UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

United States of America,
Respondent,

v

Gregory James Caton,
Petitioner-Defendant.

§ Cr. Case No.04-20075

PETITIONER'S RESPONSE TO ANSWER OF THE UNITED STATES TO MOTION VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 USC §2255

COMES NOW Gregory James Caton, petitioner-defendant appearing pro se and interposing Haines v Kerner, 404 US 519 (1972) and hereby files his response to the answer of the United States, to motion to vacate, set aside or correct sentence under 28 USC §2255. In Support thereof, petitioner Caton submits the following, to wit;

Petitioner received his copy of the government's response on June 27, 2005 and therefore this reply is timely filed.

PETITIONER'S OBJECTIONS

I.

COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO FILE AN APPEAL AFTER BEING REQUESTED TO DO SO AND AFTER BEING PAID TO DO SO

The government is distorting several facts concerning the issue of whether counsel was ineffective for failing to file

an appeal when requested. The petitioner addresses these distortions.

First of all, the government did not submit a sworn affidavit by petitioner's counsel denying the allegations nor has the government submitted any statements, evidence or contrary facts to support their conclusions that petitioner did not request an appeal. The government cannot discharge their burden of showing that the petitioner did not request his attorney file a direct appeal, with some metaphysical doubt as to the material facts, by conclusory allegations or unsubstantiated assertions. **Little v Liquid Air Corp.**, 37 F3d 1069, 1075 (5th Cir. 1994).

Second, the government alleges that the petitioner's affidavit is self-serving. This is incorrect because petitioner's affidavit contains sworn facts of personal knowledge that:

1) He paid his counsel to file an appeal;

2) Counsel did not consult with him when he (Counsel) told the court he was not going to appeal the two objected to PSI issues;

3) Petitioner told counsel he was unhappy with his sentence;

4) after consulting with his counsel after sentencing, he [petitioner] understood that counsel would file an appeal.

The above statements are not opinions of the petitioner, they are facts sworn to by the petitioner based on his personal knowledge of the events in question and, therefore, sufficient. See **Reese v Anderson**, 926 F2d 494, 499 (5th Cir. 1991).

Serious constitutional questions arise where counsel tells

the court his client would not be appealing [the two objected to PSI issues] when counsel never consulted with his client about whether or not to appeal said issues and when a defendant tells his counsel he is unhappy with his sentence and wanted to appeal his sentence. Such actions by counsel does not comport with Sixth Amendment protections of petitioner's right to effective assistance of counsel.

Counsel, in accepting money from the petitioner to effect an appeal, then, failing to do so constitutes fraud by counsel, which calls further into question, the effectiveness of counsel Unglesby.

a. Counsel was ineffective

Petitioner hired counsel Unglesby and paid him $50,000.00 to represent him in district court and to file a direct appeal. [See petitioner's affidavit ¶2]. In the Fifth Circuit, when a defendant is promised by counsel "that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal." Perez v Wainwright, 640 F2d 596, 598 (5th Cir. 1981).

In petitioner's case, the petitioner and counsel agreed that a direct appeal would be filed, as a prerequisite to paying the $50.000.00 fee. Upon payment of the fee counsel was obligated to file a direct appeal. "It was counsel's duty to protect the convicted defendant's right to appeal. The duty of counsel in the trial court does not end upon final judgment." Perez, 640 F2d at 598.

A case on point with the petitioners, **Sincox v United States**, 571 F2d 876 (5th Cir. 1978) finds that **Sincox** "paid all his money to retained counsel and his understanding was that counsel would defend the case and appeal it to the Supreme Court if necessary," **Sincox**, 571 F2d at 877, and "he never discussed waiver of his right to appeal." Id., at 877. The Fifth Circuit found **Sincox** ineffective for failing to file his clients direct appeal.

Likewise, petitioner paid his counsel to "defend his case and appeal it" to the Fifth Circuit and he [petitioner] "never discussed waiver of his right to appeal.".

This court should find counsel was ineffective for failing to perfect petitioner's appeal.

The government fails to take into consideration that the petitioner hired his counsel on an agreement that his counsel would defend him and file a direct appeal [petitioner's affidavit ¶2]; that the petitioner never waived his right to appeal and asked counsel to file a direct appeal.

Petitioner satisfies **Roe v Flores-Ortega**, 120 S.Ct. 1029 (2000) requirement that he requested counsel to file a direct appeal... Petitioner entered into the lawyer-client relationship with counsel Unglesby "based upon the fact that counsel Unglesby would file a direct appeal." [petitioner's affidavit ¶2] and again after sentencing in discussing the fact that he [petitioner] was not happy with his sentence, [pet. aff. ¶4] and requesting a direct appeal be filed during his discussions with counsel Unglesby after sentencing. [pet. aff. ¶5].

It cannot fairly be said that counsel Unglesby did not know his client wanted to appeal his sentence, seeing that a central tenet of his being hired was based upon his agreement to file a direct appeal. It, also, cannot be fairly said that counsel Unglesby did not know his client wanted to appeal his sentence, seeing that his client discussed this issue with him after sentencing and requested said appeal be filed.

Petitioner Caton satisfies Roes requirement's and even surpasses them by making counsel's fee contingent upon filing a direct appeal and never waivering from that position. Under such circumstances, counsels actions cannot be said to have been reasonable.

The petitioner is entitled to a new appeal without showing that his appeal would likely have merit. Roe, 120 S.Ct. at 1035 (citing **Peguero v United States**, 520 US 961 (1999)).

The government has not provided this court any credible evidence to show that the petitioner did not request his counsel to file a direct appeal. The petitioner submitted an sworn affidavit with specific facts to show that counsel failed to file a requested appeal. Moreover, petitioner has shown that his entire representation by counsel was base upon a contingency that counsel would file a direct appeal if needed.

This court should remand petitioner's case back to district court to allow petitioner to file an out-of-time direct appeal with appointment of counsel or, in the alternative, order an evidentiary hearing, with appointment of counsel, to decide the issue.

II.

COUNSEL'S FAILURE TO OBJECT TO OR FILE A DIRECT APPEAL ON SENTENCING ENHANCEMENT'S AFTER BLAKELY V WASHINGTON WAS ANNOUNCED CANNOT BE CONSIDERED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner Caton was sentenced after **Blakely v Washington**, 124 S.Ct. 2531 (2004) was decided by the Supreme Court.

While counsel may not have predicted the ultimate conclusions that **Blakely** applies to federal prisoner's, it is also true that the general argument that, a jury must determine all facts regarding sentence enhancements, was available to counsel and indeed made by defendants ever since the sentencing guidelines came into being. **McCoy v United States**, 266 F3d 1245, 1258 (11th Cir. 2001); **Garrott v United States**, 238 F3d 903, 905-06 (7th Cir. 2001).

Because **Blakely** was decided before petitioner's sentencing, counsel had an affirmative duty to address these concerns, especially since **Blakely** was an extension of **Apprendi v New Jersey**, 530 US 466 (2000) which did apply to federal prisoners. See, **Blakely**, 125 S.Ct. at 2542.

Counsel has an affirmative duty to know the relevant case law. **Trass v Maggio**, 731 F2d 288, 293 (5th Cir. 1984), and counsel did not know about or act upon **Blakely**, which would have reduced his sentence because his sentencing enhancements were not found by a jury beyond a reasonable doubt not admitted by the petitioner, thus constituting prejudice. **Glover v United States**, 531 US 198, 202 (2001).

On June 22, 2005 the Supreme Court in **Dodd v United States**,

S.Ct. No. 04-5286 held that the one year filing time limit based on new rights issued in Supreme Court decisions [i.e., Blakely] begins to run from the date the new right is recognized and not the date the right is declared retroactive. What this means, in his application, is that a defendant [or his counsel] must file within one year of a new Supreme Court case is decided even if it is futile! Mandatory filing of issues that will not be granted because they are not retroactive [i.e., futile]. Therefore, now it is even more critically important that counsel protect the rights of their client even if they believe it to be futile to file such claims.

a. Booker's counsel did not think it futile to file Blakely claims for his client

The government submits that it would be futile to file Blakely claims. This directly conflicts with the Supreme Court case **Bously v United States**, 523 US 614, 622-23 (1998) where it was noted that where a number of other defendants had raised the claim before the petitioner failed to do so, the claim is not novel or futile.

Here the legal basis for the right later recognized in Booker was readily available at the time of petitioner Caton's sentencing. At least 3 other circuits, the Ninth, Third and Seventh Circuit had weighed in on the issue, siding with the fact that **Blakely** affects federal prisoners.

The existence of these circuit decisions establishes that other defendants had long been raising the issue. Counsel Unglesby could have as well. In fact, it would be easier for

him to raise the issue because the Circuit split on the Blakely issue guaranteed the Supreme Court would hear the issue. Moreover, embedded in the Pineiro case, the Fifth Circuit, even concluded that the Supreme Court should address the Blakely issue.

Booker's case law decided on July 9, 2004 by the Seventh Circuit that Blakely applied to federal sentences. Booker's attorney realizing the importance of the Sixth Amendment issues in Apprendi and Blakely filed a direct appeal on those claims even though it was futile at the time. Applying the government's theory that counsel does not have an affirmative duty to defend their client with developing defenses to Booker's counsel would be patently absurd, yet that is what they are saying in petitioner's case.

Given the fact that the controlling case in the Fifth Circuit, U.S. v Piniero, 377 F3d 464 (5th Cir. 2004), stated:

> "This court assuredly will not be the final arbiter of whether Blakely applied to the federal guidelines,"
>
> Id., at 465.

A simple reading of this case would have alerted counsel to the fact that these sentencing enhancement issues would be clarified by the Supreme Court and counsel then could have addressed these issues to preserve them for appeal and eventual decision by the Supreme Court.

A quick scan of one's memory of the swirling confusion at time of petitioner's sentencing, would alert one to the huge affect that Blakely was having on all federal circuits. To

not have realized that, under such tumultuous circumstances can only be deficient, unprofessional performance, for had counsel raised those **Blakely** objections like all those other attorney's did, then petitioner would have been on direct appeal at the time **Booker** was decided [January 12, 2005] and under the intervening changes of law doctrine of **Griffith v Kentucky**, 479 US 314 (1987) would have allowed the petitioner to benefit from the **Booker** decision concerning his enhancements at sentencing, in which the sentencing court enhanced petitioner's sentence based on facts not found by a jury beyond a reasonable doubt nor admitted by the petitioner. Such performance prejudiced the petitioner. **Glover v United States**, 531 US 198 (2001) (any additional time in prison due to counsel's errors constitutes prejudice under the Strickland analysis).

Petitioner was further prejudiced by counsel's failure(s). No reasonable lawyer would forego competent litigation of possibly decisive claims. In doing so, petitioner's counsel lost the opportunity to obtain direct review under the harmless-error standard of **Champman v California**, 386 US 18 (1967) which requires the government to prove that the petitioner 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, the outcome of the proceedings would have been different.

The very fact that the petitioner is arguing this issue, under his §255, shows this court that counsel was deficient in failing to address the biggest issue in the history of the

sentencing guidelines and that failure prejudiced him severely.

b. Pre-Booker analysis of United States v Villegas (5th Cir. March 17, 2005)

Had counsel properly argued at sentencing that the sentencing enhancements were unconstitutional, counsel would have set the stage for the petitioner to obtain relief from the ruling in **Villegas** which controls cases that predate **Booker**, whether the error was objected to or not. **Villegas** noted:

> "Thus, it is different than the error in **Booker** (i.e.) the Sixth Amendment error of enhancing a sentence based on judge-found facts under the mandatory guidelines. *** For that reason, the question if the third step of the plain error test is not the same as it was in **Mares**."

In the absence of the sentencing enhancements, petitioner Caton's sentence would have been significantly reduced thus [under plain error direct appeal standard] affected his substantial rights. **Villegas**, Slip opinion at 19.

The petitioner would have been given relief since he objected at sentencing to PSI enhancements, thereby, satisfying the burden of **Villegas**.

Petitioner's counsel has plainly prejudiced his client by his failure to address the **Blakely** issues that ultimately have changed the way federal courts sentence a defendant. The government cannot seriously submit that counsel was not ineffective under such circumstances, nor can they claim that

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*Petitioner is forced to cite a slip opinion on **Villegas** because the law library at his place of incarceration does not have the F3d citation.

the petitioner was not prejudiced as a result.

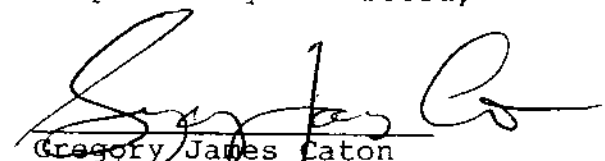
Petitioner readopts, realleges and incorporates by reference his §2255 in its entirety for these **Blakely** and direct appeal issues.

This court should grant petitioner's §2255 on this issue and vacate his sentence and resentence him without the sentencing enhancements to ensure his sentencing was fair and reliable.

WHEREFORE premises considered herein, petitioner Caton respectfully requests that this Honorable Court overrule the government objections; grant his §2255; vacate petitioner's sentence and resentence him without his sentencing enhancements and/or allow him to file a direct appeal or in the alternative order an evidentiary hearing.

July 6, 2005

Respectfully submitted,



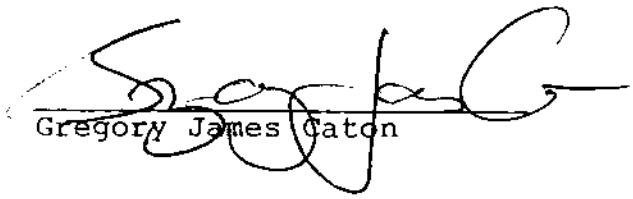
Gregory James Caton
Reg. No.07145-035
P.O. Box 26020
Beaumont, TX 77720-6020

CERTIFICATE OF SERVICE

I Gregory James Caton hereby certify that I mailed a true and correct copy of the foregoing document, addressed to:

U.S. Attorney's Office
Att: Cristina Walker, AUSA
300 Fannin St., Ste 3201
Shreveport, Louisiana 71101-3068

On this the 6th day of July, 2005.



Gregory James Caton

United States District Court
Western District of Louisiana
Office of the Clerk
800 Lafayette St., Suite 2100
Lafayette, LA 70501

July 6, 2005

Re: USA v Caton; USDC No.04-20075

Dear Clerk,

Enclosed you will find an original and two copies of my response to answer of the United State to motion to vacate, set aside or correct sentence undder 28 USC §2255. Please file this document with the Judge for review and mail me a file stamped copy in the SASE that I have enclosed. Thank you.

Sincerely,

Gregory James Caton
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Certified #7004 2510 0004 2935 7434

Filed per CM/ECF