02-2753-pr

To Be Argued By:
JAMES I. GLASSER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-2753-pr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILLIAM MOORE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JAMES I. GLASSER
Counsel to the U.S. Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Janet Bond Arterton, J.) had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 2255. The district court's ruling, denying petitioner's motion for relief under § 2255, was entered on August 5, 2002. (GA 9). On September 25, 2002, petitioner filed a timely notice of appeal, *see* Fed. R. App. P. 4(a), (c), and moved for a certificate of appealability in the district court. (GA 9, 20). On December 30, 2002, the district court granted in part and denied in part petitioner's motion for certificate of appealability under 28 U.S.C. § 2253(c)(1). (GA 184). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether petitioner has shown that alleged deficiencies in his counsel's performance had any impact on the timing of his guilty plea when (1) he does not claim that, but for his counsel's allegedly deficient performance, he would have pleaded guilty earlier, and (2) there is no objective evidence to support a claim that he would have pleaded guilty earlier.

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Preliminary Statement

The district court summoned jury panels for petitioner's trial on three occasions. Immediately before the third scheduled jury selection was to begin, and while the jury panel waited, petitioner entered pleas of guilty to two counts of a multi-count indictment. The Probation Office recommended that petitioner receive no credit for acceptance of responsibility. After a two-day sentencing hearing, the district court accorded petitioner "the benefit of the doubt" and grudgingly accorded him a two, rather than a three, level adjustment for acceptance of

responsibility. Thereafter, petitioner appealed the district court's decision not to accord him full credit for acceptance of responsibility; the appeal was rejected.

Petitioner then filed a motion to vacate his sentence under 28 U.S.C. § 2255 wherein he attempted to blame counsel for his failure to obtain full credit for acceptance of responsibility. The district court rejected this argument, holding that even if petitioner could show his counsel had provided constitutionally deficient representation, he had not shown that this allegedly deficient performance had any impact on the outcome in his case.

The defendant's acceptance of responsibility claim has twice been rejected by the district court and has previously been rejected by this Court. His latest formulation of the same argument, this time presented as a Sixth Amendment claim of ineffective assistance of counsel, should similarly be rejected.

Statement of the Case

On May 30, 1996, petitioner William Moore was arrested along with his co-defendants Vance Barnes and Michael Litt. On June 4, 1996, a grand jury sitting in Bridgeport, Connecticut returned a twenty count indictment charging Moore, Barnes, and Litt with conspiracy to possess with intent to distribute cocaine and crack cocaine and charging each defendant with various substantive cocaine and crack cocaine distributions, including the distribution of crack cocaine within 1,000 feet of a school. William Moore and Michael Litt were

also charged with possession of weapons by previously convicted felons.

On October 1, 1996, defendants Vance Barnes and Michael Litt entered pleas of guilty. Two months later, on December 4 -- the morning of jury selection and while the jury panel waited -- petitioner changed his plea to guilty on counts fourteen and fifteen of the indictment which charged him in each count with distributing more than five grams of cocaine base ("crack") within 1,000 feet of a public elementary school in violation of 21 U.S.C. §§ 841(a)(1) and 860. Immediately before petitioner's plea and pursuant to a plea agreement between the parties, the Government moved to dismiss the prior felony information that had earlier been filed pursuant to 21 U.S.C. § 851, thereby reducing the mandatory minimum term petitioner faced from twenty to ten years.

On March 12 and 13, 1997, the district court held an evidentiary hearing on disputed sentencing issues. At the conclusion of the hearing, petitioner was sentenced principally to 168 months' imprisonment on each count of conviction, to run concurrently, to be followed by a ten-year term of supervised release.

Following the imposition of sentence, Moore timely filed an appeal. This Court rejected Moore's appeal by summary order. *United States v. Litt*, Nos. 97-1218, 97-1219, 1997 WL 829302 (2d Cir. Dec. 8, 1997). Moore thereafter timely filed a motion to vacate his conviction under 28 U.S.C. § 2255, alleging that he was afforded ineffective assistance of counsel in both the trial court and the appellate court. The district court rejected the petition

by published decision. *See United States v. Moore*, 228 F. Supp. 2d 75 (D. Conn. 2002). On December 30, 2002, the district court issued a certificate of appealabilty. (*See* GA 184).[1] This appeal followed. Petitioner is incarcerated.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

Although a detailed recitation of the facts of the offense are not directly relevant to any particular claim raised by petitioner, they are relevant to demonstrate that the Government had amassed overwhelming evidence of petitioner's guilt. Negotiating a guilty plea that circumscribed the quantity of drugs attributed to petitioner, which required the dismissal of eight counts, and which required the Government to withdraw a previously filed prior felony information -- which otherwise doubled the mandatory minimum sentence -- was hardly the hallmark of ineffective assistance of counsel.

The Investigation

In late 1995, the Stamford Police Department initiated an investigation into petitioner's cocaine trafficking activities. That investigation was later joined by the Connecticut State Police Statewide Narcotics Task Force and the United States Drug Enforcement Administration. The investigation employed a variety of investigative

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[1] The designation "GA__" refers to the Government's Appendix. The designation "D.E.___" refers to the docket entry on the district court's docket sheet.

techniques, including numerous purchases of cocaine and or crack cocaine by an undercover officer, extensive surveillance, audio surveillance, video surveillance, and the execution of search and seizure warrants. (GA 101-106).

The investigation disclosed that on each occasion the undercover officer negotiated for the purchase and sale of a quantity of cocaine and/or crack cocaine from Vance Barnes, Barnes would meet with either petitioner or Michael Litt before consummating the transaction. On several occasions, Barnes told the undercover officer, either that he had "to wait for his guy" or that "it" was on its way before completing a transaction. On those occasions, surveillance officers observed Barnes meeting with petitioner and immediately thereafter Barnes completed the negotiated transaction. On other occasions, surveillance officers observed petitioner drive Barnes to the designated location to complete a narcotics transaction, drop Barnes off, wait nearby, and then pick Barnes up after the transaction was completed. Many of these transactions were video-recorded. Based on these conversations and observations, coupled with considerable information from confidential informants and sources of information, law enforcement authorities concluded that petitioner was the source of Barnes's cocaine supplies. (*See* GA 101-106).

That conclusion was confirmed at the end of the investigation when, on May 30, 1996, arrest warrants were issued for William Moore, Michael Litt, and Vance Barnes and search and seizure warrants were authorized for each of their residences. When petitioner was arrested he had

three pagers, a "cloned" cellular telephone and a large quantity of United States currency in his possession. The execution of the search and seizure warrant at petitioner's residence disclosed various contraband including: 54.2 grams of crack cocaine; 68.8 grams of powder cocaine; $3,640 in cash; a cocaine grinder with cocaine residue; a digital scale with crack cocaine; a box of Glad sandwich bags seized from petitioner's bedroom closet (packaging material); an Ajax can with removable bottom (to hide contraband); two boxes of baking soda seized from petitioner's bedroom closet (used to convert powder cocaine to crack cocaine); four (4) beepers from petitioner's dresser; one Panasonic cellular phone; a Gold Rolex watch and miscellaneous gold jewelry (valued by an appraiser to be worth over $150,000[2]); a fully loaded Jennings Model J-22 firearm; and a police scanner and other miscellaneous items. (GA 32).

Three hundred dollars recovered from petitioner's residence were serialized government funds expended during the purchase of crack cocaine and powder cocaine from petitioner and Vance Barnes on May 28, 1996.

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[2] Records disclose that William Moore did not file tax returns for the years 1993, 1994 and 1995 and records of the Internal Revenue Service further disclose that no employment, dividend or interest income of any significance was reported to the IRS for those years.

Arrest and Indictment

Petitioner, Michael Litt and Vance Barnes were arrested by law enforcement officials on May 30, 1996. On June 4, 1996 a grand jury sitting in Bridgeport, Connecticut returned a twenty count indictment against petitioner, Michael Litt and Vance Barnes. The indictment charged each defendant in count one with conspiracy to possess with intent to distribute and to distribute five grams or more of crack cocaine (in violation of 21 U.S.C. §§ 841(a)(1) and 846). Petitioner was charged with eight substantive cocaine or crack cocaine distributions, including distributions within 1,000 feet of a public elementary school (in violation of 21 U.S.C. §§ 841(a)(1) and 860) and with possession of a firearm by a previously convicted felon (in violation of 18 U.S.C. § 922(g)). (GA 27-31).

Pretrial Proceedings

Petitioner filed voluminous pretrial motions including motions to suppress evidence, motions to inspect personnel files, and others, all of which necessitated response by the Government, hearings, and resolution by the district court. *See, e.g.,* D.E. 53, 55, 57, 61, 63, 65, 72, 73, 74, 80.

Scheduled Trial and Plea Proceedings

Jury selection was originally scheduled for July 9, 1996. (D.E. 28). Thereafter, petitioner filed a motion to postpone jury selection. Petitioner's motion was granted and jury selection was rescheduled to August 7, 1996. (D.E. 7/11/96). Jury selection was then postponed again

to September 11, 1996. (D.E. 52). On September 9, 1996, petitioner once again moved to continue jury selection. (D.E. 77). The district court granted defendant's motion and scheduled jury selection for October 2, 1996. (D.E. 9/11/96). Co-defendants Vance Barnes and Michael Litt entered pleas of guilty on October 1, 1996, in advance of the scheduled jury selection. (D.E. 83, 86). It was anticipated that petitioner would also enter pleas of guilty on that date, but petitioner asked that his change of plea be scheduled the following day, the morning of jury selection. (GA 35).

On October 2, 1996, a jury panel was summoned for jury selection for the trial of petitioner. The Government was prepared to proceed to trial. It was anticipated that petitioner would enter pleas of guilty to counts fourteen and fifteen of the indictment or that jury selection would go forward. Petitioner appeared before the district court represented by his counsel Christopher Chan, Esq., along with counsel who had recently entered an appearance on behalf of petitioner, Daniel Conti, Esq. Counsel advised the court that they had not had sufficient time to review the proposed plea agreement with their client and requested a further continuance of jury selection. (GA 39-43). When the court advised counsel that a jury panel was summoned and was waiting to go forward with jury selection, counsel reiterated that they had not had sufficient time to review the proposed plea agreement with their client and that their client was simply not prepared to go forward with jury selection. (GA 39, 42). Following a brief recess, the court inquired of petitioner:

THE COURT: Mr. Moore, is it your desire, sir, that the Court not pick your jury this morning, but in fact postpone it until the next jury selection which is November 6th?

MR. MOORE: Yes, it is, your Honor.

THE COURT: All right, and is the purpose that you are asking the Court to adjourn your jury selection in order to give you full and adequate time to consider a potential plea agreement with the assistance of your counsel and to consider the ramifications of proceeding to trial?

MR. MOORE: Yes, it is, your Honor.

(GA 49-50).

The Court thereafter found that it was in the interests of justice to postpone jury selection based on "Mr. Moore's specific and personal request and that of his two counsel in order to have adequate time to consider the possibility of a plea agreement here and to avoid the consequences of trial." (GA 50). The court entered an order scheduling jury selection for the trial of this matter on November 6, 1996. (GA 51).

During the intervening month, petitioner apparently determined to go to trial rather than to accept the plea agreement. On November 6, 1996, a jury panel was again

summoned for jury selection and the Government once again prepared and secured its witnesses for trial. Petitioner was present represented by his counsel, Christopher Chan, but co-counsel, Attorney Conti, was not present. Attorney Conti had forwarded an affidavit indicating that he had been put on trial in New York Supreme Court and was, therefore, unavailable for the trial of this matter and requesting a continuance. (GA 55-60).

The court had previously explained to counsel and petitioner that because jury selection was only conducted one day a month in this District, no further adjournments would be granted. (GA 42). In response to the court's expressed intention to proceed with jury selection, petitioner, his counsel, and even petitioner's family, argued forcefully that Mr. Conti was petitioner's "trial attorney" and that petitioner would be prejudiced if he were forced to proceed with jury selection in Mr. Conti's absence. More particularly, petitioner stated:

MR. MOORE: Yes, your Honor. Mr. Chan's role at this time is to prepare motions and to serve as Mr. Conti's Connecticut counsel. Me and Mr. Chan have not gone over anything in regards to trial. I've done all my preparation with Mr. Conti. In fact, this is the first time I've seen Mr. Chan since the last time I was in court. We had one previous conversation on the phone last week and that's it. Everything I've done has been with Mr. Conti.

And later, Mr. Moore reiterated:

> MR. MOORE: I find it very important and very urgent that Mr. Conti be here. I can't see picking a jury with Mr. Chan. I haven't gone over any preparation with him and it's not fair to me to do it without him. I can't do it without Mr. Conti. I haven't seen or talked to Chan. It's my first time seeing the guy. I've done all my preparation with Mr. Conti and it's very important to pick the jury with the two of them there together.

(GA 63-65). When the court indicated that it would proceed with jury selection but delay the start of evidence until November 13th, petitioner stated:

> MR. MOORE: As I was told, the trial he's involved with is going to take at least three and a half weeks or so. So he won't be able to be here and if I can't proceed with Mr. Conti -- I mean, if I have to I will just have to fire Mr. Chan because I can't go on without Mr. Conti because I have done no preparation with him, haven't seen him or talked to him but one time.

(GA 68). Thereafter, petitioner's mother similarly appealed to the district court judge to postpone jury

selection and the start of trial so that Attorney Conti could be present to assist with jury selection. (GA 69-70).

The defendant then complained that he was not permitted to dress for court at the correctional center and that he was dissatisfied with his clothing. (GA 73). A shirt was secured for petitioner and he left the courtroom to change. When petitioner returned to the courtroom the court was advised that petitioner had done as he had threatened and fired Mr. Chan as his counsel. (GA 74). After a brief further colloquy, the district court granted petitioner's requested continuance and adjourned jury selection to December 4, 1996. (GA 77). The court admonished petitioner:

THE COURT: Mr. Moore, if you are not able to get your counsel here you're going to proceed pro se or I will appoint counsel for you. Do you understand that?

MR. MOORE: Yes, your Honor.

THE COURT: You will pick a jury on December 4, you will start evidence at 9:00 a.m. on Tuesday December 10th. There will be no adjournments. I will not give my views on whether or not there has been manipulation here. I am trying to -- I don't think it is required that this be postponed. I think you having elected to fire your attorney, you could be required to

proceed pro se or I would appoint counsel for you. I prefer under the circumstances to do it this way. Are we clear?

MR. MOORE: Yes, your Honor.

THE COURT: I don't want to hear from you about no clothes, no lawyer, firing lawyers, not ready to proceed. This is the last time and I'm not kidding. Got it?

Mr. MOORE: Yes, your Honor.

(GA 77-78).

The Plea Proceeding

Once again, during the intervening month, it appeared that this matter was headed for trial. Then, on December 4, 1996, the morning of the third scheduled jury selection, while a jury pool waited, and after the Government had once again prepared for trial and secured its witnesses, petitioner changed his plea to guilty on counts fourteen and fifteen of the indictment pursuant to a written plea agreement with the Government. The plea agreement contained a stipulation acknowledging that petitioner was responsible for the distribution of between 50 and 150 grams of cocaine base, that at least one cocaine base distribution occurred within 1,000 feet of an elementary school, and that petitioner possessed a firearm in connection with cocaine and crack cocaine in his possession on the date of his arrest. The plea agreement

also called for the dismissal of the eight remaining counts of the indictment against petitioner, and for the Government to withdraw a previously filed prior felony information, thereby reducing petitioner's mandatory minimum sentence to ten years from twenty. *See* Plea Agreement dated December 4, 1996 at 7. (GA 117-24).

In the plea agreement, the Government agreed to recommend that Moore receive credit for acceptance of responsibility but that recommendation was expressly conditioned on "the defendant's full, complete, and truthful disclosure to the Probation Office of the information requested, of the circumstances surrounding his commission of the offense . . . and upon the defendant timely providing complete information to the Government concerning his involvement in the offense to which he is pleading guilty." (GA 119). The plea agreement made clear that the district court was not bound to accept the Government's recommendation. (*Id.*).

At the plea proceeding it became abundantly clear that acceptance of responsibility was going to be a significant and disputed issue. For example, when the district court asked petitioner what his conduct was that made him guilty of the offense of conviction, petitioner responded: "On May 21st and May 28th I gave Vance Barnes a ride to sell crack cocaine and after he made the sale I gave him a ride back to his destination." (GA 83). Following petitioner's anemic and fallacious account of his criminal conduct, Government's counsel put the defense on notice that, in its view, petitioner had not accepted responsibility for his criminal conduct. (GA 95).

When petitioner was asked whether he agreed with the Government's proffer of a factual basis for his plea, petitioner stated:

> MR. MOORE: Well, like I said before, I assisted Vance Barnes in a ride. *I never gave Barnes any drugs*. I don't know if he's insinuating based on his surveillance and what he may think the way it occurred, but I assisted Vance Barnes in giving him a ride. *I never gave anything to Barnes*.

(GA 96) (emphasis supplied).[3] Following questioning by the court, petitioner eventually acknowledged that he was aware the transactions were going to take place, knew they involved crack cocaine and knew that the distributions were going to take place near a school. Defendant at first indicated that he did not have knowledge of the quantity of crack involved in the transactions but later acknowledged that he was aware that in each instance the distribution exceeded five grams of crack cocaine. (GA 96-97).

Based on the Government's proffer of facts, the stipulation that was made part of the plea agreement, and

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[3] As detailed below, petitioner's sworn statements were contradicted by his own statements at the time of sentencing. Even then, petitioner's belated, grudging admissions were inconsistent with statement made by co-defendant Barnes who acknowledged receiving crack cocaine from petitioner more often than petitioner ever acknowledged.

petitioner's statements, the court accepted petitioner's pleas of guilty.

Sentencing

Petitioner was interviewed by the Probation Office for the preparation of a presentence investigation report (PSR) and he declined to make a statement. The PSR did not recommend to the court that petitioner receive credit for acceptance of responsibility. (GA 108, 113).

By letter dated January 31, 1997, petitioner submitted a statement captioned "William Moore's Statement" which provided in full as follows:

> I, William Moore, acknowledge consistent with my statement at the time of my guilty plea, that I knowingly assisted Vance Barnes in selling quantities of cocaine as contained in counts 14 and 15 of the indictment. Additionally, at other times and places I assisted Vance Barnes in his transactions to the extent of providing him with transportation. On these dates I didn't have specific knowledge of the details of the transactions, because I did not question Mr. Barnes. However, I did have a general knowledge as to what was happening. On March 21 and May 21, 1996 I did "front" quantities of cocaine to Mr. Barnes as a favor. I wish to emphasis [sic] that at no time did I work with Mr. Barnes or Mr. Litt in selling cocaine, and that I provided cocaine on these two occasions because Mr. Barnes had apparently made commitments to the buyer, and

> did not have the cocaine required for the transaction.
>
> I acknowledge that my activities described above were illegal, and were wrong, and I am willing to accept responsibility for my actions.

(GA 139).

Following receipt of this statement, an addendum to the PSR was issued which again recommended against credit for acceptance of responsibility.

It was simply impossible to reconcile petitioner's statement under oath at the time of his guilty plea that he "never gave Barnes any drugs" with his belated statement to the court that he "fronted quantities of cocaine to Mr. Barnes." Moreover, in his written statement to the court, petitioner conceded that he gave drugs to Barnes on March 21, 1996 in addition to May 21, 1996, but did not acknowledge that he gave drugs to Barnes on May 28, 1996 -- the date referenced in count fifteen of the indictment to which he pleaded guilty. Finally, petitioner's sworn statements to the court could not be reconciled with a statement ultimately made by defendant Barnes prior to sentencing wherein Barnes acknowledged that petitioner supplied the drugs for the distributions he conducted on March 21st, May 21st, May 28th and May 30th.

At the conclusion of the sentencing hearing and following an extended colloquy with petitioner on the

issue of acceptance of responsibility, the district court concluded:

> On the issue of acceptance of responsibility and whether or not Mr. Moore -- why don't you stay here, whether or not the defendant's candor and credibility and explanation *for what had previously been lies to the Court*, that this been opportunistic, should outweigh what is now a coming clean as to what he did or didn't do or what he was accepting in connection with the offenses of conviction, I think his statement that he at no time worked with Barnes is at best cute and an attempt to peel the onion in a way that doesn't make any sense. On the other hand, elsewhere he acknowledges assisting Barnes by fronting him cocaine and driving him to the places for the transactions. I do think the explanation that he was coincidentally at the apartment building on the day of the transaction on which we saw video is perplexing and the explanation that he and Barnes were friends and hung out together a lot could give that explanation credence. On the other hand, it could also simply not be true. I think that's an equipoise and I'm just going to disregard it.
>
> I think Mr. Moore's explanation that he's twisted the statements earlier to emphasize what he claims is the truth with respect to no leadership role has had the twist that it has not looked as if he's been forthcoming. He has been forthcoming today at last. I can't tell whether that will last beyond this afternoon, *but I will give him the benefit of the*

doubt and say that at this moment when he stands before the Court for sentencing there has been minimally appropriate acceptance of responsibility and remorse and contrition whose duration I'm not sure of. However, there is no basis for awarding any reduction for timeliness.

Eyler which is at 67 F.3d at 1386, Ninth Circuit, 1995, says the focus of the Section (b) inquiry, which is as to the third prong, is on timeliness. *United States v. Covarrubias*, 65 F.3d 1362, Seventh Circuit, 1995, refers to Subsection (b) inquiry as primarily whether the defendant made an attempt to conserve government and district court resources. That is not what happened here. *We had two jury panels waiting to go for jury selection at two different months and we had scheduled a third one earlier.* The panel was not actually here. And my assumption is a fair number of the exhibits that we saw over this hearing had already been prepared for trial. *The government's and the court's resources were in no way conserved as to the timeliness of the plea and, in fact, it was with great reluctance that I adjourned jury selection in any event when your clothes and counsel were not to your liking.* Accordingly, I'm not going to award or reward you or amply award the two-level reduction with the third level. I do not think that would be appropriate.

(GA 174-76) (emphasis supplied).

The court then sentenced petitioner principally to 168 months' incarceration on each count of conviction, to run concurrently, to be followed by a ten-year period of supervised release. The court sentenced petitioner at the high end of the resulting range because it found that petitioner was a "big time" drug dealer for an extended time, who had no legitimate employment, had not paid taxes, yet drove beautiful cars, accumulated jewelry worth more than $150,000, and lived the "fast life" off the "scourge" of drug dealing that "hurt a lot of people." (GA 179-80).

Appeal

On appeal petitioner argued, *inter alia*, that the district court erred when it declined to reduce his offense level one additional level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b)(2). This Court rejected all of petitioner's claims. With respect to his acceptance of responsibility claim, the Court found that the district court provided ample support for its conclusion that petitioner's acceptance of responsibility was not timely. *United States v. Litt*, Nos. 97-1218, 97-1219, 1997 WL 829302 at 1 (2d Cir. Dec. 8, 1997).

Motion Under 28 U.S.C. § 2255

Petitioner next filed a motion to vacate his conviction under 28 U.S.C. § 2255. In his motion, petitioner claimed, *inter alia*, that but for Attorney Chan's ineffective assistance of counsel, he would have been awarded an additional one-level reduction under U.S.S.G. §3E1.1(b)

for acceptance of responsibility. The district court rejected this argument, concluding in relevant part:

> Here, while the fact that an additional one-level departure for timely acceptance of responsibility might have been available had defendant pleaded guilty earlier is not inconsequential, the seventeen month difference is not enough to constitute a "vast disparity" to permit the conclusion that there is a reasonable probability that Moore would have pleaded guilty earlier had his counsel advised him of that possibility. Therefore, in light of Moore's failure to allege any facts that suggest a reasonable probability that but for the advice of Mr. Chan, he would have "timely provid[ed] complete information to the government concerning his own involvement in the offense; or timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently," Mr. Moore has not satisfied the second prong of the *Strickland* test.

Moore, 228 F. Supp.2d at 81 (footnote omitted).

Certificate of Appealability

On or about September 25, 2002, petitioner filed a notice of appeal and moved for a certificate of appealability. On December 30, 2002, the district court issued an order as follows:

> Although the Court remains convinced that petitioner has not established that he is entitled to federal habeas corpus relief, the issue of whether petitioner has met the prejudice prong of the *Strickland* test, based on the disparity of seventeen months between the sentence he received without the additional one level departure and the sentence he would otherwise have received based on a prompt guilty plea, is a question adequate to deserve encouragement to proceed further, and thus a certificate of appealability will issue on this issue.

(GA 184-85). This appeal followed.

SUMMARY OF ARGUMENT

Petitioner claims that he was denied the full three-level credit for acceptance of responsibility because of the ineffectiveness of his trial counsel. Even if he could show that his lawyer was ineffective, however, he cannot show there is a reasonable probability that he would have pleaded guilty earlier but for the allegedly unprofessional conduct of his lawyer. Petitioner points to no objective evidence to suggest that he would have pleaded guilty earlier, and indeed has never even alleged that he would have pleaded guilty earlier but for his counsel's conduct. In any event, petitioner cannot show that he received ineffective assistance of counsel because he was represented by a second counsel who petitioner does not claim compromised his Sixth Amendment right to effective assistance of counsel.

ARGUMENT

I. PETITIONER CANNOT ESTABLISH THAT HE RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN CONNECTION WITH THE TIMING OF HIS GUILTY PLEA

Petitioner claims that but for the ineffective assistance of his counsel, Christopher Chan, Esq., he would have received the full three-point credit for acceptance of responsibility. Pet. Brief at 10-15. Specifically, petitioner alleges that Chan encouraged him to fire him as counsel to delay his trial and that this action resulted in the district court's decision to deny him the third point for acceptance of responsibility.[4] *Id.* at 11. As demonstrated below, petitioner's claim is completely belied by the record.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

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[4] Below, petitioner identified several alleged deficiencies in Chan's performance (including an allegation that Chan failed to advise him on the desirability of pleading guilty and cooperating with the government). *See Moore*, 228 F. Supp. 2d at 79 (describing petitioner's theories of ineffective assistance). Petitioner has abandoned these alternative theories in this Court, arguing here only that Chan's inexperience led him to devise a plan for Moore to fire him on November 6 in an effort to delay the trial. Pet. Brief at 11.

B. Governing Law and Standard of Review

A claim of constitutionally ineffective assistance of counsel is subject to well-established criteria for review. "To support a claim for ineffective assistance of counsel, petitioner must demonstrate," first, "that his trial counsel's performance 'fell below an objective standard of reasonableness . . . .'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In determining whether counsel's performance was objectively reasonable, this Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy.'" *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (alteration in original) (quoting *Strickland*, 466 U.S. at 689), *cert. denied*, 125 S. Ct. 1878 (2005).

Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Johnson*, 313 F.3d at 818. In other words, "[t]he defendant must 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant has the affirmative obligation of proving prejudice. *United States v. Cohen*, ___ F.3d ___, 2005 WL 2665635 at 2 (2d Cir. Oct. 20, 2005).

A defendant's self-serving, post-conviction assertions concerning his intent or what he would have done had he had the benefit of effective counsel is rarely sufficient alone to establish "a reasonable probability" that the results of the proceeding would have been different. Objective evidence is required. This Court has found that a significant sentencing disparity coupled with defendant's statement of his intention may be sufficient to support a finding of prejudice. *See United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *see also Mask v. McGinnis*, 233 F.3d 132, 141-42 (2d Cir. 2000); *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003).

A defendant must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel. If the defendant has failed to satisfy one prong, the court need not consider the other. *Strickland*, 466 U.S. at 697.

This Court reviews a claim of ineffective assistance of counsel *de novo*, *United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001), but "[w]here the district court has decided such a claim and has made findings of historical fact, those findings may not properly be overturned unless they are clearly erroneous," *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004). This Court reviews a district court's decision to deny a hearing on a habeas petition for abuse of discretion. *Pham*, 317 F.3d at 182; *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001).

C. Discussion

1. Petitioner Has Not Identified Any Objective Facts to Suggest That He Would Have Pleaded Guilty Earlier But For His Counsel's Allegedly Deficient Performance

This Court has held that a defendant's self-serving statement concerning what he would have done had he had the benefit of effective assistance of counsel cannot, by itself, satisfy the prejudice prong of *Strickland*. Objective evidence is required. *See Gordon*, 156 F.3d at 381. This standard can be met with a sworn or otherwise reliable statement of the defendant indicating that he would have acted differently but for counsel's erroneous advice, coupled with a significant sentencing disparity. *See id.*; *Aeid v. Bennett*, 296 F.3d 58, 63-64 (2d Cir. 2002). Here, petitioner has neither. Indeed, the objective evidence in this case refutes any suggestion that petitioner would have pleaded guilty earlier but for Chan's allegedly unprofessional conduct.

Significantly, petitioner never alleged at the time of sentencing, on direct appeal, in his habeas petition -- or even on this appeal -- that he was prepared to enter a guilty plea at an earlier time. He certainly has not submitted his own affidavit or that of counsel substantiating his present, belated claims. Thus, defendant has not offered even the most basic evidence indicating he was prepared to enter a plea earlier but for counsel's allegedly deficient performance. *See Aeid*, 296 F.3d at 64 (finding no

prejudice where defendant failed to allege that he would have acted differently but for counsel's alleged errors).

Additionally, petitioner cannot point to a significant sentencing disparity to support a claim of prejudice from his counsel's allegedly deficient performance. The seventeen month difference in potential sentences between the ranges calculated with a two-level and a three-level acceptance of responsibility credit simply does not qualify as a vast difference sufficient to show a "reasonable probability" that petitioner would have pleaded guilty earlier to obtain this credit. When this Court has found prejudice based in part on large sentencing disparities, the disparities have been *very large* -- disparities of over 100 months -- *and* the defendants have offered other evidence to support their claims of prejudice.

For example, in *United States v. Gordon,* counsel acknowledged that he advised defendant that he faced a maximum sentence of 120 months and a likely sentencing guideline range of 92 to 115 months. Defendant went to trial, was convicted and only then learned that he faced a guideline range of 262 to 327 months. In addition to counsel's testimony that he misadvised his client, the defendant submitted an affidavit stating that he would have pleaded guilty had he known he was facing a sentence of 12 to 17 years. 156 F.3d at 377. This Court found that the defendant's sworn statement, coupled with a potential sentencing disparity of 235 months, satisfied the prejudice prong of *Strickland*. *Id.* at 381.

Similarly, in *Mask v. McGinnis*, there was an extensive record that defendant was offered a plea bargain of 10 years to life under the mistaken belief that he qualified for

a sentencing enhancement as a violent persistent felon. Defendant rejected the plea offer, went to trial, was convicted and sentenced to 20 to 40 years' incarceration. In connection with sentencing it was determined that defendant was not a violent persistent felon and a plea offer to a lesser sentence would likely have been available. Defendant submitted an affidavit indicating that he would have accepted a plea offer of 8 to 16 years had it been offered. The Court found that the large disparity -- as much as 268 months -- between the defendant's sentencing exposure following trial and his potential exposure had a plea offer been made based on accurate information, coupled with defendant's sworn statements, satisfied the prejudice requirement of *Strickland.* 233 F.3d at 142.

Finally, in *Pham* v. *United States*, the defendant submitted an affidavit indicating he had requested that his counsel pursue a plea bargain and that he was willing to accept a sentence of between 5 and 8 years. The Government had made a plea offer of 78 to 97 months but defendant claimed that offer was never communicated to him. The defendant was ultimately tried, convicted and received a sentence of 210 months -- a sentence which exceeded the high end of the Government's offer by 113 months. The Court found that the district court erred in summarily rejected defendant's habeas petition without considering the defendant's sworn statements, coupled with the significant sentencing disparity, on whether the prejudice prong had been satisfied. 317 F.3d at 183.

The sole case relied upon by petitioner, *United States v. Leonti*, 326 F.3d 1111 (9th Cir. 2003), is readily distinguishable. In that case, the Ninth Circuit held that counsel's advice to defendant to delay entering a plea so

that counsel could review discovery and consider the evidence was wholly consistent with counsel's professional obligations. *Id.* at 1120-21. The court further found that the defendant had suffered no prejudice because there was no reasonable probability that an earlier plea would have allowed the defendant to earn a substantial assistance motion and a lighter sentence. The court had no occasion to consider the size of any potential sentencing disparity because in that case, there was no reasonable argument for prejudice. According to the court, on the facts of that case, the timing of the defendant's plea had no possible impact on the potential length of the defendant's sentence.[5] *Id.* at 1121.

In this case, although the court identified a seventeen-month sentencing disparity between a two-level and a three-level acceptance of responsibility departure, the small disparity, without even so much as an after-the-fact affidavit from petitioner stating that he would have pleaded guilty earlier to obtain this lighter sentence, is insufficient to demonstrate prejudice. This conclusion is buttressed by an examination of the objective evidence in the record demonstrating that counsel's alleged deficiencies had no impact on the timing of petitioner's plea.

The record in this case demonstrates that there is no reasonable probability that Attorney Chan's allegedly

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[5] The court further found that the record was insufficient to decide whether the defendant had received ineffective assistance of counsel *after* he entered his guilty plea, an issue not at issue in this case.

unprofessional conduct delayed petitioner's plea. According to petitioner, Chan encouraged petitioner to fire him on November 6 to delay the trial and it was this tactic that prevented petitioner from earning the full three-level credit for acceptance of responsibility. Pet. Brief at 11. Even assuming that Chan engineered his "firing" as a delay tactic, *but see* GA 68 (petitioner, not Chan, first proposed firing as method to avoid beginning jury selection), the district court found that petitioner and his entire family wanted the delay so that petitioner's "trial" counsel could be present. *Moore*, 228 F. Supp. 2d at 80 n.1. Furthermore, as the district court found, the record shows that on November 6, Moore intended to go to trial. *Id.*; *see also* GA 63-65 (Moore requesting continuance to await presence of trial counsel because he had done all of his preparation for trial with that lawyer). In other words, even if Chan had not encouraged petitioner to delay the trial by firing him, "nothing in this record permits the conclusion that Moore's guilty plea would have been entered earlier." *Moore*, 228 F. Supp. 2d at 80 n.1.

Because the record provides no evidence to suggest that petitioner would have pleaded guilty earlier, because petitioner does not even allege that he would have pleaded guilty earlier, and because the sentencing disparity is not sufficiently large to presume that petitioner would have pleaded guilty earlier, petitioner has identified no evidence to suggest a probability, much less a reasonable probability, that counsel's allegedly unprofessional conduct had any impact on his case.

2. Petitioner Cannot State A Sixth Amendment Claim For Ineffective Assistance Because He Does Not Allege That Attorney Conti, His "Trial" Counsel," Provided Ineffective Assistance

Petitioner alleges ineffective assistance of counsel on the part of Attorney Chan only. The record reflects, however, that as early as mid-September, petitioner had retained a second lawyer, Attorney Conti. (GA 47). The record also demonstrates that petitioner consulted with and was relying upon attorney Conti as his primary counsel. (GA 63-65).

Inasmuch as petitioner does not allege ineffective assistance of counsel on the part of Attorney Conti, his Sixth Amendment right to the effective assistance of counsel was not abridged. His claim must therefore fail. *See United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1996). *See also Garcia v. Lewis*, 188 F.3d 71, 75-76 n. 2 (2d Cir. 1999) (court may affirm denial of habeas relief on ground not encompassed by certificate of appealability because certificate should not limit what government can argue on appeal, especially where government would not have to obtain certificate of appealability if it were appellant).

3. The District Court Did Not Abuse Its Discretion In Declining To Hold An Evidentiary Hearing

The district court did not abuse its discretion in declining to hold an evidentiary hearing before ruling on petitioner's ineffective-assistance claim. *See Pham*, 317 F.3d at 182; *Chang*, 250 F.3d at 82. The Supreme Court has explained that courts must indulge a strong presumption that trial counsel's conduct was constitutionally adequate. Only if this Court were to reject the arguments set forth above, and conclude that petitioner "appear[s] to have successfully established his ineffective assistance claim," would a hearing be called for. In those circumstances, a remand would be appropriate to allow "the attorney whose performance is challenged . . . an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs." *McKee v. United States*, 167 F.3d 103, 108 (2d Cir. 1999) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 14, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

JAMES I. GLASSER
COUNSEL TO THE U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,354 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

JAMES I. GLASSER
COUNSEL TO THE U.S. ATTORNEY