. Broce, 488 U.S. 563, 569 (1989). "If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack." Id.

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III. ANALYSIS Petitioner raises a single ground for relief in his new motion. He now claims that Mr. Taliaferro provided him constitutionally ineffective assistance of counsel by failing to investigate the length of the conspiracy to which the Petitioner pleaded guilty. The Petitioner knowingly signed and acknowledged in open court a statement of acts that the drug conspiracy at issue ran from 1998 until August of 2015, when he was arrested after a federal investigation that included controlled purchases of drugs from him on multiple occasions and the seizure of drugs and firearms at the time of his arrest. ECF No. 60 at ¶¶ 45-51. A. 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 his deficiencies, the result of the proceeding would have been different. 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

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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., United States v. Dyess, 478 F.3d 224, 237 (4th Cir. 2007), cert. denied, 128 S. Ct. 707. In such cases, the "prejudice" prong of Strickland is "slightly modified;" a defendant making such an allegation "'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.

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Id. at 697. Here, Petitioner cannot, as to any of his ineffective assistance of counsel claims, satisfy either of Strickland's requirements. Additionally, a petitioner is not entitled to a hearing on an ineffective assistance of counsel claim based on "unsupported, conclusory allegations." See 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). B. Mr. Taliaferro's Performance Was Not Constitutionally Deficient Because the

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Conspiracy Was Continuous and the Resulting Drug Weights Were Properly Calculated. The Petitioner's entire argument relies on a new and unsupported allegation that, although
he led a drug conspiracy from 1998 to 2009, he completely exited that long-running conspiracy in 2009, then re-entered a brand new drug conspiracy from 2012 to 2015. He makes that allegation while apparently conceding that he then continued to deal the same drugs, to at least some of the

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same people, in the same place. The Petitioner then argues that, had the Court excised all allegations in the indictment from before 2012, he would have elected to proceed to trial on the allegations from 2012 to 2015 (and each of the other counts in the indictment, including an additional mandatory minimum charge). Neither of those suppositions makes any sense on the record in this case.

First, the Petitioner's argument lacks even a scintilla of reliable evidence he ever withdrew from his long-running drug conspiracy on the Eastern Shore. The argument relies on paragraph 114 of the PSR, in which he self-reported that from 2009 to 2012, he worked as a laborer for Perdue Farms before ending his employment to attend trucking school. ECF No. 60 ¶ 114. Verification of that employment had not been received by the time the PSR was completed. Regardless, even if the Petitioner had tried to hold down a legitimate job during that time, that does not mean he stopped dealing drugs or withdrew from his long-running conspiracy. The same

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section of the PSR, in ¶ 112, also notes that he again self-reported working at Perdue from February 26, 2015, to April 1, 2015. All of his drug sales to the federal investigative team occurred during the same period between March 2, 2015, and March 24, 2015 which shows as well as anything that the Petitioner was capable of processing chicken and selling illegal narcotics at the same time. ECF No. 60 at ¶¶ 45-49.

Additionally, his original counsel, who thoroughly investigated the government's allegations, as detailed in the government's previous § 2255 response, was clear at sentencing that while the Petitioner did intermittently "have a break" to try to work legitimate jobs, he still "distributed cocaine over this 17-year period of time." ECF No. 41 at 10. Likewise, in his affidavit about his investigation of the government's allegations, which included consultations with the Petitioner, Mr. Taliaferro wrote that "[i]t was apparent that except for a brief respite, Mr. Summerville had been engaged in the drug business for about 17 years." ECF No. 46 at 1. Temporarily pausing a drug distribution operation, then picking it up again with some of the same people, in the same place, dealing the same kinds of drugs, does not create two separate conspiracies.

Petitioner's reliance on United States v. McHan, 966 F.2d 134 (4th Cir. 1992), ECF No. 61 at 3, is misplaced because there is no reliable evidence his membership in the conspiracy ended in 2009. A defendant's membership in a conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action. United States v. West, 877 F.2d 281, 289 (4th Cir. 1989). Withdrawal must be shown by evidence that the defendant acted to defeat or disavow the purposes of the conspiracy. Id. An affirmative act sufficient to withdraw from a conspiracy generally requires the defendant to disavow his participation, either through "the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach

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coconspirators." United States v. Leslie, 658 F.3d 140, 143 (2d Cir. 2011) (citation and internal quotation marks omitted). "Mere cessation of the conspiratorial activity by the defendant is not sufficient to prove withdrawal." Id. Under 21 U.S.C. § 846, the government need only prove an act showing the defendant's initial participation in the conspiracy, United States v. Covos, 872 F.2d 805, 806 (8th Cir.1989), which is then presumed to continue until its end, or until the defendant's withdrawal is affirmatively shown. See United States v. Sheffer, 896 F.2d 842 (4th Cir. 1990). Where the defendant fails to show that he withdrew from a conspiracy, his membership is viewed as continuing for the duration. See United States v. Barsanti, 943 F.2d 428, 437 (4th Cir. 1991); United States v. West, 877 F.2d 281, 289 (4th Cir. 1989); United States v. Rollack, 570 F. App'x 267, 274 (4th Cir. 2014). Here, even assuming the Petitioner were correct that he temporarily paused his drug dealing while he looked for legitimate work, there is no reliable evidence of affirmative withdrawal. There does not appear to be any dispute that, when the Petitioner re entered the drug game, he was selling the same drugs, using the same methods, in the same places, with at least some overlap in personnel. That does not create a separate conspiracy severable for purposes of a statute of limitations argument.

Additionally, a defendant's claim that he withdrew from a conspiracy is an "affirmative defense[]," so "the burden is on him" to prove withdrawal. Smith v. United States, 568 U.S. 106, 112 (2013). The Petitioner has furnished no such evidence. If he truly had exited the world of narcotics and affirmatively withdrew from the conspiracy he managed from 1998 to 2009, then re entered a completely different conspiracy in 2012, he had the opportunity to say so at multiple opportunities during this prosecution. He could have told that to his attorney; at the time he negotiated the statement of facts that clearly states the conspiracy was continuous; when he changed his plea and told the Court those facts were accurate; when he met with his counsel and

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the federal case agent to discuss drug weights; or when he filed his first § 2255 motion. The Petitioner never raised the issue because no evidence exists that he stopped dealing drugs during the claimed time period. Even if he could have shown that he did stop dealing drugs during that time period, he could not show that he affirmatively exited the conspiracy or that the purported second conspiracy was completely severable from it.

Even assuming arguendo that he could make that factual showing, such that the Court would have struck the pre-2012 allegations from the indictment on statute of limitations grounds, the Petitioner still cannot show prejudice i.e., that there is a reasonable probability he would have continued to trial. It is worth remembering, in evaluating the prejudice prong of the argument, that the plea deal the Petitioner struck got him a sentence below the mandatory minimum he would have received (and likely will receive, if his case goes to trial) had he been convicted only of Counts 1 and 6 of the indictment.

The Petitioner hinges his prejudice argument on Hill v. Lockhart, 474 U.S. 52 (1985). That case is cited for the proposition that if the Petitioner knew the conduct from 1998-2009 was part of a conspiracy barred by the statute of limitations, he would have reversed his position and gone to trial. That argument ignores several things: first, that the statute under which Count 1 was charged would not have changed and would still carry a 10-year mandatory minimum if he were convicted; second, that the government had more than ample evidence with which to convict him of dealing amounts of crack cocaine far in excess of what the statute requires; third, that F.R.E. 404(b) likely would have allowed his pre-2012 drug dealing into evidence as proof of motive, modus operandi, and absence of mistake; and fourth, that he would also have faced a § 924(c) charge that carried a consecutive five-year mandatory minimum sentence if he went to trial, along with all of the other charges in the indictment. Those other charges were premised on controlled

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purchases of drugs from the Petitioner, several of which were videotaped. Agents also recorded telephone calls with the Petitioner setting up the deals.

All of that evidence was discussed with Mr. Taliaferro before he first conferred with the Petitioner so that he could properly advise his client of his options concerning a plea with the possibility for cooperation which the Petitioner expressed some initial interest in doing and trial. The evidence discussed also included the search warrants, which recovered both drugs and guns, and which led to the § 924(c) charge. The Petitioner accepted a plea bargain very early in the process, which caused the federal agents to suspend the investigation and attempt to work with the Petitioner to cooperate, after he initially indicated he wanted to do so. (That the investigation into the Petitioner's extensive drug-trafficking ring was stopped shortly after indictment and long before any trial is another fact the Petitioner's new argument fails to take into account). Ultimately, the Petitioner chose not to cooperate, which allowed his co-conspirators, including his girlfriend and other relatives, to avoid prosecution.

Petitioner's argument is that if the Court severed his pre-2012 conduct from the indictment, even considering that the plea deal he was offered (1) allowed him to avoid a second consecutive mandatory minimum sentence for possessing a firearm in furtherance of drug trafficking; (2) allowed him to avoid liability for each of the other charges in the indictment, including charges based on video-taped drug buys; (3) allowed him the opportunity to cooperate and thereby attempt to reduce whatever sentence he did receive; (4) gave him the benefit of the full three-point reduction for acceptance of responsibility; (5) ended the investigation into his extensive drug trafficking activities; and (6) allowed him to plead guilty to conduct the government could have proved at trial with relative ease; there is a reasonable probability that he would have nonetheless elected to go to trial against strong evidence and a mandatory minimum 180-month sentence if he

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lost on just two counts. That is the kind of argument made after the fact in § 2255 motions, not what a reasonable and well-advised defendant as Petitioner was would actually do when faced with such a relatively easy decision. There is no reasonable probability that a defendant who had secured good legal advice would have made any other decision given the benefits of taking the government's offer and the significant drawbacks of rejecting it. That is all setting aside the fact that Petitioner's first counsel, who he alleges was ineffective, secured a significant reduction in the attributed drug weight, thereby lowering the guidelines range, and then secured a sentence substantially below the recalculated guidelines range.

Reviewing the record, the Petitioner has received the benefit of the doubt at every step of

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the proceedings and yet continues to raise frivolous issues. The Petitioner had competent and experienced counsel who first secured a favorable plea bargain that avoided a consecutive mandatory minimum sentence. When the Petitioner relayed to his counsel that he believed the calculated drug weights were overstated, counsel convinced the undersigned to allow the Petitioner a rare conference directly with the case agent. That meeting, in which the Petitioner freely admitted dealing drugs to all of the government cooperators except one, resulted in a significant downward reduction of the drug weight used for sentencing. Since that day, the Petitioner has made four allegations of ineffectiveness against his counsel three of which he subsequently abandoned alleging that the counsel he received from his original lawyer, who happens to be one of the most experienced defense attorneys practicing in this jurisdiction, was constitutionally deficient. The fourth and final claim is just as frivolous as the first three, for the reasons stated above. The government agrees with Petitioner's assertion that this final claim can be disposed of without a hearing. It should be denied.
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IV. CONCLUSION For the foregoing reasons, the Government submits that Petitioner has no grounds for relief under 28 U.S.C. § 2255 for his new claim, and that his motion to vacate, set aside, or correct his sentence should be denied.
Respectfully submitted,
TRACY DOHERTY-MCCORMICK ACTING UNITED STATES ATTORNEY
By: /s/ Joseph E. DePadilla Assistant United States Attorney Attorney for the United States United States Attorney's Office 101 West Main Street, Suite 8000 Norfolk, Virginia 23510 Office Number - 757-441-6331 Facsimile Number - 757-441-6689 E-Mail Address joe.depadilla@usdoj.gov
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CERTIFICATE OF SERVICE
I HEREBY CERTIFY that on this 27th day of April, 2018, 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:
Kedrio L. Summerville Reg. No. 86081-083 F.C.I. Butner Medium II P.O. Box 1500 Butner, NC 27509
/s/ Joseph E. DePadilla Assistant United States Attorney Attorney for the United States United States Attorney's Office 101 West Main Street, Suite 8000 Norfolk, Virginia 23510 Office Number - 757-441-6331 Facsimile Number - 757-441-6689 E-Mail Address joe.depadilla@usdoj.gov

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FROM: Rodriquez, Veronica
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DATE: 09/28/2018 05:21:05 AM

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Norfolk Division
KEDRIO L. SUMMERVILLE, Petitioner, Criminal No.: 2:15cr100 2:17cv205 v. UNITED STATES OF AMERICA Respondent.
PETITIONER'S REPLY TO THE SUPPLEMENTAL RESPONSE OF THE U.S. TO PETITIONER'S 2255 MOTION
Petitioner, by counsel, in reply to the government's supplemental response notes that the government, after a lengthy recitation of uncontested procedural history and boilerplate law (ECF 64, at 1-6), largely fails to engage Petitioner's actual arguments.
First, Petitioner's counseled brief, ECF 49, quoted from Claim I of his pro se brief that trial counsel was, among other things, deficient in his "failure to investigate prior to the plea." The counseled brief then accurately summarized the pro se claim as arguing that trial counsel's failure to reasonably investigate prejudiced him by causing him to be sentenced based upon a greater drug weight than was justified if counsel had not been deficient in his performance. Petitioner's counseled brief also argued that trial counsel's deficient performance led to Petitioner pleading to a ten-year mandatory minimum when it is likely that only a five-year mandatory minimum would have applied absent the deficient performance. ECF 49 at 6-7. As the government notes in its Response, Petitioner's pro se claim III makes the similar assertion that but-for deficient performance, he would have faced a five-year instead of ten-year mandatory minimum. ECF 64 at 6.
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Considering that pro se motions are to be liberally construed, the legal arguments of Petitioner's counseled brief clearly fall within the parameters of Petitioner's original claims and do not constitute a "second" 2255 motion as suggested by the government. ECF 64 at 6.
Second, Petitioner's counseled brief noted that a hearing might not be necessary if the facts did not seem to be in dispute, namely the facts set forth in Petitioner's presentence report (PSR) to which the government did not object, at or before sentencing. The government turns this into a "conce[ssion] by the defense that [the claim] does not require a new hearing," ECF 64 at 1, even as it then disputes Petitioner's assertion of facts. To the extent the government disputes the very facts that it agreed to in the PSR, Petitioner asks for an evidentiary hearing to reestablish those facts and the additional facts to which the Petitioner attested in his pro se motion and counsel brief.
Third, Petitioner noted the legal test set forth in U.S. v. McHan, 966 F.2d 134 (4th Circuit, 1992), by which a court determines whether a course of conduct constitutes one or two separate conspiracies, and then applied that test in some detail to the facts of Petitioner's case. ECF 49 at 4-5. McHan's is the relevant test, as the question is not the general question of whether Petitioner continued to "deal drugs" off and on over a period of time, but whether his conduct up until 2009 constituted the same offense as his conduct after 2012. The government ignores this entire analysis because it would have to concede there is no factual basis to connect the drug conspiracy that existed up until 2009 and the separate drug conspiracy that existed after 2012; instead it misconstrues the entire issue as whether Petitioner "withdrew" from drug dealing between 2009 and 2012, rather than whether his drug dealing before 2009 was the same offense of drug dealing after 2012.
In that regard, the government asserts that the Petitioner does not offer a "scintilla of reliable evidence he withdrew." ECF 64 at 10. Whether he "withdrew" from some sort of conduct is not the issue, but even if it were, Petitioner does in fact assert the necessary facts, in his motion and
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counseled brief, and at his sentencing and to the probation officer to include in the presentence report, that he stopped dealing drugs for a period of time (2009-2012). Further, the government has to concede that when Petitioner did start dealing drugs again, it was under circumstances, as set out in the offense conduct portion of the PSR to which the government did not object, that the McHan factors establish as a separate offense. See Petitioner's analysis at ECF 49 at 4-5. To the extent the government disputes these claims, that is what an evidentiary hearing is for.
Lastly, Petitioner asserted that he was prejudiced by trial counsel's ineffective assistance of counsel and noted in that regard that his subjective assertion that he would not have accepted the plea agreement was eminently reasonable. The government goes to great length to explain why the

government's hypothetical reasonable person would have rolled over and pled to a decade of drug weight that could not legally be applied to the separate conspiracy that existed from 2012-2015. The U.S. avoids addressing Petitioner's analysis of the facts conceded by the government in the PSR that show that in all likelihood a five-year mandatory minimum would have applied to the charged conspiracy rather than the ten-year mandatory minimum to which pled in this case, ECF 49 at 6-7, a huge factor in any reasonable defendant's calculus about whether to accept a plea offer. To the extent the government disputes this evidentiary analysis, that is another reason for an evidentiary hearing.

WHEREFORE, Petitioner moves the Court to vacate his conviction and sentence or, in the alternative, to set this matter over for an evidentiary hearing.

Respectfully submitted, KEDRIO L. SUMMERVILLE

By /s/ Trey R. Kelleter, VSB #41606 VSB #41606

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513 Trent Avenue Chesapeake, VA 23323 Phone: 757/409-2264 Email Address: trey.kelleter@kelleterlaw.com\

CERTIFICATE OF SERVICE

I certify that on this 7th day of May 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to all counsel of record.

/s/ Trey R. Kelleter Trey R. Kelleter, Esquire VSB #41606 513 Trent Avenue Chesapeake, VA 23323 Phone: 757/409-2264 Email Address: trey.kelleter@kelleterlaw.com

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division
KEDRIO LEKEIS SUMMERVILLE,
Petitioner,
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CLERK, U.S. DISTRICT COURT NORFQI K. VA
V. CRIMINAL ACTION NO. 2:15crl00
UNITED STATES OF AMERICA,
Respondent.
MEMORANDUM OPINIONAND ORDER
Before the Court is Kedrio Lekeis Summerville's ("Petitioner") pro se Motion to Vacate, Set Aside, or Correct his Sentence, pursuant to Title 28, United States Code, Section 2255 ("2255 Motion"). ECF Nos. 42-43. Having thoroughly reviewed the motions, filings, and records in this case, the Court finds that this matter is ripe for judicial determination. For the reasons set forth below. Petitioner's § 2255 Motion is DENIED.
I. FACTUAL AND PROCEDURAL HISTORY
On August 6, 2015, a Grand Jury, in the Eastern District of Virginia, returned a seven count Indictment against Petitioner. ECF No. 1. Count One charged Petitioner with Conspiracy to Distribute and Possess with Intent to Distribute Cocaine and Crack Cocaine, and to Maintain a Facility for the Purpose of Manufacturing, Distributing, or using a Controlled Substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), and 856(a)(1) and (b). Id. Count Two charged Petitioner with Maintaining a Facility for the Purpose ofManufacturing, Distributing, or using a Controlled Substance, in violation of 21 U.S.C. §§ 856(a)(1) and (b). Id. Count Three charged Petitioner with Distribution and Possession with Intent to Distribute Cocaine, in
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violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Id. Count Four charged Petitioner with Distribution and Possession with the Intent to Distribute Crack Cocaine, in violation of21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Id. Count Five charged him with Distribution ofCrackCocaine,in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Id. Count Six charged Petitioner with Possession ofa Firearm in Furtherance ofa Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A). Id. Count Seven charged Petitioner with Felon in Possession of a Firearm, in violation of18 U.S.C. § 922(g)(1). Id.
Petitioner pled guilty to Count One oftheIndictmentonDecember1, 2015. ECF No. 20.
On April 14, 2016, Petitioner was sentenced to 144 months on Count One, and 5 years of supervised release. ECF No. 37. Petitioner filed this instant Motion on April 10, 2017. ECF Nos. 42-43. The Court ordered the United States Attorney to respond to Petitioner's § 2255 Petition. ECF No. 44. Petitioner's Counsel ("Counsel") filed a response on May 9, 2017. ECF No. 46. Respondent filed a Response to Petitioner's Motion on July 11, 2017. ECF No. 49. Petitioner filed a Reply on July 27,2017. ECF No. 50.
Petitioner filed a Motion to Continue the evidentiary hearing on January 29, 2018. ECF No. 57. The Court held an evidentiary hearing on this matter on January 30, 2018. ECF No. 58. At the hearing, the Court granted Petitioner's Motion to Continue and ordered the Parties to resolve this Motion through supplemental filings. ECF Nos. 58-59. Petitioner filed a Supplemental Memorandum in Support of this Motion on February 20, 2018. ECF No. 61. Respondent filed a Supplemental Response on April 27, 2018. ECF No. 64. Petitioner filed a Supplemental Reply on May 7,2018. ECF No. 64.
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II. STANDARD OF REVIEW AND BURDEN OF PROOF
A. Section 2255 Generally
A petitioner may move the court to vacate, set aside, or correct his sentence, pursuant to

28 U.S.C. § 2255, in four instances: (1) the sentence was imposed in violation ofthe Constitution or laws oftheUnitedStates;(2)thedistrictcourtlacked jurisdiction to impose the sentence; (3) the length ofthe sentence is in excess ofthe maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. See 28 U.S.C. § 2255 (2008). "Reliefimder 28 U.S.C. § 2255 is reserved for transgressions ofconstitutionalrightsandforanarrowrange ofinjuriesthat could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage ofjustice." Jones v. United States, No. 4:09CV76, 2010 WL 451320, at *4 (E.D. Va. Feb. 8,2010) (quoting United States v. Vaughn,955 F.2d 367, 368 (5th Cir. 1992)).

When a petitioner in federal custody wishes to collaterally attack his sentence or conviction, the appropriate motion is a § 2255 motion. United States v. Winestock, 340 F.3d 200, 203 (4th Cir. 2003). Section 2255 ofTitle28 oftheUnitedStatesCodegovernspost-conviction relief for federal prisoners. It provides in pertinent part:

A prisoner in custody under sentence ofacourt established by Act ofCongressclaimingtherighttoberelease uponthegroundthat the sentence was imposed in violation ofthe Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

In a proceeding to vacate a judgment of conviction, the petitioner bears the biurden of proving his or her claim by a preponderance oftheevidence. Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958). Additionally, pro se filers are entitled to more liberal construction of

their pleadings. Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), cert, denied, 439 U.S. 970 (1978) (providing that a pro se petitioner is entitled to have his petition construed liberally and is held to less stringent standards than an attorney drafting such a complaint). Furthermore, ifthemotionisbroughtbeforethejudgethatpresidedovertheconviction,thejudgemayrely upon recollections of previous events. Blackledge v. Allison, 431 U.S. 63, 74 n. 4 (1977); Carvell v. United States, 173 F.2d 348, 348-49 (4th Cir. 1949) (stating it is highly desirable that § 2255 motions "be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.").

B. Section 2255 Hearing Requirement

When deciding a § 2255 motion, the court must promptly grant a hearing "unless the motion and the files and records ofthecase conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Motions under § 2255 "will not be allowed to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178 (1947). For this reason, issues already fully litigated on direct appeal may not be raised again under the guise ofa collateral attack. Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976). Ineffective assistance of counsel claims, however, should generally be raised in a collateral motion instead of on direct appeal. United States V. Richardson, 195 F.3d 192,198 (4th Cir. 1999).

C. Ineffective Assistance ofCounsel

As a general matter, a petitioner must satisfy two factors to establish ineffective assistance of counsel: "(1) that [counsel's performance fell below an objective standard of reasonableness, and (2) that [petitioner] was prejudiced by the deficiency because it created a reasonable probability that but for counsel's errors, the result ofthe proceeding would have been

different." United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994) (citing Smith v. Smith, 931 F.2d 242,244 (4th Cir. 1991)); see also Strickland v. Washington, 466 U.S. 668, 693 (1984). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." Hoyle, 33 F.3dat418.

Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused. Strickland, 466 U.S. at 688-89. In applying and defining this standard, substantial deference must be accordedto counsel's judgment. Id. at 689. If petitioner makes an insufficientshowing on one prong, there is no reason for a court deciding an ineffective assistance claim to address both components oftheinquiry.Id.at697.Thecourtisnotrequiredtobeginwithananalysis of the first prong of Strickland because "a court need not approach the inquiry in the same order," and "need not determine whether counsel's performance was deficient before examining the prejudicesuffered by the defendantas a result oftheallegeddeficiencies."Id.

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To demonstrate deficient representation, petitioner must show "that counsel's representation fell below an objective standard ofreasonableness." Strickland, 466 U.S. at 688. A petitioner must overcome a strong presumption that counsel's performance falls within the wide range ofreasonable professional assistance imder the circumstances. Id. at 689. Also, a petitionerbearsthe biwden of provingprejudice. Fields v. Attorney Gen. oftheState ofMd.,956 F.2d 1290, 1297 (4th Cir. 1992). To demonstrate prejudice, a petitioner must prove that "there is a reasonable probabilitythat, but for counsel's unprofessional errors, the resultofthe proceeding would have been different. See id.

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III. DISCUSSION

Petitioner claims ineffective assistance of counsel in violation of the Fifth Amendment and Sixth Amendment of the United States Constitution. ECF No. 43 at 2. Petitioner specifically alleges the following claims of ineffective assistance of counsel: 1) Counsel was ineffective for agreeing to the drug weights attributed to Petitioner in the Presentence Investigation Report ("PSR") without properly investigating the break in the charged drug conspiracy resulting fi-om Petitioner's withdrawal; 2) Petitioner would not have pled guilty to the charges because he was improperly sentenced for a conviction under 21 U.S.C. § 841(b)(1)(A) versus 21 U.S.C. § 841(b)(1)(B); and 3) Counsel was deficient for failing to have Petitioner's role enhancement removed firom the guideline calculation. Each issue is discussed, in turn, below.

A. Counsel's Failure to Investigate a Break in the Drug Conspiracy Resulting from Petitioner's Withdrawal and Counsel's Agreement to Drug Weights Attributed to Petitioner

Petitioner claims ineffective assistance of counsel for Coxmsel's failure to investigate a break in the charged drug conspiracy as a result of Petitioner's withdrawal and Coimsel's agreement to the drug weights attributed to Petitioner in the PSR.

The Fifth Amendment provides that no one shall "be subject for the same offense to be twice put in jeopardyoflifeor limb." U.S. Const, amend. V. To determine whether two charged conspiracies are the same offense for double jeopardy analysis, the court must consider the degree of overlap using the following factors: 1) the time periods covered by the alleged conspiracies; 2) the places where the conspiracies are alleged to have occurred; 3) the persons charged as coconspirators; 4) the overt acts alleged to have been committed in fiirtherance ofthe conspiracies, or any other descriptions of the offenses charged which indicate the nature and

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scope of the activities being prosecuted; and 5) the substantive statutes alleged to have been violated. See United States v. McHan, 966 F.2d 134, 138-39 (4th Cir. 1992) (stating that the factors are flexibly applied when determining whether two conspiracies count asoneoffense). A defendant's membership in a conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action. United States v. West, 877 F.2d 281, 289 (4th Cir. 1989). Evidence must show that the defendant acted to defeat or disavow the purposes of the conspiracy in order to show defendant's withdrawal. Id. Defendant's membership is viewed as continuing for the duration of the conspiracy when defendant fails to show that he withdrew from the conspiracy. See id.; see also United States v. Barsanti, 943 F.2d 428, 437 (4th Cir. 1991). Defendant's claim of withdrawal is an affirmative defense and the defendant has the burden to prove that he effectively withdrew from a conspiracy. Smith v. United States, 568 U.S. 106,112-13(2013).

Petitioner argues that Counsel's assistance was ineffective during his matter because of Counsel's failure to investigate the break in the drug conspiracy resulting from Petitioner's withdrawal and Counsel's agreement to the drug weights attributed to Petitioner in the PSR. Reasonable investigation would have led Counsel to discover that Petitioner withdrew from the conspiracy for a three year period, a period from 2009 to 2012. Petitioner states that he withdrew from the conspiracy and stopped selling drugs from 2009 to 2012 to earn legitimate wages from Perdue Farms. Id. at 4. The investigation would have uncovered that the original conspiracy spanned from 1998 to 2009 and the second conspiracy existed from 2012 to 2015.

ECF No. 61 at 2. Petitioner contends that this three year break in the conspiracy supports the notions that Petitioner was charged for two separate conspiracies, there is no known overlap in persoimel other than Petitioner, and there is no known commonality in drug supply or

distribution. Id. at 5. Therefore, absent Counsel's failure to investigate, Petitioner states that thereis reasonableprobability that the outcomeofthe proceedingwould have been different. Respondent argues that Counsel not only continued to investigate the drug amounts attributed to Petitioner, but also secured a meeting with Respondent to discuss what Petitioner believed were inaccuracies in the drug weights attributed to him. Petitioner states in his Motion that he was credited with a base offense level of 34 instead of 26. ECF No. 43 at 5. This statement is erroneous. Petitioner's base offense level was reduced, from 34 to 32, and Petitioner's sentencing guideline range was also reduced as a result of the meeting Counsel arranged. Rather than adding the newly reduced amounts to the prior uncontested amounts. Petitioner only totaled the amounts that were reduced and left out the attributed drug weights that were correct at the outset oftheproceedings.Respondentcontendsthattherewasnomistakein the drug weight calculation at sentencing, and the Parties persuaded the Court to significantly reduce the drug weight attributed to Petitioner. Sentencing Tr. at 4.

Respondent notes that Petitioner fiirther alleges that Counsel "admitted under oath that his performance failed and violated Strickland's standards and has caused the [PJetitioner to be sentenced based on the Counsel['s] failures to investigate. . . ." ECF 43 at 4. Petitioner's statement is a serious misrepresentation of Counsel's statements at sentencing. Respondent emphasizes that Counsel stated at sentencing that he bore "some responsibility for where we are today" because of his efforts to have Petitioner begin cooperation with Respondent early and cooperate in hopes of receiving a Rule 35 reduction after sentencing. Sentencing Tr. at 12. Petitioner has not shown that the advice he received was deficient under Strickland. Also, Petitioner cannot show prejudice because he has not pointed to anything related to Coimsel's representation that put him in a worse position than he would have been in with different

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counsel. Petitioner cannot overcome his prior statements expressing his satisfaction with Counsel and admitting the facts underpinning his conviction and mandatory minimum sentence during the guilty plea proceeding. Guilty Plea Hr'g Tr. at 6, 8-9,24.

Respondent also contends that Petitioner did not meet his burden to prove that Petitioner effectively withdrew from the drug conspiracy from 2009 to 2012. IfPetitionerhadevidenceto prove that he effectively withdrew from the conspiracy during that time frame, Petitioner had numerous opportunities to inform Counsel of his withdrawal. Petitioner failed to mention this evidence when both Parties "negotiated the facts stating the conspiracy was continuous; when Petitioner changed his plea and told the Court the facts were not accurate; when he met with [Counsel] and the federal case agent to discuss drug weights; or when he filed his first § 2255 motion." ECF No. 64 at 12-13. Respondent argues that even if Petitioner proved he stopped selling drugs during the three year break, this break does not show that Petitioner affirmatively left the conspiracy or that the conspiracy constitutes two separate conspiracies versus one conspiracy.

Counsel argues that prior to advising Petitioner to plead guilty to the offense, Counsel thoroughly investigated the case. Coimsel states that he discussed Petitioner's role, met with the lead agent for the Drug Enforcement Administration that was working the case, and met with Respondent. ECF No. 46 at 1. Counsel discussed the evidence ofthe case with Petitioner and based on the evidence against Petitioner, Counsel advised Petitioner that he should plead guilty early, cooperate, and work to get a Rule 35 to modify any sentence he may receive. Id. at 2. Counsel also notes that Petitioner agreed with this advice. Id. Counsel further indicates that he investigated Petitioner's caseimtilthe end of the caseandwas ableto negotiatewith Respondent that Petitioner's drug weights were overstated, despite his drug involvement. Id. Finally,

Counsel negotiated with the Respondent to ultimately reduce the drug weight for the offense, resultingin drug weights totaling 8,555.86kilogramsofcocaine. See id. at 2-3.

The Court finds that Counsel's performance was effective. The Court cannot conclude that Petitioner affirmatively withdrew from the conspiracy during the three year time frame. Petitioner admitted to Respondent andCounsel thatheranthedrugorganization for 17years and both Parties addressed his break in the conspiracy during argument at sentencing. See

SentencingTr. at 9-10. Specifically, Counsel addressed Petitioner's break from selling drugs to argue for a term of incarceration below the sentencing guideline range. Because of Counsel's argument at sentencing, the Court sentenced Petitioner to 144 months' imprisonment a sentence well below Petitioner's sentencing guideline range of 262-327 months' imprisonment. Id. at 10-11. The Court also finds that there is no need to address the second prong ofStrickland because Petitioner failed to meet the standards set forth in the first prong.
Therefore, Petitioner does not have a claim for ineffective assistance ofcounsel because Counsel did adequately investigate the length ofPetitioner'sinvolvementinthedrugconspiracy and used Petitioner's break in selling drugs to effectively argue for a variance in Petitioner's sentence.

FROM: Rodriquez, Veronica
TO: 86081083
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B. Guilty Plea
Petitioner asserts he would not have pled guilty to the drug conspiracy as Petitioner was improperly sentenced vmder21U.S.C.§ 841(b)(1)(A), carrying a ten year mandatory minimum, versus 21 U.S.C. § 841(b)(1)(B), which carries only a five year mandatory minimum.
As previously mentioned, a petitioner must satisfy two factors to establish ineffective assistance of covmsel: (1) counsel's performance fell below an objective standard of
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reasonableness, and (2) that petitioner was prejudiced by counsel's deficiency. Hoyle, 33 F.3d at 418.
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)). When evaluating a post-guilty plea claim ofineffectiveassistance,statements previously made, under oath, affirming satisfaction with counsel are binding on the defendant absent "clear and convincing evidence to the contrary." Fields, 956 F.2d at 1299 (citing Blackledge, 431 U.S. at 74-75 (1977)) (stating that entering a plea provides evidence that a plea was entered into voluntarily and intelligently).
A defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that coimsel may have misjudged the admissibility of the defendant's confession. McMann v. Richardson, 397 U.S. 759, 770-71 (1970). Courts must consider whether the advice provided to the defendant was within the range of competence demanded ofattorneys in criminal cases. Id. at 771. "On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand[,] defendants facing felony charges are entitled to the effective assistance ofcompetent counsel." Id. Counsel is required "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure ofdeference to counsel'sjudgments." Id.
Petitioner argues that he would not have pled guilty had Counsel made Petitioner aware of his affirmative statute of limitations defense to the conspiracy charge. The statute of
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limitations for a drug conspiracy is five years. See 18 U.S.C. § 3282 (2003). Petitioner was indicted on the charges in 2015, ECF No. 1, and the statute of limitations would bar the prosecution of any conspiracy acts that occurred prior to 2010. Because Petitioner withdrew from the conspiracy in 2009, the alleged conspiracy acts from 1998 to 2009 constituted a separateconspiracy and therefore barred from prosecutionaccordingto the statute oflimitations. ECF No. 61 at 2. Respondent's evidence supporting the 2012-2015 conspiracy included controlled buys of crack cocaine from Petitioner and the uncorroborated evidence of one cooperating informant. ECF No. 22 at 1-2; see also PSR 34-35, 45-49. Petitioner, when deciding to plead guilty to the conspiracy, "would have factored into his decision that the allegations against him likely supported only a five year mandatory minimum on the drug charges, not the ten year minimum to which he pled." ECF No. 61 at 7. Specifically, Petitioner contends that the controlled buys carried a total drug weight of 124 grams ofcrackand ifproven, would support the sentence for the five year mandatory minimum sentence. ECF No. 61 at 7. Respondent argues that Petitioner's claim is meritless because his recalculation of the drug weights is incorrect. Respondent makes note that Petitioner does not claim that he was innocent ofthe offense and does not claim that his plea was involuntary. Specifically, Petitioner pled guilty to dealing over five kilograms ofcocaine and over 280 grams ofcrack cocaine, and was attributed, correctly and by agreement, with amounts well in excess of those minimums. Guilty Plea Hr'g Tr. at 8. The statute under which Count One was charged would not have changed and would still carry a ten year mandatory minimum ifPetitioner were convicted. Counsel argues that he advised the Court that the correct statutory range was a term often

years to life imprisonment, based on the new drug weight calculation reflected in the PSR. The new calculation was based on the available evidence and Petitioner's 17 year drug involvement.
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Counsel corroborates Respondent's argument that a second debriefing after the initial PSR, but before the sentencing hearing ^resulted in an agreement to reduce the drug weight to reflect a total drug weight of 8,555.86 kilograms ofcocaine.SentencingTr.at45. Petitioner agreed to this correction.
The Court finds that Petitioner entered his guilty plea voluntarily and intelligently. At sentencing, the Court even asked Petitioner if he was satisfied with the advice and coimsel he received; and Petitioner, tmder oath, answered in the affirmative. Sentencing Tr. at 2. The Coiut determines that Coimsel's advice and performance was effective because he was able to successfully argue a reduction in Petitioner's total offense level and criminal history category. Id. at 4, 7. Petitioner's total offense level reduced to 36 and his criminal history category lowered to category IV. Id. at 7. The total offense level changed because both Parties, including the Petitioner, agreed to the finding that the drug weights should be 8,555.86 kilograms of cocaine. Id. at 4. The Court finds that even with the recalculation ofthedrug weight attributed to Petitioner, Petitioner still faced a mandatory minimum oftenyears.The Court also finds that Petitioner was not prejudiced by Counsel's advice to Petitioner to take the plea agreement because Petitioner received a term ofimprisonment of 144 months, a term ofincarceration well below his sentencing guideline range of262-327 months' imprisonment.
Therefore, Petitioner's Counsel was not ineffective for counseling Petitioner to plead guilty as Petitioner would still face the mandatory minimum oftenyearsaftertherecalculation ofPetitioner's drug weight. Also, Petitioner did not suffer any prejudice as the Court sentenced Petitioner below his sentencing guideline range.
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C. Enhancement Objection
Petitioner finally asserts thathisCounsel failed to inform theCourt thatthePartiesagreed to the removalofa role enhancementat sentencing. ECF No. 43 at 7.
As a general matter, a petitioner must satisfy two factors to establish ineffective assistance of counsel: "(1) that [counsel's performance fell below an objective standard of reasonableness, and (2) that [petitioner] was prejudiced by the deficiency because it created a reasonable probability that but for counsel's errors, the result ofthe proceeding would have been different." Hoyle, 33 F.3d at 418 (citing Smith, 931 F.2d at 244). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." Id.
Individuals are assigned the three-level role enhancement for being a manager or supervisor ^but not organizer or leader of a criminal activity that involved five or more participants. U.S.S.G. § 3B1.1(b).
Petitionerargues that Respondent erredwhenthey addedthe managerrole enhancement. Petitioner statesthatRespondent wasfullyaware thatPetitioner statedthathe worked forhimself and did not have others work for him. Petitioner states that prior to sentencing. Respondent and Counsel removed the manager role enhancement; however, at sentencing. Counsel failed to inform the Coiut that the enhancement was removed.
Respondent argues that Petitioner's allegation that Coimsel provided constitutionally deficient coimsel stems from misunderstanding the Parties' negotiations. Respondent initially planned to argue that the four-level enhancement, for a more serious leadership role, should apply. ECF No. 49 at 11. However, after negotiating with Counsel, the Parties agreed to apply only the three-point enhancement. ECF No. 46 at 2. There was never an agreement to, nor any reason to, eliminate the enhancement in its entirety. Petitioner does not argue that the facts
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would not support the role enhancement he received. Respondent contends that there is no basis for Petitioner's contention that the enhancement was, or should have been, eliminated altogether, and so there was no deficiency under Strickland. Additionally, Counsel argues that Petitioner was fully aware that the Respondent agreed that 3B1.1(B) should apply, which reduced the enhancement from four levels to three levels. The enhancement was reduced, not removed entirely.
The Court finds that Petitioner cannot satisfy the first prong of the Strickland standard

because Petitioner did not show that Coimsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. The Court concludes that the enhancement applies in this case because "the record reflects that [Petitioner] didn't do it by [himself], [he] had other people participating in the illegal distribution ofdrugswith[him],andso[he][was]enhancedas a manager ofthatcriminal conduct." Sentencing Tr. at 15. The Court cannot conclude that both Parties would have removed the enhancement in its entirety since Petitioner admitted, in the statement of facts associated with his plea agreement, that he managed at least five other individuals during the drug conspiracy. See ECF No. 22 at 1. The Court also finds that there is no need to address the second prong ofStricklandbecausePetitionerfailedtomeetthestandards set forth in the first prong.

Therefore, Petitioner does not have a claim for ineffective assistance ofcounsel based on Coimsel's failure to inform the Court that the parties agreed to the removal of a role enhancement at sentencing.

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

FROM: Rodriquez, Veronica
TO: 86081083
SUBJECT: d4
DATE: 09/28/2018 05:06:03 AM

IV. CONCLUSION
For the reasons set forth above, the Court finds that it is clear from the pleadings and record that Petitioner is not entitled to relief. Accordingly, Petitioner's Motion to Vacate, Set
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Case 2:15-cr-00100-RAJ-DEM Document 66 Filed 07/11/18 Page 15 of 16 PageID# 467
Aside, or Correct his Sentence, pursuant to 28 U.S.C. § 2255, is DENIED.
Pursuant to Federal Rule of Appellate Procedure 22(b)(1), this Court may issue a certificate ofappealability only ifthe applicant has made a substantial showing ofthe denial ofa constitutional right. Petitioner has not set forth a specific issue that demonstrates a substantial showing of a denial of a constitutional right. Because Petitioner fails to demonstrate a substantial showing of a denial of a constitutional right, a Certificate of Appealability is DENIED. The Court DIRECTS the Clerk to send a copy ofthis Order to all Parties.
IT IS SO ORDERED.
Norfo July/
k, Virginia ,2018
16

TRULINCS 86081083 - SUMMERVILLE, KEDRIO LEKEIS - Unit: BTF-M-C

FROM: Rodriquez, Veronica
TO: 86081083
SUBJECT: d
DATE: 09/28/2018 05:21:05 AM

Case 2:15-cr-00100-RAJ-DEM Document 70 Filed 09/25/18 Page 1 of 1 PageID# 477

FILED: September 25, 2018
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-7182 (2:15-cr-00100-RAJ-DEM-1) (2:17-cv-00205-RAJ) UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
KEDRIO LEKEIS SUMMERVILLE
Defendant - Appellant
This case has been opened on appeal.
Originating Court United States District Court for the Eastern District of Virginia at Norfolk Originating Case Number 2:15-cr-00100-RAJ-DEM-1 2:17-cv-00205-RAJ Date notice of appeal filed in originating court: 08/21/2018 Appellant (s) KEDRIO LEKEIS SUMMERVILLE Appellate Case Number 18-7182 Case Manager Michael Radday 804-916-2702

APPENDIX C

VIRGINIA BAR COMPLAINT

From:
Mr. Kedrio Summerville
Fed No. 86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

Related Case(s):
18-7182
2:17-cv-00205-RAJ
2:15-cr-00100-RAJ-DEM

PETITIONERS INFORMAL COMPLAINT(S) AGAINST BAR MEMBERS AND REQUEST FOR THE RETURN OF ALL FUNDS FROM THEM

Each State has a Bar Association and each Bar member is apart of the American Bar Association. Each bar has a complaint procedure and is able to Order the return of all funds from its Bar members due to its negilence and reckless and incompent mishandling of a clients case. Then there are other remedies more drastic than the reinburstment of the funds, such as suspensions. In this case,the petitioner request that the parties Order Bar Member Trey Kelleter to return all funds that were provided him to for the following reasons that show that he is incompetent and has sabotaged my case.

Facts:

1. The petitioner was indicted in the EDVA region on various drug crimes. The petitioner was "originally assigned VA Bar member William Taliaferro,jr, Esq" as his criminal defense lawyer.
2. Mr. Taliaferro came immediately to the petitioner and told me that I need to hurry up and sign a 10 yrs to life plea deal before he even reviewed the case.
3. After I had signed based upon the counsels hurry advice, the counsel finally reviewed the material later and found out that I was telling him the truth and that I was not this per say mastermind or upscale drug dealer, in fact he found out that even the government knew and that he had messed up.. But it was too late and the Court did not allow the plea to be withdrew and the petitioner was given the longer sentence. (See Attached)

4. I filed a 2255 Motion and based it upon the Ineffective Claims that the counsel admitted to himself on numerous occassions. I was immediately Granted the Evidentiary Hearing and brought back to court.

5. However, I retained Mr. Trey Kelleter as my Evidentiary Counsel and on the day of the Hearing, without any notice to me, the Counsel filed for a continuance , even though all the parties were already in the court together.

6. I was transported back to a holding facility and while in the facility my lawyer sent me a copy of a "new claim" for my 2255 that he had already filed without my consent. In the new motion he requested that all my claims be struck and that their is no need for a Evidentiary Hearing, which was absolutely ridicolous.

7. The "per say new claim" was based upon me not being in a conspiracy and then withdrawing from it. (See attached). The government seized the opportunity to agree to dismiss all claims and argued that the claims that the lawyer raised are barred and even without merit and agreed that no hearing is necessary now because my original claims have been struck and this one was meritless. (see attached)

8. Based upon these new filings and request to not hold the evidentiary hearing, the District Court denied me and never resolved my actual claims due to the counsels new claims.

Therefore, because any compentent counsel must know when a issue is to be raised and must not cancel winning arguments for meritless arguments and then go against their clients own wishes and winning issues. I do request that all of my money in the sum of $5,000.00 be returned to me immediately and that the parties also sanction the counselors herein for the mishandling of my case(s).

Please send the funds directly to my account via Western Union by using the following information:
Kedrio Summerville, 86081-083
City: FBOP
State : DC

Respectfully submitted on this 01 day of April, 2019 by

S/ Kedrio Summerville
Kedrio Summerville

Certificate of Service, 28 USC 1746

I, Kedrio Summerville, do hereby swear under the penalty of perjury that a copy of the herein complaint and request for the return of all funds has been sent via US Postal mail to the Virginia State Bar at 707 East Main St., in Richmond, VA 23219 on this 01 day of April 2019 from FCI Butner II.

S/ Kedrio Summerville
Kedrio Summerville

APPENDIX D

PETITIONER'S PRO SE ORIGINAL 2255 FILING AND EVIDENTIARY HEARING COURT ORDER

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

Kedrio L. Summerville

Case: 2:15CR100
New (TBA)_____

-vs-

United States of America

ACCOMPANYING MEMORANDUM BRIEF IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 USC § 2255

Comes now the petitioner, Kedrio L. Summerville...., hereby pro se humbly before the Court to file his [Accompanying Memorandum] Brief in Support of his Motion to Vacate, set Aside, or Correct Sentence pursuant to 28 USC § 2255 that was imposed by this Court on April 14, 2016 and filed on April 19, 2016. The petitioner is also requesting for New Counsel to be assigned on his behalf. Relief Sought: To Vacate the Conviction and Sentence that was obtained in violation of the 5th and 6th Amendment Constitutional Safeguards and Rights of the Petitioner based upon the Ineffective Assistance. The Petitioner is also requesting that a Evidentiary Hearing be held to resolve all disputes and Constitutional issues.

Date: 4- -2017

s/Kedrio Summerville, pro se
Kedrio L Summerville
Fed No: 86081-083
FCI Butner II
PO Box 1500
Butner, NC 27509

Statement for Review:

The Counselor was ineffective during critical stages of the proceedings which violated the petitioner's Sixth Amendment and Fifth Amendment Constitutional Rights and requires this Court to Vacate the Conviction and Sentence and to also hold a Evidentiary Hearing to resolves these Constitutional Violations that the Counselor has admitted under oath to have occured. (See Sent. Tr. p. 12 lines 1-8)

Applicable Facts

On August 6, 2015, the Grand Jury for the Eastern District of Virginia Norfolk Division returned a [7-Count Indictment for]:

Ct 1--21 USC § 846 Conspiracy to Distribute Narcotics

Ct 2--21 USC § 856 Maintaining Drug Involved Premises

Ct 3 & 4-- Possession with Intent to Distribute of Cocaine

Ct 5--21 USC § 841 (b)(1)(b) Distribution of Cocaine Base

Ct 6--18 USC § 924 (c)(1)(a) Possession of Firearm in Futherance of a Drug Trafficking Crime

Ct 7--18 USC § 922(g) Felon in Possession of Firearm

The Counselor, William L. Taliaferro, before reveiwing the facts adviced the petitioner to "hurry and plead guilty"to the Count 1 Conspiracy charges that carried 10 years to life. But after the petitioner followed his "hurry up advice" the Counselor admitted that he "messed up" and then also stated he "messed up" because the governments evidence was found to be unsustantiated and could not be relied upon and the government also admitted it too. (see Sent tr. p. 3 lines 1-25 and p. 12 lines 1-8)

Therefore, the petitioner's counselor was ineffective during the critical stages and prejudiced the petitioner and caused the Court to impose the sentence because of his constitutional errors, and requires this Court to Vacate the Conviction and Sentence and Resentence the petitioner based upon the correct facts and under the correct statutory provision and without the enhancement.

ISSUE I

Counselor Taliaferro was Ineffective during critical stages and has admitted under oath that his performance failed and violated Strickland's standards and has caused the petitioner to be sentenced based upon the counselors failures to investigate prior to the plea stages and afterwards.

The Supreme Court established a [2 prong test] for determining whether a defendant [received] ineffective assistance of Counsel & regardless if they are appointed or retained.

First, the petitioner must show that his attorney's performance failed to meet an "objective standard of reasonableness" In this case, the Counselor has stated and confessed before the Court that it was his fault that the petitioner's case is messed up . (see sent. tr. p. 12 lines 1-3, Ex A)

pg: 12 line 1-7

Second, the petitioner must show that [but for] the Attorney's inadequacies or failures, there is a "reasonable probability that the outcome of the proceedings would have possibility been different. (see p. 3 lines 1-25 and p. 12 lines 1-7 of sent. tran where both the government and counselor both admitted that the priors actions and quantities could not be proven or relied upon and that they messed up." ; see also Glover v US 531 US 198,203 (2001)..any amount of actual additional jail time has 6th Amendment significance.(Molina - Martinez v US 136 S.Ct 1338,1343(2016)

Prejudice Prong

Counselor Taliaferro has admitted under oath that he is responsible for the petitioner facing the penalties and that he failed to investigate prior to advising him to plea & relied soley on the government's evidence. In fact, the government also agreed that it could not verify the reliability of the amounts and that they are unsubstantiated and must be removed.(see p. 3 of sent tr.)

After the truth of the case had come forth the Counselor instead of moving to correct the plea and statutory findings, instead 4 days before sentencing attempted to [force] the petitioner to obtain another lawyer for sentencing. Therefore, because of these errors the petitioner was prejudiced during the plea and sentencing phases and counselors performance fell below the objective reasonableness of the counselors and has violated the petitioner's 5th and 6th Amendment Constitutional Rights.

Cause Prong

Because of the conceded ineffective actions of the Counselor the Court was forced to sentence the petitioner based upon the unreliable and insufficent evidence and was the cause of the petitioner receiving 144 months instead of 70-87 months. The difference is a base offense level of 34 instead of 26 (See Ex B fact sheet) and a increased guideline sentence. (see p. 4 lines 1-25 of sent tr. and also DOC 34 p. 2-3 Sec I attached in Ex B)

Therefore absent these counselors errors and hasty actions, there is a reasonably probability that the outcome of the proceeding would have been different and the cause and prejudice prongs are met and require the Court to Vacate the Conviction & Sentence and Grant the Evidentiary Hearing as requested. (See Attached Affidavit)

A defendant has a right to be sentenced and convicted upon the correct and reliable information. When a counsel acts outside of the wide range of reasonable conduct and professional assistance ..it cannot be said that Counsel was effective especially when he admits his failure and ineffectiveness. In Woodard v Collins, 898 F.2d 1027 (5th Cir. 1990),the Appeal Court held that a Remand was required to determined whether petitioner was prejudiced by counselors failure.

Counselor Taliaferro stated before the Court..I think I bear some responsibilities for where we are today , just because I was [so anxious] that he get up front on this thing and get to be the 1st in line, that I myself thought that he was probably bigger than he was ,,and the true are amounts are much less) To try to clear it up at sentencing was the cause of the tainted picture being presentened to the Court and led the Court to act and apply the increased statutory and sentencing ranges and led to the sentence being procedurally unreasonable and requires resentencing.

ISSUE II

Counselor was ineffective for failing to inform the Court that the Leadership/ Manager role enhancement was also removed with the drug quantities.

Prior to sentencing, the government and attorney removed the leadership/ manager role enhancement but at sentencing, the Counselor failed to inform the Court that this was also removed and the Court based its sentence off of the drug quantity and leadership enhancements, thus causing the sentencing to be procedurally unsound and based off of impermissible factors. Because of the Counselors ineffective assistance the court is required to Remand for resentencing and to remove the enhancement.(US v Christian 13-6530 (6th Cir. 2015)

→ In Christian, the District Court applied a "leadership/manager role enhancement but the Appeal Court showed that there is a difference between a upward departure vs a guideline enhancement for a leadership. The Court found that the sentence was based upon procedural error that violated the petitioners substantial rights & ordered the removal of the enhancement and for the defendant to be resentenced. (see also US v McEntire 153 F.3d 424 (7th Cir. 1998);US v Cameron 573 F.3d 179, 185 (4th Cir. 2009); US v Kamper 748 F.3d 728, 749 (6th Cir. 2014)..an incorrect calculation of the guidelines range is reversible procedural error that requires Remand).

Therefore, because of the counselors failures, it requires the

this Court to Vacate the sentence and Remand for Resentencing.(see Jansen v US 369 F.3d 237, 244 (3rd Cir. 2004)..when defense counsel fails to object to an improper enhancement under the guidelines, Counsel has rendered ineffective assistance.)

ISSUE III

Due to the Counselor 's conceded errors that violated Strickland, the Court must Resentence the Petitioner under the Correct Statutory finding of 5-40 instead of 10 to life. (US v Beier 20 F.3d 1428 (7th Cir. 1994)..a criminal defendnat has a due process right to be sentenced on the basis of reliable information not misstaken)

When the Court sentences a defendant under the incorrect statutory regime, it cannot be said that his sentence was based upon correct information and that the defendant was not prejudiced by the higher statutory finding.(Molina-Martinez v US, supra and Peugh v US 133 S.Ct 2072 (Sp. Ct 2013)

In US v Levy 76 F.3d 671 (5th Cir. 1996) the Appeal Court has determined that a defendant could challenge quantity calculations in the 2255. Later the 8th Circuit found that the extrapolation of drug quantities is also error. In this case, the Counselor and Government have conceded that the prior quantities were wrong and could not be substantiated but agreed that they are 90% or more lower than they originally thought.

Conclusion

The petitioners proceedings were flawed because of the ineffectiveness of Counselor Taliaferro and his hasty approach to shuffle the defendant through the system. Because of this , the Court is required to Grant the Vacating of the Conviction and Sentence and Grant the Evidentiary Hearing as well to cure the Constitutional violations that have caused the petitioner's sentence to be procedurally unconstitutional and his substantial rights to be violated.

Respectfully submitted on this ___day of April, 2017 by,

s/_____

Kedrio L. Summerville
Fed No.:86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

Certificate of Service

Pursuant to 28 USC § 1746

I, Kedrio L. Summerville , do hereby swear under the penalty of perjury that a copy of the 2255 form and brief has been sent via US Postal Mail to the US. District Court for the Eastern District of Virginia in Norfolk on this ___day of April, 2017.

s/_____
Kedrio L. Summerville

EXHIBIT A

Fact Page

Orginal Drug Quantities	-vs-	Amended Findings
PSI-7 was 422.657 crack		35 grams of crack
PSI-8 was 1275 gr. of powder		420 grams of powder
PSI-12 was 79,700 gr. powder		*0 grams of powder
PSI-15 was 1530 gr of powder		765 gram of powder
PSI-23 was 2000 gr. of powder and 56 gr. of crack		252 gram powder
PSI-26 was 1680 gr of powder		392 powder
PSI-28 was 2 kilo powder		*0 gr of powder
PSI-29 was 5 kilo of powder		*0 gr of powder
PSI 30 was 4.5 oz cocaine		*0 gram of powder
PSI-31 was 1275 gr of crack		*0 gram of crack
PSI 32 was 1219 gr.of crack		*0 grams of crack
PSI-33 was 8000 gr. of powder		*0 grams of powder
PSI-38 was 113 gr of crack		113 grams of crack
PSI-41 was 390 gram of crack		*0 grams of crack
PSI 42 was 603 gr of crack		*0 grams of crack
PSI-43 was leadership		* no attribution
PSI-44 was money finding		* no attribution

Total finding is:

148 grams of crack and 2229 grams of powder

BOL of 26 BOL of 26

Guideline Range for both 110-137 as a category V

but with departure and acceptance of responsiblity the findings are BOL 23 and produces 70-87 months as a category IV

Statutory Provisions 5-50 years based upon 500 but less than 5000 grams of powder cocaine and 28 or more grams but less than 280 grams of crack

I. Agreed upon new drug weight attributions based on amendments to the PSR:

PSR Paragraph	New Drug Weight Attributions or Disputes Based on Amendments to PSR
7	35 grams of cocaine base
8	420 grams of cocaine powder
12	0 grams (evidence cannot be substantiated)
15	765.45 grams powder
17	Defendant disputes the guns at this time, but not at the time of the arrest so this does not affect the guidelines.
22	Defendant disputes the guns at this time, but not at the time of the arrest so this does not affect the guidelines.
23	252 grams of cocaine
26	392 grams of cocaine
28	No attribution.
29	No attribution.
30	No attribution.
31	0 grams (evidence cannot be substantiated)
32	0 grams (evidence cannot be substantiated)
33	0 grams (evidence cannot be substantiated)

PSR Paragraph	New Drug Weight Attributions or Disputes Based on Amendments to PSR
36	0 grams (evidence cannot be substantiated)
38	113.4 grams of cocaine base
41	0 grams (evidence cannot be substantiated)
42	0 grams (evidence cannot be substantiated)
43	No attribution.
44	No attribution.
51	If the Court adopts these amendments based on the agreement between the parties, the new cocaine weight is 8,320.063 grams and the new cocaine base weight is 1,928.88 grams. Converting both of these amounts to kilograms of marijuana and adding it to the previous attributable amount of marijuana of 2.8216 kilograms yields at total of 8,555.86 kilograms of marijuana and corresponding offense level of 32. The adjustments for enhancements and acceptance of responsibility to remain the same so the final offense level 36 with a criminal history of V and a corresponding advisory guideline range of 292-365. The probation officer was provided an in depth spreadsheet with the base calculations to arrive at this new guideline range.

EXHIBIT B

[Leadership]

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEVIN MYELL SLADE, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
631 F.3d 185; 2011 U.S. App. LEXIS 1692
No. 08-4932
October 29, 2010, Argued
January 27, 2011, Decided

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Slade v. United States, 131 S. Ct. 2943, 180 L. Ed. 2d 234, 2011 U.S. LEXIS 4079 (U.S., 2011)Appeal after remand at, Decision reached on appeal by **United States v. Slade**, 2012 U.S. App. LEXIS 2263 (4th Cir. N.C., Feb. 6, 2012)

Editorial Information: Prior History

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. (4:08-cr-00003-FL-1). Louise W. Flanagan, Chief District Judge.

Disposition:
VACATED AND REMANDED.

Counsel ARGUED: Richard Clarke Speaks, SPEAKS LAW FIRM, PC, Wilmington, North Carolina, for Appellant.
Joshua Bryan Royster, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.
ON BRIEF: George E. B. Holding, United States Attorney, Anne M. Hayes, Jennifer P. May-Parker, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Judges: Before MOTZ, GREGORY, and SHEDD, Circuit Judges. Judge Gregory wrote the opinion, in which Judge Motz and Judge Shedd joined.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant pled guilty to one count of conspiracy to distribute and to possess with intent to distribute 50 grams or more of cocaine base and five kilograms or more of cocaine, in violation 21 U.S.C.S. § 846. At sentencing, the United States District Court for the Eastern District of North Carolina, at New Bern, adopted the findings of the presentence report, including imposition of the so-called leadership enhancement. Defendant appealed.Defendant's sentence was vacated and remanded because the district court improperly imposed the leadership enhancement and that mistake constituted plain error; being a buyer or seller of illegal drugs, even in league with other persons, did not establish that defendant had functioned as a manager or supervisor of criminal activity.

OVERVIEW: The district court did not err in calculating the base drug amount attributable to defendant because if the transactions were facilitated for defendant on behalf of his co-conspirators, he was liable as if he had sold them himself. Also, the district court did not commit clear error in applying the enhancement for possession of a firearm because a reliable co-conspirator who interacted with defendant in the course of that conspiracy related his knowledge that defendant "always carried guns" in

In Jeopardy
In Perpetration

connection with his drug trafficking activities. However, the finding that defendant was a mid to upper-level member of the drug conspiracy who sold or delivered cocaine and cocaine base both to his own clientele and to other members of the conspiracy, who, in turn, sold the drugs to their clientele, and the finding that certain coconspirators sold cocaine and cocaine base "for" defendant on various occasions, did not justify imposition of an enhancement for a management or supervisory role. Being a buyer or seller of illegal drugs did not establish that a defendant had functioned as a manager or supervisor of criminal activity.

OUTCOME: Defendant's sentence was vacated and the case was remanded for resentencing.

LexisNexis Headnotes

Criminal Law & Procedure > Sentencing > Guidelines

Appellate courts review a district court's calculation of the quantity of drugs attributable to a defendant for sentencing purposes for clear error.

Criminal Law & Procedure > Sentencing > Guidelines

Under U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B) the defendant is responsible not only for his own acts, but also for "all reasonably foreseeable acts" of his co-conspirators in furtherance of the joint criminal activity.

Criminal Law & Procedure > Sentencing > Imposition > Evidence
Evidence > Procedural Considerations > Burdens of Proof > Allocation

Defendant bears the burden of establishing that the information relied upon by the district court at sentencing is erroneous.

Criminal Law & Procedure > Sentencing > Guidelines

When a defendant failed to object to a drug-quantity calculation before the district court, appellate courts review for plain error.

Criminal Law & Procedure > Sentencing > Imposition > Evidence

A district court has broad discretion at sentencing to weigh credibility.

Criminal Law & Procedure > Sentencing > Adjustments

Under U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), a district court must increase the defendant's offense level two levels if a dangerous weapon (including a firearm) was possessed. U.S. Sentencing Guidelines Manual § 2D1.1(b)(1). In order to prove that a weapon was present, the Government need show only that the weapon was possessed during the relevant illegal drug activity.

Criminal Law & Procedure > Sentencing > Adjustments

Appellate courts review findings of fact relating to sentencing enhancements for clear error. Under this standard of review, the appellate court will only reverse if left with the definite and firm conviction that a mistake has been committed.

Criminal Law & Procedure > Sentencing > Adjustments
Evidence > Procedural Considerations > Burdens of Proof > Allocation

The enhancement for possession of a firearm reflects the increased danger of violence when drug traffickers possess weapons and should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), cmt., application n. 3. The enhancement is proper when the weapon was possessed in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction, even in the absence of proof of precisely concurrent acts, for example, gun in hand while in the act of storing drugs, drugs in hand while in the act of retrieving a gun. It is the defendant's burden to show that a connection between his possession of a firearm and his narcotic offense is clearly improbable.

U.S. Sentencing Guidelines Manual § 3B1.1(b) provides for a three-level enhancement in a defendant's offense level if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive. U.S. Sentencing Guidelines Manual § 3B1.1(b). Application of the enhancement is warranted if the defendant was a manager or supervisor of one or more other participants. U.S. Sentencing Guidelines Manual § 3B1.1(b), cmt., application n. 2.

When a defendant failed to object to the aggravating role determination in the district court, appellate courts review for plain error. To prevail under this standard, a defendant must show that an error was made, is plain, and affected his substantial rights. In the sentencing context, an error affects substantial rights if, absent the error, a different sentence might have been imposed.

Although the U.S. Sentencing Guidelines Manual does not define the term manager, courts utilize the dictionary definition: a person whose work or profession is the management of a specified thing (as a business, an institution, or a particular phase or activity within a business or institution). The U.S. Sentencing Guidelines Manual § 3B1.1(b) enhancement is appropriate where the evidence demonstrates that the defendant controlled the activities of other participants or exercised management responsibility.

A defendant does not qualify for an aggravating role enhancement under U.S. Sentencing Guidelines Manual § 3B1.1 in the absence of evidence that he organized or managed participants, as opposed to property, in the criminal enterprise.

Being a buyer or seller of illegal drugs, even in league with five or more other persons, does not establish that a defendant has functioned as a manager or supervisor of criminal activity.

Opinion

Opinion by: GREGORY

Opinion

{631 F.3d 187} GREGORY, Circuit Judge:

This case deals with the propriety of imposing a leadership sentencing enhancement where the defendant was a mid-level drug dealer who did not supervise others. In June of 2008, Kevin Myell Slade pled guilty without a plea agreement to one count of conspiracy to distribute and to possess with intent to distribute fifty grams or more of cocaine base and five kilograms or more of cocaine in violation 21 U.S.C. § 846 (2006). At sentencing, the district court adopted the findings of the presentence report ("PSR"), including imposition of the so-called leadership enhancement. The court then sentenced Slade to 365 months imprisonment, the upper end of the guideline's range. Because the district court improperly imposed the leadership enhancement and this mistake constitutes plain error, we vacate and remand for resentencing.

I.

The New Bern Police Department in tandem with the North Carolina State Bureau of Investigations targeted several narcotics distributors in Craven County, North Carolina, including Slade. Investigators determined that Slade was a mid-level drug trafficker, who supplied large quantities of cocaine, crack cocaine, and marijuana to six indicted and unindicted coconspirators. These individuals subsequently distributed the controlled substances. Several co-conspirators, including Slade's "right hand man," sold cocaine and crack cocaine on his behalf. Slade was also transported to various drug deals by his cousin.

During the investigation, the New Bern Police Department conducted multiple controlled buys from Slade as well as seizures. Investigators obtained statements from numerous individuals who provided information regarding the defendant's drug trafficking activities. Among these individuals was Herman King, who informed the police that Slade always carried guns. The government also presented testimony on behalf of Sergeant Wilcutt who testified about Slade's criminal history involving guns.

On July 2, 2008, Slade pled guilty to count one of the indictment: conspiracy. At sentencing, the district court adopted the PSR, which held Slade accountable for drugs totaling a base offense level of thirty four, with a two-level upward enhancement for possession of a firearm, a three-level enhancement for Slade's leadership role in the offense, and a three-level reduction for acceptance of responsibility. It then calculated the range of imprisonment at 292 to 365 months. After hearing from counsel and taking the allocution from Slade, the court sentenced him to 365 months. Slade timely appealed.

II.

A.

Slade first argues that the district court erred in calculating the base drug amount **{631 F.3d 188}** attributable to him under § 2D1.1(a)(3) of the Sentencing Guidelines. More specifically, he contends that the district court considered unreliable and unsubstantiated evidence in the PSR to find him responsible for the equivalent of 20,515 kilograms of marijuana. Slade's argument is meritless.

"We review the district court's calculation of the quantity of drugs attributable to a defendant for sentencing purposes for clear error." *United States v. Randall*, 171 F.3d 195, 210 (4th Cir. 1999) (*citing United States v. McDonald*, 61 F.3d 248, 255 (4th Cir. 1995)). Under § 1B1.3(a)(1)(B) the defendant is responsible not only for his own acts, but also for "all reasonably foreseeable acts" of his co-conspirators in furtherance of the joint criminal activity. *Id.; United States v. Lipford*, 203 F.3d 259, 271-72 (4th Cir. 2000). The defendant bears the burden of establishing that the information relied upon by the district court-here the PSR-is erroneous. *Randall*, 171 F.3d at 210-11 (*citing United*

States v. Love, 134 F.3d 595, 606 (4th Cir. 1998)). Because Slade failed to object to the drug-quantity calculation before the district court, we review for plain error. *See United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

Slade argues that because he was incarcerated when the drug deals occurred-namely during several months in 2006-it was physically impossible for him to have facilitated them. The government responds that Slade was sentenced in August, and therefore had eight months to complete the alleged transactions. Yet the PSR indicates that Slade was arrested subsequent to his first arrest in January 2006, indicating that he was not incarcerated but instead out on bail. This reading is also supported by the fact that his probation was revoked in July of 2007, suggesting that his sentence was probation, not incarceration. Furthermore, it is within the discretion of the district court to credit the testimony of these witnesses who discussed his involvement in the drug trade. *United States v. Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993) (district court has broad discretion at sentencing to weigh credibility). It was not plain error for the district court to believe witnesses over Slade's word by, for example, believing that the transactions occurred during the periods of 2006 when Slade was not incarcerated. Finally, if the transactions were facilitated for Slade on behalf of his co-conspirators, he is liable as if he had sold them himself.

B.

Slade next argues that the district court improperly applied the two-level enhancement for possession of a firearm. Under § 2D1.1(b)(1), a district court must increase the defendant's offense level two levels "[i]f a dangerous weapon (including a firearm) was possessed." U.S. Sentencing Guidelines Manual, § 2D1.1(b)(1) (2004). In order to prove that a weapon was present, the Government "need show only that the weapon was possessed during the relevant illegal drug activity." *United States v. McAllister*, 272 F.3d 228, 233-34 (4th Cir. 2001) (*citing United States v. Harris*, 128 F.3d 850, 852 (4th Cir.1997). "We review findings of fact relating to sentencing enhancements for clear error." *Id.* Under this standard of review, this Court will only reverse if left with the "definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 336-37 (4th Cir. 2008) (internal quotations omitted).

The enhancement "reflects the increased danger of violence when drug traffickers possess weapons" and should be applied "if the weapon was present, unless it is clearly improbable that the weapon **{631 F.3d 189}** was connected with the offense." USSG § 2D1.1(b)(1), cmt. n.3. The enhancement is proper when "the weapon was possessed in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction," *United States v. Manigan*, 592 F.3d 621, 628-29 (4th Cir. 2010) (internal quotation marks omitted), even in the absence of "proof of precisely concurrent acts, for example, gun in hand while in the act of storing drugs, drugs in hand while in the act of retrieving a gun," *United States v. Harris*, 128 F.3d 850, 852 (4th Cir. 1997) (internal quotation marks and citations omitted). It is the defendant's burden to show that a connection between his possession of a firearm and his narcotic offense is "clearly improbable." *See id.* at 853 (internal quotation marks omitted).

Here, the PSR recommended application of the two-level enhancement under USSG § 2D1.1(b)(1) based on the statement of Herman King, a co-conspirator who purchased or received cocaine from Slade in 2005, that Slade "always carried guns" in connection with his drug-trafficking activities. In objecting to this recommendation in the district court, Slade asserted that King's statement that he "always" carried guns during the course of his drug activities was not credible because it was uncorroborated and because he had been arrested for and convicted of several drug offenses where a gun was not involved. The Government countered that, as shown by Slade's criminal record, he was charged with and convicted of other gun offenses during the course of the subject drug

conspiracy. The Government also presented testimony from a state detective familiar with the investigation of Slade that King's statements to investigators concerning Slade were reliable and not untruthful. The detective confirmed that, during the subject conspiracy, Slade shot known drug dealers and gave a handgun to an individual who later pled guilty in federal court to a drug trafficking offense.

The district court credited the detective's testimony and, relying on it, Slade's criminal history, and the evidence in the PSR, overruled Slade's objection and adopted the PSR's recommendation to apply the two-level enhancement under USSG § 2D1.1(b)(1). The district court did not commit clear error in applying the enhancement. Slade was a member of the subject drug conspiracy from "at least 2003 to January 2007," and a reliable co-conspirator who interacted with Slade in the course of that conspiracy related his knowledge that Slade "always carried guns" in connection with his drugtrafficking activities. Slade has not shown that it was "clearly improbable" that the firearms were connected with the drug conspiracy, and he is entitled to no relief on this claim.

C.

Finally, Slade's offense level was increased three levels because the district court determined that he played an aggravating role as a manager or supervisor of the drug conspiracy. Section 3B1.1(b) of the Guidelines provides for a three-level enhancement in a defendant's offense level "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." USSG § 3B1.1(b). Application of the enhancement is warranted if the defendant was a manager or supervisor "of one or more other participants." *Id.*, cmt. n.2; *see United States v. Bartley*, 230 F.3d 667, 673 (4th Cir. 2000).

Because Slade failed to object to the determination in the district court, this Court reviews for plain error. *See United States v. Rooks*, 596 F.3d 204, 212 (4th **{631 F.3d 190}** Cir. 2010), *cert. denied*, 131 S. Ct. 148, 178 L. Ed. 2d 89 (Oct 4, 2010). To prevail under this standard, Slade must show that an error was made, is plain, and affected his substantial rights. *Id.* In the sentencing context, an error affects substantial rights if, "absent the error, a different sentence might have been imposed." *United States v. Hernandez*, 603 F.3d 267, 273 (4th Cir. 2010).

Slade argues that the district court's determination that he was a manager or supervisor of the drug conspiracy was erroneous because the record evidence is insufficient to show that he actually "managed" or "supervised" persons involved in the conspiracy. (Appellant's Br. at 16). 1 We agree. Although the Guidelines do not define the term manager, this Court utilizes the dictionary definition: "'a person whose work or profession is the management of a specified thing (as a business, an institution, or a particular phase or activity within a business or institution).'" *United States v. Chambers*, 985 F.2d 1263, 1268 (4th Cir. 1993) (quoting Webster's Third New International Dictionary 1372 (1986) (emphasis omitted)). The enhancement is appropriate where the evidence demonstrates that the defendant "controlled the activities of other participants" or "exercised management responsibility." *Bartley*, 230 F.3d at 673-74 (internal quotation marks omitted).

According to the PSR, which the district court adopted, Slade was a "mid[-] to upper-level" member of the drug conspiracy who sold or delivered cocaine and cocaine base both to his own clientele and to other members of the conspiracy, who, in turn, sold the drugs to their clientele. Certain coconspirators also sold cocaine and cocaine base "for" Slade on various occasions. The PSR reveals further that an unindicted co-conspirator drove Slade to various locations to deliver cocaine base to his clients. These are the only factual findings supporting the role enhancement assessed against Slade, 2 and they do not justify imposition of an enhancement for a management or supervisory role.

It is clear that Slade sold illegal drugs, "[b]ut being a buyer [or] seller of illegal drugs, even in league with . . . five or more other persons, does not establish that a defendant has functioned as a[ ] . . . manager or supervisor of criminal activity." *United States v. Sayles*, 296 F.3d 219, 225 (4th Cir. 2002) (internal quotation marks omitted). In cases where this Court has affirmed the application of an aggravating role adjustment under USSG § 3B1.1(b), there existed on the record evidence that the defendant actively exercised some authority over other participants in the operation or actively managed its activities. *See United States v. Llamas*, 599 F.3d 381, 389-90 (4th Cir. 2010) (affirming USSG § 3B1.1(b) enhancement where the defendant "exercised supervisory responsibility over" the activities of a call center by, *inter alia*, enforcing the center's rules, punishing non-compliant operators, and coordinating the operators' activities); *Kellam*, 568 F.3d at 147-48 (affirming USSG § 3B1.1(b) enhancement where the defendant controlled the drug buys of coconspirators and directed the terms of payment); *Bartley*, 230 F.3d at **{631 F.3d 191}** 673-74 (affirming USSG § 3B1.1(b) enhancement where the defendant directed the activities of street-level drug dealers and advised them on drug sales techniques, set prices and payment terms, arranged logistics of delivery, and directed the mailing and transport of drugs); *United States v. Al-Talib*, 55 F.3d 923, 932 (4th Cir. 1995) (affirming USSG § 3B1.1(b) enhancement where the defendant "acted as a manager in a large criminal enterprise, supervising the preparation of marijuana for shipment and sending out his inferiors to deliver the drugs"); *United States v. Brooks*, 957 F.2d 1138, 1152 (4th Cir. 1992) (affirming USSG § 3B1.1(b) enhancement where the defendant, *inter alia*, paid employees of the drug operation and "effectively ran the operation while her husband was ill").

Such evidence is lacking in this case. Although Slade supplied large quantities of drugs to some co-conspirators who, in turn, sold those drugs to their clientele, there is simply no evidence that Slade exercised any supervisory responsibility over these persons by controlling them or directing the terms of their sales. Additionally, while an unindicted coconspirator did drive Slade to various locations to deliver cocaine base to his own clientele, there is no indication from the record that the co-conspirator did so pursuant to or as a result of any exercise of managerial or supervisory authority by Slade. Finally, while various co-conspirators sold drugs "for" Slade, there is simply no evidence in the record that Slade had any involvement in those sales beyond that of supplying the drug. In short, this record does not support the conclusion that Slade was exercising authority over other coconspirators or managing the conspiracy's activities. In light of the absence of any evidence of Slade's aggravating role as a manager or supervisor, the district court erred in enhancing his offense level under USSG § 3B1.1(b). 3

The district court's error was also plain. *See Olano*, 507 U.S. at 734 (explaining that "plain" error is "synonymous with clear or . . . obvious" error (internal quotation marks omitted)). Finally, the court's error affected Slade's substantial rights. Under the plain error standard, Slade has the burden of showing that the court's error "had a prejudicial effect on the sentence imposed." *United States v. Lynn*, 592 F.3d 572, 580 (4th Cir. 2010). Here, had the district court correctly calculated Slade's Guidelines range, it might have given Slade a lower imprisonment term. 4 Considering that the **{631 F.3d 192}** district court sentenced Slade at the highest end of what it thought to be the Guidelines range, there exists a nonspeculative basis to infer prejudice that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (discussing the fourth prong of the plain error test) (internal quotation marks and alteration omitted).

In sum, although the district court did not err in its calculation of Slade's base offense level or in enhancing that level for possession of a firearm, the court erred in assessing an enhancement under USSG § 3B1.1(b) for Slade's role in the offense. The 365-month sentence is therefore procedurally unreasonable. *United States v. Diaz-Ibarra*, 522 F.3d 343, 347 (4th Cir. 2008). We therefore vacate and remand it to the district court for resentencing.

III.

For the foregoing reasons, the sentence of the district court is vacated and remanded for resentencing consistent with this opinion.

VACATED AND REMANDED

Footnotes

1

Slade also argues that there is no evidence that he managed or supervised property (Appellant's Br. at 16), but this assertion is irrelevant, as a defendant does not qualify for an aggravating role enhancement under USSG § 3B1.1 in the absence of evidence that he organized or managed participants, as opposed to property, in the criminal enterprise, *United States v. Cameron*, 573 F.3d 179, 185 (4th Cir. 2009).

2

The Government does not contend to the contrary. (See Appellee's Br. at 18-19).

3

The Government's argument does not alter our conclusion. It claims that the section 3B1.1(b) enhancement was properly applied because the record "contains statements that [Slade]'s driver drove him around to deliver [cocaine base] to his client and that his 'right hand man' sold [cocaine base] and cocaine for him." (Appellee.s Br. at 18). It is certainly true that Slade's cousin, Felicia Beckworth, drove Slade to various locations to deliver cocaine base to his clients, but there is no indication from the PSR that she did so pursuant to any direction or exercise of supervisory authority by Slade. Moreover, while Beckworth did in fact drive Slade, the claim that she was "his" driver finds no record support. The PSR also reveals that LoMichael Grice, an unindicted co-conspirator described as Slade's "right hand man," sold cocaine and cocaine base "for" Slade. But, again, there is no evidence that Slade in any way controlled or directed Grice's drug sales, and the appellation "right hand man" does not reveal anything about whether Grice was acting pursuant to or as the result of any exercise by Slade of supervisory authority.

4

Without the three-level enhancement under USSG § 3B1.1(b), Slade's total offense level would have been 33. A total offense level of 33 and a Category V criminal history produce an advisory Guidelines range of 210 to 262 months' imprisonment, *see* USSG ch. 5, pt. A (sentencing table).

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA COURT
(NORFOLK DIVISION)

United States of America Case.No. 2:15-cr-100

-vs-

Kedrio L. Summerville
Petitioner-Pro Se

PETITIONERS § 2255 RESPONSE IN REGARD TO RELIEF

Comes now the petitioner, Kedrio L. Summerville,hereby pro se, humbly before the Court to move the Court to [Grant] the 2255 Relief sought by Summerville and to Vacate the Sentence & Remand for both a Evidentiary Hearing and Resentencing, as well as appoint new counsel to assist the petitioner for the following reasons:

I. Response to Governments and Former Counsel Positions

First, the government states on p. 2 of its response in lines 16-18, that [both the petitioner and Taliaferro agreed they had discussed the charges and possible sentences and that the petitioner understood those charges and possible penalties.]

The problem with the governments position is that the government

nor counsel even knew the actual findings [prior to plea] and the information relayed to Summerville was not even true once investigated, thus everyone was acting under the misconception of inaccurate information.

In fact to prove this point, after the plea was signed, the former counsel "finally investigated" the merits of the case & determined that he was wrong and that he was wrong for advising the petitioner to plea guilty based upon false pretense. Not only did he "admit his own ineffectiveness", but the government also conceded that there was a grave misunderstanding that had occured "that led to the petitioner pleading guilty". Therefore, what the petitioner "understood was based upon falsehood" and the plea could not be intelligently entered, nor knowingly or voluntarily entered, when all parties agreed that they were wrong. (US v Sandlin 96 Fed App's 388 (6th Cir. 2004)..the parties when drafting the plea acted under the misconception of the law and the court vacates the sentence)

Next, once the parties actually [realized] that the information used was fictious in nature, the parties removed thousands of grams and even the leadership role, or at least that was what the counsel for Summerville..told him... Again, once the petitioner arrived at the sentencing, the petitioner was still hit with the leadership/managerial role, when all parties knew that the information was not true.

The government cannot rely upon the fictious information to uphold a increased statutory penalty nor apply the leadership role enhancment without violating the petitioner constitutional due process rights.(US v Smack 347 F.3d 533, 540 (3rd Cir. 2003); Paters v US 159 F.3d 1043 (7th Cir. 1998)..counsel was ineffective in the plea negotiation process and warranted an evidentiary hearing to determine whether the petitioner would have accepted the plea)

The government states that the "original statement of facts" stated that the petitioner managed at least 5 people, but what the government has left out is that the information was struck because the government and counsel[found] that this was error as well . In fact, the government was fully aware that the petitioner stated that he worked for himself and did not have others work for him.

The 3 level leadership / managerial enhancement must be removed. (US v Guinta, 89-5245 (4th Cir. 1991)..the governments evidence is tenous and insufficient) ; US v Musa, 15-2078 (8th Cir. 2016) ..the district court did not make the findings required to impose the § 3b1.1 enhancement and it [requires resentencing] without the enhancement; see also US v Fiosa 13-50734 (5th Cir. 2015)

Next, the government in its response failed to adhere or even mention the [new Supreme Court] ruling of Lee v US, 16-327, which came out in June 2017 in its response. Why, because the Lee

decision [specifically dealt with the "decision making process" of the defendant that led to the acceptance of the plea and the information provided from the counselor].

In this case, the counselor admitted that he was responsible for failing to investigate prior to the plea and was the cause of the situation the petitioner faced at that time. Even with the concession of the counselors own ineffectiveness, the government has sought to refer to the Rule 11 proceedings, but Lee said that the Rule 11 proceedings cannot cure the defect in the attorney's erroneous information being relayed to the defendant prior to the plea. Therefore, all the governments arguments fail on the merits and require this Court to Vacate the Sentence and Remand for Resentencing and a Evidentiary hearing to resolve what are the facts of the case and why the counselor failed to investigate prior to advising Summerville to accept a plea when he had not even investigated prior to the offering of his advice.(Mosley v Butler 13-2515 (7th Cir. 2014)..the counselors failure to properly investigate, rendered the counselors performance objectively unreasonable; Liao v Junious, 14-55897 (9th Cir. 2016).. the counselors performance was constitionally defective and the court erred by holding that the defendant suffered no prejudice based upon the counselors ineffectiveness, and the courts ruling is objectively unreasonable and is a malfunction of justice)

Strickland v Washington and Hill v Lockhart both require the attorney to investigate the case and not just accept the governments version of facts. Strickland held that a reasonable attorney has a obligation to research the revelant facts and information and laws governing. In Summerville's case, the cause of the erroneous information being used to persuade Summerville to plea guilty was based upon the counselors own admission of errors. The only one to suffer from this objectively unreasonable performance is Summerville because it has added quantities and years to the petitioner's sentence. Once all the "smoked clear", the petitioner should have only been held for less than 200 grams, but instead he is still being held for thousands that all parties are aware is incorrect.Thus cause and prejudice are clearly shown and in light of Lee v US, it requires the Court to Vacate the plea and sentence and Grant the Evidetiary Hearing and then.proceed accordingly. (US v Galloway, 56 F.3d 1259 (10th Cir. 1995).. the counsel can raise his own ineffectiveness; Dillion v Duckworth 751 F.2d 895 (7th Cir. 1995); Tollet v Henderson 411 US 258 (1973); and US v Rumery 698 F.2d 764 (5th Cir. 1983)..counsel induced guilty plea based upon erroneous advice, which renders the plea itself involuntary and unintelligently entered and constitutes ineffective assistance.)

The right to effective assistance extends to all critical stages of a criminal prosecution. The pre-plea stage is the most critical in a case where a plea.. is accepted. Thus, if the pre-

plea stage is based off of inaccurate or fictious [information], then it cannot be said that a defendant has voluntarily, intelligently entered into a agreement that can stand. Lee shows the Court this sound principle and trumps all of the prior rulings to the contrary. The Lee was out at least 2 weeks prior to the governments response submission, but the government strategically [avoided Lee]. However, the Lee governs this case because the counselor has admitted that his actions were ineffective and was the cause of the situation Summerville faced today. (see sent. transcripts).; US v Vasquez 7 F.3d 81 (5th Cir. 1993); Richardson v Miller 721 F.Supp 1087 (WD.MO 1989) and US v Barnes 662 F.2d 777 (DC 1980)

Conclusion

Based upon the original arguments and concession of the government and counsel, as well as the petitioners response, the petitioner moves the court to Vacate the Conviction and Sentence and to Remand for a Evidentiary Hearing and futher proceedings.

Respectfully submitted on this ___day of July, 2017 by,

s/_____

Kedrio L. Summerville
Fed No. 86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

CERTIFICATE OF SERVICE

I, Kedrio L. Summerville, do hereby swear under the penalty of perjury that a copy of the 2255 response has been sent via US Postal Mail to the following parties below:

AUSA, Joseph E. DePadilla

101 West Main St., Suite 800

Norfolk, VA 23510

and

The US District Court for the Eastern District of VA, Norfolk

Executed on this ___day of July, 2017 pursuant to 28 USC § 1746.

s/_____

Kedrio L. Summerville
Fed No. 86081-083
FCI Butner II
PO Box 1500
Butner,NC 27509

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

KEDRO LEKEIS SUMMERVILLE,

Petitioner,

v. CRIMINAL ACTION NO: 2:15cr100

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("Motion"). The Government has filed a response in opposition to Petitioner's Motion. Having considered the pleadings, the Court finds it necessary to conduct a hearing. Petitioner has made allegations, if true, could constitute both deficient performance and prejudice under *Strickland v. Washington,* 466 U.S. 668 (1974). The Court finds it would facilitate the administration of justice if the Petitioner had the assistance of counsel. Accordingly, it is

ORDERED that Melinda Glaubke of Virginia Beach, Virginia, a member of the bar of this Court, being a qualified and experienced attorney, is **APPOINTED** as counsel to represent Petitioner in this federal habeas proceeding. Her representation shall be for the purpose of preparing and assisting the Petitioner with the hearing related to issues in this habeas corpus petition.

The Clerk is **DIRECTED** to send a copy of this Order to Petitioner, the United States Attorney, Eastern District of Virginia, World Trade Center, Suite 8000, 101 West Main Street,

Norfolk, Virginia 23510, and Melinda Glaubke. The Court will contact counsel to schedule a hearing on this petition.

It is so **ORDERED**.

Norfolk, Virginia
October 6, 2017

/s/
Raymond A. Jackson
United States District Judge

COPY