FILED: June 23, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6145
(4:10-cr-00149-MSD-TEM-1)
(4:15-cv-00056-MSD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SAMUEL B. JACOBS

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

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6145

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL B. JACOBS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Mark S. Davis, District Judge. (4:10-cr-00149-MSD-TEM-1; 4:15-cv-00056-MSD)

Submitted: June 20, 2017 Decided: June 23, 2017

Before SHEDD, WYNN, and DIAZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Samuel B. Jacobs, Appellant Pro Se. Brian James Samuels, Assistant United States Attorney, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

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

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

DISMISSED

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

SAMUEL B. JACOBS,

Petitioner,

v.

Civil No. 4:15cv56
Criminal No. 4:10cr149

UNITED STATES OF AMERICA,

Respondent.

OPINION and ORDER

This matter is before the Court on Samuel B. Jacob's ("Petitioner") Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Petitioner's § 2255 Motion contains a single claim asserting that defense counsel provided constitutionally deficient representation at sentencing. After reviewing the written record, the Court finds that an evidentiary hearing is unnecessary because the record conclusively demonstrates that Petitioner is not entitled to relief. See R. Gov. § 2255 Proc. for U.S. Dist. Cts. 8(a). For the reasons discussed below, Petitioner's § 2255 motion is DENIED.

I. FACTUAL AND PROCEDURAL HISTORY

In 2005, approximately five years before the first indictment was issued in this case, Petitioner organized and formed a financial investment company called Alliance Financial Services Corporation ("Alliance").[1] After its formation, Petitioner used Alliance to defraud investors, with Petitioner falsely promising numerous individuals that the money they provided to Alliance would be invested in legitimate investment products, such as real estate. In reality, Petitioner used the "investments" Alliance received to pay personal debts, to pay debts owed by his broadcasting company, and, at least initially, to pay interest/earnings to earlier-in-time investors.

On December 14, 2010, Petitioner and his co-defendant were named in a multi-count criminal indictment charging various financial crimes, including mail fraud. ECF No. 1. On January 10, 2012, a superseding indictment was returned adding additional charges against both defendants. ECF No. 85.

Petitioner and his co-defendant contested the charges and proceeded to a joint jury trial. At the conclusion of trial, the jury found Petitioner guilty of more than twenty fraud-related counts, and not-guilty of two counts. ECF No. 116. On February 21, 2013, Petitioner was sentenced to a term of imprisonment of 144 months. ECF No. 211. Petitioner's sentence was determined, in part, based on the fact that his crimes caused over $700,000 in losses to over 130 victims. Petitioner

[1] At the time Alliance was formed, Petitioner was also the president and majority owner of JBS, Inc. ("JBS"), a broadcasting company that operated several local television stations and controlled the rights to valuable FCC broadcasting licenses.

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filed an appeal in the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit affirmed his conviction and sentence. ECF No. 237. Petitioner subsequently filed a petition for a writ of certiorari, and such petition was denied by the United States Supreme Court. Jacobs v. United States, 134 S. Ct. 1953, reh'g denied, 134 S. Ct. 2869 (2014).

Petitioner timely filed the instant § 2255 motion in this Court, along with a memorandum in support. ECF Nos. 246-47. After the Government was granted a briefing extension, the Government filed a response brief, ECF No. 253, and Petitioner filed a reply, ECF No. 254. Petitioner's § 2255 motion is therefore ripe for review.

II. STANDARD OF REVIEW

A federal prisoner, in custody, may collaterally attack his sentence or conviction by moving the district court "to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). To obtain such relief, a petitioner must prove by a preponderance of the evidence that his sentence or conviction was "imposed in violation of the Constitution or laws of the United States," that the district court "was without jurisdiction to impose such sentence," that the sentence exceeds "the maximum authorized by law," or that the sentence or conviction is "otherwise subject to collateral attack." Id.; see Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958). Because a § 2255 motion "is

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ordinarily presented to the judge who presided at the original conviction and sentencing . . . the judge's recollection of the events at issue" may inform the resolution of the motion. Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977).

A § 2255 motion is, in essence, a statutory federal habeas corpus action that enables a petitioner to collaterally attack his sentence or conviction through the filing of a new proceeding, as contrasted with a direct appeal. United States v. Hadden, 475 F.3d 652, 663 (4th Cir. 2007). The existence of the right to pursue a collateral attack does not displace a direct appeal as the "usual and customary method of correcting trial errors." United States v. Allgood, 48 F. Supp. 2d 554, 558 (E.D. Va. 1999).

Although a petitioner advancing new claims asserted for the first time in a § 2255 motion must generally "clear a significantly higher hurdle than would exist on direct appeal," United States v. Frady, 456 U.S. 152, 166 (1981), a freestanding claim of ineffective assistance of counsel is properly asserted for the first time in a § 2255 motion, see United States v. King, 119 F.3d 290, 295 (4th Cir. 1997) ("[I]t is well settled that 'a claim of ineffective assistance should be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal, unless the record conclusively shows ineffective assistance.'" (quoting United States v. Williams, 977 F.2d 866,

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871 (4th Cir. 1992))). Such rule exists because the Federal Rules Governing § 2255 Proceedings permit expansion of the record, which is generally unavailable on direct appeal. United States v. Baptiste, 596 F.3d 214, 216 n.1 (4th Cir. 2010) (citing Massaro v. United States, 538 U.S. 500, 504-06, (2003)).

The Sixth Amendment to the Constitution of the United States provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The United States Supreme Court has interpreted the right to counsel as providing a defendant "'the right to the effective assistance of counsel.'" Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). To obtain relief based on an allegation of ineffective assistance, a petitioner must establish both that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) counsel's inadequate performance caused the petitioner prejudice. Id. at 687-88. "Vague and conclusory allegations contained in a § 2255 petition" are insufficient to carry a petitioner's burden under Strickland, and such allegations may therefore "be disposed of without further investigation by the District Court." United States v. Dyess, 730 F.3d 354, 359 (4th Cir. 2013) (quotation marks and citation omitted).

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Satisfying the first prong of Strickland requires a petitioner to establish 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. Reviewing courts strongly presume that counsel exercised reasonable professional judgment, and only in "relatively rare situations" will a § 2255 motion establish that, "'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" Tice v. Johnson, 647 F.3d 87, 102 (4th Cir. 2011) (quoting Strickland, 466 U.S. at 690). As it is all too easy to challenge an act, omission, or strategy, once it has proven unsuccessful, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. A petitioner's showing of deficient performance must therefore go beyond establishing that counsel's performance was below average, because "effective representation is not synonymous with errorless representation." Springer v. Collins, 586 F.2d 329, 332 (4th Cir. 1978); see Strickland, 466 U.S. at 687. As recently reiterated by the Fourth Circuit, the "basic lesson" of Strickland is not just deference but high deference, and attorneys are permitted to "be

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selective and strategic without risking an ineffective assistance of counsel claim." United States v. Mason, 774 F.3d 824, 828, 830 (4th Cir. 2014) (citations omitted).

The second prong of Strickland requires a petitioner to "affirmatively prove prejudice," which requires a showing 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 693-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. If a petitioner fails to prove either of the two prongs of the Strickland test, the court need not evaluate the other prong. Moore v. Hardee, 723 F.3d 488, 500 (4th Cir. 2013).

III. DISCUSSION

Petitioner's § 2255 motion alleges that his trial counsel was ineffective for failing to adequately research the facts of this case relevant to sentencing. Specifically, Petitioner asserts that defense counsel failed to obtain and utilize a publicly filed "UCC Financing Statement" even though Petitioner spoke with his lawyer about such document on multiple occasions prior to trial. Petitioner asserts that such document proves that Petitioner's "victims" did not truly suffer a "loss" because their investments in Alliance were fully collateralized. Petitioner further argues that because his sentencing Guidelines

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were driven primarily by the "loss" suffered by the "victims," the presentation of the UCC Financing Statement at sentencing would have reduced his advisory sentencing Guideline range by eight to nine years.

A. Deficient Performance

For the purposes of analyzing whether Petitioner has demonstrated that his lawyer provided constitutionally deficient performance, the Court assumes as true Petitioner's version of the facts (that is, that he spoke with his lawyer about the UCC Financing Statement prior to trial on multiple occasions, but that counsel "declined to investigate" such publicly filed document prior to trial or sentencing). Jacobs Aff. ¶ 2, ECF No. 247-1. However, even assuming such facts to be true, Petitioner fails to demonstrate constitutionally deficient performance as required by the first prong of the <u>Strickland</u> test.

In reviewing defense counsel's performance, it is important to first note that the Guideline loss calculation that Petitioner seeks to challenge in his § 2255 motion is <u>not</u> a sentencing issue that was overlooked by defense counsel. To the contrary, Petitioner's lawyer argued extensively at sentencing that the loss calculation set forth in Petitioner's Presentence Investigation Report was grossly overstated and should be <u>reduced to zero</u> as a result of personal guarantees and

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promissory notes that Mr. Jacobs provided to the alleged victims. Sent. Tr. 16-75, ECF No. 235. Such guarantees/notes were purportedly backed by the value of the FCC broadcasting licenses owned by Petitioner's broadcasting company. Moreover, counsel did not merely advance a legal challenge to the Guideline loss calculation, but rather, he called several witnesses at sentencing, including Petitioner, in an effort to prove that collateral had in fact been pledged by Petitioner to the alleged victims at or around the time that the victims "invested" with Alliance. Id. at 17-58.

Counsel's affirmative efforts to reduce the Guideline loss calculation to zero, including the presentation of live testimony and legal arguments, undoubtedly fall within the wide range of reasonably professional assistance. Petitioner's § 2255 claim is best categorized as an improper hindsight attempt to demonstrate that because counsel's reasoned strategy failed, a different course of action (introducing a single additional document) should have been pursued. See Meyer v. Branker, 506 F.3d 358, 371 (4th Cir. 2007) (noting the dangers in conducting a hindsight review of counsel's performance, including the fact that "adverse outcomes can make perfectly reasonable judgments look questionable in retrospect"). However, as discussed in greater detail in the "prejudice" analysis below, the record reveals that defense counsel's

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decision not to further investigate the UCC Financing Statement was eminently reasonable in light of the fact that: (1) such document did not pledge collateral to Petitioner's individual victims, but rather, purports to collateralize Alliance itself;[2] and (2) such document was not filed until more than ten months after Petitioner was indicted, rendering it of no apparent significance to the Guideline calculation of the "loss" attributable to Petitioner. Cf. Mason, 774 F.3d at 830 (explaining that because counsel's role is to "exercise professional judgment, which often involves setting priorities," attorneys are permitted to "be selective and strategic without risking an ineffective assistance of counsel claim") (citations omitted). Stated differently, Petitioner's assertion that his counsel performed deficiently is grounded in the contention that the Financing Statement proves that Petitioner pledged collateral to the "victims," when in reality, it only establishes that, long after the fraud was discovered, Petitioner pledged collateral from one of his companies to the other. While Petitioner challenges the completeness of his counsel's investigation, "counsel has a duty to make reasonable

[2] Not only does the Financing Statement indicate on its face that the collateral discussed therein was being pledged by JBS to Alliance, ECF No. 247-1, but Petitioner acknowledges such fact in his § 2255 memorandum, see ECF No. 247, at 6 ("Jacobs argues that his Sentencing Court was deprived of the information it needed to properly calculate his Guideline range, namely a UCC Financing Statement in which Jacobs had formally pledged secured collateral to Alliance sixteen months prior to sentencing . . . .") (emphasis added).

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investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 687 (emphasis added). Because Petitioner and counsel "discussed the UCC Financing Statement on several occasions pre-trial," ECF No. 247, at 8, defense counsel acted reasonably by choosing not to investigate such document further.

For the reasons stated above, Petitioner fails to demonstrate that defense counsel's "omissions were outside the wide range of professionally competent assistance" such that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Petitioner's claim for collateral relief in his § 2255 motion is therefore denied.

B. Prejudice

Alternatively, the Court finds that even if it assumes (an assumption that is against the weight of the record evidence) that defense counsel was constitutionally deficient for failing to research and/or introduce the UCC Financing Statement at sentencing, Petitioner fails to prove prejudice. Petitioner fails to satisfy Strickland's second prong as he does not demonstrate a "reasonable probability" that the introduction of the UCC Financing Statement at sentencing would have changed the outcome. To the contrary, the Court has no doubt that it would

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have rejected any reliance on such document for reasons already stated on the record during the sentencing hearing.

As outlined above, Petitioner's counsel advanced a detailed objection to the Guideline loss calculation at sentencing, which had both factual components and legal components, in an effort to prove that Petitioner pledged collateral to his victims such that there was no "loss" within the applicable sentencing Guideline provisions. Sent. Tr. 16-65. Defense counsel's argument included highlighting events occurring both before and after the fraud was discovered, with the focus being on whether Petitioner pledged valuable collateral to Alliance investors. The Court rejected defense counsel's arguments on various grounds, including the fact that certain events involving purported collateral occurred after the fraud was discovered. Id. at 65-71. After the Court overruled defense counsel's objection, counsel persisted in his argument, but the Court ultimately declined to "revisit" its ruling based on the additional arguments offered by the defense. Id. at 71-73, 75.

In order to determine whether there is a reasonable probability of a different outcome, the Court considers the contents of the UCC Financing Statement, the date it was filed, and the Court's ruling at sentencing. As to the contents of the Financing Statement, it is readily apparent from the face of such document that it assigns rights to Alliance Corporation,

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not to individual victims that were defrauded by Petitioner when they invested with Alliance. ECF No. 247-1. Such document, therefore, appears to have less value than the oral promises and promissory notes that Petitioner allegedly made in favor of specific investors that were argued by defense counsel at sentencing. As to the date of such document, as noted several times herein, it was not filed until October 20, 2011, more than ten months after Petitioner was indicted.[3]

Turning to the Court's ruling at sentencing, the Court's ruling was based in part on its finding that, even if the purported collateral could somehow be viewed as collateral provided to the victims, any efforts to provide collateral after the discovery of the fraud cannot form the basis for offsetting the "loss" suffered by the victims. Specifically, the Court explained as follows:

> First, it appears that the better interpretation of the legal standard is that a defendant must demonstrate the collateral was, in fact, pledged or was otherwise provided prior to the discovery of the offense.

[3] The Government has provided evidence in support of its contention that the UCC Financing Statement was not filed to provide collateral to Petitioner's victims (even indirectly), but rather, was filed to prevent Mr. Jacobs' business partner in JBS from exercising authority over JBS's assets. Petitioner disputes the accuracy of such facts in his reply brief. This Court's ruling does not in any way depend on the resolution of such factual dispute, and for the purposes of this motion, the Court accepts as true Petitioner's assertion that the Financing Statement was filed to protect the interests "of those that had lent funds to Alliance Financial Services Corporation." Jacobs Aff. ¶ 2, ECF No. 247-1.

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> Second, it appears that Mr. Jacobs has not demonstrated that collateral was effectively pledged or otherwise provided either before discovery of his crime or subsequent to its discovery, and this concept that [a] promise is collateral is questionable at best in my view.

Sent. Tr. 67 (emphasis added). The Court went on to cite several cases on the record in support of its legal findings. See United States v. Payne, 127 F. App'x 638, 640-41 (4th Cir. 2005) (finding that the district court did not err in concluding that the proceeds of the sale of a house should not be credited against the intended loss calculation because such collateral was not provided "as part of [the] offense," but rather, was pledged after "the offense . . . had been discovered"); United States v. Austin, 479 F.3d 363, 369 (5th Cir. 2007) (explaining that "assets pledged up until the time the offense is discovered" can be used to offset the loss calculation "because the pledge of assets is not an attempt to buy a sentence reduction or continue the fraud, but instead to effectuate a reduction of the actual or intended loss"); United States v. Dullum, 560 F.3d 133, 139 (3d Cir. 2009) (rejecting the defendant's argument that a loss resulting from a fraudulent check "should be reduced to zero because [the defendant] had other funds in his bank accounts to offset the bad check," holding instead that the "straightforward language" of the Guidelines supports the interpretation that "collateral" acts as

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an offset to a loss in "situations involving a traditional notion of [pledged] collateral," not fraud that is "more akin to theft"). This Court went on at the sentencing hearing to conclude that Petitioner's victims had "provided unsecured investments to Alliance," and thus, reliance on Mr. Jacobs' assets in JBS and/or his promises to "personally stand[] behind their investment[s] does not amount to collateral for the purposes of the guidelines calculation." Sent. Tr. 71; see United States v. Terbrack, 399 F. App'x 105, 108 (6th Cir. 2010) (rejecting the defendant's suggestion that "all assets owned by a debtor should be considered 'collateral' for a debt whenever an unsecured creditor . . . could litigate to recover them"). After the Court issued its ruling and defense counsel sought to advance additional arguments on this issue, the Court reiterated: "And from a timing standpoint there are also issues with anything that was done after the activity was discovered." Sent. Tr. 75; see United States v. Brown, 877 F. Supp. 2d 736, 749 (D. Minn. 2012) (concluding that "it would be improper to credit Defendant for the value of" the assets that "were not pledged to the victims' benefit prior to the discovery of the fraud," because allowing such a credit would permit defendants to "buy a sentence reduction after being caught," which would improperly create a sentencing disparity dictated by the financial status of a criminal defendant) (citation omitted);

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United States v. Peterson, No. 4:12cr3062, 2013 WL 162255, at *5 (D. Neb. Jan. 15, 2013) (describing the potential for the loss calculation to be offset by "'collateral pledged or otherwise provided by the defendant' prior to the offense being detected" (quoting U.S.S.G. § 2B1.1 cmt. n. 3(E)(ii))) (emphasis added); see also United States v. Saunders, 129 F.3d 925, 931 n.4 (7th Cir. 1997) (explaining that, under the then applicable version of the Guidelines, "district courts should offset the amount of [a fraudulent] loan only by the value of the collateral the bank has or expects to gain at the time the fraud is discovered") (citation omitted).

Consistent with the cases cited by the Court at the time of sentencing, and the additional cases cited herein, Petitioner plainly fails to carry his burden to prove Strickland prejudice. First, notwithstanding the fact that Alliance as a corporation may have become "secured" after the filing of the UCC Financing Statement, the individual victims that invested money with Alliance in order to earn income on their investments remained unsecured creditors without collateral (although they may have been in a better position to litigate to recover their losses as a result of such corporate securitization). Second, and more importantly, even assuming that Petitioner filed the UCC Statement for the sole purpose of protecting the investor victims, such post-indictment actions occurred far too late in

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time to be considered a legitimate offset to the victims' losses. See Austin, 479 F.3d at 369 (noting that "to allow the pledge of collateral after discovery of the offense would be totally at odds with the principles embodied in [the Guidelines] and would alter the long-standing, well-recognized rule that post-detection repayments or pledges of collateral do not reduce the loss"). Accordingly, there is not a reasonable probability that the outcome would have been different if defense counsel had introduced the UCC Financing Statement at sentencing. Having failed to undermine the Court's confidence in the sentencing outcome, Petitioner's lone claim for collateral relief is denied.

IV. CONCLUSION

For the reasons discussed above, Petitioner's § 2255 motion is **DENIED** on the merits. ECF No. 246. Finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c)(2); see R. Gov. § 2255 Proceedings for U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003).

Petitioner is **ADVISED** that, because this Court has **DENIED** a certificate of appealability, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. R. Gov. § 2255 Proceedings for U.S. Dist. Cts. 11(a). If Petitioner intends to seek a certificate of appealability from the Court of Appeals, he must forward a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510, within sixty (60) days from the date of this Opinion and Order.

The Clerk is DIRECTED to forward a copy of this Opinion and Order to Petitioner, Petitioner's former counsel, and the United States Attorney's Office in Newport News, Virginia.

IT IS SO ORDERED.

/s/
Mark S. Davis
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
December 5, 2016

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FILED: August 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6145
(4:10-cr-00149-MSD-TEM-1)
(4:15-cv-00056-MSD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SAMUEL B. JACOBS

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Judge Wynn and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

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Additional material from this filing is available in the Clerk's Office.