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WESTERN DISTRICT OF LOUISIANA
LAFAYETTE, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE OPELOUSAS DIVISION

CV05-0659 SECP

JUDGE MELANÇON
MAGISTRATE JUDGE HILL

United States of America,
Plaintiff-Respondent,

vs.

Gregory James Caton,
Petitioner-Defendant.

§ Cr. Case No. 04-~~20092~~ 20075
§ Cv. Case No.

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

COMES NOW Gregory James Caton petitioner-defendant appearing pro-se and interposing Haines v Kerner, 404 US 519 (1972); United States v Santora, 711 F2d 41, 42 (5th Cir. 1983), hereby submits his memorandum brief in support of his motion to vacate, set aside or correct sentence pursuant to §28 USC §2255. In support thereof, petitioner submits the following, to wit;

STATEMENT OF THE FACTS

On September 17, 2003 a criminal complaint was filed in the Western District of Louisiana charging petitioner with possession of a firearm by a convicted felon, in violation of 18 USC §922(g)(1).

On September 23, 2003 the petitioner appeared for a detention

hearing and was ordered detained for trial.

On October 15, 2003 petitioner was charged in a two-count indictment charging him with possession of a firearm by a convicted felon, in violation of 18 USC §922(g)(1) and §924(a)(2) and; forfeiture of the firearm and ammunition pursuant to 18 USC §924 (d)(1).

On November 25, 2003 petitioner at his arraignment entered a plea of not guilty, and was ordered detained pending trial.

On May 25, 2004 the petitioner was charged in a three-count Bill of Information of violating §18 USC §1341, mail fraud; 21 USC §§331(d), 355(a) and 333(a)(2), introducing unapproved new drugs into interstate commerce and; 18 USC §981 (a)(1)(C) and 28 USC §246(C), a forfeiture count.

On May 26, 2004 the petitioner entered a plea of guilty.

On August 24, 2004 the petitioner was sentenced to 33 months in federal prison followed by a term of three years of supervised release. The district court adopted the probation officer's PSR findings that more than $800,000.00 but less than $1,500,000.00 was involved in the offense [increasing petitioner's sentence by eleven points] that the petitioner used minimal planning [increasing petitioner's sentence by two points]; That the petitioner used mass-marketing in the offense [increasing petitioner's sentence two points] and; That the petitioner used sophisticated means in the instant offense [increasing petitioner's sentence two points]. The district court dismissed the two point increase for conscious or reckless risk enhancement that petitioner's counsel objected to. The district court notified the petitioner of his

right to appeal and time limits to do so.

After sentencing, petitioner Caton discussed his case with his Counsel and told him he was unhappy with the outcome and asked his counsel to appeal the ruling in his case.

SWORN AFFIDAVIT OF GREGORY JAMES CATON
IN SUPPORT OF RELEVANT FACTS

I, Gregory James Caton having been duly sworn according to law deposes and says.

1. That I am the petitioner in this 28 USC §2255.

2. That my counsel, Lewis O. Unglesby personally represented to me and my wife that the $50,000 fee I paid him included him filing my direct appeal.

3. That counsel had not consulted me when he told the court I was not going to appeal the two objected PSI issues.

4. That I told counsel Unglesby, upon completion of sentencing that I was unhappy with the sentence.

5. That after my conversation with counsel Unglesby after my sentencing, it was my understanding that he would file my requested direct appeal.

I, Gregory James Caton having read the above statements hereby swear under penalty of perjury that they are true and correct. 28 USC §1746.

Executed on this the 8th day of April, 2005.

Gregory James Caton

LEGAL ARGUMENTS

I.

PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT

Petitioner's substantive arguments in this motion turns upon the right of due process and effective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees that criminal defendants are entitled to effective assistance of counsel in presenting their defense. The Supreme Court has stated, "the right to counsel is a fundamental right of criminal defendant's; it assures the fairness, and thus the legitimacy of our adversary process." **Kimmelman v Morrision,** 477 US 365, 374 (1986). Furthermore, the Supreme Court has recognized that "the right to counsel is the right to effective assistance of counsel." **McMann v Richardson,** 397 US 759, 771 (1970).

To succeed on the claim of ineffective assistance of counsel, a criminal defendant must show that his "Counsel's" conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." **Strickland v Washington,** 466 US 668, (1984). The **Strickland** court held that in order for a defendant to prevail on an ineffective assistance of counsel claim, he must satisfy a two prong test. **Strickland,** 466 US at 687-88. A defendant must demonstrate that the representation "fell below an objective standard of reasonableness" and "a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have

been different." **Strickland**, 466 US at 694.

A court reviewing a claim of ineffective assistance of counsel must determine whether a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceedings would have been different or whether the result was fundamentally unfair or unreliable. **Lockhart v Fretwell**, 113 S.Ct. 838 (1993). Ultimately, the **Strickland** test requires the court to focus upon whether counsel's performance was sufficient to ensure the fundamental fairness of the proceeding. **Nealy v Cabana**, 764 F2d 1173, 1180 (5th Cir. 1985). However, the prejudice that must be shown need not be anything more than even one additional day in jail. **Glover v United States**, 531 US 198 (2001).

A.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO FILE HIS REQUESTED APPEAL

On May 26, 2004 petitioner plead guilty to three counts of a Bill of Information. On August 24, 2004 petitioner was sentenced to thirty three months in federal prison, followed by a three year term of supervised release. During the sentencing of the petitioner, counsel objected to: 1) the two point enhancement for the conscious or reckless risk of serious bodily injury [U.S.S.G. §2F1.1 (b)(7)(A) and; 2) victim impact, on page 7 par. 14-16 of petitioner's PSR.

The district court ultimately sustained objection one (S.Tr.

21; 4-8) [1] and as to the second objection found that the alleged victim did not sustain any damages caused by petitioner Caton. (S.Tr. 21; 9-12).

Counsel noted that the only enhancement argument is for the two points for conscious or reckless risk of serious bodily injury pursuant to §2F1.1 (b)(7)(A). (S.Tr. 20; 22-23).

Subsequently, the court adopted the PSR's unobjected sentencing enhancements of 17 points (S.Tr. 22; 13-18) (S.Tr. 23; 16-17) (S.Tr. 23; 24-25) (S.Tr. 24; 1), and sentenced the petitioner.

The court, then, advised the petitioner that he could appeal his case and had ten (10) days to file notice of appeal. (S.Tr. 26; 2-13).

Petitioner asked counsel to file a Notice of Appeal for him and argue the sentencing issues they had discussed through the proceedings.

Later, petitioner found that counsel had not filed his requested appeal and had lost the opportunity to challenge the **Blakely v Washington**, 124 S.Ct. 2531 (2004) violations.

In **Roe v Flores-Ortega**, 120 S.Ct. 1029 (2000) the Supreme Court reaffirmed a longstanding premise that counsel has a duty to file a Notice of Appeal when such is requested by the defendant:

> "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See, **Rodriquez v United States**, 395 US 327, 23 Led2d 340,

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[1] (S.Tr. ___ ; _-_) refers to sentencing transcripts page number ____ and lines _-_ .

> 89 S.Ct. 1715 (1969); C F **Peguers v United States**, 520 US 961 (1999) ("When counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit.") Id.

The petitioner is entitled to a new Direct Appeal due to his counsel's deficient performance in failing to file petitioner's requested Direct Appeal.

Petitioner repeatedly during his plea arraignment emphasized his issues with his case: "I'm here to enter pleas to protect my wife and my employees and others." (P.Tr. 5; 24-25)[2]. There are accuracy issues in the pleas. (P.Tr. 6; 12-14); That petitioner only had an hour to read over the documents which he signed. (P.Tr. 8; 1-4); (P.Tr. 9; 15-25); (P.Tr. 10; 1-6); (P.Tr. 11; 23-25); petitioner never intended to harm anyone and believed in his products. (P.Tr. 21; 10-11).

The court had to recess the plea hearing in order to have petitioner to consult with his attorney so that he could address his concerns. (P.Tr. 12; 1-6). The court even noted in addressing the guilty plea to the petitioner that "I can't just blink at that even though everybody is trying to get through this as best they can." (P.Tr. 23; 14-15).

Time and time again, the petitioner questioned the charges against him and had to consult his attorney. This is prima facie evidence that petitioner would not forego his rights to challenge

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[2] (P.Tr. ___ ; _-_) denotes Plea arraignment transcripts page number ___ ; Lines _-_ .

his case, as well as what he has sworn to in his sworn affidavit which is incorporated herein.

Counsel had a duty to make reasonable investigations into the **Blakely** sentencing enhancement issues that were decided **before** petitioner was sentenced. **Strickland**, 466 US at 690-91. **Strickland** does not require this court to defer to decisions that are uninformed by inadequate investigation into the controlling facts of law. **Moore v Johnson**, 194 F3d 586, 615 (5th Cir. 1999). Counsel's failure to file the required notice of appeal prejudiced the petitioner by causing him to default his **Blakely** arguments which vastly increased his sentence in violation of **Glover v United States**, 531 US 198 (2001). Petitioner's case should be remanded back to the district court and petitioner allowed to file a direct appeal, with counsel appointed.

B.

COUNSEL WAS INEFFECTIVE FOR FAILING TO RESEARCH AND ARGUE THE BLAKELY v WASHINGTON, 124 S.Ct. 2531 (2004) UNCONSTITUTIONAL SENTENCING ENHANCEMENTS

Petitioner Caton was sentenced after **Blakely v Washington**, 124 S.Ct. 2531 (2004) was handed down by the Supreme Court. Therefore, retroactivity is not an issue. **United States v Knowles**, 29 F3d 947, 951 (5th Cir. 1994). Even cases on Direct Appeal, when an intervening change of law is handed down by the Supreme Court, is given retroactive effect. **Griffith v Kentucky**, 479 US 314 (1987). The petitioner presents his **Blakely** arguments under the umbrella of ineffective assistance of counsel claims, which

violates the Sixth Amendment to the United States Constitution.

a) **BLAKELY VIOLATIONS**

In **Blakely**, Justice Scalia observed that:

> "[a]ny evaluation of Appredi's" 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning either in his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 USC §§841(b)(1)(A), (D) based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more than likely got it right than got it wrong." 125 S.Ct. ar 2542.

Cast in **Blakely** language, petitioner's argument is simple. It is for a jury to find the element's necessary to convict a defendant to a particular range of punishment by proofs beyond a reasonable doubt. Accordingly where the Bill of Information nor the plea agreement does not specify the enhanced sentence imposed by the sentencing judge, based upon a preponderance of evidence standard, violates **Blakely.**

In the petitioner's sentence from a base level six (6) to: 1) eleven points pursuant to §2F1.1 (b)(1)(L) for an offense involving losses of more than $800,000.00 but less that $1,500,000.00; 2) §2F1.1 (2)(A) for minimal planning; 3) §2F1.1(b)(3) for mass-marketing and; 4) §2F1.1 (b)(6)(C) for sophisticated means.

Petitioner's counsel has an affirmative duty to know the relevant case law. **Trass v Maggio**, 731 288, 293 (5th Cir. 1984)

(holding that ignorance of relevant law constitutes an "identifiable lapse in constitutionally adequate representation."). Counsel may be ineffective if he fails to investigate sources of evidence which may be helpful to the defense. **Davis v Alabama**, 596 F2d 1214, 1217 (5th Cir. 1979). Counsel has an affirmative duty to make an independent examination of the factual circumstances, pleadings and laws involved. **Loyd v Whitley**, 977 F2d 149 (5th Cir. 1992); **United States v Johnson**, 612 F2d 1011 (5th Cir. 1980), and counsel may not sit idly by thinking that an investigation would be futile. **Powell v Alabama**, 287 US 45, 58 (1932).

There can be no tactful decision in failing to investigate new Supreme Court case law which protects the rights of a DEFENDANT. Counsel's failure to investigate the intervening Supreme Court decision **Blakely** severely prejudiced the petitioner because any additional prison time constitutes prejudice under the **Strickland** standard of review. **Glover v United States**, 531 US 198 (2001). There exists more than a reasonable probability that had counsel objected to the **Blakely** sentencing violations the outcome of the proceedings would have been different. Furthermore, when counsel chose to default the **Blakely** claims he caused the petitioner to lose the opportunity to obtain direct review under the harmless-error standard of **Chapman v California**, 386 US 18 (1967), which requires the government to prove that the defendant was not prejudiced by the error. By defaulting counsel shifted the burden to the petitioner to prove that there exists a reasonable probability that, absent his attorney's incompetence, his proceedings would have been different. This error and omission

is not objectively reasonable because "the extraordinary weighty burden of showing prejudice arising from his counsel's ineffective assistance of counsel." **Huynh v King**, 95 F3d 1052 (1th Cir. 1996).

At the time of petitioner's sentencing, the Supreme Court had already set the wheels in motion in 2000 with **Apprendi v New Jersey**, 530 US 466 (2000) and extended the Sixth Amendment protections to sentencing in **Blakely.** Clearly, counsel did not afford the petitioner his Sixth Amendment protections that the Constitution requires as determined by the Supreme Court, that a criminal defendant is entitled to.

This Honorable Court should vacate petitioner's sentence and resentence the petitioner without the sentencing enhancements that violate **Blakely** and **Sixth Amendment** and in line with the **Ex Post Facto Clause** of the **United States Constitution.**

C.

COUNSEL'S CUMULATIVE ERRORS AND OMISSIONS DEPRIVED PETITIONER OF DUE PROCESS AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Caton's ineffective assistance of counsel claims are obviously of constitutional magnitude and satisfy the cause and prejudice standard. "Ineffective assistance of counsel is cause for procedural default." **Murray c Carrier**, 477 US 478, 488 (1986). "[I]f [a] procedural default is the result of ineffective assistance of counsel, the Sixth Amendment... requires that responsibility for default be imputed to the [government] which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" **Cuyler v Sullivan**,

466 US 335, 344 (1980); **Deutscher v White**, 884 F2d 1152 (9th Cir. 1989); **Bliss v Lockhart**, 891 F2d 1335 (8th Cir. 1989); **Hardiman v Renynolds**, 971 F2d 500 (10th Cir. 1992).

Petitioner's counsel committed several errors and omissions which, taken alone, rise to a constitutional level. However, a criminal proceeding is made up of many parts. The various parts, like pieces of a puzzle are put together to make a whole. When those errors and omissions are viewed together, the completed puzzle clearly demonstrates ineffective assistance of counsel. The combination of the counsel's errors and omissions rendered the sentencing and appellate proceedings fundamentally unfair and deprived Mr. Caton of due process of law as guaranteed by the United States Constitution.

Looking at the errors and omissions as a whole, Mr. Caton has overcome the presumption that his counsel provided reasonable professional assistance. **Strickland**, 104 S.Ct. at 2065; **United States v Weston**, 708 F2d 302, 306 (7th Cir. 1983).

Petitioner has established that counsel was incompetent. Looking at the proceedings as a whole, counsel's conduct so undermined the proper functioning of the adversarial process that the proceedings cannot be relied on as having produced just result. **Strickland**, 104 S.Ct. at 2064.

Petitioner hereby incorporates all of the claims of ineffective assistance of counsel raised into this brief into this issue by reference herein.

D.

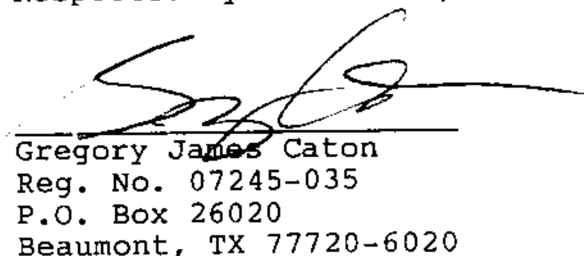
PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON THESE MATTERS

The petitioner avers that he is entitled to relief on his §2255 issues or in the alternative is entitled to an evidentiary hearing on his issues which allege sufficient facts which, if true, would support the conclusion of law advanced. **Townsend v Sain**, 372 US 293, 312, 83 S.Ct. 745, 756, 9 Led2d 770, 785 (1963). 28 USC §2255 provides the standard of determining whether to grant an evidentiary hearing. The Statute requires a hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 USC §2255; **United States v Auten**, 632 F2d 478 (5th Cir. 1980). Petitioner requests appointment of counsel if a hearing or resentencing is ordered.

WHEREFORE premises considered herein, petitioner Gregory James Caton prays that his §2255 petition is granted and he is allowed to file a direct appeal and/or he is resentenced without the seventeen (17) points of sentencing enhancements and in accordance with petitioner's **Ex Post Facto** concerns or in the alternative order an evidentiary hearing on these matters, with appointment of counsel.

Date: April 8, 2005

Respectfully submitted,



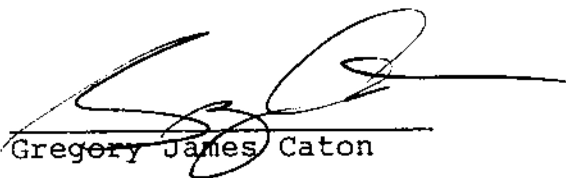
Gregory James Caton
Reg. No. 07245-035
P.O. Box 26020
Beaumont, TX 77720-6020

CERTIFICATE OF SERVICE

I, Gregory James Caton hereby certify that I mailed a true and correct copy of my 28 USC §2255 and Memorandum Brief, addressed to:

United States Attorney's Office
Att: Larry J. Regan, AUSA
800 Lafayette St., Suite 2200
Lafayette, LA 70501

On this the 8th day of April 2005.



Gregory James Caton

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