RECORD NO. 17-3274

In The
United States Court of Appeals
For The Third Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

PETER SEPLING,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANT AND JOINT APPENDIX VOLUME I OF II (Pages 1 – 21)

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INTRODUCTION

Peter Sepling brought this 28 U.S.C. § 2255 proceeding to "vacate, set aside, or correct" his federal sentence, claiming ineffective assistance of sentencing counsel in violation of the Sixth Amendment. A108–54. As both the court and the government observed at Sepling's sentencing, a controlled substance called methylone was "driving" his sentence. A89:18–20; A92:3.[1] Under the 2013 U.S. Sentencing Guidelines Manual (U.S.S.G.), which applied in this case, methylone was not listed in § 2D1.1, which determines the base offense level depending on the type and quantity of a controlled substance. For a substance not listed in § 2D1.1, a process existed. The court had to identify "the most closely related controlled substance referenced in" § 2D1.1's Drug Equivalency Tables. *See* U.S.S.G. § 2D1.1, cmt. n.6. In those Tables, each listed substance has a ratio to convert the quantity of that substance into an equivalent amount of marijuana (e.g., 1 gram of cocaine equals 200 grams of marijuana, a conversion ratio of 200:1). § 2D1.1, cmt. n.8(B). After the closest listed substance is identified, potency differences can be considered: the court can adjust when the listed substance "produces a greater effect on the central nervous system" than the non-listed substance involved in the defendant's case. *See id.* cmt. n.6.

[1] Our citations to the sentencing hearing transcript in the appendix include line references followed by a colon after citing the appendix page as A#.

These steps require counsel to familiarize himself with the basic qualities of the relevant substances. A sentencing process conducted in ignorance of these qualities is flawed. Sepling's sentencing counsel abdicated this responsibility and indeed never alluded to this process. The Probation Office chose ecstasy (MDMA) as the closest listed substance to methylone, and used the Guidelines' harsh 500:1 conversion ratio for MDMA, a ratio 2.5 times the conversion ratio for cocaine. Sepling's counsel said nothing about the 500:1 ratio for MDMA, even though counsel in other cases have persuaded courts to reject it as the product of discredited science and arbitrary analysis that drastically overstates MDMA's harmfulness. Moreover, the record reveals that Sepling's counsel failed to investigate methylone—he admittedly knew next to nothing about it, and did not know that methylone is significantly less potent than MDMA. Because of counsel's failure to investigate, his client was left largely to fend for himself in a proceeding that greatly exaggerated the nature and severity of his offense, depriving him of evidence that would support a larger variance. The process failed as a confrontation between adversaries, in violation of the Sixth Amendment.

To compound matters, the § 2255 motion establishes that counsel violated his duty to adequately consult for an appeal, even though Sepling had nonfrivolous appeal issues regarding his sentence—including one concerning an unfulfilled agreement by the government to cap the quantity of methylone used for sentencing.

The district court denied Sepling's § 2255 motion without an evidentiary hearing. This Court granted a Certificate of Appealability (COA). Sepling has established ineffective assistance of counsel. At the very least, an evidentiary hearing is warranted on his claims.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255. On September 25, 2017, the district court denied Sepling's § 2255 motion to vacate, set aside, or correct his sentence. Sepling timely appealed on October 13, 2017. This Court has jurisdiction under 28 U.S.C. § 2253(a) and 28 U.S.C. § 1291 because the underlying order is a final order disposing of a § 2255 motion.

STATEMENT OF THE ISSUES

1. Did sentencing counsel render ineffective assistance by failing to investigate the drug methylone and negotiate with the Government regarding the marijuana equivalency ratio for methylone, which was the driving force of his sentence? A20 (COA); A122–30, A136–38, 143–53 (pleadings).
2. Did sentencing counsel render ineffective assistance based on his advice regarding the merits of a direct appeal? A20 (COA); A135–36 (pleadings).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Counsel is not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency.

STATEMENT OF THE CASE

1. Peter Sepling pleaded guilty to an offense involving GBL.

In June 2011, Peter Sepling was indicted in the Middle District of Pennsylvania on counts charging activity in April 2011 involving anabolic steroids and gamma butyrolactone (GBL). A38. After his arrest, Sepling agreed to be interviewed, admitted he ordered the GBL, and consented to a search of his home. PSR ¶¶14–15.[2] In December 2011, the court released him on personal recognizance. ECF No. 53. Sepling pleaded guilty to count 1 of the indictment: aiding and abetting the importing of GBL from China, in violation of 21 U.S.C. § 952. A45 (Sept. 9, 2013 plea agreement). The plea agreement provided, per Fed. R. Crim. P. 11(c)(1)(C), that the career-offender Guideline would not be used for Sepling's sentencing. A53 ¶11A. The plea was accepted on October 28, 2013, ECF No. 136, and a PSR was prepared on December 23, 2013. PSR p. 2. Sepling was represented by CJA-appointed counsel Joseph Nahas. ECF No. 76.

[2] References to the Presentence Investigation Report (PSR) are to the PSR as revised in May 2014. We have been unable to obtain the original PSR.

2. The parties agreed to resolve Sepling's separate methylone case by treating methylone as relevant conduct for sentencing in this case, and Sepling maintains that the government agreed that the quantity would be limited to three kilograms.

On January 16, 2014, before sentencing could occur, Sepling was arrested on a one-count criminal complaint in the Middle District of Pennsylvania for a different Schedule I controlled substance known as methylone. *See United States v. Sepling*, No. 3:14-mj-0006-TMB (M.D. Pa. Jan. 16, 2014). The complaint charged conspiracy to import methylone from July 2013 to January 16, 2014, which was more than two years after the GBL offense. *Id.*; *see* PSR ¶3, ¶51. The methylone complaint resulted from a sting operation by Department of Homeland Security agents in which they seized a package of methylone containing three kilograms. PSR ¶¶17–27. Sepling was arrested weeks later. PSR ¶28.

For the methylone case, Sepling was appointed a different attorney, Assistant Public Defender Ingrid Cronin, PSR ¶51, and she negotiated with AUSA William Houser; Nahas was not involved. A122, A130–131. The parties reached an unwritten agreement on April 15, 2014 to resolve the methylone case. PSR ¶4. Under this agreement, Sepling agreed "to accept responsibility for his conduct with the importation of Methylone" and to include methylone as "relevant conduct" for sentencing in this GBL case. PSR ¶4. The government agreed to withdraw the one-count criminal complaint. *Id.* Sepling maintains that the government also agreed to cap the quantity of methylone at three kilograms, the amount seized by

the government. A118 ¶1, A122, A131, A136–38, A150. He contends that in April 2014 he attended a "proffer meeting" with Cronin and AUSA Houser where "Mr. Houser confirmed the 3 kilo amount verbally." A150.

3. The revised PSR added methylone, but sentencing counsel did not communicate with Sepling about the sentencing impact of methylone or the revised PSR before Sepling arrived at court for sentencing.

On May 9, 2014, the Probation Office revised Sepling's PSR, *see* PSR pp. 2, 23, by adding methylone as relevant conduct, but used a quantity of 10 kilograms to calculate the Guidelines sentence, PSR ¶34. That quantity came from an interview of the accomplice for whom Sepling ordered methylone; agents had interviewed the accomplice months earlier, soon after he was identified as possessing the three-kilogram package. PSR ¶¶18-22, 26–27.

The addition of methylone as relevant conduct radically increased Sepling's base offense level. *See* PSR ¶34. To determine the base offense level, the court needed to convert methylone to an equivalent amount of marijuana. *See* U.S.S.G. § 2D1.1 cmt. n.8(B) (2013). Because methylone was not referenced in the 2013 Guidelines' tables, *see id.*, the court needed to select the "most closely related controlled substance referenced in [§ 2D1.1]." *Id.* cmt. n.6. The Probation Office chose ecstasy—known as MDMA. PSR ¶34. In the Guidelines, the marijuana-to-MDMA conversion ratio is 500:1—2.5 times the conversion ratio for cocaine. § 2D1.1, cmt. n.8 (D).

Using a 500:1 conversion ratio and a quantity of 10 kilograms, the PSR treated the methylone as equivalent to 5,000 kilograms of marijuana. PSR ¶34. This yielded a base offense level of 34 under § 2D1.1's Drug Quantity Tables. *Id.*

The Probation Office denied Sepling a reduction for acceptance of responsibility, reasoning that his participation in the importation of methylone after his guilty plea for GBL rendered him ineligible for the reduction. PSR ¶31.

Using a total offense level of 34 and a criminal history category of V, and factoring in the Rule 11(c)(1)(C) agreement, the PSR calculated an advisory range of 235-240 months. PSR ¶¶80–81. The PSR also noted that the government supported immediate application, through a variance, of an amendment that the Sentencing Commission had just approved (No. 782, effective November 1, 2014) to reduce by two the base offense level for most drug trafficking offenses. PSR ¶95. That reduction would lower the PSR's recommended range for Sepling to 188-235 months. *See* Sentencing Table (2013).

Sepling tried to speak to Nahas about sentencing—in particular the impact of methylone—but to no avail; Nahas did not speak to Sepling until about five minutes before the hearing, on May 27, 2014, when he told Sepling that they should rely on the court's mercy. A122, A130, A137–38, A150–52.

Nahas filed no objections to the PSR and filed no sentencing memorandum.

4. At the sentencing hearing, counsel acknowledged he knew little about methylone.

Portions of the sentencing hearing are discussed in the argument below. For purposes of background, we note the following.

Nahas did not take issue with the 500:1 ratio; he did not argue that it exaggerates MDMA's harmfulness. As for methylone, he acknowledged that he knew "very little" about it. A76:20–24. When the court said it would assume that methylone has "somewhat" less impact than ecstasy, Nahas said he did not know if that was so. A92:5–11 ("I don't know"). The AUSA said he did not know either. *Id.* The court said, "Neither do I." *Id.* The court remarked, "I don't know anything about Methylone." *Id.*

Addressing the court, Sepling acknowledged that he had "let the [judge] down" by "going back to being a drug abuser" with the methylone conduct, and spoke of his addiction. A79:1–9; A80:6–14.

Sepling disputed the PSR's use of a 10 kilogram quantity of methylone based on his understanding that the parties' agreement limited the quantity to three kilograms. A81:8; *see also* A8. Sepling also maintained that he thought he was eligible for a reduction for acceptance of responsibility, and he addressed some of his conduct supporting that reduction. *See* A82:7–9; A82:16–18; A83:3–7.

The court, however, said it agreed with the PSR's Guidelines calculation. A91:12–14. The court adopted the PSR without change, *see* Statement of Reasons

(SOR) at 1, and accepted the Rule 11(c)(1)(C) agreement, *id.* at 2. But the court deemed the Guidelines calculation to be "a little more severe than they ought to be in this circumstance" and sentenced Sepling to 102 months, A93:19–23, which the court recognized as a "substantial downward variance from the recommended guideline range," A14. The variance included a two-level reduction in the base offense level for the Commission's impending amendment. SOR at 2–3; A68–71.

Nahas then told Sepling that he had no viable appeal because he received a below-Guidelines sentence, and so no appeal was filed. A119 ¶7; A135.

5. The district court denied Sepling's *pro se* § 2255 motion, and this Court granted a COA on two ineffective-assistance claims.

Sepling filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, contending that his sentencing counsel (Nahas) rendered ineffective assistance. A108–38 (dated May 26, 2014). The district court denied the motion without an evidentiary hearing, and denied a certificate of appealability (COA). A4 (order); A5 (opinion). This Court granted a COA on two claims:

> (1) "Appellant's claim that his sentencing counsel was ineffective for failing to investigate the drug methylone and negotiate with the Government regarding the marijuana equivalency ratio for methylone, which was the driving force of his sentence";
>
> (2) "Appellant's claim that his sentencing counsel was ineffective based on his advice regarding the merits of a direct appeal."

A20.

SUMMARY OF ARGUMENT

I. Sepling's counsel rendered ineffective assistance for Sepling's sentencing. Counsel knew next to nothing about methylone, the substance that was driving the sentence. Even if the Probation Office correctly chose MDMA as the most closely related substance referenced in § 2D1.1, that should have merely been the starting point, but counsel went no further. Research would have revealed the opportunity to challenge the Commission's Guidelines' harsh treatment of MDMA, which some courts have rejected as flawed because it overstates MDMA's harmfulness.

Moreover, counsel was deficient for neglecting powerful evidence that methylone is substantially less potent than MDMA—evidence that a basic investigation would have revealed. The DEA itself has taken the view that methylone is half as potent as MDMA. But Sepling's counsel did not know that, and unlike counsel in other cases, Sepling's uninformed counsel failed to invoke the court's authority to adjust the ratio or otherwise grant a variance to account for potency. Doing so could have led to the government to stipulate to an adjustment for methylone's lower potency, as the government has done elsewhere.

Counsel's deficiencies led to a flawed sentencing process which prejudiced Sepling. Mitigating evidence on harmfulness and potency, which the court did not confront, supports a larger variance. Moreover, in the usual case, the Guidelines range has an anchoring effect which affects the sentence.

At the very least, an evidentiary hearing is warranted before it can be determined that Sepling was not prejudiced—so the lower court can confront scientific evidence on harmfulness and potency.

II. Counsel also rendered ineffective assistance by advising Sepling to not appeal his sentence. Adequate consultation for an appeal requires more of counsel than relaying his view that an appeal would lack merit. Sepling's counsel had a duty to adequately consult with Sepling regarding an appeal, for two reasons. First, by raising concerns at sentencing, Sepling reasonably demonstrated he was interested in appealing. Second, and in any event, a rational defendant would have wanted to appeal because Sepling had nonfrivolous appeal issues. One issue involved the court's failure to address Sepling's contention that the parties' agreement to resolve his separate methylone case (an agreement which merged the methylone offense into the sentencing proceeding) included a stipulation to cap the methylone quantity at three kilograms. Another nonfrivolous appeal issue involved the court's denial of an adjustment for acceptance of responsibility, where the court appeared to apply a *per se* rule rejected by this Court.

Sepling was prejudiced because there is a reasonable probability that, but for counsel's deficiency, Sepling would have timely appealed. Any issues regarding the content of their communications may be resolved in an evidentiary hearing.

STANDARD OF REVIEW

The denial of an ineffective-assistance claim is reviewed "*de novo* because both the performance and prejudice prongs of ineffective assistance of counsel claims present mixed questions of law and fact." *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002). Generally in a § 2255 case, legal conclusions are reviewed *de novo*, while the clear-error standard applies to factual findings. *United States v. Travillion*, 759 F.3d 281, 289 (3d Cir. 2014). But the "court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005) (internal quotation marks omitted). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," an evidentiary hearing is required. 28 U.S.C. § 2255(b). "[A] district court's failure to grant an evidentiary hearing when the files and records of the case are inconclusive on the issue of whether movant is entitled to relief constitutes an abuse of discretion." *United States v. McCoy*, 410 F.3d 124, 131 (3d Cir. 2005).

ARGUMENT

I. Counsel rendered ineffective assistance for Sepling's sentencing.

Under the Sixth Amendment, a defendant has a fundamental right to a fair proceeding. To that end, the Sixth Amendment provides a right to the "Assistance of Counsel," U.S. Const. Amend. VI, which requires "the assistance necessary to justify reliance on the outcome of the proceeding," *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* at 685 (citations omitted). The Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.*

The right to effective assistance of counsel exists during sentencing "because 'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (alternation in original) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)).

A claim for ineffective assistance of counsel is reviewed under *Strickland*'s familiar two-part framework: a claim succeeds when counsel (1) rendered deficient performance that (2) prejudiced the defendant. *Strickland*, 466 U.S. at 687.

A. Counsel performed deficiently by failing to investigate and contest the PSR's severe treatment of methylone, the substance that was driving his client's sentence.

An attorney's performance is deficient if it "fell below an objective standard of reasonableness," which means "reasonableness under prevailing professional norms." *Id.* at 688. Counsel's "duties include the duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments." *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017); *see, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524–29 (2003) (holding that "counsel chose to abandon their investigation [into mitigating evidence] at an unreasonable juncture, making a fully informed decision with respect to sentence strategy impossible").

Thus, for strategic choices to become "virtually unchallengeable," they must be "made after thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. A "weak presumption that counsel's actions might be part of a strategy" transforms into a "strong" presumption only if "counsel actually pursued an *informed* strategy (one decided upon after a thorough investigation of the relevant law and facts)." *Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005). So, "[t]he defendant is most likely to establish incompetency where counsel's alleged errors of omission or commission are attributable to a lack of diligence rather than an exercise of judgment." *Id.* at 501.

This is such a case. When a controlled substance is not listed in § 2D1.1, the court must first determine the "most closely related controlled substance referenced." § 2D1.1, cmt. n.6 (2013). To do that, the court must, "to the extent practicable," consider (1) whether the substances have a substantially similar chemical structure, (2) whether the substances have a substantially similar "stimulant, depressant, or hallucinogenic effect on the central nervous system," and (3) "[w]hether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline." *Id.* Once the "most closely related" listed substance is chosen, if it has a higher potency than the non-listed substance, the court can consider an adjustment for relative potency. *See* Part I.A.2, *infra*.

Even if the Probation Office correctly chose MDMA as the "most closely related substance referenced," that should have merely been the starting point for Sepling's counsel, but he went no further. As shown below, he should have known that under *Kimbrough v. United States*, 552 U.S. 85 (2007), courts have the authority to reject the Guidelines' 500:1 ratio for MDMA because, as some courts have ruled, the ratio is deeply flawed by overstating MDMA's harmfulness, particularly compared to cocaine.

Additionally, contrary to the PSR's assumed 1:1 equivalency between methylone and MDMA, a basic investigation would have revealed that methylone warrants far more favorable sentencing treatment than MDMA because methylone is far less potent—in the DEA's view, 50% as potent.

1. Counsel knew next to nothing about methylone and did not address the harmfulness of MDMA, to which the PSR was equating methylone.

Sepling's counsel filed no memorandum for Sepling's sentencing. He did not object to the PSR's use of a 500:1 conversion ratio for methylone. At the hearing, counsel confessed that he knew next to nothing about methylone:

> In regards to this Methylone, which I have never heard up [sic] – by the way, until he got rearrested in January – and Mr. Houser and I have spoken about it. *Mr. Houser tried to educate me as well as Mr. Sepling tried to educate me. My understanding of the drug, which is very little*, is that drug is -- *he [Sepling] will explain the Court [sic]* -- it's like a watered down ectasy [sic] that it's not to the degree of the ectasy [sic] drug, but it's like – you somehow get a high for maybe an hour, an hour and 15 minutes or something like that. You dance around in a club or something. He didn't distribute it. He didn't use it to take advantage of women, none of those things, you know.

A76–77 (emphases added).

The italicized statement reveals that counsel relied on the government and the defendant to "educate" him. But Sepling is not a lawyer or scientist. Counsel's reliance on the defendant to educate him is particularly troublesome because counsel failed to communicate with Sepling about the revised PSR until counsel

met with Sepling a mere five minutes before the hearing. *See* A122, A130, A137–38, A150–52. At the hearing, Sepling indicated that counsel had failed to even tell him that he would be sentenced that day. A81:4 ("I didn't know about this hearing."); A83:9 ("I'm ill prepared today.").

The block quote above also reveals that counsel decided to outsource to Sepling any discussion of methylone at the hearing. During allocution, a nervous Sepling conveyed his subjective "feeling" from methylone and MDMA: "If ecstasy is a ten of high feeling where you get high and dance around and it feels good, getting rubbed by your girlfriend, that lasts six hours. It's a ten. This stuff is six and lasts about an hour and a half." A80:19–23.

When the court later raised the issue of methylone's impact relative to MDMA, counsel hung his client out to dry by stating that he could not confirm whether methylone is even "somewhat" less impactful, because he *did not know*:

> THE COURT: * * * *I don't know anything about Methylone,* but I will accept the fact that it's somewhat less of an impact than ecstacy [sic]. I assume that's correct.
>
> MR. HOUSER: I can't answer that, Judge.
>
> THE COURT: You can't answer that, no.
>
> MR. NAHAS: *I don't know either, Judge.*
>
> THE COURT: *Neither do I.*

A92 (emphases added).

As that colloquy reveals, counsel did not know about methylone's lower potency, even though (as explained below) the government has represented or stipulated elsewhere that methylone is *far* less potent (50%) than MDMA. Counsel failed to even argue that potency is a relevant consideration or that the court could account for disparities in potency.

Nor did counsel say anything to counter the Guidelines' severe treatment of MDMA. The court revealed its heightened concern about MDMA when discussing the nature and severity of the offense, stating that this is "serious business because I know -- I read about ecstacy [sic]." A92:4–5.

2. Research would have revealed the opportunity to challenge the Guidelines' harsh treatment of MDMA, which some sentencing courts have rejected as flawed.

The PSR calculated Sepling's base offense level using MDMA's 500:1 conversion ratio. But a court has authority to reject that ratio as deeply flawed because it overstates MDMA's harmfulness, particularly in relation to cocaine. Sepling's counsel neglected this issue.

Because the Guidelines do not always accurately capture the harmfulness of a drug, and because the Guidelines are advisory, a court may reject a drug Guideline based on a policy disagreement. *See Kimbrough*, 552 U.S. at 101. Thus, *Kimbrough* held that a sentencing court may reject the Guidelines' 100:1 crack-to-powder cocaine ratio, by disagreeing with the disparate treatment of those

drugs based on data about relative harmfulness. *Id.* at 91; *see id.* at 97 (noting that the crack-to-powder cocaine Guideline was determined to be based "on assumptions about 'the relative harmfulness of . . . two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support'" (citation omitted)). This rejection authority includes the power to adopt "a replacement ratio," *Spears v. United States*, 555 U.S. 261, 266 (2009) (per curiam), one that, "in [the court's] judgment, corrects the disparity," *id.* at 265. *Spears* upheld a court's authority to replace the 100:1 crack-to-powder cocaine ratio with a 20:1 ratio. *Id.* at 266.

A court commits procedural error when it concludes that it lacks authority to reject a Guideline on policy grounds. *United States v. Palillero*, 525 F. App'x 92, 94 (3d Cir. 2013). Moreover, "*Kimbrough*'s rationale is not limited to the former crack cocaine/powder cocaine disparity." *Id.* at 93. For instance, in a case involving possession of child pornography, this Court upheld a trial court's decision to vary downward based on a policy disagreement with U.S.S.G. § 2G2.2 because the trial court could conclude that the Guideline "was not developed pursuant to the Commission's institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives." *United States v. Grober*, 624 F.3d 592, 608 (3d Cir. 2010).

Under *Kimbrough*, lawyers have been challenging the Guidelines' 500:1 MDMA ratio because, like the crack-cocaine Guideline, the MDMA Guideline was a flawed response to a congressional directive. Before 2001, the Commission's marijuana conversion ratio for MDMA was 35:1. *See* U.S. Sentencing Comm'n, *Report to Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendments* 6 (2001) ("Ecstasy Report"). But panic over ecstasy led Congress to enact the Ecstasy Anti-Proliferation Act of 2000, which directed the Commission to enhance penalties for MDMA offenses. Pub. L. 106-310, § 3663, 114 Stat. 1101 (2000). The Commission reacted by drastically elevating the ratio to 500:1. *See* Ecstasy Report 5. But as defense counsel elsewhere have argued with supporting scientific evidence: the Commission's 2001 report was tainted by suspect or discredited research; more recent studies have shown that the Commission overstated MDMA's harms; and MDMA is not more harmful than cocaine and has ranked among the least harmful of a range of controlled substances. *See* n.3, *infra.*

Several courts have embraced this type of challenge upon confronting evidence mitigating the harmfulness of MDMA. *See United States v. Qayyem*, No. 1:10-cr-00019-KMW, 2012 WL 92287, at *5 (S.D.N.Y. Jan. 11, 2012) (Wood, J.) ("[T]he 500:1 marijuana equivalency ultimately chosen by the Commission does not accurately reflect the then-existing research, nor is it supported by more recent evidence. The Court therefore adopts a 200:1 MDMA-to-marijuana

equivalency."); *United States v. McCarthy*, No. 09-cr-1136-WHP, 2011 WL 1991146, at *1, 4–5 (S.D.N.Y. May 19, 2011) (Pauley, J.) (adopting 200:1 ratio as the highest justifiable); *see also* Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 Suffolk U. L. Rev. 1083, 1127 & n.179 (2012) (referencing a 2011 Washington case where the court "cited the evidentiary hearing transcript in *McCarthy* to support a decision to vary from the same Guideline").

For example, in *McCarthy*, expert testimony from a two-day evidentiary hearing in December 2010 compelled the court to reject the 500:1 ratio as overstating the harmfulness of MDMA. 2011 WL 1991146, at *1. The court settled on the 200:1 ratio used for cocaine, as "no witness testified that MDMA was more harmful than cocaine." *Id.* at *4. But the court added that "much of the evidence indicates that MDMA is *less harmful than cocaine*, suggesting that an *even lower* equivalency may be appropriate." *Id.* at n.2 (emphasis added).

The *McCarthy* court found that, in elevating MDMA ratio from 35:1 to 500:1, the Commission engaged in "selective analysis" that was "incompatible with the goal of uniform sentencing based on empirical data." *Id.* at *4. Experts testified in *McCarthy* that the disparate treatment of MDMA and cocaine could not withstand analysis. *See id.* at *2–3. Notably, in setting MDMA's ratio at half the ratio of heroin, the Commission relied on a handful of factors, but those *same*

factors revealed that MDMA "is in fact *less* harmful" than cocaine." *Id.* at *4. The evidence showed that cocaine was far more likely than MDMA to result in hospitalization; was responsible for exponentially more emergency room visits; was "far more addictive than MDMA"; was "associated with substantial violence" when trafficked; was far more prevalent than MDMA in producing federal criminal cases; and "causes several adverse health effects not implicated by MDMA use." *Id.* at *3–4. In short, the Commission "ignored several effects of cocaine that render it significantly more harmful than MDMA." *Id.* at *3.

In both MDMA and methylone cases, defense counsel have used the *McCarthy* hearing transcript and other scientific and medical evidence to contest exaggerated concerns about MDMA.[3] Basic research would have revealed the availability of this challenge and provided crucial evidence for Sepling's sentencing court to confront. It was objectively unreasonable for counsel to not investigate this matter and educate the court.

[3] *See, e.g.*, Def. Phan's Supp. Sentencing Memo., *United States v. Phan*, No. 2:10-cr-00027-RSM (W.D. Wash. Jan. 4, 2011), ECF. No. 119; Sentencing Mem., No. *United States v. Qayyem*, 1:10-cr-00019-KMW (S.D.N.Y. Nov. 23, 2011), ECF No. 31; Def's Memo. in Mitigation of Sentence 7–31, *United States v. Konarksi*, No. 2:13-CR-00071-NBF (W.D. Pa. May 9, 2014), ECF No. 99 (methylone); Def's Sentencing Br., *United States v. McGuire*, No. 8:13-cr-00421-MSS-TGW (M.D. Fla. June 23, 2014), ECF No. 67; Def's Position Re: Application of Sentencing Guidelines, *United States v. Chin Chong*, No. 1:13-CR-00570 (E.D.N.Y. July 24, 2014), ECF No. 147 (methylone).

A finding of deficient performance under *Strickland* can arise when a lawyer ignores decisions from outside this circuit that contain readily-available argument and evidence. For example, in *Jansen v. United States*, 369 F.3d 237 (3d Cir. 2004), this Court held that counsel's failure to raise a Guidelines argument constituted deficient performance under *Strickland* where the argument was adopted by courts outside the circuit and thus was "readily available to him." *Id.* at 243–44; *see also Gov't of Virgin Islands v. Vanterpool*, 767 F.3d 157, 168–69 (3d Cir. 2014). And, naturally, a sentencing court can be influenced by other sentencing courts. For instance, in *Spears*, the Supreme Court observed that the sentencing court was "[r]elying in part on decisions from other District Courts" from outside the circuit (two cases) when the sentencing court rejected the crack/cocaine 100:1 ratio and replaced it with a 20:1 ratio. 555 U.S. at 262.

In denying Sepling's § 2255 motion on the ground that counsel was not deficient, the court did not consider counsel's investigation. Rather, the court said that sentencing courts have divided on whether to reject the Guidelines' MDMA ratio. A12. But of course such decisions point in different directions: a sentencing court is not *required* to reject a Guideline on policy grounds; it is a matter of discretion. *Grober*, 624 F.3d at 609. That does not excuse a lawyer's failure to investigate, depriving his client of the opportunity to have the court exercise discretion on this crucial matter by confronting evidence and informed argument.

In this connection, this Court has found ineffective assistance where a lawyer's failure to raise a sentencing argument "deprived [his client] of the opportunity to have the district court consider whether she qualified for an adjustment." *United States v. Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991). *Headley* involved the Guidelines' role-in-the-offense adjustment for defendants who are minimal or minor participants; counsel "did not specifically call this guideline to the district court's attention, and did not request the court to make a finding that her role was minor or minimal." *Id.* at 1083. This Court was "not suggest[ing] that an adjustment for role in the offense was required" for Headley, a courier for a large narcotics ring; it would depend on factors. *Id.* at 1084. But the adjustment was "arguably available," *Jansen*, 369 F.3d at 244 (characterizing *Headley*), so counsel was ineffective by "depriv[ing] Headley of the opportunity to have the district court consider whether she qualified." *Headley*, 923 F.3d at 1084.

And in *Jansen*, sentencing counsel was deficient for not raising a challenge even though no controlling authority resolved the issue in question (whether drugs possessed for personal use should count for the base offense level), *see* 369 F.3d at 241–44; negative authority would need to be distinguished, *id.* at 243; the argument was not compelled by the Guidelines' text, *see id.* at 250 (Alito, J., concurring); and there were "reasonable policy arguments on both sides," *id*. Counsel nonetheless was deficient. *Id.* at 243–44. So was Sepling's counsel.

3. Counsel also was deficient for neglecting powerful evidence that methylone is substantially less potent than MDMA.

The PSR's calculation treated methylone and MDMA as equivalent on a 1:1 basis. *See* PSR ¶34. From a basic investigation, however, counsel would have discovered that methylone is substantially less potent than MDMA. But Sepling's counsel did not know that, and he failed to even invoke the court's authority to adjust the ratio or otherwise grant a variance to account for potency differences. His performance was objectively unreasonable.

Again, with a non-listed substance, choosing "the most closely related" listed drug does not end the analysis. Based on evidence and informed argument, the court may account for differences between the non-listed and listed substances, because the listed substance, though having a similar chemical structure and similar types of effects, may be substantially more potent. The Guidelines contemplate such an adjustment. *See* § 2D1.1, cmt. n.6 (2013) ("In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue."); *United States v. Rose*, 722 F. Supp. 2d 1286, 1289, 1291 (M.D. Ala. 2010) (observing that "[b]oth the government and Rose agreed that the court may account for the potency of the drugs possessed in fashioning an appropriate sentence," and granting a variance for the diminished potency of BZP-TFMPP as compared to MDMA).

In this case, research would have revealed that methylone is substantially less potent than MDMA. A Google search would have shown that the DEA itself has taken the position that methylone is *half* as potent. DEA, Office of Diversion Control, 3,4-Methylenedioxymethcathinone (Methylone) 1 (2013) (stating that studies showed that "Methylone . . . was about half as potent as MDMA").[4]

By presenting mitigating evidence about MDMA and methylone, lawyers have persuaded courts that a 500:1 ratio exaggerates methylone's harmfulness. For example, a month after Sepling's sentencing, in a case out of Tampa, counsel filed a comprehensive sentencing memo along with the *McCarthy* transcript, the DEA's position on methylone's potency, and other scientific information. *See* Def.'s Sentencing Br. & Ex. Lists, *United States v. McGuire*, No. 8:13-cr-421-T-35ETGW ("*McGuire*") (M.D. Fla. June 23–24, 2014), ECF Nos. 67–69. After an evidentiary hearing in which "by everyone's concession" methylone was deemed no more than "half as strong as MDMA," the court applied a ratio of 200:1. *See* Tr. of Sentencing at 7, *McGuire* (M.D. Fla. Jan. 6, 2015), ECF No. 109.

A month after counsel in *McGuire* filed their challenge, counsel in a methylone case in Brooklyn filed expert evidence and studies about MDMA and methylone. *See* Def.'s Position re: App. of Sentencing Guidelines, *United States v. Chin Chong*, No. 1:13-cr-00570-JBW ("*Chin Chong*") (E.D.N.Y. July 24, 2014),

[4] Available at https://www.deadiversion.usdoj.gov/drug_chem_info/methylone.pdf.

ECF Nos. 147, 147-1–3, 147-10–12. The court adopted a 200:1 ratio. *Chin Chong*, 2014 WL 4773978, at *15 (E.D.N.Y. Sept. 24, 2014).

Based on the DEA's position on potency, in a case from Miami, the government adopted a 50% reduction for methylone (which the Probation Office reflected in the PSR), and represented that this was government policy:

> [Methylone] is 50% the potency level of MDMA as determined by the Drug Enforcement Administration Special Testing Unit, in Virginia. When the probation officer did her calculations for the conversion to marijuana, she reduced the applicable conversion level by 50% from 500 grams of marijuana as stated for an MDMA conversion, to 250 grams of marijuana to one gram of [methylone] *which is the currently followed policy*.

Govt's Resp. to Def. Marte's Objections to the PSR, *United States v. Marte*, No. 1:13-cr-20537-DLG ("*Marte*") (S.D. Fla. Jan. 7, 2014), ECF No. 34 (emphasis added). At sentencing, the government told the court that methylone was determined "to be half the strength of MDMA, resulting in a *policy maneuver* of accounting half the strength in the conversion." Tr. of Sentencing at 10, *Marte*, (S.D. Fla. Jan. 9, 2014), ECF No. 48 (emphasis added).

The government there referenced the testimony of Dr. Prioleau, a DEA pharmacologist who was relying on a published potency study. Tr. of Sentencing at 9–13, 19–20, *Marte*, (S.D. Fla. Feb. 19, 2014), ECF No. 45. Dr. Prioleau's testimony that methylone is only 50% as potent as MDMA has been cited by defense lawyers in other cases. For example, nine months before Sepling's

sentencing, counsel in a Tulsa case invoked Dr. Prioleau's testimony from a Virginia case about methylone being half as potent. Def.'s Sentencing Mem. at 1, 6, *United States v. Poole*, No. 4:13-cfr-00066-CVE (N.D. Okla. Aug. 9, 2013), ECF No. 31. The court granted the requested variance. Min. Sheet, *Poole*, (N.D. Okla. Aug. 26, 2013), ECF No. 41.[5]

Of course, raising such a challenge sets the stage to negotiate with the government. On the day that Sepling's PSR was revised, counsel in a methylone case in a neighboring Pennsylvania district filed a pre-sentencing challenge attacking MDMA's 500:1 ratio and urging (based on the DEA's position) an adjustment based on methylone's lower potency. *See* Def's Memo. in Mitigation of Sentence at 9, *United States v. Konarski*, No. 2:13-CR-00071-NBF ("*Konarski*") (W.D. Pa. May 9, 2014), ECF No. 99. Negotiations led to a government stipulation with a 50% reduction in the conversion ratio. Govt's Resp. at 1, *Konarksi*, (W.D. Pa. Aug. 19, 2014), ECF No. 146 (noting that the stipulation "end[ed] the need for the Court to determine the appropriate conversion rate between Methylone and Marijuana"); Stipulation, *Konarksi*, (W.D. Pa. Aug. 19, 2014), ECF No. 147.

[5] In rejecting Sepling's § 2255 motion, the district court cited two methylone cases in which other district courts applied a 500:1 ratio. But, again, lawyers are not constitutionally required only to make arguments that are guaranteed to prevail. *See* Part I.B.3, *supra* (discussing *Headley* and *Jansen*). This could not excuse counsel's failure to investigate the drug driving his client's sentence.

In Sepling's case, basic research would have revealed (at the very least) the DEA's position. Competent counsel would have challenged the PSR's 1:1 equivalency between MDMA and methylone, negotiated with the government, and submitted evidence to educate the court on the nature and severity of the offense. But Sepling's counsel confessed that he did not know if methylone has even somewhat less of an impact than MDMA. A92:10. He was unprepared to educate the judge, who remarked, "I don't know anything about Methylone." A92:5–6.

Yet in denying Sepling's § 2255 motion, the court *credited* counsel's performance because (as noted above) counsel said *the defendant* would explain that methylone is "like a watered down ecstasy that it's not to the degree of the ecstasy drug." A13 (citing A76–77). But counsel was not raising a scientific point about relative potency; he neither invoked authority for considering potency nor argued for a variance based on potency. It is the "duty of counsel to raise critical issues for [the] court's consideration." *Carthorne*, 878 F.3d at 465. From the full context, moreover, it appears he was trying to convey that this was a recreational drug which Sepling was not personally distributing but instead using non-violently as an addict. *See* A77:1–6. Nor did Sepling invoke objective evidence; he relayed his subjective user experience about the "feeling" and duration of the "high." A80:19–23. Counsel's performance was unreasonable.

B. Counsel's deficiencies led to a flawed sentencing process which prejudiced Sepling.

"To show prejudice, a petitioner need only 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 567 (3d Cir. 2017) (footnote and citation omitted). This standard is "not stringent" and "is less demanding than the preponderance standard." *Branch v. Sweeney*, 758 F.3d 226, 238 (3d Cir. 2014) (internal quotation marks omitted). In the sentencing context, "[t]he reasonable probability of *any* decrease in [the defendant's] sentence would establish prejudice." *United States v. Smack*, 347 F.3d 533, 540 (3d Cir. 2003) (emphasis added).

Unlike *Strickland*'s performance component, which is limited to the time of counsel's conduct, prejudice "is analyzed taking into account everything that the reviewing court knows given the benefits of hindsight, whether or not it was reasonably ignored by trial counsel." *Abdul-Salaam*, 895 F.3d at 266 n.6; *see, e.g.*, *Jansen*, 369 F.3d at 243–50 (assessing prejudice in part based on favorable post-sentencing case law). Under this hindsight analysis, a significant development should be considered here: the Commission's most recent Guidelines amendments, effective November 1, 2018, show that methylone should *not* be equated with MDMA. *See* 83 Fed. Reg. 20,145, 20,149 (May 7, 2018).

Specifically, in the Drug Equivalency Tables, the amendment creates a new entry for the class of drugs to which methylone belongs—synthetic cathinones. *Id.* at 20,149–51. For this class, the amendment sets a default conversion ratio of 380:1, which in part reflects how sentencing courts have treated this class as a whole. *Id.* at 20,151. But the Commission recognized that, within that class, "some substances may be significantly more or less potent than the typical substances in the class that the ratio was intended to reflect." *Id.* Because "methylone is an example of a lower potency substance," *id.*, the amendment (in Application Note 27(D)) specifically provides that "a downward departure may be warranted *in cases involving methylone.*" *Id.* at 20,149 (emphasis added).

The amendment passed on the heels of testimony urging individualized consideration and highlighting methylone's lower severity. *See* Statement of Kevin Butler Before the U.S. Sentencing Comm'n Public Hrg. on Synthetic Drugs 4–10 (Mar. 14, 2018).[6] Butler, who testified at the Commission's March 2018 hearing on synthetic drugs, stressed that "not all synthetic cathinones are sufficiently similar in chemical structure, pharmacological effects, potential for addiction and abuse, or associated harms." *Id.* at 4. Regarding methylone, he cited expert testimony submitted by counsel in prior cases, including testimony that

[6] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20180314/Butler.pdf. Butler testified on behalf of the federal defenders.

"'[t]he bulk of pharmacological evidence . . . supports a conclusion that methylone is on average, 5-fold less potent than MDMA for a variety of endpoints relevant to the psychoactive effects of this class of drugs of abuse.'" *Id.* at 6. Butler also cited evidence that methylone is much less harmful than cocaine. *Id.* at 7.

The amendment was adopted after the court below denied Sepling's § 2255 motion, and so the court did not consider this development.

1. There is a reasonable probability of a lower sentence based on mitigating evidence about methylone which the lower court did not evaluate.

In ruling that Sepling suffered no prejudice, the court below reasoned, in the main, that Sepling received "downward variance from the recommended guideline range." A14. But mitigating evidence on harmfulness and potency, which the court did not confront, supports a larger variance. Moreover, in the usual case, the Guidelines range has an anchoring effect which affects the sentence, so a lower range has a reasonable probability of yielding a lower sentence.

a. Mitigating evidence about methylone warrants a larger variance because it goes to the nature and severity of the offense.

The court did not deny that mitigating evidence about a controlled substance should be considered at sentencing. Rather, citing the sentencing transcript, the court reasoned that the court "accepted that methylone was somewhat less of an impact than ecstasy." A14. This reasoning does not withstand analysis.

First, it is not clear that the court actually considered methylone's potency when imposing the sentence. To be sure, in expressing its concern about methylone, the court said it would "assume" and "accept" (presumably from Sepling's statement about the "high" he reported "feeling," A80:19–23) that methylone has "somewhat less of an impact than ecstasy." A92:6–7. But despite the court's stray comment, the transcript is ambiguous as to whether the court's variance was based on potency, a matter not mentioned in the Statement of Reasons. It would be odd, to say the least, for a court to render a finding on potency when the court and both parties' counsel said they did not know if methylone has even *somewhat* less of an impact than MDMA. A92:5–11.

Second, if the court did consider potency—despite a professed lack of knowledge and no evidentiary submission—that *favors* a finding of prejudice, because it means the court was willing to consider it. *See Headley*, 923 F.2d at 1084 (finding prejudice from counsel's failure to argue for a Guideline adjustment because the sentencing "court's express willingness to consider departure" made it "reasonable to believe that the outcome of the proceeding may have been different had counsel argued for an adjustment"). It is one thing to "assume," without knowledge or evidence, that methylone has "*somewhat*" less potent. A92 (emphasis added). It is quite another to confront scientific evidence and the DEA's

guidance that methylone is *substantially* less potent, coupled with evidence showing that MDMA's harmfulness has been greatly exaggerated.

Third, for relative potency, methylone is only half the equation; the other half is MDMA. But the court never considered whether the MDMA Guideline itself overstates MDMA's severity. As another court of appeals has observed, "a district court confronted with an argument that the MDMA Guidelines range is flawed must confront the merits of any scientific or policy-based arguments and articulate its reasons for rejecting such arguments." *United States v. Kamper*, 748 F.3d 728, 744 (6th Cir. 2014). Sepling's counsel failed to advance that argument.

In the end, counsel's failure to investigate mitigating evidence on harmfulness and potency resulted in a flawed process, leaving the court with incomplete and faulty information when it was evaluating the scope of the variance. When the mitigating evidence is properly considered, there is a reasonable probability of a larger variance.

b. Also, there is a reasonable probability that a lower ratio would have yielded a lower sentence.

There is also a reasonable probability that an informed counsel could have negotiated a stipulation from the government that methylone is 50% as potent as MDMA, yielding a lower ratio and thus a lower range. As noted, around the time of Sepling's sentencing, in the Western District of Pennsylvania, informed counsel obtained such a stipulation. *See* Part I.A.3 (discussing *Konarski*).

A stipulation here would have been unsurprising. In 2012, an internal DOJ email advised a number of U.S. Attorney offices—including the office that prosecuted Sepling—that methylone should be considered half as potent as MDMA. *See* Ex. D to Def.'s Reply to Govt's Sentencing Mem., *Chin Chong*, No. 1:13-cr-00570-JBW (E.D.N.Y. Aug. 19, 2014), ECF No. 155-1. The email was sent by DOJ's Special Operations Division, Narcotic and Dangerous Drug Section. *Id.* The subject was "Sentencing Guidelines for Synthetics." *Id.* The email attached "Sentencing Guideline Recommendations" from DEA's Office of Drug Evaluation (ODE). *Id.* Regarding methylone, the DOJ email advised that courts "could adjust the marijuana equivalency accordingly (presumably, 1 gram of methylone equals 250 grams of marijuana)," *id.*, because "**DEA ODE states that the potency for methylone is ½ that of MDMA[.]**" *Id.* (bold in original).

This DOJ guidance may explain the government's stipulation in *Konarski*. And it may explain another exhibit submitted by counsel in *Chin Chong*: a November 2013 plea agreement from the District of Maryland which included a stipulation using a ratio of 250:1 to calculate the marijuana equivalency for methylone; the stipulation recited that, "[a]ccording to DEA chemists and pharmacologists, one gram of methylone is the equivalent of 250 grams of marijuana." Ex. C to Def.'s Reply to Govt's Sentencing Mem., *Chin Chong*, (E.D.N.Y. Aug. 19, 2014), ECF No. 155-1.

Accordingly, there is a reasonable probability that if Sepling's counsel had been adequately informed, he could have negotiated a stipulation to cut the ratio in half to reduce the offense level. Sepling then would have had a lower advisory range as the benchmark before the court considered a variance under § 3553(a) based on other factors including his individual circumstances. Even without a stipulation, had counsel performed reasonably by investigating and presenting mitigating evidence about methylone, the court could have adopted a replacement ratio, as others have done (e.g., 200:1 or 250:1).

If a conversion ratio of 200:1 or 250:1 had been applied to the PSR's quantity of 10 kilograms, Sepling's base offense level under the 2013 Guidelines would have dropped to 32. *See* § 2D1.1(c)(3)-(4). With this one change, the range bottom would have dropped to 188 months (before the two-level variance for the then-impending drug amendment), *nearly four years lower* than the bottom calculated in the PSR. *See* PSR ¶81 (range: 235 to 240 months, after Rule 11(c)(1)(C) agreement). With the two-level variance he received for the impending amendment, the bottom of the range would have been 151 months.

But the prejudice inquiry should not ignore Sepling's claim (discussed below, *see* Part II.B.1, *infra*) that the government had agreed to a lower drug quantity of three kilograms. As the PSR recited, methylone came into sentencing as "relevant conduct" in this GBL case because the parties reached an agreement to

resolve the separate methylone case that was pending against Sepling. PSR ¶4. Sepling maintains that the agreement included a stipulation limiting the methylone quantity to three kilograms, A118 ¶1, A122, A131, A136–38, and he contends that AUSA Houser confirmed this to him at a "proffer meeting." A150. At sentencing, Sepling informed the court about the quantity agreement. A81:8; *see also* A8. Neither the AUSA nor the court addressed it.

With three kilograms and a revised ratio, the range drops further under the 2013 Guidelines Manual:

Revised Ratio	Marijuana equivalency for 3 kg of methylone	Base offense level	Guidelines range before amendment	Total offense level after variance for amendment	Adjusted Guidelines range
250:1	750 kg	30	151-188	28	130-162
200:1	600 kg	28	130-162	26	110-137

To be sure, Sepling received a "downward variance from the recommended guideline range": a sentence of 102 months. A14. But he was prejudiced nonetheless because "sentencing decisions are anchored by the Guidelines," *Peugh v. United States*, 569 U.S. 530, 541 (2013), which serve as "the lodestone of sentencing," *id.* at 544. The "Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it." *Id.* at 544.

This anchoring phenomenon reflects the system's aim for uniformity by ensuring that the advisory Guidelines remain the "benchmark" for sentencing and

appellate review. *Id.* at 541. Thus, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*.'" *Id.* at 542 (emphasis in original; internal quotation marks omitted).

The Supreme Court underscored this anchoring effect in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). Applying plain-error review, *Molina-Martinez* held that in the "usual case" there is a reasonable probability that the Guidelines range affected the sentence, given the "systemic function of the selected Guidelines range." *Id.* at 1345–46. This was true in *Molina-Martinez* even though the imposed sentence fell within the corrected range, which was only seven months lower than the original range. *Id.* at 1344. *Molina-Martinez* echoed *Peugh*'s point that the Guidelines "anchor the court's discretion in selecting an appropriate sentence." *Id.* at 1349. The Guidelines serve as the "lodestar" in all but the rarest of cases, and their "real and pervasive effect" on sentencing is borne out empirically: they "have the intended effect of influencing the sentences imposed by judges." *Id.* at 1345–46. Therefore, "[a]bsent unusual circumstances," a defendant "will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id.* at 1347.

This is true when a court imposes a below-Guidelines sentence. "[A] sentencing court's exercise of its discretion to impose a sentence outside the Guidelines range or to determine that a within-Guidelines sentence is greater than necessary to serve the objectives of sentencing will necessarily be skewed when it misperceives the applicable range." *United States v. Langford,* 516 F.3d 205, 213 (3d Cir. 2008) (internal quotation marks and citation omitted). Thus, in *United States v. Calabretta*, 831 F.3d 128 (3d Cir. 2016), this Court, on plain-error review, rejected the government's argument that a large downward variance from an incorrect range rebutted *Molina-Martinez*'s presumption of prejudice. *Id.* at 138–39. The record did "not 'show . . . that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range.'" *Id.* (quoting *Molina-Martinez,* 136 S. Ct. at 1346).

Here, the record does not establish that this is the rare case where the range had no anchoring effect. Although the sentencing court did "think the guideline calculation in this case seems . . . more severe than it ought to be" (perhaps given Sepling's individual circumstances) and thus unsuitable "in terms of fairness," A91, the court deemed the sentence reasonable in view of both "the considerations expressed in 18 U.S.C. § 3553(a) and a consideration of the United States Sentencing Guidelines." SOR 4. The court said it granted a "downward variance from the recommended guideline range." A14. The record does not foreclose the

possibility that the court worked down from the bottom of the range. *See United States v. Ibarra-Luna*, 628 F.3d 712, 717–18 (5th Cir. 2010) (noting that a sentencing court may settle on a non-Guidelines sentence "by starting with the Guidelines range and adding or subtracting a fixed number of years").

The record simply is silent as to what the court might have done had it approached the § 3553(a) factors from a range untainted by the 500:1 ratio. *See Molina-Martinez*, 136 S. Ct. at 1347 (ruling that where "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights"); *United States v. Hester*, 2018 WL 6259314, at *8–9 (3d Cir. Nov. 30, 2018) (precedential) (holding that the incorrect application of a four-level enhancement was, "in and of itself, 'sufficient to show a reasonable probability of a different outcome absent the error[,]'" even though the district court negated that enhancement by varying down four levels with "an explicit statement that it intended to rectify" the enhancement's effect; "[d]espite these assurances," it would be improper to "rely on conjecture to conclude that the District Court necessarily would have imposed the same sentence") (quoting *Molina-Martinez*, 136 S. Ct. at 1345).

But this concerns more than a disputed calculation. Counsel's deficiency also deprived Sepling of significant evidence about methylone and MDMA to

mitigate the nature and severity of the offense. This Court has recognized that a mistaken Guidelines designation can also prejudicially influence the court when it varies below the range. *See Calabretta*, 831 F.3d at 138–39. In *Calabretta*, the defendant successfully challenged his career-offender enhancement by arguing that U.S.S.G. § 4B1.1's residual clause was unconstitutionally vague. *Id.* at 137.[7] But the defendant had received a 68-month variance below the advisory range. *Id.* at 131. In holding, on plain-error review, that the enhancement may have affected his sentence, this Court reasoned, in part, that it could not "divine whether the District Court would have placed such emphasis on Calabretta's criminal history and his eluding conviction, had he not been designated a career offender convicted of multiple, prior 'crimes of violence.'" *Id.* at 139.

Thus, a Guideline designation can signal harmful information that colors the court's assessment of an appropriate sentence, even when the court decides to vary below the range. Sepling's below-Guidelines sentence may have been negatively influenced by faulty information (500:1) signaling that his conduct involved a dangerous substance substantially more harmful than cocaine.[8]

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[7] That ruling was abrogated by *Beckles v. United States*, 137 S. Ct. 886 (2017).

[8] For this reason, among others, this case is unlike this Court's pre-*Molina-Martinez* decisions in *United States v. Flores*, 454 F.3d 149 (3d Cir. 2006) and *United States v. Zabielski*, 711 F.3d 381 (3d Cir. 2013), where alleged Guidelines calculation errors were deemed harmless. In those cases, the defendants' arguments, if successful, would have altered Guidelines calculations but would not

2. At the very least, an evidentiary hearing is warranted.

At the very least, an evidentiary hearing is warranted before it can be determined that Sepling was not prejudiced—so the lower court can confront scientific evidence on harmfulness and potency.

With a § 2255 motion, the district court must grant a hearing to "determine the issues and make findings of fact and conclusions of law with respect thereto," except where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). This Court has required evidentiary hearings when, as here, the record did not conclusively show that the defendant was not prejudiced. *See McCoy*, 410 F.3d at 132; *Smack*, 347 F.3d at 534 (remanding for a hearing when no record was developed on factual questions that "might bear on [defendant's] sentence—and hence on whether he was prejudiced by receiving the sentence he did").

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have altered information about the offense. Here, by contrast, counsel's deficiency deprived the court of mitigating evidence (about MDMA and methylone) that could have altered the range while also bearing on the nature and severity of the offense.

II. By Advising Sepling To Not Appeal, Counsel Rendered Ineffective Assistance.

"Where the basis of a defendant's ineffective assistance claim is counsel's failure to appeal, a more specific version of the *Strickland* standard applies." *Harrington v. Gillis*, 456 F.3d 118, 125 (3d Cir. 2006). When a defendant has not instructed his counsel to file or not file an appeal, the court must determine "whether counsel in fact consulted with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). The Supreme Court "employ[ed] the term 'consult' to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id*.

If counsel has not adequately consulted about an appeal, his performance is deficient unless he had no duty to consult. *Id.* Counsel has a duty to consult "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. Courts should consider "all the information counsel knew or should have known." *Id*.

When counsel breaches this duty, the defendant is prejudiced if there is a reasonable probability that, without the deficiency, "he would have timely appealed." *Id.* at 484. On that issue, "evidence that there were nonfrivolous

grounds for appeal or that the defendant promptly expressed a desire to appeal will often be highly relevant." *Id.* at 485. Thus, "[t]he performance and prejudice inquiries may overlap because both may be satisfied if the defendant shows nonfrivolous grounds for appeal." *Id.* at 472.

Here, Sepling's counsel failed to adequately consult with him about an appeal despite a duty to do so. And there is a reasonable probability that, but for this deficiency, Sepling would have appealed. Thus, counsel rendered ineffective assistance. Any evidentiary issues regarding the communications between counsel and client can be developed in a hearing.

A. Counsel did not adequately consult with Sepling.

As this Court has reiterated, "since the decision to appeal 'cannot be made intelligently without appreciating the merits of possible grounds for seeking review, and the potential risks to the appealing defendant, a lay defendant needs help *before* deciding.'" *Lewis v. Johnson*, 359 F.3d 646, 656 (3d Cir. 2004) (emphasis in *Lewis*) (quoting *Flores-Ortega*, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part). "[A]dequate consultation requires," among other things, "advising the client about the advantages and disadvantages of taking an appeal, *and* making a reasonable effort to determine whether the client wishes to pursue an appeal, *regardless of the merits of such an appeal*." *Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007) (second emphasis added).

From this record, it cannot be said that Sepling's counsel adequately consulted. Based on the § 2255 motion, counsel simply told Sepling (presumably immediately after he was sentenced) that he "had no viable issue that could be raised on appeal since the court imposed a sentence below the applicable Guideline range." A136; *see also* A119 ¶7. But "[s]imply asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense." *Thompson*, 504 F.3d at 1207. It does not fulfill the purpose of "assur[ing] that any waiver of the right to appeal is knowing and voluntary." *Id.* at 1206.

Thus, in *Thompson*, the "content of the exchange," which lasted no longer than five minutes, "did not constitute adequate consultation" where counsel simply notified the defendant of his right to appeal (the judge had already done that) and conveyed that "he did not think an appeal would be successful or worthwhile." *Id.* "No information was provided to [the defendant] from which he could have intelligently and knowingly either asserted *or* waived his right to appeal." *Id.*; *see also Hudson v. Hunt*, 235 F.3d 892, 894, 896 (4th Cir. 2000) (ruling that counsel did not adequately consult by advising he "was not interested in handling the appeal because [he] did not feel that there was anything to appeal," as there "was no discussion of the costs and benefits of an appeal"); *cf. Vinyard v. United States*, 804 F.3d 1218, 1223–25, 1228 (7th Cir. 2015) (noting that "[a] decision not to file a notice of appeal at all will be appropriate if the lawyer has consulted adequately

with her client about the decision," and holding that counsel adequately consulted by discussing options and giving reasonable advice to not appeal).

In sum, Sepling has pleaded a failure to adequately consult.

B. Counsel had a duty to consult with Sepling.

The Supreme Court expected that courts "will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 481. Sepling's counsel had that duty for two reasons.

First, Sepling "reasonably demonstrated to counsel that he was interested in appealing." *See id.* at 480. At sentencing, Sepling conveyed his unhappiness with the PSR, because it did not account for an agreement to cap the methylone quantity at three kilograms and it denied a reduction for acceptance of responsibility. A81:8–11; A82:7–23; A83:3–6. An evidentiary hearing could determine how he may have conveyed this to counsel beyond the sentencing hearing.

Second, the consultation duty independently arises when "a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)." *Flores-Ortega*, 528 U.S. at 480. As explained below, Sepling had nonfrivolous grounds for appeal.

1. A rational defendant would have wanted to appeal the government's failure to fulfill its promise to limit the methylone "relevant conduct" to three kilograms.

Sepling had a nonfrivolous appeal issue about drug quantity. Methylone was included in his sentencing because, as the PSR said, "the parties *agreed* to incorporate the new criminal conduct [methylone] into the instant [GBL] federal offense for purposes of relevant conduct," based on "the defendant's *agreement* to accept responsibility for his conduct with the importation of Methylone." PSR ¶4 (emphases added). According to Sepling, he "agreed to only a three kilogram quantity," A138, a stipulation based on the amount seized in the government's sting operation. A118 ¶1, A122, A131, A136–37, A150.

Without the agreement, it is not clear the methylone would properly qualify as "relevant conduct" for his remote GBL offense. In assessing whether an offense qualifies as relevant conduct, a court considers factors concerning the relationship (or lack thereof) between the offenses. *See* U.S.S.G. § 1B1.3(a) & cmt. n.9 (factors). Here, the time interval between the offenses was substantial—a gap of 2.25 years. *Compare* PSR ¶1 (GBL: April 2011) *with* PSR ¶3 (methylone: July 2013 to January 2014). The accomplices were not the same. *Compare* PSR ¶5 *with* PSR ¶¶26–27. And, of course, the drugs were quite different. *See* PSR ¶34 (applying ratio of 8.8:1 for GBL vs. ratio of 500:1 for methylone).

At the sentencing hearing, Sepling informed the court that the agreement limited the quantity of methylone to three kilograms. *See* A81:8–9 ("There was a three kilo agreement I thought we had Ms. Cronin said.").[9] But the Probation Office had used a much larger quantity of 10 kilograms. PSR ¶34. That was based on a statement by Sepling's accomplice to investigators months earlier, shortly after the accomplice was caught with the three-kilogram package that the government had intercepted in its sting operation. *See* PSR ¶27.[10] When Sepling informed the court about the three-kilogram agreement, the AUSA did not specifically address that matter. The court erred by failing to inquire whether the government had made that promise or stipulation. *See* Fed. R. Crim. P. 32(i)(3)(B) ("At sentencing, the court . . . must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing[.]"); *United States v. Friedman*, 658 F.3d 342, 362 (3d Cir. 2011) (ruling that a court must respond to a defendant's

[9] For his part, sentencing counsel contended the offense level should reflect a quantity of three kilograms, and that the government would have had to bring forth the accomplice to prove a larger quantity. A71:22–A72:17. The court below interpreted this as "emphasiz[ing] at sentencing that Petitioner's sentence should be calculated using an amount of three (3) kilograms of methylone." A15.

[10] The accomplice (*see* PSR ¶¶26–27) had a motive to curry favor with the prosecution. *See* PSR ¶28 (cooperation). He had not been charged by the time of Sepling's sentencing.

colorable mitigation argument advanced for a variance under § 3553(a)); *see also United States v. Villegas-Miranda*, 579 F.3d 798, 801–03 (7th Cir. 2009) (holding that a sentencing court is required "to specifically address" the defendant's "principal arguments" supporting a lower sentence under § 3553(a) that were "not so weak as not to merit discussion") (internal quotation marks omitted).

Their agreement resembled a plea deal for the methylone matter, with Sepling taking responsibility for importing methylone and the government relieved of its prosecution burden. Whether a plea or cooperation agreement exists and was violated are questions of law. *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000). And "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). A court "must determine whether the government's conduct was inconsistent with what was reasonably understood by defendant when entering the plea of guilt." *Baird*, 218 F.3d at 229. Civil contract principles can aid the interpretation, but plea and cooperation agreements should also be "construed in light of special due process concerns." *Id.* (internal quotation marks omitted). "In this circuit, the government must adhere strictly to the terms of the bargain it strikes with defendants." *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d

Cir. 1989) (internal quotation marks omitted). When the government fails to do so, specific performance is available. *Id.*

The government and defendant "can agree that the defendant will admit to particular conduct and the government will not attempt to show that other conduct was involved." *United States v. Jeffries*, 908 F.2d 1520, 1526 (11th Cir. 1990). *Jeffries* involved a plea in which the government stipulated that the drug quantity was 13 grams of cocaine. *Id.* at 1522, 1525. But the government provided the probation officer with evidence of more (which was used to prepare the PSR) and conveyed this evidence at sentencing. *Id.* at 1523. The Eleventh Circuit held that "the agreement precluded the finding that [the defendant] was involved in transactions other than the 13 grams stipulated to in the agreement," *id.* at 1526, and ordered specific performance, *id.* at 1527.

In sum, Sepling had a nonfrivolous appeal issue regarding the district court's failure to address his contention about the parties' agreement.

2. A rational defendant would have wanted to appeal the denial of an adjustment for acceptance of responsibility, where the court appeared to apply a *per se* rule rejected by this Court.

As shown below, the Probation Office denied an acceptance-of-responsibility reduction (under U.S.S.G. § 3E1.1) based on a single fact: Sepling's methylone activity. At sentencing, Sepling complained about the denial of the reduction. A82:7–23; A83:3–6. But the court adopted the PSR without change. It

was error to reason that the methylone activity posed a *per se* bar to the reduction rather than considering the totality of the circumstances. *See United States v. Dussan*, 378 F. App'x 166, 168–69 (3d Cir. 2010) (remanding because this Court could not "determine from this record whether the [district court] considered the totality of the circumstances, or committed an error of law by concluding that Dussan was ineligible for the adjustment because he committed a crime while on bail awaiting sentencing").

Although sentencing courts receive special deference regarding acceptance of responsibility, *United States v. Williams*, 344 F.3d 365, 379 (3d Cir. 2003), the decision must be based on the "totality of the situation," *United States v. McDowell*, 888 F.2d 285, 292 n.2 (3d Cir. 1989). A non-exhaustive list of eight considerations appears in § 3E1.1's Application Note 1. One is whether the defendant "truthfully admit[ed] the conduct for offense(s) of conviction." § 3E1.1, cmt. n.1(A). And although he "is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction," his "truthfully admitting or not falsely denying" relevant conduct weighs in his favor. *Id.* Also considered is "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility." *Id.* cmt. n.1(H).

For the GBL offense, Sepling immediately cooperated when he was caught; he agreed to an interview by waiving his rights and consented to a home search.

PSR ¶¶14–15. And he pleaded guilty. As this Court has said, "Guideline 3E1.1 creates an . . . incentive for defendants to plead guilty." *United States v. Cohen*, 171 F.3d 796, 805 (3d Cir. 1999). His plea agreement recites that "the defendant has assisted authorities in the investigation and prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate its resources efficiently." A51 ¶9.

Moreover, though Sepling could have remained silent about the purported "relevant conduct," § 3E1.1, cmt. n.1(A), he did not. The AUSA never disputed counsel's claim that Sepling "cooperated with the authorities" and "showed them his computer" "with no hassle whatsoever to the government." A72:5–10. That raised an additional factor favoring him: "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense." § 3E1.1, cmt. n.1(E). As Sepling told the court, when agents came to his home about methylone: "I opened the door. I showed them where the drugs were. I admitted to what I did," A82:21–23; "I gave them the computer, the e-mail where I ordered it from. I showed them," A83:4–5. He added, "I saved everyone time and effort not to charge me, have a grand jury." A82:7–9. Indeed, the PSR says he "*accept[ed] responsibility* for his conduct with the importation of Methylone." PSR ¶4 (emphasis added).

Yet the PSR denied the adjustment by citing a single factor as dispositive:

> Application Note 1(B) to U.S.S.G. § 3E1.1 indicates that a reduction in the offense level is warranted when there is a voluntary termination or withdrawal from criminal conduct or associations by the defendant. Before and subsequent to pleading "guilty" on October 28, 2013, the defendant participated in the importation of Methylone from China.

PSR ¶31. The government echoed this reasoning at sentencing upon countering Sepling's challenge. A88:3–5 (stating that "because Mr. Sepling was on release at the time he committed this [methylone] offense, he certainly would have lost acceptance of responsibility on that first offense."). The court adopted the PSR.

But this *per se* approach was wrong. The Probation Office seemed to read the application note as though the failure to satisfy a listed factor categorically bars the reduction. But that is not so. *See Williams*, 344 F.3d at 380 ("The Government wrongly treats the quoted language in Application Note 1(a) as establishing a *per se* bar to the grant of a reduction for acceptance of responsibility."); *Dussan*, 378 F. App'x at 168 ("Though a defendant's 'voluntary termination or withdrawal from criminal conduct or associations' is an appropriate consideration in determining whether a defendant has accepted responsibility, U.S.S.G. § 3E1.1 cmt. n.1(b), it is only one relevant factor (albeit an important one)."). The court must consider the "totality of the situation." *McDowell*, 888 F.2d at 293 n.2.

Sepling's acceptance of responsibility for the methylone offense should not have been ignored; after all, the methylone offense, not the GBL offense, was

driving his sentence. *See* A82:18–19 (Sepling contending that if the government had prosecuted him separately for methylone, he would have received an acceptance reduction for that case, so he should get that here).

Because it was unclear whether the court considered the totality of the circumstances or instead imposed a *per se* rule of ineligibility, Sepling could have sought a remand in a direct appeal. *See Dussan*, 378 F. App'x at 168–69.

* * *

In sum, because Sepling had a nonfrivolous appeal issue, this means "a rational defendant would want to appeal," and thus counsel had a duty to consult. *See Flores-Ortega*, 528 U.S. at 480. Because counsel failed to adequately consult, counsel's performance was deficient.[11] If any issues need to be resolved regarding the content of their communications, that should be determined in an evidentiary hearing, since the record does not conclusively show that Sepling is entitled to no relief on this claim. *See* 28 U.S.C. § 2255(b).

[11] It was also objectively unreasonable for counsel to tell Sepling he could not have a viable appeal with a below-Guidelines sentence. That ignored the anchoring effect of the Guidelines range, *see* Part I.B.2, *supra*, and the fact that Sepling's appeal issues alternatively supported a variance even if they would not affect the base offense level calculation at step one.

C. Counsel's deficiency prejudiced Sepling because there is a reasonable probability that he would have timely appealed.

Sepling was prejudiced because there is a reasonable probability that, but for counsel's deficiency, Sepling "would have timely appealed." *See Flores-Ortega*, 528 U.S. at 484–85. This conclusion is supported by the existence of nonfrivolous appeal issues, which is "highly relevant" in deciding if the defendant would have appealed. *Id.* at 485; *see Frazer v. South Carolina*, 430 F.3d 696, 708 (4th Cir. 2005) ("The mere presence of non-frivolous issues to appeal is generally sufficient to satisfy the defendant's burden to show prejudice.").[12]

As a remedy, the Court can reinstate his right to appeal by remanding for reentry of a sentence from which he can timely appeal. *See United States v. Shredrick*, 493 F.3d 292, 302 (3d Cir. 2007).

CONCLUSION

The order denying Sepling's § 2255 motion should be reversed. The matter should be remanded for resentencing, and Sepling's appeal right from his sentence should be reinstated. At the very least, the matter should be remanded for an evidentiary hearing.

[12] A defendant may establish other reasons to believe he would have appealed, which may be developed in an evidentiary hearing. *See Harrington*, 456 F.3d at 126, 130–31.

Dated: December 7, 2018

Respectfully submitted,

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RULE 46.1 CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1 (e), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

s/ Sean E. Andrussier

Dated: December 7, 2018

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS, AND WITH 3d Cir. LOCAL APPELLATE RULE 31.1(c)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,912 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies being filed with this Court.

4. I certify that a virus check has been performed on this electronic brief using Bitdefender Total Security 2018 and that no virus was detected.

Dated: December 7, 2018 s/ Sean E. Andrussier

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 7th day of December 2018, the foregoing Brief for Appellant was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF System. I also certify that I caused seven paper copies to be delivered by UPS Next Day Air, which will send notice of such filing to the following registered CM/ECF users:

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RECORD NO. 17-3274

In The
United States Court of Appeals
For The Third Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

PETER SEPLING,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOINT APPENDIX
VOLUME I OF II
(Pages 1– 21)

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

United States of America
Plaintiff,

v.

Case Nos.: 3:CR-11-195
3:CV-15-1094

Peter Sepling, pro se
Defendant.

District Judge A. Richard Caputo

Notice of Appeal

Notice is hereby given that Peter Sepling, Defendant, pro-se, appeals to the United States Court of Appeals for the Third Circuit from the order entered in this proceeding on the 25th day of September, 2017.

Date: October 6, 2017

Respectfully submitted,

Peter Sepling

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VERIFICATION AND CERTIFICATION

This is to verify and certify that the forgoing is true and correct to the best of my knowledge and that an exact copy has been sent to the U.S. Attorney, via U.S. Mail in pre-paid first class postage. The declaration is made under the pain and penalties of perjury pursuant to 28 U.S.C. § 1746.

10/9/17
Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	
	NO. 3:11-CR-0195
v.	(JUDGE CAPUTO)
PETER SEPLING.	

ORDER

NOW, this 25th day of September, 2017, **IT IS HEREBY ORDERED** that:

(1) The Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 161) filed by Petitioner Peter Sepling is **DENIED**.

(2) A Certificate of Appealability **SHALL NOT ISSUE**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	
	NO. 3:11-CR-0195
	(JUDGE CAPUTO)
v.	
PETER SEPLING.	

MEMORANDUM

Presently before me is the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 161) filed by Petitioner Peter Sepling ("Petitioner"). Petitioner pled guilty in this Court to Count I of the Indictment charging Petitioner with aiding and abetting the importation of in excess of one (1) kilogram of gamma butyrolactone ("GBL") from China to the United States in violation of 21 U.S.C. § 952. After Petitioner's guilty plea was accepted but before sentencing, Petitioner was arrested and charged in a one-count criminal complaint with conspiring to import methylone into the United States in violation of 21 U.S.C. § 963. Pursuant to the agreement of the parties, the criminal conduct relating to the importation of methylone was incorporated into the GBL case for purposes of relevant conduct. In exchange for Petitioner's agreement to accept responsibility for his conduct involving the importation of methylone, the United States agreed to withdraw the one-count criminal complaint. The United States Probation Office thereafter prepared a Presentence Investigation Report ("PSR") indicating a guidelines sentencing range of 188-235 months in prison. Petitioner was sentenced to a prison term of 102 months.

Now, Petitioner contends that his sentencing counsel was constitutionally ineffective for the following reasons: (1) failing to investigate methylone; (2) failing to participate in negotiations concerning drug quantity, relevant conduct, and marijuana-to-methylone drug equivalency ratio; (3) failing to argue that Petitioner was a minor participant in the offense conduct; and (4) failing to correctly advise Petitioner on the merits of a direct appeal. Because he fails to satisfy the standard for evaluating ineffective assistance of counsel claims set forth by the Supreme Court in *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Petitioner's § 2255 motion will be denied.

I. Background

Petitioner was charged in Counts 1-5 of a six-count Indictment that was returned by a Federal Grand Jury on June 7, 2011. (*See* PSR, ¶ 1). Those charges were brought following an investigation into the importation of GBL and the trafficking of anabolic steroids in or around Luzerne County, Pennsylvania. (*See id*. at ¶ 6). More particularly, Petitioner ordered GBL through the internet and paid another individual to accept the parcels, and then Petitioner would sell the GBL for $30.00 per ounce. (*See id*. at ¶¶ 13, 15). In total, Petitioner was involved in the distribution and possession with intent to distribute 1.1 kilograms of GBL. (*See id*. at ¶ 16).

On October 28, 2013, Petitioner appeared in this Court with his counsel, Joseph P. Nahas ("Nahas" or "sentencing counsel"), and, as part of a written plea agreement, Petitioner pled guilty to Count 1 of the Indictment. (*See id*. at ¶ 2; *see also* Doc. 123, "Plea Agreement," ¶ 1). The plea agreement also provided, *inter alia*, that: (1) pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the sentencing guidelines would be calculated without reference to the career offender guideline; (2) the United States would recommend a three-level reduction in offense level if Petitioner adequately demonstrated acceptance of responsibility; (3) Petitioner would fully cooperate with the United States; and (4) the United States would move for dismissal of the remaining counts after sentencing. (*See* Plea Agreement, ¶¶ 1, 9, 11A, 13). The guilty plea was accepted and a presentence investigation was ordered. (*See* PSR, ¶ 2).

Following Petitioner's plea, Homeland Security agents began an investigation into a methylone smuggling and distribution organization in the Wilkes-Barre area. (*See id*. at ¶ 13). As part of that investigation, Homeland Security agents identified Petitioner as a participant in the importation of five (5) or six (6) packages containing a total of approximately ten (10) kilograms of methylone from July 2013 to January 2014. (*See id*. at ¶ 27). Petitioner would utilize email to arrange for the shipments to be made from China. (*See id*.). During a recorded conversation, Petitioner discussed the seizure of a prior shipment, the need to be careful with law enforcement, the possibility of ordering a new package containing 300 grams of methylone, and changing the method

in which the methylone was concealed in shipments. (*See id*. at ¶ 28). Petitioner was arrested shortly after the recorded conversation at his residence, where agents found approximately 125 grams of methylone. (*See id*.). Petitioner was charged in a one-count criminal complaint with conspiring to import methylone into the United States in violation of 21 U.S.C. § 963. (*See id*. at ¶ 3).

After Petitioner was arrested on the methylone charge, Ingrid Cronin ("Cronin") was assigned to represent Petitioner on that charge. (*See* Doc. 161-1, "Sepling Decl.", ¶ 1). According to Petitioner, during his discussions with Cronin, he was led to believe that the quantity of methylone at issue that was going to be made part of the GBL case as relevant conduct was (3) kilograms and not ten (10) kilograms. (*See id*.). Based on these conversations, Petitioner was under the impression that he would be "saving the prosecution time and resources thus justifying a lower sentencing exposure." (*Id*. at ¶ 2). Petitioner thus believed that his prison exposure was 60 to 80 months. (*See id*. at ¶ 3). Cronin during that conversation never indicated to Petitioner that he would not receive the acceptance of responsibility reduction on his sentence. (*See id*. at ¶ 4). Petitioner further declares that once he agreed to the transfer of the relevant conduct to the GBL case, he never received a copy of the PSR, he had no knowledge that the PSR's calculations were derived from a ten (10) kilogram quantity of methylone at a marijuana-to-methylone ratio of 500:1, and/or that the PSR did not include reductions for acceptance of responsibility or as a minor participant. (*See id*. at ¶ 5). Had he been furnished with a copy of the PSR, Petitioner represents that he would have objected to the calculation of the base offense level. (*See id*. at ¶ 6). Lastly, Petitioner maintains that his decision to forego a direct appeal was founded on Nahas' representation that Petitioner had no viable claim on appeal since he received a below guidelines range sentence. (*See id*. at ¶ 7).

The United States Probation Office prepared a PSR prior to sentencing. (*See* PSR, *generally*). The PSR calculated Petitioner's base offense level as 34. (*See id*. at ¶ 34). The PSR did not subtract a three-level reduction for acceptance of responsibility in light of Petitioner's participation in the importation of methylone from China. (*See id*. at ¶ 31). The PSR further recognized that, based on the terms of the plea agreement, Petitioner's sentencing guidelines were calculated without reference to the career offender provisions, resulting in a total offense level of 34 and a criminal history category of V. (*See id*. at ¶ 81). The PSR further noted that a two-level downward variance may be

applicable pursuant to 18 U.S.C. § 3553(a) to account for an anticipated amendment to the sentencing guidelines. (*See id*. at ¶ 95). Accordingly, with the two-level downward variance, the guidelines range for Petitioner was between 188 and 235 months. No objections were raised to the PSR. (*See* Doc. 156, "Sentencing Tr.," 5:9-20).

Petitioner appeared for sentencing on May 27, 2014. (*See id*., *generally*). At sentencing, Nahas asserted that the PSR incorrectly calculated the base offense level at 34 based on ten (10) kilograms of methylone when Petitioner was only caught with three (3) kilograms. (*See id*. at 5:22-6:1). Nahas thus contended that Petitioner's base offense level should have been 32 as opposed to 34. (*See id*. at 6:11-25). And, applying the two-level variance based on the anticipated amendments to the sentencing guidelines, Nahas argued that the appropriate offense level was 30 with a criminal history category of V. (*See id*.). Nahas then requested a further reduction of the base level to 28 because Petitioner was only a minimal participant in the importation of the methylone. (*See id*. at 7:8-22). Ultimately, Petitioner's sentencing counsel advocated for a prison sentence of between five (5) and seven (7) years. (*See id*. at 12:3-9).

Petitioner spoke on his own behalf at sentencing. (*See id*. at 12:25-18:21). Petitioner described methylone as "like ecstasy. If ecstasy is a ten of high feeling when you get high and dance around and it feels good, getting rubbed by your girlfriend, that lasts six hours. It's a ten. This stuff [methylone] is six and lasts about an hour and a half." (*Id*. at 14:19-23).[1] Petitioner further explained that he believed his agreement regarding the methylone was for three (3) kilograms, and, as a result, Petitioner believed his sentencing exposure was 63 months, and that he'd be happy with 84 months. (*See id*. at 15:7-12, 16:13). Petitioner further argued that he thought he would receive a two-level reduction from his base offense as a "minimal participant." (*See id*. at 16:6-7, 16:17). With regards to the importation of the methylone, Petitioner explained that he found the company that sold methylone and he ordered it. (*See id*. at 19:7). Another individual provided Petitioner the address to have the methylone shipped to, and that individual sent the money, picked up the packages, and

[1] The Assistant United States Attorney at sentencing agreed with Petitioner's characterization of methylone as a "club drug like ecstasy." (*Id*. at 23:23).

broke down the drug. (*See id*. at 19:9-11). Petitioner stated that he ordered methylone ten (10) times, and he got a "decent amount" of money for his involvement. (*See id*. at 19:13-23). While Petitioner used the drug and partied with it, he never distributed methylone; however, Petitioner was aware that the other individual was distributing the drug. (*See id*. at 19:24-20:2).

At the conclusion of Petitioner's sentencing argument and the United States' response thereto, I noted that I agreed with the guideline calculation, but thought that it "seems more severe than it ought to be." (*Id*. at 25:12-21). In considering the factors set forth in 18 U.S.C. § 3553(a), I "accept[ed] the fact that [methylone is] somewhat less of an impact than ecstasy." (*Id*. at 26:6-7). As such, in view of the § 3553(a) factors and "recognizing that . . . the sentencing guidelines are a little more severe than they ought to be in the circumstances," Petitioner was sentenced to 102 months in prison. (*Id*. at 27:19-23).

Now, pursuant to 28 U.S.C. § 2255, Petitioner contends that the representation provided by sentencing counsel was constitutionally deficient. (*See* Docs. 161-162, *generally*). The United States has filed its opposition to Petitioner's § 2255 motion, (*see* Doc. 169, *generally*), and Petitioner has filed a reply thereto. (*See* Doc. 173, *generally*).

II. Legal Standards

A. 28 U.S.C. § 2255.

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002). Section 2255 permits a prisoner sentenced by a federal court to move the court that imposed the sentence to "vacate, set aside, or correct the sentence" where: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a).

Section 2255(b) generally entitles a petitioner to a hearing on his motion, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ." 28 U.S.C. § 2255(b); *see also* Rule 4(b), Rules Governing Section 2255 Proceedings for the United

States District Courts ("If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party."). The threshold the petitioner must meet to obtain an evidentiary hearing is considered to be "reasonably low." *United States v. Booth*, 432 F.3d 542, 546 (3d Cir. 2005). In considering a § 2255 motion, the "district court must 'accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record.'" *Johnson v. United States*, 294 F. App'x 709, 710 (3d Cir. 2008) (quoting *Booth*, 432 F.3d at 545-46). The district court may, however, dispose of "vague and conclusory allegations" contained in a § 2255 petition without further investigation. *Id*. at 710 (quoting *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000)).

B. Ineffective Assistance of Counsel.

Among other protections, the Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution "to have the assistance of counsel for his defense." U.S. Const. amend. VI. The applicable federal precedent for ineffective assistance claims is the well-settled two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish he was denied the effective assistance of counsel under *Strickland*, the movant must show that (1) the performance of trial counsel fell below an objective standard of reasonableness, and (2) the performance of counsel unfairly prejudiced the defense. *Id.* at 687-88, 691, 104 S. Ct. 2052. "Both *Strickland* prongs must be satisfied." *George v. Sively*, 254 F.3d 438, 443 (3d Cir. 2001) (citing *United States v. Nino*, 878 F.2d 101, 104 (3d Cir. 1989)).

The first *Strickland* prong requires a defendant to "establish . . . that counsel's performance was deficient." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001). Proving a deficiency in conduct "'requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed defendant by the Sixth Amendment.'" *Id*. (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052). "In assessing counsel's performance, 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Id*. (quoting *Strickland*, 466 U.S.

at 689, 104 S. Ct. 2052).

"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is to say, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. The benchmark for judging any claim of ineffectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*.

The second prong of *Strickland* requires a defendant to show that counsel's performance unfairly prejudiced the defendant, meaning that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Id*. at 687, 104 S. Ct. 2052. It is not enough to show that the error had some conceivable effect on the outcome of the proceeding, for virtually every act or omission would meet such a test. *Id*. at 693, 104 S. Ct. 2052. Rather, the defendant must show there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id*. at 694, 104 S. Ct. 2052. A reasonable probability is sufficient to undermine confidence in the outcome of the trial. *Id*. The Third Circuit has stated that the "*Strickland* prejudice standard is not 'stringent' - it is, in fact, 'less demanding than the preponderance standard.'" *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011) (quoting *Jermyn*, 266 F.3d at 282).

III. Discussion

Petitioner argues that sentencing counsel was constitutionally ineffective for four reasons: (1) failing to investigate methylone, the drug that was the driving force behind Petitioner's guidelines range; (2) failing to participate in negotiations concerning drug quantity, relevant conduct, and marijuana-to-methylone ratio; (3) failing to argue that Petitioner was a minor participant in the offense conduct; and (4) failing to correctly advise Petitioner on the merits of a direct appeal. (*See* Doc. 162, *generally*). I will address these arguments in turn, but first note that the instant motion is properly resolved without a hearing. Section 2255(b), as stated, requires an evidentiary hearing for all motions brought pursuant to the statute "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *Booth*, 432 F.3d at

545; *United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992). "Where the record, supplemented by the trial judge's personal knowledge, conclusively negates the factual predicates asserted by the petitioner or indicate[s] that petitioner is not entitled to relief as a matter of law, no hearing is required." *Judge v. United States*, 119 F. Supp. 3d 270, 280 (D.N.J. 2015); *see also United States v. Tuyen Quang Pham*, 587 F. App'x 6, 8 (3d Cir. 2014); *Government of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1075 (3d Cir. 1985); *Booth*, 432 F.3d at 546.

Based on the record of this matter, and for the reasons set forth below, Petitioner's ineffective assistance claims are without merit, and no hearing is therefore required for the resolution of the instant § 2255 motion.

A. Failure to Investigate Methylone.

Petitioner first contends that his counsel was deficient for failing to investigate the drug methylone despite counsel's acknowledgment that he "knew nothing about the drug." (*See* Doc. 16, 7). Petitioner therefore maintains that counsel was ineffective because he was not prepared to challenge the PSR's application of a 500:1 drug equivalency ratio, which, Petitioner contends, overstated the seriousness of methylone. (*See id*. at 7-10). As a result, Petitioner asserts that, having no objection to the PSR, the court adopted a 500:1 marijuana-to-methylone drug equivalency ratio based on the finding that methylone is most analogous to 3,4-methylenedioxymethamphetamine ("MDMA" or "ecstasy"), which also converts at a ratio of 500:1. (*See id*. at 6; *see also* Sententcing Tr., *generally*; PSR, ¶ 34). In his reply, Petitioner highlights that the Probation Office's recommendation to apply a 500:1 ratio in this case should have been objected to by sentencing counsel given several decisions from courts in the Second Circuit applying a 200:1 marijuana-to-MDMA conversion ratio. (*See* Doc. 173, 5-12).

Petitioner is not entitled to relief under *Strickland*. Although Petitioner cites cases applying a 200:1 drug equivalency ratio for MDMA, other courts have continued to apply a 500:1 marijuana-to-MDMA ratio. *See*, *e.g.*, *United States v. Silouangkhoth*, 550 F. App'x 643, 645 (10th Cir. 2013) (affirming district court's use of 500:1 ratio for MDMA); *United States v. Thannavong*, 533 F. App'x 589, 593 (6th Cir. 2013); *United States v. Ferguson*, 447 F. App'x 898, at 903 (10th Cir. 2012). Moreover, the Fifth Circuit recently affirmed a district court's use of a 500:1 drug equivalency ratio

for methylone. *See United States v. McClure*, - - - F. App'x - - -, 2017 WL 3207141, at *1 (5th Cir. July 27, 2017) ("Because methylone is not specifically referenced in U.S.S.G. § 2D1.1(c), in calculating the guidelines range, the district court determined that MDMA was the most closely related controlled substance and therefore applied MDMA's 500:1 drug equivalency ratio."); *see also United States v. Breton*, 672 F. App'x 108, 110 (2d Cir. 2016) (affirming district court's use of methylone-to-marijuana equivalency of 500:1). Use of this ratio was thus appropriate, especially given the characterization of methylone as comparable to MDMA. (*See* Sentencing Tr., 10:25-11:1, 14:19-23, 23:23).

Moreover, in addressing the § 3553(a) factors at sentencing, I accepted as true that methylone has less of an impact than MDMA. (*See id*. at 26:6-7). This was consistent with the argument provided by Petitioner's sentencing counsel, as well similar statements by Petitioner, that methylone is like a "watered down ecstasy" and "not to the degree of the ecstasy drug." (*Id*. at 10:25-11:1, 14:19-23). The sentence of imprisonment imposed on Petitioner reflects that, as the 102 month sentence amounted to a significant downward variance from the recommended guidelines range of 188-235 months. (*See id*. at 25:12-28:9).

Here, Petitioner is unable to satisfy either prong of *Strickland*. First, Petitioner is unable to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Although sentencing counsel acknowledged that he knew little about methylone, he appropriately likened the drug to a "watered down ecstasy." In fact, counsel's characterization of the drug was consistent with Petitioner's statements at sentencing. Thus, Petitioner cannot demonstrate any performance deficiencies by his counsel with respect to the PSR's recommendation that methylone is most closely related to ecstasy. Likewise, Petitioner fails to demonstrate that counsel's performance was deficient based on his failure to advocate for a "200-to-1 ratio [which] was widely adopted in the majority of MDMA cases," (Doc. 173, 13), because, despite Petitioner's claim to the contrary, courts continue to apply a 500:1 marijuana-to-MDMA ratio and a 500:1 drug equivalency ratio in methylone cases. As such, because there was no error in calculating Petitioner's guidelines range, Petitioner is unable to demonstrate that sentencing counsel's conduct was objectively unreasonable regarding the drug equivalency ratio applied in this case.

Second, even if Petitioner established that his sentencing counsel was deficient in failing to advocate for a 200:1 marijuana-to-methylone ratio, Petitioner has not demonstrated that he was prejudiced as a result. In sentencing Petitioner, I accepted that methylone was somewhat less of an impact than ecstasy, and, more significantly, found that the guidelines were more severe than they ought to be and did not "suit me in terms of fairness." (Sentencing Tr., 25:12-21, 26: 6-7). Based on these considerations, Petitioner was sentenced to a 102 month term of imprisonment, a substantial downward variance from the recommended guideline range. In these circumstances, Petitioner has failed to demonstrate a reasonable probability that counsel's purported deficient performance affected his sentence. *See United States v. Hopkins*, 568 F. App'x 143, 148 (3d Cir. 2014) (citing *United States v. Hankerson*, 496 F. 3d 303, 310 (3d Cir. 2007)).

B. Failure to Participate in Negotiations Concerning Drug Quantity, Relevant Conduct, and Marijuana-to-Methylone Ratio.

Petitioner next asserts that his sentencing counsel was constitutionally ineffective for failing to participate in negotiations with Cronin concerning drug quantity, relevant conduct, and marijuana-to-methylone ratio after he was arrested on the methylone charge. (*See* Doc. 162, 2, 10-15). According to Petitioner, sentencing counsel was not present during negotiations for a "verbal plea agreement" that provided for rolling the methylone charge into the GBL case as relevant conduct and for a sentence based on a three (3) kilogram quantity of methylone. (*See id*. at 11). Rather, Cronin was present for those discussions, and she indicated that Petitioner "would be looking at a sentence in the area of 60-80 months." (*Id*.; *see also* Sepling Decl., ¶ 3). Petitioner further argues that he was unable to discuss these negotiations or the content of the PSR with sentencing counsel until five (5) minutes before sentencing. (*See* Doc. 162, 11). As a result, Petitioner contends that Nahas was unprepared for sentencing, which Petitioner maintains is evident based on counsel's failure to argue for a sentencing reduction based on acceptance of responsibility, his failure to discuss the methylone quantity, and his failure to contest the marijuana-to-methylone conversion ratio. (*See id*. at 11-13).

Petitioner is not entitled to relief on the second issue raised in the instant § 2255 motion. First, counsel's performance regarding his conduct with respect to the marijuana-to-methylone conversion ratio was not deficient for reasons previously articulated. Moreover, Petitioner's

sentencing counsel was not deficient regarding the quantity of methylone at issue, as he emphasized at sentencing that Petitioner's sentence should be calculated using an amount of three (3) kilograms of methylone. (*See* Sentencing Tr., 5:22-6:25, 11:23-12:9). Further, counsel did not act unreasonably in failing to argue that Petitioner should receive a reduction for acceptance of responsibility given that Petitioner, following his guilty plea to the importation of GBL, conspired to import methylone from China, which, pursuant to the agreement of the parties, was conduct for which Petitioner was being sentenced. (*See* PSR, *generally*; Sentencing Tr., *generally*). Simply put, it would have made no sense for sentencing counsel to argue for Petitioner to receive a reduction based on acceptance of responsibility when his sentence was being driven by his post-plea/relevant conduct pertaining to the importation of methylone. Petitioner fails to rebut the presumption that Nahas' decision to argue for reductions based on quantity and participation as opposed to acceptance of responsibility was part of a sound strategy. *See*, *e.g.*, *United States v. Baxter*, 684 F. App'x 133, 136-37 (3d Cir. 2017).

Second, even if Petitioner's sentencing counsel's performance was inadequate on any of these issues, Petitioner was not prejudiced. Here, Petitioner pled guilty, and, in connection with his plea, he signed a "Statement of Defendant." (*See* Plea Agreement, *generally*; Doc. 124, "Statement of Defendant", *generally*). In both of those documents, Petitioner acknowledged that he faced a maximum sentence of twenty (20) years in prison. (*See* Plea Agreement, ¶ 1; Statement of Defendant, ¶ 2). Petitioner does not dispute that a plea colloquy was held on his guilty plea, nor does Petitioner contest the adequacy of that colloquy. (*See* Doc. 162, *generally*; 173, *generally*). Thus, Petitioner cannot demonstrate that he was prejudiced by the allegedly erroneous prediction of his sentencing exposure, as the Third Circuit has held that "an erroneous sentencing prediction by counsel is not ineffective assistance of counsel where, as here, an adequate plea hearing was conducted." *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007) (citing *United States v. Jones*, 336 F.3d 245, 254 (3d Cir. 2003); *United States v. Mustafa*, 238 F.3d 485, 492 (3d Cir. 2001); *Masciola v. United States*, 469 F.2d 1057, 1059 (3d Cir. 1972) (per curiam)). Likewise, as there was no basis for Nahas to argue for a reduction for Petitioner's acceptance of responsibility, Petitioner was not prejudiced by that conduct. *See*, *e.g.*, *Martin v. United States*, No. 14-666, 2017 WL 1496961, at *6 (N.D. Ala. Feb. 28, 2017). Furthermore, Petitioner has not demonstrated any prejudice as a result of his sentencing

counsel not participating in the negotiations with the United States after he was arrested for importing methylone where Petitioner was represented by other counsel during those discussions.

C. Failure to Argue Petitioner was a Minor Participant.

The third issue raised by Petitioner in the instant motion is that sentencing counsel incorrectly argued that Petitioner was a minimal participant in the offense when counsel should have advocated that Petitioner was a minor participant in the overall underlying conduct. (*See* 162, 15-16). Petitioner is correct that Nahas argued at sentencing that Petitioner was a minimal participant in the offense. (*See* Sentencing Tr., 7:13-22, 12:12).

The commentary to § 3B1.2 to the guidelines defines both "minor participant" and "minimal participant." U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 cmts. 4, 5. A "minimal participant" is an individual who is "plainly among the least culpable" of those involved in the offense conduct. *Id*. § 3B1.2 cmt. 4. The minimal role reduction is intended to apply to defendants with demonstrated "lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others." *Id*. By contrast, a "minor participant" is an individual whose conduct is "less culpable than most other participants . . ., but whose role could not be described as minimal." *Id*. § 3B1.2 cmt. 5. A defendant who is a "minimal participant" in criminal activity is entitled to a four-level reduction in his or her offense level, and a defendant who is a "minor participant" in the activity receives a two-level reduction. *Id*.

The Guideline's commentary emphasizes that inquiries under § 3B1.2 are "heavily dependent" on the facts of each case and require the court to examine the totality of the circumstances. *Id*. § 3B1.2 cmt. 3(C). The Sentencing Commission developed the factors test of Amendment 794 to guide this fact-intensive analysis of a defendant's relative culpability. *Id*. The factors, now part of Application Note 3(C) to § 3B1.2, are:

> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
>
> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
>
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
>
> (v) the degree to which the defendant stood to benefit from the criminal activity.

Id.[2]

Petitioner is not entitled to relief based on his counsel's alleged error in arguing for a reduction based on minimal participation and not minor participation in the underlying offense. Although sentencing counsel characterized Petitioner as a "minimal participant", (*see* Sentencing Tr., 7:13-22, 12:12), it is clear from the sentencing record that Nahas sought a reduction for Petitioner as a "minor participant" given his request for only a two-level reduction rather than a four-level reduction. (*See id*.). Petitioner cannot demonstrate that sentencing counsel's performance was objectively unreasonable.

Petitioner is also unable to establish prejudice as a result of counsel's reference to minimal participation as opposed to minor participation. Petitioner was not eligible for a sentence reduction as a "minor participant." As explained by Petitioner at sentencing, his role in the importation of the methylone included researching the drug on the internet and finding the company that sold the drug. (*See* Sentencing Tr., 19:4-19). Petitioner explained that he ordered the drug on ten (10) occasions, and, while he did not distribute the methylone, he knew that the other individual involved in the importation was breaking down the drug and selling it. (*See id*. at 19:9-20:2). Petitioner was also recorded discussing the importation of methylone, during which Petitioner indicated that they needed to be careful about law enforcement, suggested a new method of concealing methylone in future shipments, and discussed the possibility of ordering a new package from China. (*See* PSR, ¶ 28). Petitioner was also recorded providing a full description of methylone, acknowledging that it was illegal, and advising that he had 125 grams of methylone stashed at his home. (*See id*.). On these facts, Petitioner was not a "minor participant" in the offense, and, therefore, any error by sentencing counsel in arguing for minimal participation instead of minor participation was not prejudicial to

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[2] This commentary was added on November 1, 2015, *see United States v. Edmonds*, No. 12-232, 2016 WL 5253333, at *4 (W.D. Pa. Sept. 22, 2016), which was after Petitioner was sentenced.

Petitioner. *See*, *e.g.*, *United States v. Altwood*, No. 13-260, 2017 WL 3868692, at *3-4 (M.D. Pa. Sept. 5, 2017) (denying § 2255 petition where the petitioner was not entitled to mitigating reduction under § 3B1.2); *United States v. Thompson*, No. 11-77, 2016 WL 4528127, at *5 (M.D. Pa. Aug. 30, 2016) (same); *accord United States v. Berry*, 314 F. App'x 486, 489 (3d Cir. 2008) (counsel was not ineffective for failing to make a motion for downward adjustment under § 3B1.2 where the evidence clearly indicated that the petitioner was not a minor/minimal participant).

D. Failure to Properly Advise Petitioner on Merits of a Direct Appeal.

Lastly, Petitioner argues that his sentencing counsel was ineffective because "he had no viable issue that could be raised on appeal since the court imposed a sentence below the applicable Guideline range." (*See* Doc. 162, 16-17). Petitioner claims he would have likely have prevailed on a direct appeal in two respects. (*See id*.). First, Petitioner argues that he would have prevailed as the result of the due process violation that occurred based on the alleged "erroneous starting point" in the calculation of Petitioner's guidelines range. (*Id*. at 17). Second, Petitioner claims that his appeal would have been successful because he was eligible for the acceptance of responsibility reduction. (*See id*.).

Petitioner is not entitled to relief based on his counsel's purportedly erroneous advice regarding the merits of a direct appeal. Petitioner does not contend that his sentencing counsel failed to file an appeal despite an explicit instruction to do so, (*see* Doc. 162, *generally*), nor does he claim that he was unable to consult with sentencing counsel regarding a potential appeal. (*See id*. at 16 ("Sepling was advised by counsel" regarding the merits of an appeal)). Rather, Petitioner's claim is that the advice regarding the likely success of an appeal was deficient. (*See id*. at 16-17). For reasons previously discussed herein, the claims that Petitioner asserts should have been raised on appeal did not present viable appellate issues. Additionally, "[w]here there is no evidence that the client requested an appeal, it cannot be said that counsel was ineffective for advising against an appeal when it would be meritless.'" *Dixon v. United States*, 151 F. Supp. 3d 582, 599 & n.9 (E.D. Pa. 2015) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). Here, as sentencing counsel's advice that Petitioner's appeal would be unsuccessful did not fall below an objective standard of reasonableness, habeas relief on Petitioner's claim that counsel's advice

regarding the merits of an appeal is not warranted.

IV. Conclusion

For the above stated reasons, Petitioner was not denied the effective assistance of counsel. As such, Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence will be denied. Further, in proceedings brought pursuant to 28 U.S.C. § 2255, an applicant cannot appeal to the circuit court unless a certificate of appealability has been issued. Under 28 U.S.C. § 2253(c)(2), a court may not issue a certificate of appealability unless "the applicant has made a substantial showing of the denial of a constitutional right." Restated, a certificate of appealability should not be issued unless "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). As reasonable jurists would not disagree with the resolution of Petitioner's § 2255 petition, a certificate of appealability will not issue.

An appropriate order follows.

September 25, 2017
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

BLD-128 February 22, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3274**

UNITED STATES OF AMERICA

VS.

PETER SEPLING, Appellant

(M.D. Pa. Crim. No. 3-11-cr-00195-001)

Present: RESTREPO, BIBAS and NYGAARD, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability ("COA") is granted in part and denied in part. A COA is granted as to Appellant's claim that his sentencing counsel was ineffective for failing to investigate the drug methylone and negotiate with the Government regarding the marijuana equivalency ratio for methylone, which was the driving force of his sentence. See Molina-Martinez v. United States, 136 S. Ct. 1338 (2016). Also, a COA is granted as to Appellant's claim that his sentencing counsel was ineffective based on his advice regarding the merits of a direct appeal. See Vinyard v. United States, 804 F.3d 1218 (7th Cir. 2015). Reasonable jurists could conclude that these claims are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

A COA is denied as to the remaining claims raised in Appellant's application. Specifically, to the extent that Appellant raises other ineffectiveness of counsel claims relating to sentencing counsel's failure to participate in negotiations and to argue that

Appellant was a minor participant, reasonable jurists would agree that Appellant has not made a "substantial showing," see 28 U.S.C. § 2253(c), that sentencing counsel's performance fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668 (1984).

The Clerk shall appoint counsel to represent Appellant in this appeal. See 3d Cir. IOP 10.3.2.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: August 21, 2018

tmm/cc: Peter Sepling

Stephen R. Cerutti, II, Esq.