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WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE, LOUISIANA

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA \* CRIMINAL NO. 04CR20075  
VERSUS \* JUDGE MELANCON  
GREGORY JAMES CATON \* MAGISTRATE JUDGE HILL

**ORDER SETTING EVIDENTIARY HEARING AND APPOINTING COUNSEL**

Pending before the undersigned for Report and Recommendation is the Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. §2255, filed by petitioner, Gregory James Caton. [rec. doc. 27]. The Government has filed an Answer and Memorandum in Support of it's Answer, to which petitioner has filed a Reply. [rec. doc. 33 and 34]. Petitioner is incarcerated at the Federal Correctional Complex in Beaumont, Texas.

In the instant motion to vacate, petitioner asserts several claims for relief including a claim that he received ineffective assistance of counsel because his attorney, Lewis O. Unglesby, failed to file an appeal on his behalf.<sup>1</sup>

On May 26, 2004, after waiving indictment, pursuant to a plea agreement, petitioner pleaded guilty to a counts one and two of a three count Bill of Information charging him with Mail Fraud in violation of 18 U.S.C. §1341 and 1342, and Introduction of Unapproved New Drugs into Interstate Commerce in violation of 21 U.S.C. §331(d), 355(a) and 333(a)(2). He additionally agreed to the forfeiture of

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<sup>1</sup>Petitioner also asserts the following: (1) that he received ineffective assistance of counsel because his attorney failed to argue claims based on *Blakely v. Washington*, 124 S.Ct. 2531 (2004); and (2) that the cumulative effect of these errors by counsel deprived him of Due Process.

property charged in count 3 of the Bill of Information pursuant to 18 U.S.C.

§981(a)(1)(C) and 28 U.S.C. § 2461(c). [rec. doc. 1, 2, 3, 4, and 10]. On August 24, 2004, petitioner was sentenced to thirty-three months imprisonment on each count, the sentences to run concurrently. [rec. doc. 19 and 22].

The instant §2255 motion was filed on April 13, 2005. Petitioner contends that during a post-sentencing consultation, he requested that his retained attorney, Lewis O. Unglesby, file an appeal on his behalf. However, Unglesby failed to file his requested appeal. In support, petitioner attaches his affidavit in which he states that he requested and paid Unglesby to appeal his sentence. However, Unglesby failed to file the requested appeal. [affidavit ¶ 2, 4, and 5]. Moreover, he states that Unglesby had not consulted with him before he advised the court at sentencing that the petitioner was not going to appeal his sentence. [affidavit ¶ 3].

The government contends that petitioner's affidavit is self-serving and therefore should be given little weight. The government also notes that since petitioner pled guilty, the likelihood of a viable appeal was diminished. Therefore, the government contends that petitioner has failed to satisfy his burden of establishing ineffective assistance of counsel. [rec. doc. 33]. The government submits no affidavits or other evidence in support of its position. Specifically, the government has not submitted the affidavit of defense counsel Unglesby. Nevertheless, the government suggests that an evidentiary hearing on this issue should be granted.

In *Roe v. Flores-Ortega*, the United States Supreme Court set forth the standards applicable to a claim of ineffective assistance of counsel due to counsel's failing to file a

notice of appeal. When discussing the first *Strickland* inquiry, whether counsel's performance was deficient, the Court reaffirmed that a "lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe*, 120 S.Ct. at 1035 citing *Rodriguez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969) and *Peguero v. United States*, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999). Moreover, the Court reaffirmed that "at the other end of the spectrum, a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). For cases that lie between those poles, that is, where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, an antecedent question must be answered, specifically, "whether counsel in fact consulted with the defendant about an appeal." *Id.* The term "consult" was defined in this context as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.*

In the instant matter, the record reveals that petitioner was advised by the Court of his right to appeal his sentence and the time limitation for filing same, as well as his right to court appointed counsel if he was unable to afford the services of an attorney to handle an appeal. [sent. tr. pg. 26]. Moreover, the record reveals that during sentencing, while petitioner was present in open court, Mr. Unglesby expressly advised the court that he would not appeal any adverse rulings on his objections to the PSI prepared by the probation department. [sent. tr. pg. 11]. However, there is no evidence in the record

regarding Mr. Unglesby's position as to what transpired after sentencing and more specifically, whether Mr. Unglesby believed that petitioner did not wish to appeal his sentence, or whether Unglesby informed petitioner that he would not take an appeal on his behalf or that his fee did not include appellate services. Thus, on the record before this court, the undersigned cannot determine under which of the *Roe* scenarios petitioner's claim falls. Therefore, the undersigned cannot undertake an analysis of petitioner's claim to determine whether petitioner's counsel was deficient. Based on the foregoing;

**IT IS ORDERED** that an **evidentiary hearing** will be conducted before the undersigned commencing at **10:00 a.m. on November 17, 2005**, in Courtroom 6, Federal Building, 800 Lafayette Street, Lafayette, Louisiana, to address the following issue raised in the §2255 *habeas* petition filed by Gregory James Caton:

Whether petitioner received ineffective assistance of counsel due to counsel's failure to file a direct appeal on petitioner's behalf.

**THE EVIDENTIARY HEARING IS LIMITED TO THIS SOLE ISSUE. NO OTHER ISSUE SHALL BE ADDRESSED BY THIS COURT DURING THE HEARING.**

**IT IS FURTHER ORDERED** that the Federal Public Defender for the Western District of Louisiana appoint counsel to represent petitioner at the said hearing.

**IT IS FURTHER ORDERED** that the **United States Attorney** shall prepare a writ of *habeas corpus* ad testificandum to the Warden of the Federal Correctional Complex in Beaumont, Texas, to produce Gregory James Caton for the hearing to be signed by the undersigned.

**IT IS FURTHER ORDERED** that the **Clerk of Court** shall issue summons commanding the appearance of attorney Lewis O. Unglesby at the evidentiary hearing, and further that service of the summons shall be made by the Office of the United States Marshal.

**IT IS FURTHER ORDERED** that the **Clerk** mail a copy of this order to the Federal Correctional Complex in Beaumont, Texas, the place of petitioner's incarceration.

**THE CLERK IS FURTHER DIRECTED** to notice the United States Attorney's Office, Assistant United States Attorney Cristina Walker, Attorney Lewis O. Unglesby and the petitioner accordingly.

**THE CLERK IS FURTHER DIRECTED** to provide the United States Marshal with a copy of this Order.

**THE UNITED STATES MARSHAL'S SERVICE** is directed to arrange for the transportation of the petitioner to this court as soon as practicable, and to produce him before the undersigned on **November 17, 2005 at 10:00 a.m.**

Signed this 27 day of September, 2005, at Lafayette, Louisiana.

COPY SENT:  
DATE: 9-29-05  
BY: gbl  
TO: USPD

*Unglesby w/ summons  
Fed Corr Center TX  
USM-1 cert*

  
C. MICHAEL HILL  
UNITES STATES MAGISTRATE JUDGE