

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

DANTA O. ROBERTS

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Peter L. Goldman
SABOURA, GOLDMAN & COLOMBO, P.C.
211 North Union Street
Suite 100
Alexandria, Virginia 22314
(703) 684-6476 Telephone
(703) 373-1941 Facsimile

Counsel for Petitioner

QUESTION PRESENTED

I. Whether the Fourth Circuit erred by ruling that the record did not conclusively demonstrate any deficiencies in trial counsel's representation, and Mr. Roberts' claims are therefore cognizable on direct appeal.

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RULE 14.1(b) STATEMENT

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

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I. The opinion of the United States District Court for the Eastern District of Virginia is attached hereto as Appendix II.

JURISDICTION

The Judgment of the United States Court of Appeals for the

Fourth Circuit was entered on July 2, 2021. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

A. THE PLEA BEFORE THE DISTRICT COURT.

In December 15, 2014, Mr. Roberts was apprehended and arrested by Chestefield County police, using a confidential source/informant, in a purported drug transaction. Drugs and a weapon were found in or around Mr. Roberts.

On May 5, 2015, Mr. Roberts was charged in a four count Indictment with Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. Secs. 841, Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. Sec. 841, Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. Sec. 922(g)(1), and Use and Carrying of a Firearm During and in Relation to a Drug Trafficking Crime, in violation of 18 U.S.C. Sec. 924(c), in the United States District Court for the Eastern District of Virginia, 15CR-83.

On July 7, 2015, Mr. Roberts appeared before the Eastern District Court of Virginia (the Honorable Henry E. Hudson), and entered a plea of guilty to Count I (Possession with Intent to Distribute Heroin), in violation of 21 U.S.C. Sec. 841, of the same Indictment. The other three counts were dismissed.

The written Plea Agreement and Statement of Facts were entered

into the record. A Sentencing Hearing occurred on October 2, 2016. Mr. Roberts was sentenced to a mid-United States Sentencing Guideline Range (188-235 months) of 200 months of incarceration, with other conditions.

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

On or around September 26, 2016, Mr. Roberts filed a *pro se* Motion under 28 U.S.C. Sec. 2255, claiming his Plea/Sentencing was improper due to Ineffective Assistance of Counsel. Mr. Roberts argued that his trial level counsel was ineffective for three reasons: (1) his counsel did not file Notice of Appeal, despite Mr. Roberts' instruction to do so; (2) his counsel did not apprise Mr. Roberts about all of the "direct consequences" associated with his plea (i.e., loss of benefits on Mr. Roberts' family; and (3) his counsel did not make the most viable, available and effective argument at sentencing.

The Government filed an Opposition to Mr. Roberts' Motion. The District Court held an Evidentiary Hearing on Mr. Roberts' Motion, Claim 1. The District Court dismissed Claims 2 and 3, prior to the Evidentiary Hearing. (JA 185-192.)

At the Evidentiary Hearing, Mr. Roberts testified that he told his trial counsel in court that he wanted to appeal the sentence of 200 months. Trial counsel did not see him after he left the courtroom. He later asked his girlfriend, Erica Johnson, to call

trial counsel, to ask her to note an appeal.

On cross-examination, Mr. Roberts acknowledged that he waived the right to appeal in his written Plea Agreement.

On re-direct examination, Mr. Roberts reviewed the District Court's advisement of his right to appeal the sentence in the Sentencing Hearing.

Erica Johnson, mother of Mr. Roberts' child, testified that he asked her to contact trial counsel to note an appeal of the sentencing. She did so, the next day. She was told by trial counsel's office that Mr. Roberts had waived his appeal in the Plea Agreement. Trial counsel later confirmed that position with her.

Trial counsel testified that she reviewed the Appeal Waiver in the Plea Agreement with Mr. Roberts, prior to his entry of the plea. An appeal by Mr. Roberts could potentially have been a breach of the Plea Agreement. Counsel had no notes in her file about appeal discussions with Mr. Roberts or Ms. Johnson. The District Court granted Mr. Roberts' Motion on Claim 1, and allowed Mr. Roberts to note this appeal to this Court. The District Court re-sentenced Mr. Roberts, giving him the previous sentence.

Mr. Roberts filed a timely Notice of Appeal to the Fourth Circuit.

SUMMARY OF ARGUMENT

Mr. Roberts' 2255 Motion was based on Constitutional/Sixth

Amendment rights violations. Trial counsel did not meet the standard set forth in *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct 1399, 1409-11 (2012), in that counsel did not adequately explain the plea process and its ramifications to Mr. Roberts, to allow him to make a fully informed decision about the Government's plea offer.

Mr. Roberts counsel did not apprise Mr. Roberts about all of the "direct consequences" associated with his plea (i.e., loss of benefits on Mr. Roberts' family); and his counsel did not make the most viable, available and effective argument at sentencing. The record does conclusively demonstrate the deficiencies in trial counsel's representation, and is therefore cognizable on direct appeal.

ARGUMENT

I. MR. ROBERTS' 2255 MOTION WAS BASED PRIMARILY ON CONSTITUTIONAL/SIXTH AMENDMENT VIOLATIONS BY COUNSEL.

Mr. Roberts' moved the District Court under 28 U.S.C. Sec. 2255 to vacate his sentence and/or plea, based upon the ineffective assistance of his trial counsel. *Mr. Roberts' 2255 Motion and argument was based primarily on violations of his Constitutional, Sixth Amendment rights.* Trial counsel's ("counsel") errors were significant, and compromised Mr. Roberts' Constitutional Rights: (1) counsel did not note an appeal as directed by Mr. Roberts, as

the District Court held; and (2) counsel did not explain the plea process, ramifications and options to Mr. Roberts, in violation of the Sixth Amendment/Constitutional rights and requirements under *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

Where "an attorney's ineffectiveness conclusively appears on the face of the record", ineffectiveness of counsel issues can be heard on direct appeal. *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016).

A. INEFFECTIVE ASSISTANCE OF COUNSEL; THE APPLICABLE STANDARD.

To prevail on an ineffective assistance of counsel claim, a movant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct 1399, 1409-11 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

The Supreme Court has stated that the standard for ineffective assistance of counsel is a high one. The issue is whether counsel's representation amounted to incompetence under prevailing professional norms and not whether it deviated from best practices

or most common custom. See *Premo v. Moore*, 562 U.S. 115, 122 (2011).

B. COUNSEL DID NOT ADEQUATELY EXPLAIN TO MR. ROBERTS THE BENEFITS THAT WOULD BE LOST AS PART OF HIS PLEA AGREEMENT WITH THE GOVERNMENT.

The District Court already granted in part Mr. Roberts' 2255 Motion, namely that trial counsel failed to note an appeal as directed by Mr. Roberts.

However, the District Court and the Fourth Circuit erred in denying Mr. Roberts' Claim 2 - namely that he did not understand the benefits that would be lost to his family via his plea. This failure by counsel made the entire Plea and Sentencing process constitutionally defective.

To begin with, this Court should understand Mr. Roberts' background. He has an 8th grade education. He eventually received a GED. He had suffered from mental illnesses, before he saw a psychiatrist. He has an IQ function full scale of 72. He started using marijuana at age 9; a full user at 11. He began abusing prescription medication at age 12, after he was shot. He began using crack and heroin at age 18.

Danta Roberts needed special guidance in the Plea and Sentencing process. He didn't receive it.

Under the Constitution, the plea process requires special efforts and attention from counsel. In 2012, the Supreme Court held

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

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

1. When He Entered His Plea, Mr. Roberts Was Not Informed By Counsel About The Ramifications Of The Plea On Sentencing And Benefits.

As Mr. Roberts set forth in his 2255 Motion, he was not

apprised by counsel of the loss of benefits the Plea would result in under 21 U.S.C. Sec. 862(b). Mr. Roberts was not informed that his Plea would result in the loss of benefits to household/family members. Just as counsel did not note the appeal, counsel did not explain this important waiver or loss of rights and benefits to Mr. Roberts. He may well have rejected the Plea Offer, gone to trial, or at least tried to negotiate a better plea regarding this loss of family benefits issue.

Mr. Roberts' lack of knowledge of the direct consequences of his plea renders the entire plea and sentencing constitutionally defective. See *Brady v. United States*, 397 U.S. 742, 755 (1970).

The loss of benefits to Mr. Roberts' family is real, and devastating. His girlfriend and her three children will suffer.

Missouri v. Frye, 566 U.S. at 140, sets a high standard for effective assistance of counsel in the plea process. The Sixth Amendment right to effective assistance of counsel extends to the presentation, explanation and consideration of plea offers. The Sixth Amendment right to effective assistance of counsel applies to "all 'critical' stages of criminal proceedings". *Missouri v. Frye*, 132 S.Ct. at 1409-11(citing *Montejo v. Louisiana* 556 U.S. 778, 786 (2009), quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967)).

That high standard was not met in this case, to Mr. Roberts' loss of Constitutional rights. Further, the record conclusively

demonstrates the deficiencies in Mr. Roberts' trial counsel; failure to explain the ramifications of the plea offer.

II. CONCLUSION

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

Mr. Roberts requests that the Court grant Certiorari, and direct the Fourth Circuit to hear these ineffective assistance of counsel issues on direct appeal.

Respectfully submitted,

/s/

Peter L. Goldman, Esq.
SABOURA, GOLDMAN & COLOMBO, P.C.
211 North Union Street, Suite 100
Alexandria, VA 22314
(703) 684-6476 (o)
(703) 373-1941 (f)
pgoldmanatty@aol.com
Counsel for Appellant
Danta O. Roberts

APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4643

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANTA OMAR ROBERTS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:15-cr-00083-HEH-RCY-1; 3:16-cv-00793-HEH-RCY)

Submitted: June 21, 2021

Decided: July 2, 2021

Before MOTZ, RICHARDSON, and RUSHING, Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, P.C., Alexandria, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Olivia L. Norman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Danta Omar Roberts pled guilty to possession with intent to distribute heroin and was sentenced to 200 months' imprisonment. He did not appeal. He subsequently filed a 28 U.S.C. § 2255 motion alleging several claims of ineffective assistance of counsel. The district court granted relief on Roberts' claim that defense counsel provided ineffective assistance by failing to file a notice of appeal, *see United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993) (holding that counsel's failure to file notice of appeal when requested to do so is per se ineffective assistance and the remedy is to vacate and reimpose the criminal judgment to permit appeal period to run again), and denied relief on his remaining claims on the ground that they were without merit. The court vacated the criminal judgment, entered an amended judgment reimposing the same sentence, and allowed Roberts to note an appeal. Roberts now appeals the district court's order denying in part his § 2255 motion and the amended judgment.

To the extent that Roberts seeks to challenge the district court's § 2255 order denying his non-*Peak* claims on the merits, he must obtain a certificate of appealability under 28 U.S.C. § 2255. 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 procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Because Roberts' remaining habeas claims could have been raised in Roberts' criminal appeal or a subsequent § 2255 motion, the district court should

not have dismissed them with prejudice. *See In re Goddard*, 170 F.3d 435, 437 (4th Cir. 1999). Therefore, we grant a certificate of appealability as to those claims, and affirm as modified to reflect dismissal without prejudice.

Turning next to Roberts' appeal from his amended criminal judgment, we note that claims of ineffective assistance of counsel generally are not cognizable on direct appeal. *United States v. Maynes*, 880 F.3d 110, 113 n.1 (4th Cir. 2018). Instead, to permit adequate development of the record, such claims should be raised in a 28 U.S.C. § 2255 motion. *United States v. Baptiste*, 596 F.3d 215, 216 n.1 (4th Cir. 2010). An exception exists, however, where "an attorney's ineffectiveness conclusively appears on the face of the record." *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016). Upon review, we conclude that the record does not conclusively demonstrate any deficiencies in counsel's representation, and therefore this claim is not cognizable on appeal.

Accordingly, we affirm the district court's amended criminal judgment and we affirm the district court's dismissal of Roberts' § 2255 claims as modified to reflect that the dismissal is without prejudice. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED

FILED: July 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4643
(3:15-cr-00083-HEH-RCY-1)
(3:16-cv-00793-HEH-RCY)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DANTA OMAR ROBERTS

Defendant - Appellant

J U D G M E N T

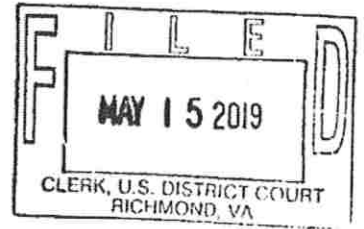
In accordance with the decision of this court, the judgment of the district court is affirmed as modified.

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

APPENDIX II

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



UNITED STATES OF AMERICA)

v.)

Criminal No. 3:15CR83-HEH

DANTA OMAR ROBERTS,)

Petitioner.)

MEMORANDUM OPINION

(Dismissing Claims 2 and 3 and Setting Claim 1 for an Evidentiary Hearing)

Danta Omar Roberts ("Petitioner"), a federal inmate proceeding *pro se*, filed this motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Petitioner contends that he is entitled relief on the following grounds:

- Claim 1 Petitioner failed to receive the effective assistance of counsel because counsel failed to follow an appeal as directed. (ECF No. 29, at 4.)¹
- Claim 2 Petitioner failed to receive the effective assistance of counsel because counsel failed to advise him that by pleading guilty he and his immediate family would be rendered ineligible to receive federal benefits. (*Id.* at 5.)
- Claim 3 Petitioner failed to receive the effective assistance of counsel because counsel failed to advance a viable challenge to Petitioner's Career Offender enhancement under the Sentencing Guidelines ("USSG"). (*Id.* at 6.)

The Government has responded. Petitioner has replied. The matter is ripe for disposition.

¹ The Court employs the pagination assigned by the CM/ECF docketing system to all citations in the record.

I. PROCEDURAL HISTORY

On May 5, 2015, a grand jury charged Petitioner with: possession with intent to distribute heroin (Count One); possession with intent to distribute cocaine (Count Two); possession of a firearm and ammunition by a convicted felon (Count Three); and use and carry of a firearm during and in relation to a drug trafficking crime (Count Four). (ECF No. 3, at 1–3.) On July 7, 2015, pursuant to a Plea Agreement, Petitioner pled guilty to Count One. (ECF No. 17, at 1.) Petitioner acknowledged that, had the matter gone to trial, the Government could have proved the facts pertinent to Petitioner’s guilt with respect to Count One beyond a reasonable doubt. (ECF No. 18, at 1.) Petitioner further acknowledged that, had the matter gone to trial, the Government could have proved beyond a reasonable doubt the facts necessary to establish Petitioner’s guilt with respect to Counts Three and Four. (*Id.* at 2–3.)

At sentencing, Petitioner was found to be Career Offender (*see* ECF No. 22, ¶ 24), with a corresponding sentencing range of 188–235 months. (*See id.* at 18.) On October 6, 2015, the Court sentenced Petitioner to 200 months of imprisonment. (ECF No. 26, at 2.)

II. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate the ineffective assistance of counsel, a defendant must show first that counsel’s representation was deficient, and second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the deficient performance facet of *Strickland*, the defendant must overcome the “‘strong presumption’ that counsel’s strategy and tactics fall ‘within the wide range of reasonable

professional assistance.” *Burch v. Corcoran*, 273 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). The prejudice component requires a defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. In analyzing ineffective assistance of counsel claims, it is not necessary to determine whether counsel performed deficiently if the claim is readily dismissed for lack of prejudice. *Id.* at 697.

A. Claim 1

An attorney’s failure to file a requested appeal is *per se* ineffective assistance of counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483–86 (2000). This is true even if the defendant has waived his right to appeal. *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007). The United States Court of Appeals for the Fourth Circuit has instructed that “when a defendant brings a § 2255 claim based on his attorney’s failure to file a requested notice of appeal, the district court should hold a hearing if it is unclear in the record whether the attorney was so instructed.” *Id.* at 272. That is the case here.

Petitioner swears that, following sentencing, he instructed his attorney, Mary Maguire, to file an appeal. (ECF No. 29, at 4.) Ms. Maguire swears that she

has reviewed her file and correspondence with Mr. Roberts and has no documents concerning any conversations with Mr. Roberts concerning his right to appeal. In addition, counsel has no independent recollection of a conversation with Mr. Roberts concerning his right to appeal. In other words, counsel cannot tell the Court whether or not Mr. Roberts told her to appeal his case.

(ECF No. 45-1, ¶ 1 (punctuation corrected).) When, as here, “a colorable Sixth Amendment claim is presented, and where material facts are in dispute involving inconsistencies beyond the record, a hearing is necessary.” *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (citing *Becton v. Barnett*, 920 F.2d 1190, 1192 (4th Cir. 1990); *Moore v. United States*, 950 F.2d 656, 661 (10th Cir. 1991)). Accordingly, the Court will set Claim 1 for an evidentiary hearing.

B. Claim 2

In Claim 2, Petitioner complains that his counsel failed to advise him of the consequences under 21 U.S.C. § 862a by pleading guilty to Count One. That statute provides that:

An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 802(6) of this title) shall not be eligible for—

- (1) assistance under any State program funded under part A of title IV of the Social Security Act, or
- (2) benefits under the supplemental nutrition assistance program (as defined in section 3 of the Food and Nutrition Act of 2008 (7 U.S.C. 2012)) or any State program carried out under that Act.

21 U.S.C. § 862a. As explained below, Petitioner cannot demonstrate any prejudice for this alleged omission.

In the context of a guilty plea, the Supreme Court modified the second prong of *Strickland* to require a showing that “there is a reasonable probability that, but for counsel’s errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant’s assertion that he

would not have pled guilty if he had received better assistance from counsel is not dispositive of the issue. *See United States v. Mora-Gomez*, 875 F. Supp. 1208, 1214 (E.D.Va.1995). Rather, “[t]his is an objective inquiry and dependent on the likely outcome of a trial had the defendant not pleaded guilty.” *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (internal citation omitted) (citing *Hill*, 474 U.S. at 59–60). The Court looks to all the facts and circumstances surrounding a petitioner’s plea, including the likelihood of conviction and any potential sentencing benefit to pleading guilty. *Id.* at 369–70. As explained below, those facts demonstrate clearly demonstrate that Roberts was not prejudiced by the omission he alleges here.

First, prior to pleading guilty to Count One, Petitioner already was ineligible for benefits under 21 U.S.C.A. § 862a by virtue of his two prior felony drug convictions. (ECF No. 22, ¶¶ 35, 37). Moreover, Petitioner’s admissions in his Statement of Facts reflect that his conviction of not only Count One, but also of Counts Three and Four was a near certainty. Furthermore, by pleading guilty to Count One and having the other counts dismissed, Petitioner significantly reduced his sentencing exposure. In the absence of a guilty plea, and the 3-level reduction to his Offense Level for acceptance of responsibility, Petitioner’s Total Offense Level for Count One would have been 34. Petitioner’s corresponding advisory sentencing range would have been 262 to 327 months of imprisonment. Additionally, Petitioner would have been subject to an additional 60-month consecutive sentence for his inevitable conviction on Count Four. Thus, in the absence of a guilty plea, Petitioner faced a probable sentence of 322 to 397 months of imprisonment. By pleading guilty, Petitioner reduced his advisory sentencing

range to 188 to 235 months. (ECF No. 22, at 18.) In light of the foregoing circumstances, Petitioner fails to demonstrate *any* possibility that he would have pled not guilty and insisted on going to trial if his attorney advised him regarding the consequences under 21 U.S.C.A. § 862 of pleading guilty. Claim 2 will be dismissed.

C. Claim 3

In Claim 3, Petitioner faults counsel for not arguing that “the sentence espoused in the Pre-Sentencing Report was . . . at odds with . . . more current and modern defendants with similar cases . . .” (ECF No. 30, at 10 (spelling corrected).) Thereafter, Petitioner directs the Court to statistics and other defendants who were adjudged career offenders and received a variant sentence below the advisory guideline range or at the bottom of the guideline range. (*Id.* at 10–12.) Counsel, however, cited statistics and a host of cases for the proposition that “[d]istrict courts around the country have imposed sentences below the career offender guideline range, finding that the guideline is flawed and/or imposes a sentence too harsh for the individual.” (ECF No. 21, at 2–3 (citations omitted).) Petitioner fails to demonstrate that counsel performed deficiently or that he was prejudiced by the alleged omission of counsel Petitioner asserts here. Accordingly, Claim 3 will be dismissed.

III. CONCLUSION AND FURTHER PROCEEDINGS

Petitioner’s Motion to Resubmit Previously Submitted Motion for Summary Judgment (ECF No. 40) will be granted. Petitioner’s Motions for Summary Judgment (ECF Nos. 39, 44) will be denied. Claims 2 and 3 will be dismissed. Claim 1 will be set for an evidentiary hearing. Counsel will be appointed to represent Petitioner on Claim 1.

Within eleven (11) days of the date of entry hereof, counsel for Petitioner and the Government shall contact to the Court to set the matter for an evidentiary hearing.

An appropriate Order will accompany this Memorandum Opinion.

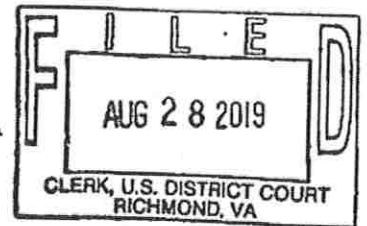


/s/

Henry E. Hudson
Senior United States District Judge

Date: May 14, 2019
Richmond, Virginia

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



UNITED STATES OF AMERICA)
)
v.) Criminal No. 3:15CR83-HEH
)
DANTA OMAR ROBERTS,)
)
Petitioner.)

MEMORANDUM OPINION
(Granting 28 U.S.C. § 2255 Motion)

Danta Omar Roberts ("Petitioner"), a federal inmate proceeding *pro se*, filed this motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Petitioner asserted that he was entitled relief on the following grounds:

- Claim 1 Petitioner failed to receive the effective assistance of counsel because counsel failed to follow an appeal as directed. (ECF No. 29, at 4.)¹
- Claim 2 Petitioner failed to receive the effective assistance of counsel because counsel failed to advise him that by pleading guilty he and his immediate family would be rendered ineligible to receive federal benefits. (*Id.* at 5.)
- Claim 3 Petitioner failed to receive the effective assistance of counsel because counsel failed to advance a viable challenge to Petitioner's Career Offender enhancement under the Sentencing Guidelines ("USSG"). (*Id.* at 6.)


By Memorandum Opinion and Order entered on May 15, 2019, the Court dismissed Claims 2 and 3 and set Claim 1 for an evidentiary hearing. (ECF Nos. 46, 47.)

¹ The Court employs the pagination assigned by the CM/ECF docketing system to all citations in the record.

On August 23, 2019, the Court conducted an evidentiary hearing on Claim 1. For the reasons stated from the bench, the Court will grant Petitioner's 28 U.S.C. § 2255 Motion with respect to Claim 1. The Judgment in a Criminal Case entered October 6, 2015 (ECF No. 26) will be vacated. An identical Judgment in a Criminal Case will be issued contemporaneous with this Memorandum Opinion and Order so as to permit Petitioner to file a Notice of Appeal.

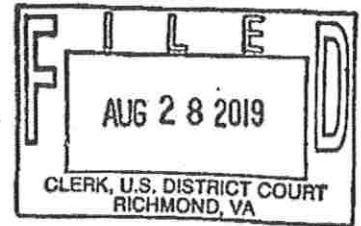
Petitioner is hereby advised that he has the right to appeal his criminal case to the United States Fourth Circuit Court of Appeals. Should Petitioner choose to appeal, he must file a Notice of Appeal with the Clerk of Court within fourteen (14) calendar days after the date the Amended Judgment of conviction is filed or within fourteen (14) calendar days after any government appeal is filed, whichever is later. Fed. R. App. P. 4(b)(1)(A). Counsel for Petitioner is directed to promptly provide this Memorandum Opinion and Order to Petitioner and ascertain whether Petitioner wishes to pursue an appeal.

An appropriate Order will accompany this Memorandum Opinion.

 /s/
Henry E. Hudson
Senior United States District Judge

Date: Aug. 28, 2019
Richmond, Virginia

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



UNITED STATES OF AMERICA)
)
v.) Criminal No. 3:15CR83-HEH
)
DANTA OMAR ROBERTS,)
)
Petitioner.)

FINAL ORDER
(Granting 28 U.S.C. § 2255 Motion)

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

1. Petitioner's 28 U.S.C. § 2255 Motion is GRANTED (ECF No. 29) with respect to Claim 3.
2. The Judgment in a Criminal Case entered October 6, 2015 (ECF No. 26) is vacated. An identical Judgment in a Criminal Case will be issued contemporaneous with this Memorandum Opinion and Order so as to permit Petitioner to file a Notice of Appeal.
3. Counsel for Petitioner is DIRECTED to promptly provide this Memorandum Opinion and Order to Petitioner and ascertain whether Petitioner wishes to pursue and appeal.
4. The Clerk is DIRECTED to TERMINATE the civil action associated with the 28 U.S.C. § 2255 Motion.

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

It is so ORDERED.

A handwritten signature in dark ink, appearing to read "H. Hudson".

/s/

Henry E. Hudson
Senior United States District Judge

Date: Aug 28 2019
Richmond, Virginia