

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

JAHMALL AUGUSTINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

1:14-cr-00042

**TO: Jahmall Augustine, #09485-094, *pro se*
FCI Bennettsville
Federal Correctional Institution
P.O. Box 52020
Bennettsville, SC 29512**

David White, Esq., AUSA

REPORT AND RECOMMENDATION

THIS MATTER came before the Court upon the Order (ECF No. 96) of Chief Judge Wilma A. Lewis in Criminal No. 14-00042 referring Petitioner Jahmall Augustine's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 65) and Respondent's Motion to Dismiss of the United States to the Motion to Vacate of Jahmall Augustine (ECF No. 85) to the undersigned for a report and recommendation. For the reasons that follow the undersigned recommends that Petitioner's motion be denied and that Respondent's motion be granted.

I. BACKGROUND

As the parties are familiar with the underlying facts of this case, only those facts relevant to this discussion will be recited. In April of 2014, the Grand Jury of the District

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Court of the Virgin Islands returned a three-count indictment charging that, while he was an inmate at Golden Grove Correctional Facility, Jahmall Augustine possessed prison contraband and possessed marijuana in violation of United States laws. Criminal No. 14-00030, (ECF No. 1).

The following month, in an unrelated encounter with police, Augustine was arrested and charged with four crimes, to wit: (1) felon in possession of a firearm; (2) possession with intent to distribute; (3) possession of firearm in furtherance of drug trafficking crime; and (4) unauthorized possession of firearm. Criminal No. 14-00042, (ECF No. 11).

Following negotiations between himself, his court-appointed attorney, and the Assistant United States Attorney assigned to the matters, Augustine agreed to plead guilty to Count 1 in each of the cases. Plea Agreement, Criminal No. 14-00030, (ECF No. 65) and Plea Agreement, Criminal No. 14-00042, (ECF No. 38). As part of his plea agreements, Augustine waived his right to appeal any sentence within the maximum provided in the statutes of conviction.

Augustine (hereinafter Petitioner) was sentenced in both matters on February 13, 2015. On August 14, 2015, Petitioner filed the subject motion pursuant to 28 U.S.C. § 2255 citing ineffective assistance of counsel and claiming that (1) his attorney was ineffective because Petitioner received a greater sentence than what was agreed to in the plea agreement and (2) his attorney was ineffective for failing to file an appeal despite Petitioner's direction to do so. Criminal No. 14-00042, (ECF No. 65). On April 25, 2017, the

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Government filed a motion to dismiss Petitioner's § 2255 motion on the basis that Petitioner's motion is meritless. Criminal No. 14-00042, (ECF No. 85).

II. LEGAL STANDARD

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)). A § 2255 petition is not a substitute for an appeal. *Hodge v. United States*, 554 F.3d 372, 378-79 (3d Cir. 2009) (citing *Bousley v. United States*, 523 U.S. 614, 621 (1998)). However, a petitioner properly raises ineffective assistance of counsel arguments under § 2255 rather than on direct appeal. *See, e.g., Massaro v. United States*, 538 U.S. 500, 504 (explaining it is "preferable" that such claims be considered on collateral review where the record for such claims may be properly developed); *accord United States v. Garcia*, 516 F. App'x 149, 151 (3d Cir. 2013) ("It is well-settled that this Court ordinarily does not review claims of ineffective assistance of counsel on direct appeal.").

Claims of ineffective assistance of counsel must satisfy the two-part test set-forth in *Strickland v. Washington*:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose

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result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

A court reviews a petitioner's claim under the "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 688. The Third Circuit concurs that, "a fair assessment of attorney performance requires that every effort 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." *Rainey v. Varner*, 603 F.3d 189, 197 (3d Cir. 2010) (quoting *Strickland* at 689).

Where a Defendant has signed an appellate waiver, a court must determine (1) whether Defendant knowingly and voluntarily waived his appellate rights; and (2) whether enforcing the waiver would result in a miscarriage of justice. *United States v. Mabry* 536 F.3d 231, 237 (3d Cir. 2008).

Pro se pleadings are construed liberally and must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

III. DISCUSSION

The central thesis of this collateral attack is that counsel provided constitutionally ineffective assistance by failing to file an appeal challenging Petitioner's sentence.

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Petitioner claims that he received a sentence that was longer than the sentence promised in the plea agreement and consequently, his attorney should have filed an appeal.¹ In an affidavit attached to his motion, Petitioner states that after receiving the presentence investigation report and seeing that it recommended a longer sentence than the plea agreement contemplated, he attempted to reach his attorney to discuss the same but was unable to reach him. Petitioner further states that at his sentencing he told his attorney that his sentence was “a mistake saying, ‘I didn’t plea to 57, I pled to 37 which was on the paper he made me sign.’” (ECF No. 64-4) at ¶ 2.² Petitioner also states that after sentencing he phoned his attorney and requested an explanation regarding the disparity between what was stated in the plea agreement and the sentence that Petitioner received. Finally, Petitioner presents a letter sent to him by his attorney purporting to show that counsel refused to file an appeal despite having been so directed by his client.

Even if Petitioner was legitimately dissatisfied with the communication he received, Attorney Moorhead’s representation was within the “wide range of professionally competent assistance” expected of counsel. *Strickland*, 466 U.S. at 690. This conclusion is supported by the record.

First, in the plea agreement, the parties acknowledged that the criminal history category II, on which the plea agreement sentencing range was calculated, was based on

¹ Augustine’s appellate waiver will be discussed below. Augustine did not waive his right to petition under § 2255 on a claim of ineffective assistance of counsel.

² Hereinafter, all ECF numbers refer to Criminal No. 14-00042.

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“available information.” (ECF No. 38) at ¶ f. This language indicates that the parties, including the Petitioner, were aware that the criminal history category might change once the presentence report was complete.

Second, it would have been futile for Attorney Moorhead to object to this element of the presentence report as the criminal history increase from category II to category III was not due to an error. Rather, the increase from category II to category III was due to the fact that Petitioner was on probation when he committed the offense to which he pled guilty.³ (ECF No. 52) at 2-3. Petitioner does not challenge this element of his presentence report on the basis that the criminal history is incorrect; he only challenges the resultant sentence.

Third, Petitioner states only that he wanted his attorney to “fix it” referring to the perceived “mistake” in his sentence. (ECF No. 65-4) at ¶¶ 1, 2. At no point in his motion or affidavit does Petitioner state that prior to or at sentencing he notified his attorney that he wanted to withdraw his plea. The plea agreement contains an agreement to recommend a sentence “at the low end of the guideline range.” (ECF No. 38) at ¶ l. Based on a criminal history category II, the plea agreement contemplated an advisory guideline range of 27-33 months imprisonment in Crim. No. 2014-42 and 10-16 months imprisonment in Crim. No. 2014-30. (ECF No. 38) at ¶ g and Crim. No. 30, (ECF No. 65) at ¶ g. With a criminal history category III, Petitioner’s total guideline range was 57-71 months. (ECF No. 85-11) at 6, ¶

³ Counsel cannot be found ineffective for failing to make a meritless objection. *See, e.g. Moore v. Deputy Comm’rs of SCI-Huntingdon*, 946 F.2d 236, 245 (3d Cir. 1991).

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50. Petitioner was sentenced to 57 months, the bottom of the guideline range. (ECF No. 61) at 2.

Fourth, counsel's letter explains in plain language the reasons for Petitioner's sentence and why counsel maintained a good-faith belief that even with a criminal history of III, and, consequently, a longer sentence than Petitioner would have liked, Petitioner actually received a much lighter sentence than he would have if tried and convicted on all four counts. And, given the evidence that would have been presented at trial, the plea agreement, even with a 57 months sentence, was the best option available. (ECF No. 65-3).

Fifth, in the letter presented by Petitioner, his attorney explains the rationale for not filing an appeal, writing,

On March 9, 2014, I received your letter dated February 23, 2014 in which you stated that you wanted to appeal your sentence. As you know, you had 14 days after your sentence to appeal your sentence. Judge Finch reminded you of this at your sentencing hearing. You were sentenced on February 13, 2014. You're right to appeal tolled on February 27, 2014 well before I even received your letter. Additionally, as you know, you waived your right to appeal your sentence. *I cannot file a frivolous appeal.*

I hope this answers your questions. I am convinced that you did the best thing by accepting the Plea Agreement which I negotiated. You would have lost both trials had you gone to trial. Your sentence would have been a lot more than 69 months. You also need to keep in mind that if you are resentenced you can receive a sentence much longer than 67 months as the Court is not bound by your Plea Agreement. Appealing your sentence makes no sense whatsoever.

Motion, (ECF No. 65-3) at 3-4 (grammatical and date errors in original) (emphasis added).

Sixth, Petitioner's plea agreement includes the following clause:

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The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, *the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction or the manner in which that sentence was determined, . . .* the defendant expressly waives the right to petition under 28 U.S.C. Section 2255, except his right to claim ineffective assistance of counsel. The defendant has discussed these rights with the defendant's attorney. The defendant understands the rights being waived, and the defendant waives these rights knowingly, intelligently, and voluntarily.

Plea Agreement, (ECF No. 38) at 6 (emphasis added). Petitioner initialed the lower right-hand corner of this page of the plea agreement and signed the plea agreement, dated August 24, 2014. *Id.* at 7.

After liberally construing Petitioner's § 2255 motion and examining the record, the Court concludes that Petitioner has failed to satisfy the first prong of *Strickland* as Petitioner has failed to show how Attorney Moorhead's representation was unreasonable, and thus, constitutionally inefficient. As Petitioner has failed to show that his counsel's representation was deficient, the Court need not examine whether Petitioner was prejudiced by counsel's performance.

This Court's finding that counsel's representation was objectively reasonable is based in-part on the appellate waiver contained in the plea agreement. Accordingly, the Court will review the terms of the plea agreement and the sentencing transcript to determine whether the appellate waiver was knowing and voluntary and whether "enforcement would work a miscarriage of justice." *Mabry*, 536 F. 3d at 237.

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As noted above, Petitioner initialed the lower right-hand corner of the page that contained the appellate waiver, which read, in part: “the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction or the manner in which that sentence was determined.” (ECF No. 38) at 6. He signed the plea agreement affirming that he entered into the agreement “knowingly, voluntarily, and upon advice of counsel.” *Id.* at 7.

When the plea agreement was signed, the understanding of all of the parties was that the then-Defendant would be sentenced to 37 months. However, at sentencing, defense and government counsels’ concurrence that a 57 months sentence was now appropriate was explained:

MR. MOORHEAD: These matters, Your Honor, are unusual in a sense that for the first time that I can think of, the U.S. Attorney and I are in complete agreement with regards to the calculations in the presentence report in both cases. The only correction or comment we have to make in regards to the presentence report has to do with, actually has to do with number 30, so I'll deal with that later. The parties, we're here pursuant to a plea bargain agreement that was signed by Mr. Augustine and the People. It was represented, we agreed, the People agreed to make a recommendation at the lower end of the sentencing guidelines in both cases. In Criminal No. 40, the sentencing calculations as prepared by the Office of Probation comes out to 57 to 71 months.

So accordingly, we would ask that the Court adopt the recommendation of the parties and sentence Mr. Augustine to the lower end of that, not to exceed 57 months.

....

MR. MOORHEAD: Additionally, for the record, I might note, the presentence – plea bargain agreement is before the Court and the way it was written, the

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standard language that was used was, I believe it stated that if the guidelines, if the calculations is this, then the sentence will be this. And at the time we took the plea it was represented that for Criminal No. 42 that those calculations would be 37. However, the if, which is the operative word there, proved not to be the proper calculations. So what we have here is a higher sentence than what was represented at the time we took the plea. So the [plea]- bargain agreement stated if the category is -- I don't have it in front of me -- then the sentence would be 37 months. But there is no violation of the presentence report, because of the operative word if. The government and I were in error, at that time.

The same thing goes for Criminal No. 30, those calculations increase by two months. At the time it was ten months to fourteen, it appeared to be twelve months to sixteen. But be that as it may, Your Honor, we believe that it is still a very favorable plea bargain agreement. We do not wish -- and there is no basis to withdraw it, at this time.

That's our recommendation, Your Honor. I ask that the Court adopt the recommendations of the parties.

THE COURT: Counsel, it is my understanding that you agreed in sentencing this, these two cases should be consecutive.

MR. MOORHEAD: That was part of the plea bargain agreement, yes, Your Honor. And there would be a recommendation that they both be at the lower end of the guidelines. But the operative word is consecutive, yes.

THE COURT: Very well.

Sentencing Transcript Excerpt, February 13, 2015, pp. 2-3, 7-9.

That the waiver was narrowly tailored; that Petitioner was sentenced within the maximum provided in the statute of conviction;⁴ that the reason for the difference between

⁴ "The parties understand that the Court may impose any sentence, up to the statutory maximum, regardless of any guideline range computed, and that the Court is not bound by the position of the parties." (ECF No. 38) at 4. "Count 1 charges a violation of Title 18, United States Code, Section 922(g)(1), which carries a sentence of 0 to 10 years of incarceration . . ." *Id.* at 2-3.

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the sentence proposed in the plea agreement and the sentence imposed by the Court was rational and justified; and because Petitioner was apprised on more than one occasion as to the reason for the change from a 37 months sentence to a 57 months sentence, the Court finds that Petitioner's acceptance of the appellate waiver was knowing and voluntary and enforcement of the appellate waiver would not work a miscarriage of justice in this case.

Respondent argues that Petitioner's motion should be dismissed because "Augustine's counsel did not render ineffective assistance in failing to file a notice of appeal because such an appeal would have been frivolous" (ECF No. 85) at 9-10. As discussed above, the Court agrees. Accordingly, the Court will recommend that Respondent's motion to dismiss be granted.

A district court must hold an evidentiary hearing on a § 2255 motion when the motion, records, and files in the case do not "*conclusively show* that the prisoner is entitled to no relief." *United States v. McCoy*, 410 F.3d 124, 131 (3d Cir. 2005) (italics in original). A "District Court's decision not to hold an evidentiary hearing will be an abuse of discretion unless it can be conclusively shown that [the petitioner] cannot make out a claim for ineffective assistance of counsel." *United States v. Lilly*, 536 F.3d 190, 195 (3d Cir. 2008). Because the motion and the records in this case conclusively show that Petitioner is not entitled to relief and, because it has been conclusively shown that Petitioner cannot make out a claim for ineffective assistance of counsel an evidentiary hearing is not required. *See Cherys v. United States*, 405 F. App'x 589, 591 (3d Cir. 2011).

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V. CONCLUSION

For the foregoing reasons, the following IS HEREBY RECOMMENDED:

1. Petitioner's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 65) be **DENIED**.
2. Respondent's Motion to Dismiss of the United States to the Motion to Vacate of Jahmall Augustine (ECF No. 85) be **GRANTED**.
3. There being no substantial showing that Petitioner's constitutional rights were violated, it is recommended that a certificate of appealability be **DENIED**.⁵

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: November 21, 2018

/s/ George W. Cannon, Jr.
GEORGE W. CANNON, JR.
MAGISTRATE JUDGE

⁵When a district court issues a final order on a § 2255 motion, it must make a determination whether it will permit a certificate of appealability. 3d Cir. L.A.R. 22.2; Fed. R. App. P. 22(b)(1).