UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DONROY GHOST BEAR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

12-5004

CR. No. 5:06-CR-50095-RHB

PETITIONER'S MOTION IN SUPPORT OF HIS APPLICATION OF HIS 28 U.S.C. § 2255

COMES NOW, Petitioner, Donroy Ghost Bear, and moves this Court to rule on his Motion for a 28 U.S.C. § 2255 and to grant him the relief requested.

ISSUE ONE

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard of Review

Strickland v. Washington, 466 U.S. 668 (1984)
Gool v. United States, 377 Fed. Appx. 583 (8th Cir. 2010)
Lyons v. Luebbers, 403 F.3d 585, 594 (8th Cir. 2005)
Kamerud v. United States, 2011 U.S. App. LEXIS 1384 (8th Cir. 2011)

Statement of Facts

Petitioner was arrested after an indictment of January 30, 2007. (Docket 8)

Petitioner was detained after his arrest. (Docket 17)

Petitioner was released from detention for drug treatment March 14, 2007. (Docket 43)

After completion of drug treatment, Petitioner was again released on bond on April 11, 2007. (Docket 43)

On May 30, 2007, Petitioner was arraigned on a superseding indictment. (Docket 103)

On or around June 2007, Petitioner personally met with Assistant U.S. Attorney Mark Vargo, and his lawyer, Terry Pechota, at the U.S. Attorney's office. Present was DEA Cooper and Petitioner made a proffer to them at that time. (Exhibit-B)

On or about September 2007, Petitioner met again with AUSU Vargo, and Petitioner's lawyer, Steve Rozan, along with Agent Cooper, at the United States Attorney's office for a further proffer. (Exhibit-B)

During the first proffer with AUSA Vargo, DEA Cooper, and DEA Hill, Petitioner provided information as to the dealings of drugs and the buyers of the drugs the Petitioner dealt with. Petitioner was to call when further information could be provided. (Exhibit-B)

After Petitioner hired attorney Steven Rozan, Rozan advised the Petitioner not to talk to the Government anymore until he had looked at everything and if he could see if he could get me the best deal. (Exhibit-B)

Attorney Rozan then set up the second proffer with AUSA Vargo, DEA Cooper, and DEA Hill. (Exhibit-B)

At the second proffer, it was agreed that there would be continuing cooperation by the Petitioner. (Exhibit-B).

Attorney Rozan advised me that every time Petitioner talked to the Government with information I was to call and advise him of when the Petitioner did that and what the information was. (Exhibit-B)

The Petitioner was directed to contact DEA Cooper directly and the Petitioner made contact with DEA Cooper on at least a weekly basis about shipments of drugs brought to the reservation and whom was selling them. (Exhibit-B)

Also at the second proffer the Petitioner provided AUSA Vargo, DEA Cooper, and DEA Hill, information on Gloria Bettelyoun; Tom Waters, a seller; Daussy Rabbit, a transporter; and Miles Janis' delivery to Colorado Springs from Tucson, Arizona, and the fact that Rabbit had offered for Petitioner to buy through Arizona or Denver, Colorado. (Exhibit-B)

At the second proffer, Petitioner gave AUSA Vargo, DEA Cooper, and DEA Hill, information about Verlyn Garnier, a seller; Casey Means, a seller; and Arrow Banks' and her husband who were the connection in Denver, Colorado. (Exhibit-B)

During this period of time, it was difficult to gather information because everyone knew that the Petitioner was on pre-trial release.

At the first proffer, AUSA Vargo, DEA Cooper, and DEA Hill, wanted petitioner to talk about his brother Shane Tyon, and when Petitioner refused, they cancelled that proffer. (Exhibit-B) However, before the proffer was over, the Government had Petitioner look at pictures and identify certain individuals that Petitioner had already identified in the second proffer. (Exhibit-B)

Before the second proffer was completed, the Government advised Petitioner that he was to notify them immediately of any drugs coming into the reservation and who was involved and they gave Petitioner a direct number to DEA Cooper.

Petitioner started making telephone calls to DEA Cooper at least two times a week with names and telephone numbers and the kinds and amount of drugs. While talking with DEA Cooper, he would then ask Petitioner about specific people or specific deals in drugs and for Petitioner to investigate what he could find out. (Exhibit-B)

Shortly after the telephone call with DEA Cooper, Petitioner was getting gas at the same time as Dale Martin. Dale Martin advised Petitioner he had just returned to deliver 50 pounds.

Petitioner immediately called DEA Cooper. DEA Cooper then called Gary Janis who set up one-quarter mile away from Bobby Martin's house; however, the Martins saw Janis so they ran through the Creek and got away with the drugs. (Exhibit-B)

Petitioner advised DEA Cooper that Little Spotted Horse had marijuana and DEA Cooper called the BIA who went to the house and while they were at the door, the drugs were flushed down the toilet. (Exhibit-B)

Petitioner was with Darrell Eagle when he purchased drugs from Nikki Big Crow, Petitioner called DEA Cooper who called the BIA who subsequently arrested Nikki Big Crow who was prosecuted in Federal Court. (Exhibit-B)

Around September 2008, Petitioner acquired information as to who was bringing drugs to the reservation and where they were coming from and called DEA Cooper at least every other day and DEA Cooper advised Petitioner to keep up the work and to call anytime. During this time, Petitioner provided information on at least nine groups of drug dealers and their transactions on the reservation. (Exhibit-B)

At this time, Petitioner offered DEA Cooper to help make buys for the Government and DEA Cooper advised the Petitioner he could not do that. (Exhibit-B)

Petitioner then provided information to DEA Cooper on Dean Cottier, Cora Janis, Riki Begola, and Mona Richards. (Exhibit-B)

Petitioner then offered DEA Cooper to set up a deal with some of the above-named individuals and DEA Cooper advised Petitioner that Judge Battey would not approve of it. (Exhibit-B)

Petitioner then related to DEA Cooper that Tom Waters was buying and fronting marijuana from Gloria Bettelyoun at three pounds per week and that Daussy Rabbit was the mule

that drove the drugs from Colorado Springs and that Miles Janis was delivering from Tucson, Arizona. Petitioner then told DEA Cooper that 50 pounds of marijuana and cocaine was going to be delivered and that I had been offered the opportunity to buy some of the drugs. I offered to be wired and to make the buy, but DEA Cooper refused and only wanted to know how and when the shipment was being made. (Exhibit-B)

Steve Rozan, Petitioner's attorney, would call AUSA Vargo and ask how Petitioner was cooperating and was told that he was working closely with DEA Cooper, which Steve Rozan relayed to me. (Exhibit-B)

On November 1, 2008, Petitioner received the Factual Basis and the Plea Agreement from attorney Rozan in the mail. Petitioner signed the Factual Basis and the Plea Agreement and on November 3, 2008, filed them with the Clerk. (Docket 293-)

Petitioner was advised by attorney Rozan that the Plea Hearing was scheduled for November 10, 2008, and for Petitioner to appear on that date and that Rozan would be present to defend him. (Exhibit-B)

On November 10, 2008, the Petitioner appeared with attorney Rozan before Judge Battey and with AUSA Vargo. The Judge read the Factual Basis and the Plea Agreement and asked Petitioner how he would plead and the Petitioner said guilty. (Exhibit-A)

Petitioner's lawyer, Steve Rozan, then asked Judge Battey about Petitioner continuing on pre-trial release because prior to the Plea Hearing Petitioner had met with AUSA Vargo in his office, where it was agreed that Petitioner would continue to cooperate with the Government and that he would remain on bail to be able to assist the Government. (Exhibit-A)

Judge Battey advised attorney Rozan and AUSA Vargo that if he accepted the Plea that he would have to place Petitioner in custody. (Exhibit-A)

AUSA Vargo then notified Judge Battey that the Petitioner needed to remain on bond to fulfill Petitioner's obligation to the Government in his Plea Agreement and Petitioner's attorney told Judge Battey that more time was needed to gain a 5K1.1. (Exhibit-A)

Judge Battey then recessed the Court and ordered AUSA Vargo and attorney Rozan into his chambers where they remained for 30-45 minutes. (Exhibit-A)

When attorney Rozan exited from the Judge's chambers, he told the Petitioner, "let's go, I cannot believe this happened." (Exhibit-A)

While exiting the courthouse with attorney Steve Rozan, AUSA Vargo was standing in the hallway and told the Petitioner to stay in contact with DEA Cooper and to provide all the information the Petitioner had and he would see that Petitioner received a 5K1.1. Petitioner asked AUSA Vargo what he wanted him to do and Vargo stated, "provide names, phone numbers, transactions, concerning drugs on the reservation." (Exhibit-A)

After exiting the courthouse with attorney Rozan, the Petitioner was told by him that Judge Battey and Vargo did not want Petitioner in jail and told Rozan what motions to file to keep him out of jail and that the motions needed to be filed by Friday. (Exhibit-A and Docket 302)

The Motion to Remain on Bond after Plea, states, ...there were exceptional reasons" (Exhibit-Z, p. 2), and states that, "previously related in chambers" that Petitioner began cooperating and debriefing shortly after attorney Rozan was appointed counsel. (Exhibit-Z, p. 2)

And (Exhibit-Z, p. 2) states that "...led to recent seizures of both cocaine and methamphetamine" and that the Petitioner would solicit a 5K1.1 motion for downward departure ...." (Exhibit-Z, p. 3)

The Government also filed a motion concerning release of Petitioner after Plea Hearing (Exhibit-AA) and stated that the Court had authority to release the Petitioner on bond between his plea and sentencing. (Exhibit-AA, p. 3)

Judge Battey then set another hearing date for a Plea Hearing on November 18, 2008. (Exhibit-M)

Petitioner's Factual Basis states that his crime "ended in 2001" (Exhibit-H), and the Court referred to this at the change of Plea Hearing. (Exhibit-I, p. 7)

And, the Court referred to the Plea Agreement during the Plea Hearing. (Exhibit-G)

The Plea Agreement states that a Plea Agreement Supplement concerning the defendant's cooperation **shall** be filed whether or not the defendant has agreed to cooperate with the United States. (Exhibit-G, p. 2)

During the Plea Hearing, the Court referred to the Plea Agreement Supplement (Exhibit-I, p. 7) and admonished the Petitioner that the decision to file a Rule-35 is exclusively with the province of the United States. (Exhibit-I, p. 8) (Exhibit-P)

The Plea Agreement also set forth that unless there was significant evidence disclosed in the P.S.I. to the contrary, the Government would join the Defendant in asking the Court to reduce the Petitioner's offense level by two (2) points, and that if his level was over 16 join the Defendant in moving for one (1) additional level. (Exhibit-G, p. 2)

The Plea Agreement also referenced the Factual Basis for the Court to rely on. (Exhibit-G, p. 4)

The Court also advised the Petitioner at his Plea Hearing that he would qualify for only 47 days a year good time. (Exhibit-I, p. 8)

After Petitioner received a copy of his P.S.I., he advised attorney Rozan that he would pay for a private investigator (Exhibit-B), which Rozan replied he did not need one. (Exhibit-B)

Petitioner's Plea Agreement was supplemented with a Plea Agreement Supplement (Exhibit-P), which sets forth that it is an additional part of the Plea Agreement. (Exhibit-G)

An additional paragraph in the Supplement (Exhibit-P, p. 2) states that if the Defendant should fail in any way to cooperate fully, completely, truthfully, the United States will be released from its commitments, and this Plea Agreement will be null and void.

And, (Exhibit-P, p. 2) states in significant part that, if in the opinion of the United States Attorney, the defendant has met all of the obligations under the plea agreement and has provided full, complete and truthful information and testimony, and the United States is persuaded that the same constitute substantial assistance as that term is utilized at 18 U.S.C. § 3553(e), it will, at an appropriate time, but within one year of the date of the defendant's sentence is imposed move the Court pursuant to Rule-35(b) … to reduce the defendant's sentence to reflect substantial assistance …. (Exhibit-P)

Every time that Petitioner called DEA Cooper or other federal officials he contacted attorney Rozan and related the information that was passed on to the Government. (Exhibit-B)

Petitioner's counsel, Steve Rozan, filed an objection to the P.S.I. and a Memorandum in Mitigation (Exhibit-K) and cited that the Factual Basis (Exhibit-H) was vague, but did not point out that the factual basis accepted by the Court shows that the Conspiracy involvement by the Petitioner ended in 2001. (Exhibit-K)

Petitioner's counsel, Steve Rozan, set forth no law of the Eighth Circuit as to acceptance of responsibility. (Exhibit-K, pp.4-5)

Petitioner's counsel alleged post-offense rehabilitation, but provided the Court with no evidence. (Exhibit-K, pp. 4-5)

Petitioner's counsel sets forth that he should qualify under the safety valve, but presents no factual basis for the Court to rule on or any Eighth Circuit law on the issue. (Exhibit-K, pp. 3-4)

Petitioner's counsel sets forth that 18 U.S.C. § 3553(a) factors and then presents no evidence as to his qualifying for any of the seven (7) factors set forth. (Exhibit-K, p. 4)

Petitioner's counsel did not attach any factual evidence to the objections to the P.S.I. (Exhibit-K)

Petitioner's counsel at no time told Petitioner or asked Petitioner to have witnesses or family present at Petitioner's sentencing. (Exhibit-B)

Petitioner could have his family and friends as witnesses to testify at his sentencing in mitigation under 18 U.S.C. § 3553(a). (Exhibits-C,D,E,F,N,O); however, attorney Rozan said he did not need any. (Exhibit-B)

Prior to sentencing, Petitioner's counsel knew that he would receive only 47 days a year good time instead of 54 days and failed to address this issue with the Court prior to or at sentencing (Exhibit-I, p. 8) (Exhibits-K-L)

Prior to sentencing, Petitioner's counsel presented Petitioner with testimony of Cottier wherein he testified at Waters' sentencing where he went to Denver for himself and others at the same time for drugs; this was acquired from Tyon's lawyer Mossbacher. (Exhibit-B)

Prior to the beginning of the sentencing hearing, Petitioner's counsel stated he had been in the back and the Government had Eccoffey, Cottier, Lafferty, and Waters, ready to testify against Petitioner, so I had better not object to the P.S.I. (Exhibit-B)

On November 26, 2007, Petitioner sent his counsel, Steve Rozan, a letter requesting information and attempting to clarify his fees, costs, proffers, motions, witness testimony, sentencing guidelines, and plea bargaining. (Exhibit-U)

On or about December 10, 2007, Petitioner's counsel told Petitioner he did not have time to answer his letter, he was too busy, that he was in contact with the Government as to the proffer, gave him the names of two (2) others to investigate in South Dakota, and he never called them. He was going to send out investigators from Texas, an ex-agent, very expensive, and stated in response to my letter that I was going to get seven (7) years. (Exhibit-B)

While representing Petitioner, counsel Rozan was publicly reprimanded on October 31, 2007 (Exhibit-Q-R) for failing to properly account for funds to clients, failed to provide legal knowledge and skill necessary for representation, or reasonably consult with clients through the State Bar of Texas and never notified or told the Petitioner. (Exhibit-B)

From this record, the Petitioner's counsel made the same mistakes with other clients as he made with the Petitioner and were made at the same time as representing the Petitioner which is a pattern of conduct of ineffective assistance of counsel. (Exhibit-A-R)

And, at the same time, Petitioner's counsel Rozan was retained by another client, Dan Davis (Exhibit-S), for representation in a criminal case in the same District Court and during the same time he represented Petitioner and promised a specific sentence and a prison of choice for Mr. Davis and then failed to appear at sentencing for that client. (Exhibit-Q-R)

And, at the same time as Petitioner's counsel Rozan represented him, he also represented a client, Ervin Praus, in the State of North Dakota, and provided ineffective assistance of counsel, and was sanctioned by the Supreme Court of North Dakota #21000031. (Exhibit-T)

The Chief Judge of the District of South Dakota appointed two (2) investigators on February 8, 2010 to investigate Petitioner's counsel Steve Rozan, which is the District that Petitioner's case is from. (Exhibit-V)

On or about September 2009, the State of Texas Supreme Court sanctioned attorney Steve Rozan for ineffective assistance of counsel and other violations and including suspending his license to practice law for two (2) years with three (3) years probation afterwards and to advise his clients as to these sanctions (Exhibit-W); however, attorney Rozan never advised Petitioner of this happening. (Exhibit-B)

Prior to the Petitioner hiring attorney Rozan, he met with him at the Burnsley Hotel in Denver, Colorado, and Petitioner's sons, Delbert Ghost Bear and Raymond Ghost Bear, went along. (Exhibits-BB and CC)

At this meeting with Steve Rozan, he told Delbert Ghost Bear and Raymond Ghost Bear that Petitioner would not do any time in prison if they hired him. (Exhibits-BB and CC)

Petitioner's sons, Delbert Ghost Bear and Raymond Ghost Bear, advised him to hire Steve Rozan so that he would not go to prison.

At the beginning of the sentencing hearing, the Government deferred to Petitioner's counsel as to the objections to the P.S.I. (Exhibit-L, p. 4)

Petitioner's counsel then set forth that Petitioner initiated cooperation with the Government. (Exhibit-L, p. 4)

Petitioner's counsel then attempts to argue to the Court without placing the Petitioner on the stand or presenting any evidence or witnesses as to the acceptance of responsibility (Exhibit-L, p. 5) and then withdraws the objection as to the acceptance of responsibility. (Exhibit-L, pp. 5-6)

The Court then warned Petitioner's counsel that he had the burden of proof on acceptance of responsibility. (Exhibit-L, p. 6)

The Government then pointed out to the Court that Petitioner's counsel's statements acknowledge Petitioner's leadership role so, therefore, any argument as to the leadership enhancement was moot and also any argument on the safety valve was moot. (Exhibit-L, p. 6)

However, the Government states that the Court had discretion to grant acceptance or responsibility. (Exhibit-L, p. 7)

The Court then reads the Factual Basis in the record and asks Petitioner's counsel if the Factual Basis belies acceptance of responsibility. (Exhibit-L, p. 7-8)

Petitioner's counsel then states to the Court without any testimony, evidence or witnesses, that Petitioner agrees and accepts full responsibility. (Exhibit-L, p. 8)

However, the Court states to Petitioner's counsel that based on the record so far this late revelation could be classified as too little too late. (Exhibit-L, p. 9)

The Court then sets forth that the case was a large conspiracy and the P.S.I. increases two (2) levels for leadership role. (Exhibit-L, p. 10)

The Court then sets forth that the Petitioner is not entitled to acceptance of responsibility. (Exhibit-L, p. 10)

And, the Court states that the Petitioner is not entitled to acceptance of responsibility. (Exhibit-l, P. 11)

The Government then states that the Petitioner provided information to the FBI none of it ever came to fruition, it is unlikely there would be a Rule-35 Motion. (Exhibit-L, p. 12)

The Government did say that in the event they use Petitioner's proffer, provide it to a defendant who then pleads guilty, he would be qualified for Rule-35. (Exhibit-L, p.12)

Nothing in Petitioner's Plea Agreement or Supplemental Plea Agreement (Exhibit-P) says anything about a proffer and Rule-35.

The Government then asked the Court to sentence the Petitioner to the low end of the Guideline range. (Exhibit-L, p. 13)

Petitioner's counsel again attempts to make an argument to the Court without any evidence or witnesses as to acceptance of responsibility and the assistance to the Government. (Exhibit-L, pp.14-16)

Petitioner's counsel without producing any 302's tells the Court he has read them and it shows the Petitioner passing on information. (Exhibit-L, p. 16)

Petitioner's counsel then states to the Court without any witnesses or evidence that Petitioner did certain post-conviction rehabilitation, but under the Eighth Circuit, there is no credit. (Exhibit-L, P. 17)

Petitioner's counsel then tells the Court that his family was in the back of the Court who don't wish to address the Court. (Exhibit-L, p. 18)

The Court then pointed out to Petitioner's ineffective counsel that the burden of proof for acceptance or responsibility was not just argument and it was the Petitioner's burden. (Exhibit-L, p. 19)

Petitioner's counsel stated to the Court that just that morning he received ten letters which he filed and apologized for the lateness. (Exhibit-L, p. 20) However, Petitioner had given these letters to his ineffective counsel, Steve Rozan, some three-to-four weeks prior to the sentencing hearing. (Exhibit-B)

The Court finally tells the Petitioner's ineffective counsel that proof was not provided to the Court on acceptance of responsibility.(Exhibit-L, p. 22)

After the sentencing, Steve Rozan advised me that he would be back to see me, and said he was "pissed off" because Vargo lied to him and that he had an appeal brief ready. (Exhibit-B)

About a week after sentencing, Paul Winter, local counsel, came to visit me at the county jail and stated that Rozan had filed the appeal and the Steve Rozan was a good attorney; that he had checked him out and that Rozan had done everything possible he could for me. (Exhibit-B)

I was taken back to Rapid City, South Dakota, as a witness in a government corruption case. Steve Rozan advised me that since I was going to get a Rule-35, I should not testify, it would piss off Vargo. I was never called to testify. (Exhibit-B)

While waiting in jail for transfer to the B.O.P., I called DEA Cooper on his cell phone and he told me it was good not to testify in the Lyle Wilson case if I wanted my Rule-35. I told Cooper about Brandon Schriener and the cocaine he had and how much and where it was coming from, and who was all involved in his transactions, and Cooper told me to call with any other information I had, and I told Cooper that I had bought ounces from Schriener and that Lafferty and R.J. Ponds were with me at times. (Exhibit-B)

I was taken back to Sioux Falls and while there a counselor came to get me and told me I had a telephone call. It was DEA Cooper who asked if I had any further information for him, to which I said no and then asked DEA Cooper about Nikki Big Crow case that I read about in the newspaper, and DEA Cooper stated that "you did a good job on that one." I asked DEA Cooper what I was going to get and Cooper stated that his report to Vargo would show that the bust came from me and that I should contact Steve Rozan for a Rule-35. (Exhibit-B)

I called Steve Rozan about the conversation with DEA Cooper and asked about the Rule-35 and Steve Rozan said he would call AUSA Vargo. (Exhibit-B)

I called Steve Rozan back about a week later and he told me that Vargo and Cooper would not return his calls and that he could do nothing. (Exhibit-B)

I made numerous telephone calls to Steve Rozan about the Rule-35 and every time he stated that the Government had to do something, he could do nothing. (Exhibit-B)

I wrote a letter to AUSA Vargo (Docket #359) asking Vargo what was going to happen with my Rule-35 and who had to file for it and what the process was and I never received any response. (Exhibit-B)

On September 23, 2009, Steve Rozan wrote a letter concerning his Appeal to Petitioner (Exhibit-X) and at that time he was under sanctions by certain Bar Associations and did not advise the Petitioner so. (Exhibit-B)

On October 18, 2010, Petitioner received a package from Steve Rozan, which included *pro se* Writ of Certiorari (Exhibit-Y) and Steve Rozan never told the Petitioner that he was sanctioned from any State Bar Association. (Exhibit-B)

Petitioner would also point out the fact that early in his case, April 21, 2008, that a Joint Unopposed Motion for Continuance of Trial was filed (Exhibit-DD) setting forth that at that time the Petitioner qualified as a viable source of information relative to extortion amongst tribal members of the Pine Ridge Reservation and had met with AUSA Mark Vargo to authenticate and document information, and was looking for a 5K1.1 from the Government for his assistance in this investigation.

Ineffective Assistance of Counsel must establish that Petitioner's counsel's performance was deficient, and that he was prejudiced by this deficient performance. **Gool v. United States** 377, Fed. Appx. 583 (8th Cir. 2010)

Reasonable performance of counsel includes an adequate investigation of the facts, consolidation of viable theories, and development of evidence to support the theories. And, Petitioner must overcome the presumption the challenged action might be considered sound trial strategy. **Gool** @ 586 citing **Strickland**, 466 U.S. @ 689.

PRE-PLEA

First, it is evident from the facts of this case that Petitioner was released on bond and was released for the purpose of assisting the United States in prosecution of others, including drugs and payoffs, and that his counsel, Steve Rozan, advised the Petitioner to do so. The Petitioner and his family were under the assumption because of this assistance that he would not go to prison based on his statements to the Petitioner and his family members. (Exhibits-BB, CC)

The Petitioner contacted the Government and his counsel, Steve Rozan, at least weekly concerning drug dealing and payoffs, that is every time that Petitioner called the Government he also contacted his counsel, Steve Rozan, and gave him the same information he had given to the Government. (Exhibit-B)

Therefore, at all times Petitioner's ineffective counsel knew of the exact information that he was supplying to the Government even before his Plea Agreement with the Government. Petitioner's counsel also knew that he identified some pictures of individuals that the Government asked him to identify.

On a number of occasions, the Government attempted to arrest individuals that the Petitioner identified to them and during these arrests some of the individuals escaped or flushed drugs down the toilet; however, the raids came from information supplied by the Petitioner to the Government, and his counsel, Steve Rozan.

What is evident is the fact that the Petitioner provided information to the Government and left on bond to continue for over a year and a half, a lengthy period of time.

Petitioner advised the Government and his counsel, Steve Rozan, that he could set up buys for the Government, but the Government stated that Judge Battey would not approve of it. (Exhibit-A)

Even so, Petitioner's counsel, Steve Rozan, would call the Government to question them about Petitioner's assistance and was advised that he was working closely with the DEA.

However, Petitioner's counsel, Steve Rozan, had a theory about the Government not having jurisdiction over this case pursuant to a treaty, and the Petitioner advised Rozan that it was not a good theory and it had been tried before, but he kept affirming that he could get the case dismissed on that theory.

Here, the Petitioner's counsel's performance pre-plea was certainly deficient in the fact that he was projecting a theory of defense that if researched in the beginning would have shown that the Government had jurisdiction.

Here, the Petitioner has presented evidence and Facts that, since Petitioner spent 19 months on pre-trial release to assist the Government, and that he did assist the Government, that it could not be sound trial strategy to have Petitioner assist the Government and then not move the Court on his own for a Rule-35 Motion or 5K1.1, and/or specify at the time of the Plea Agreement (Exhibit-G) or Supplemental Plea Agreement (Exhibit-P) those facts, **Strickland** 466 U.S. @ 869 quoting **Michel v. Louisiana**, 350 U.S. 91, 101 (1955).

It is obvious from Petitioner's 15-year sentence, and no Rule-35 Motion or 5K1.1 or acceptance of responsibility that his counsel advising him and his family that he would not do

any prison time (Exhibits-BB and CC), Petitioner's defense was prejudiced by his Counsel's Ineffective Assistance, **Nave v. Delo**, 62 F.3d. 1024, 1035 (8th Cir. 1955).

And, this Circuit has known of Petitioner's counsel, Steve Rozan's, ineffective assistance of counsel in the same manner in other cases:

> **U.S. v. Mendiola**, 2010 U.S. Dist. LEXIS68413 (D. Ark. 2010), "failure to file a § 2255."
> **Canady v. U.S**, 2005 U.S. Dist. LEXIS15852 (N.D. Tex. 2005) "conflict of interest."
> **U.S. v. Beckham,** 2009 U.S. Dist. LEXIS7472- (S.D. Tex. 2009) "ineffective assistance of counsel plea agreement."

And, this Circuit is aware Petitioner's counsel, Steve Rozan, had his law license suspended for the above cases and other reasons. (Exhibits-Q,R,S,T,U,W)

Failure to file a Rule-35 Motion.

Failure to notify client of State Licensing Board sanctions.

Failure to provide legal knowledge and skill.

Here, in the Statement of Facts, the Petitioner has provided substantial assistance pre-plea to the Government, and his ineffective counsel knew of the specifics of his assistance (as set forth in the Statement of Facts) (and the Trial Court knew of the substantial assistance by allowing the Petitioner to stay on pre-trial release for 19 months) and, therefore, Petitioner's counsel should have on his own Motion filed a Rule-35 Motion or 5K1.1 irregardless of whether the Government filed. **United States v. Perez**, 526 F.3d 1135 (8th Cir. 2008). "A District Court may review a Government's refusal to make a substantial assistance motion …" **Perez** @ 1138.

That is, ineffective counsel could have filed a Motion to Compel. **United States v. McClure**, 338 F.3d 847, 850 (8th Cir. 2003). Here, the Petitioner has not made mere assertions of assistance to the Government, but has provided facts, facts that the Trial Court knew. **United States v. Mullins**, 399 F.3d 888, 890 (8th Cir. 2005)

And, here it is factual that his ineffective counsel made no attempt to enforce the Plea Agreement or the fact of the Petitioner's substantial assistance to the government. The fact is that Petitioner's ineffective counsel knew of Petitioner's pre-plea assistance that led to arrests and seizures. (Exhibits-B and Z)

In summary, pre-plea, the facts are that the Petitioner provided substantial assistance, drugs were seized, persons were arrested and prosecuted, and Petitioner's counsel and the Trial Court knew these facts pre-plea, and Petitioner's Ineffective Counsel Rozan made no attempt to marshal the evidence, ask for a hearing, present evidence and witnesses and, in fact, was mute throughout the proceedings in forcing the Government to live up to its contract with the Petitioner.

Petitioner's guilty plea forecloses all pre-plea non-jurisdictional attacks on his conviction, **United States v. Shafer**, 176 Fed. Appx 707 (8th Cir. 2006); however, ineffective assistance of counsel is a Constitutional, jurisdictional issue in this case.

INEFFECTIVE ASSISTANCE OF COUNSEL AT PLEA HEARING

Standard of Review

Strickland v. Washington, 466 U.S. 668 (1984)

Petitioner incorporates herein by reference his argument on Ineffective Assistance of Counsel at pre-plea.

Petitioner has set forth Facts that he had two (2) Plea Hearings that he participated in, and the fact is that the first Plea Hearing on November 10, 2008, record has not been found. (Exhibit-A)

First, Petitioner's counsel at the November 10, 2008, Plea Hearing knew or should have known that the Court was required to detain the Petitioner after his plea, and his Ineffective

Counsel was unprepared to file a motion, knew no facts or law about such a motion, and it took the initiative of the Trial Court to prepare Ineffective Counsel to present a motion to the Court. (Exhibit-A, ¶¶ 5-6)

The Trial Court held a conference in chambers with Ineffective Counsel and AUSA Vargo. (Appendix-A, p. 2 IV)

At the conference in chambers, the Trial Court advised Petitioner's Ineffective Counsel on the motion to file for Petitioner to stay on bond after he plead. (Appendix-Z)

In writing this Motion, Petitioner's Ineffective Counsel cited **United States v. Brown**, 900 F.2d 1300 (8th Cir. 1990), and even set forth the fact that the Court and the Government refused to allow **Brown** to make controlled buys and that was disapproved by the Eighth Circuit.

That is, Petitioner's Ineffective Counsel knew that the Petitioner was ready to make controlled buys for the Government; however, the Government stated that the Trial Court, specifically Judge Battey, would not approve it. (Exhibit-B, p.3, ¶ 26) Knowing this, Petitioner's Ineffective Counsel failed to even raise such an issue at the Plea Hearing, that is to assist the Petitioner to get as low a sentence as possible or to get the Court to put on the record that it would not allow the Petitioner to make controlled buys.

And, at the Plea Hearing, Petitioner's counsel, even though there was a Plea Agreement and a Supplemental Plea Agreement, failed to make any argument for the substantial assistance that the Petitioner had already up to that point provided to the Government.

And, the fact is, that the Trial Court, Government, and Petitioner's Ineffective Counsel, knew that Petitioner was providing substantial assistance to the Government (Exhibit-DD) on April 21, 2008, some seven (7) months prior to the Plea Hearing, and did nothing on behalf of the Petitioner.

Therefore, Petitioner's Ineffective Counsel failed to perform as an advocate for the Petitioner at the Plea Hearing, by failing to prepare for the hearing, prepare a Motion for Continuation on Bond having the Trial Court to instruct Ineffective Counsel on the motion to file, and by not clarifying with the Court on allowing the Petitioner to make controlled buys, and failure to point out to the Court the Petitioner's substantial assistance up to that point of time is Ineffective Assistance of counsel and cannot be considered trial strategy.

For these reasons, the Court should grant the § 2255 and remand him for re-sentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Standard of Review

Rompilla v. Beard, 545 U.S. 374 (2005)
Wiggins v. Smith, 539 U.S. @ 524 (2003)
1 ABA Standards for Criminal Justice 4-4.1 (2 ed. 1982 Supp)

Petitioner incorporates herein by reference as if fully set forth his issues on Ineffective Assistance of Counsel, Ineffective Assistance of Counsel Pre-Plea, Ineffective Assistance of Counsel Plea Hearing.

I.

PREPONDERANCE OF EVIDENCE

Standard of Review

United States v. Villareal-Amarillas, 562 F.3d 892 (8th Cir. 2009)

The Federal Sentencing Guidelines declare that use of a preponderance of evidence standard is appropriate to meet Due Process requirements.

United States v. Booker, 543 U.S. 220 (2005) and its exercising of 18 U.S.C. § 3553(b)(1) eliminates any Due Process concerns requiring a heightened standard of proof for fact-finding and, therefore, Petitioner's Ineffective Counsel, if he had prepared for sentencing

would have discovered that the Eighth Circuit decided this in 2005, and should have investigated pre-sentencing, and presented witnesses and evidence in mitigation for the Petitioner at sentencing.

As will be shown, Petitioner's Ineffective Counsel failed to prepare for sentencing, failed to provide any witnesses and evidence at sentencing, which resulted in the length of the sentence that the Petitioner received, based on preponderance of evidence standard and, therefore, the Petitioner challenges the reasonableness of his sentence. **United States v. Bah**, 439 F.3d 423, 432-33 (8th Cir. 2006).

Here, (Exhibit-L, p. 6) the Trial Court tells Ineffective Counsel that he has the "burden of establishing evidence..." and the Trial Court went further (at p. 9) that Ineffective Counsel's late revelation was too little too late and the Court stated this is "findings of fact."

Most striking in the transcript (Exhibit-L, p. 19), the Court advised and warned Ineffective Counsel, "Well, you understand the burden of proof is your burden and not just argument, but burden?" and from this point forward Ineffective Counsel still presents no evidence of witnesses.

And, (Exhibit-L, p. 22), the Court stated, "The proof has not been provided to the Court."

Therefore the facts in this case are that the Court used the Preponderance of Evidence standard, that was available to Ineffective Counsel, and because of that failure to provide a defense for the Petitioner, he was prejudiced in a lengthy sentence that he should not have received.

That is not one (1) witness nor one (1) piece of evidence was presented at the Petitioner's sentencing in mitigation (FACTS) for the Court to rule on.

For this reason alone, this Court should grant the § 2255.

II.

ACCEPTANCE OF RESPONSIBILITY

Standard of Review

United States v. Jones, 612 F.3d 1040 (8th Cir. 2010)
United States v. Long Soldier, 431 F.3d 1120, 1122-23 (8th Cir. 2005)

Petitioner incorporates herein by reference as if fully set forth his issues on Ineffective Assistance of Counsel, Ineffective Assistance of Counsel Pre-plea, Ineffective Assistance of Counsel Plea Hearing, and Preponderance of Evidence.

"Whether the Defendant has accepted responsibility is a factual question that depends largely on credibility assessments made by the Court." **Long Soldier**, 431 F.3d @ 1122. Here, the fact is that the Trial Court continuously warned Ineffective Counsel that he had the burden to prove that the Petitioner should receive a three (3) point reduction in his offense level for the acceptance of responsibility, and the facts of this case are that his unprepared, Ineffective Counsel presented no evidence or witnesses for the Trial Court to grant the three (3) point acceptance of responsibility (Exhibit-L) speaks for itself as that fact.

Most significant here is the fact that Ineffective Counsel if he had known the Guidelines and prepared for sentencing with evidence and witnesses could have presented to the Court the fact that Petitioner was eligible for the additional one (1) point acceptance of responsibility "provides an additional one (1) point decrease in offense level for a defendant ... who has assisted authorities ... thereby appropriately meriting an additional reduction." Therefore, irregardless of any Rule-35 Motion or 5K1.1 reduction, the Petitioner's Ineffective Counsel failed to be prepared at sentencing to present evidence and witnesses as to his assistance to the Government, that he should have called the DEA or FBI or AUSA to testify as to the assistance

that the Petitioner provided; this failure shows that under **Rompilla**, Ineffective Counsel failed to investigate or prepare for the sentencing proceedings.

Three (3) point reduction in the Petitioner's level would have made a five (5) year difference in his sentence, therefore, it is a fact that the Petitioner was prejudiced in a higher sentence by the failure of his Ineffective Counsel to present witnesses and evidence as to his acceptance of responsibility, and the Trial Court specifically instructed ineffective counsel to that fact.

When the Petitioner has shown that the actions of Ineffective Counsel resulted in inattention, neglect, rather than reasoned judgment, the Petitioner has rebutted the presumption of strategy, even if the Government offers a possible strategy. **Rompilla**, @ 396-97 and 506 F.3d 503, which has been adopted by this Circuit.

What is striking in the record is the fact that Ineffective Counsel attempts to tell the Court that he is going to "validate it for him on his behalf on the record" and then failed to do so at any further point in the proceedings. (Exhibit-L, p. 5)

And, the record points out the Government did not object to the Acceptance of Responsibility (Exhibit-L, p. 7), but that was based on the assertion by Ineffective Counsel that the Petitioner was going to testify which never happened.

Further, the Trial Court finally stated after giving Ineffective Counsel the opportunity for witness testimony and evidence as to acceptance of responsibility that "based on the assurance of counsel, I believe that obviates all of the objections … that he is not entitled to the acceptance of responsibility as simply being too little too late…"

Here, then, the deficient performance by Ineffective Counsel resulted in prejudice increased sentence by five (5) years because of his failure to properly prepare for sentencing by

doing an adequate investigation for evidence and witnesses in mitigation; however, it should not be forgotten that Ineffective Counsel was laboring under the effect of numerous investigations by State Licensing Boards as to ineffective assistance of counsel as to other defendants and by various Courts, including this District and Circuit, the facts which are attached hereto.

That is, the undiscovered mitigation of witnesses as evidence as to his acceptance of responsibility adds up to a mitigation case that was not presented, **Wiggins**, *supra* @ 538, and the likelihood of a different result (as the Trial Court kept warning Ineffective Counsel) would have been sufficient to undermine confidence in the outcome, and this is not just statements by the Petitioner, but is supported with the attached facts, which are evidence and un-rebuttable.

Here, the facts are that the Petitioner's Ineffective Counsel simply ignored his obligation to find mitigation for sentencing, especially since he had been advised by the P.S.I. what he needed to investigate and prepare for, **Rompilla**, *supra*.

Here, the fact is that the Petitioner plead guilty in open court, and to the Factual Basis in open Court. That is, the Plea (Exhibit-G) sets forth that "unless significant evidence disclosed in the PSI ..." "... will recommend to the Court for acceptance of responsibility" and the Statement of Factual Basis (Exhibit-H) signed and agreed on October 31, 2008, that he "would send a Courier to Denver to deliver cash and return with cocaine," set forth and accepted the facts of his Plea and the Petitioner would point out that at no time has he withdrawn his Plea of the Factual Basis and does not wish to do so at this time; therefore, at the time of sentencing the record was replete with facts that the Petitioner accepted responsibility and what he did to commit the crime, and there is nothing in the record that is disputed, of which his Ineffective Counsel failed to defend at sentencing.

And, the fact is that at the Plea Hearing (Exhibit-I, p. 14), the Trial Court set forth the elements that the Petitioner was pleading to and that has not been withdrawn by the Petitioner at any time, of which Ineffective Counsel failed to show the Court; what Ineffective Counsel did was just make statements to the Court and presented no evidence such as the Plea Agreement, Factual Basis or the Plea Hearing Transcript to overcome the P.S.I. allegations.

The Burden for the two (2) point Acceptance of Responsibility was on the Petitioner's Ineffective Counsel, **United States v. Spurlock**, 495 F.3d 1011, 1014 (8th Cir. 2007).

That is, Ineffective Counsel should have been prepared with evidence and/or witnesses at sentencing to defend the two (2) point Acceptance of Responsibility level departure by presenting that the Petitioner truthfully admitted the conduct comprising his offense, (the attached facts here do so) and that he voluntarily surrendered to authorities promptly (the facts here prove that), and the timeliness of his conduct manifesting the Acceptance of Responsibility. The fact is the Trial Court and the P.S.I certainly attempt to make it appear that the Petitioner was attempting to withdraw his plea, which he was not, and is not attempting to do.

Here, also the record (Plea Agreement, Factual Basis, Plea Transcript) show that the Petitioner has not minimized his conduct or partially accept responsibility, and his Ineffective Counsel should have placed a record before the Court instead of just statements to these facts, otherwise the Trial Court had no choice but to deny the two (2) point Acceptance of Responsibility. **United States v. Ngo**, 132 F.3d 1231, 1233 (8th Cir. 1997)

And, even after the Petitioner plead guilty, his conduct of cooperation with the Government was consistent with his plea of guilty. **United v. Herron**, 539 F.3d 881 (8th Cir. 2008)

And, the fact is that the Ineffective Counsel could have made an argument with facts that the Petitioner had no post-plea denial of guilt; however, Ineffective Counsel was unprepared for mitigation even after receiving the P.S.I. **United States v. Tonks**, 574 F.3d 628, 632 (8th Cir. 2009)

The fact is that the Government was not opposed to the Petitioner receiving the two (2) point Acceptance of Responsibility, and did not believe that Petitioner had not accepted responsibility; however, because of Ineffective Assistance of Counsel (even after the Court's warning to counsel), no facts were presented to the Court for it to rule otherwise.

Therefore, based on this record, the Petitioner had Ineffective Assistance of Counsel as recognized by the Trial Court, the Trial Court warned Ineffective Counsel to present evidence and witnesses, and the fact is that Ineffective Counsel did no pre-sentencing investigation to prepare for sentencing as to the three (3) point Acceptance of Responsibility, and this failure prejudiced the Petitioner in an increase of his sentence of five (5) years.

And, the fact is that prior to and during the Petitioner's case before the Trial Court, the Ineffective Counsel labored under the pressure of numerous investigations and loss of his license to practice before numerous Courts, thereby prejudicing his defense and pre-sentencing investigation.

For these reasons, the § 2255 should be granted.

III.

BREACH OF PLEA AGREEMENT

Standard of Review

Santobello v. New York, 404 U.S. 257, 262 (1971)
United States v. Schell, 343 Fed. Appx. 154 (2009)
Wade v. United States, 504 U.S. 181, 186 (1992)
United States v. EV, 500 F.3d 747 (2007)

Here, the facts are that the Government produced and signed a Plea Agreement with the Petitioner (Exhibit-G), which was supplemented (Exhibit-P), which states in relevant part that, "Any significant deception by the Defendant with respect to material facts or issues under investigation shall constitute a breach of this plea agreement and the United States may elect to void this agreement on account thereof."

First, it is evident from the facts of this case that the United States at no time elected to void this agreement.

Also, the Plea Agreement (at p.2) sets forth that, "If the Defendant should fail in any way to cooperate fully, completely, and truthfully, the United States will be released from its commitments, and this Plea Agreement will be null and void." Nothing in the facts of this case, including the Sentencing Transcript set forth that the Petitioner did not fully, completely, truthfully cooperate with the United States. (Exhibit-L)

What should be made clear at this point in this argument is that other than a Rule-35, there is nothing in the Plea Agreement that relates to any other relief.

That the record is replete with facts that the Petitioner was helping the Government with information (Exhibits-A,B,I,Z,AA,DD), which all set forth the help of the Petitioner in various investigations that were ongoing or were new information.

Here then, the issue is under 18 U.S.C. § 3553(e), the Petitioner met all the criteria irregardless of the Rule-35 Motion and also for 5K1.1 And, the facts are clear that other than at sentencing, the Petitioner's Ineffective Counsel made no attempt for him to receive credit under 18 U.S.C., § 3553(e) of 5K1.1 for the assistance that he had provided and documented with his counsel at least on a weekly basis. (Exhibit-B)

Therefore, prior to sentencing, Ineffective Counsel had information to research an 18 U.S.C. § 3553(e) Motion or 5K1.1 and to file a motion to compel the Government to file either one, which he did not do.

Therefore, here in this case, the Petitioner made proffers to the Government, then agreed to cooperate, cooperated and provided information that is supported by facts and the record; therefore, Petitioner has made a substantial showing of providing facts under 18 U.S.C. § 3553(e).

With that in mind, if the Petitioner's Ineffective Counsel had filed a motion to compel before or at sentencing for the Government to file an 18 U.S.C. § 3553(e) motion, the Government would have been put on notice as would the Trial Court. See **United States v. Tournier**, 171 F.3d 645 (8th Cir. 1999); **United States v. Sanchez**, 475 F.3d 978 (8th Cir. 2007).

And, here, the Petitioner was under the assumption that the Government was going to file a 18 U.S.C. § 3553(e) Motion or a 5K1.1 before sentencing, which was one of the reasons for his pleading guilty.

The fact is a Motion to Compel could have been filed by Ineffective Counsel, but he did not **United States v. EV**, 500 F.3d 747 (8th Cir. 2007) and if Ineffective Counsel had done research prior to sentencing he would have found that fact out based on Eighth Circuit case law.

And, the Petitioner is setting forth that the agreement to file an 18 U.S.C. § 3553(e) Motion or 5K1.1 was an oral contract by the United States as related to the Petitioner by his Ineffective Counsel. Therefore, the Petitioner is asking for specific performance. **United States v. Goings** 200 F.3d 539, 544 (8th Cir. 2000)

In the Sentencing Transcript (Exhibit-L, p. 12), the Government admits about the pending 18 U.S.C. 3553(e) and 5K1.1 Motions. Petitioner would also point out that the statement by the

Government in this hearing as to the fruition of the information provided by the Petitioner is overruled by their own motion placed in the Court to keep the Petitioner out on bail after his plea hearing. And, the statement by the Government in the Sentencing Transcript that the Petitioner made contact from time-to-time with the FBI is outright misleading in that the Petitioner maintained contact at least weekly and sometimes more often. (Exhibit-B)

What is even more striking is the fact that Ineffective Counsel told the Court without producing any evidence that the Petitioner provided evidence that was produced in 302's. (Exhibit-L, p. 16)

Here, since Ineffective Counsel failed to file a Motion to Compel, to file a 18 U.S.C. § 3553(e) Motion or 5K1.1, the Court was unable to make a decision of why it was not done such as bad faith. **United States v. Richardson**, 390 Fed. Appx. 614 (8th Cir. 2010); **United States v. McClure**, 338 F.3d 847, 850 (8th Cir. 2003)

And, there is certainly a plethora of case law in this Circuit and others that the District Court's authority is not limited to waiting for the Government to file a motion that is in light of representations made by the Petitioner here and the promises of the Government and the help provided by the Petitioner, the District Court (if asked) may require the Government to make such a motion, and the Government cannot base its decision on factors other than the substantial assistance provided by the Petitioner. **Stockdall**, 45 F.3d @ 1261. That is any other reason produced by the Government is considered bad faith. **United States v. Fields**, 512 F.3d 1009 (8th Cir. 2008)

Petitioner would point this Court to **United States v. Mendiola**, 2010 U.S. Dist LEXIS68413 (E.D. Ark. 2010; **Canady v. United States**, 2005 U.S. Dist LEXIS1585 (N.D. Tex. 2005); **United States v. Beckham**, 2009 U.S. Dist LEXIS74727 (S.D. Tex. 2009) cases where

his Ineffective Counsel had performed or failed to perform as an advocate for a defendant, and has been sanctioned, and that these cases are before, during and after Petitioner's case.

Therefore, since the extent of departure or reduction under 18 U.S.C. § 3553(e) or 5K1.1 Motions can be based only on the assistance-related considerations, and his Ineffective Counsel failed to advocate for these departures, then he has been prejudiced. **United States v. Pepper**,412 F.3d 995, 998 (8th Cir. 2005)

And, here the facts presented in this § 2255 set forth his substantial assistance. **United States v. Haack**, 403 F.3d 997 (8th Cir. 2005)

Therefore, under the Plea Agreement that is written, the Government relates to a Rule-35 Motion that is filed up to one (1) year after sentencing.

Here, more than one year since sentencing has expired, and the Government has failed to file a Rule-35 Motion on the Petitioner's behalf.

And Ineffective Counsel failed to file a motion with the Court to compel the Government to file the Rule-35 Motion. And, from the facts presented here, Ineffective Counsel could not have done so even if he wanted to as he was suspended from the practice of law at the time and had not made Petitioner aware of that fact; therefore, he was prejudiced by the failure of Ineffective Counsel's failure to file a Motion to Compel. That is, (Exhibit-B) sets forth that the Government's terms for a Rule-35 Motion.

Here, then, the issue is first has the Petitioner provided substantial assistance to the Government)? (Exhibit-B) sets forth with specificity the persons by name, the drugs, and the involvement of the FBI and United States Attorney in the District in those cases and investigations. However, since Petitioner's Ineffective Counsel never filed a Motion to Compel the Government to file a Rule-35 Motion, there is no record for this Court to determine if the

Government's failure to do so is improper. **United States v. Marks**, 244 F.3d 971, 973 (8th Cir. 2001). That is, the Court if the Motion to Compel had been filed could have granted a departure if the Court found that the Government's refusal was irrational, in bad faith, or based on unconstitutional motive. **United States v. Wattree**, 431 F.3d 618, 624 (8th Cir. 2005) Here the facts are that over 15 months while on pre-trial release, the Petitioner continuously supplied the Government with names, dates, places and amounts of drugs, which were acted on by the Government, and persons were indicted and charged. However, since that time, there have been further investigations that are ongoing based on the Petitioner's information supplied to the Government, and this Court is aware of that and has refused to unseal certain records in the Petitioner's case to keep from the public such information.

Here, the Government has bad faith in that it has investigated, arrested and prosecuted others from the information supplied by the Petitioner, and there currently ongoing investigations from that information as is shown from the Sealing of the Motions for bail after plea, the sealing of his Plea Agreement and Supplemental Plea Agreement, which even though Petitioner moved a motion for unsealing, the Court has refused to do so to protect its ongoing investigations. A review of (Exhibits-Z and AA) proves that point as fact.

For these reasons, the Petitioner summarizes that he should have been provided a Rule-35 Motion for his substantial assistance, and his Ineffective Counsel should have filed a Motion to Compel, but, however, because of his loss of license to practice law was unable to do so, and Ineffective Counsel failed to notify Petitioner of his loss of license and prejudiced the Petitioner in that he was not given a lower sentence for his substantial assistance and for this reason alone, the § 2255 should be granted.

Or, the Court can enforce the Plea Agreement and have the Government pursuant to the Supplemental Plea Agreement file a Rule-35 Motion now based on the substantial assistance of the Petitioner.

Here, then, the Plea Agreement and the Supplemental Plea Agreement make no mention of an 18 U.S.C. § 3553(e) or 5K1.1 Motions, and since that is so, Petitioner's counsel was ineffective for failure to file a motion for the Petitioner to receive such a reduction and that prejudiced the Petitioner in his sentence length. That is, the Petitioner could have received a reduction in his sentence to the 10-year mandatory minimum if his Ineffective Counsel would have asked the Court to do so or asked the Government to state on the record why not; however, there is nothing in this record for the Court to determine why the Government would not do so if asked.

Here, since the Petitioner has made a substantial threshold showing there should be a hearing ordered on this issue. **Unites States v. Perez**, 526 F.3d 1135, 1138 (8th Cir. 2008)

The issue raised herein is that the honor of the Government in the plea agreement and the public confidence in the fair administration of justice and the effective administration of justice is at stake, that is the Plea was induced based on the Petitioner's substantial assistance promises, promises that never happened. **United States v. Thournout**, 100 F.3d 590, 594 (8th Cir. 1996) Petitioner asks for the Plea Agreement to be enforced.

FAILURE TO INVESTIGATE OR PRESENT MITIGATION AT THE SENTENCING

Standard of Review

Rompilla v. Beard, 545 U.S. 374 (2005)

The issue here is the adequate investigation in preparing for sentencing that did not happen in this case, and prejudiced the Petitioner in the fact that not one witness or one piece of

evidence was presented that would mitigate the Petitioner's sentence that was presented in the P.S.I. long before the sentencing date.

The undiscovered mitigation listed below taken as a whole might well have resulted in a lesser sentence.

It is the duty of Petitioner's counsel to conduct a prompt investigation of the circumstances and to explore all avenues leading to facts relevant to the penalty phase. **ABA Standards for Criminal Justice**, 4-4.1 (2 ed. 1982 Supp.)

Here, since the Guidelines are no longer mandatory, the District Court must take the Guidelines into account together with the other sentencing factors enumerated in 18 U.S.C. § 3553(a). That is, the District Court can vary from the appropriate Guidelines based on certain § 3553(a) factors; however, in this case no § 3553(a) factors to vary were presented to the Court, because Ineffective Counsel did no investigation prior to sentencing. **United States v. Mashek**, 406 F.3d 1012, 1017 (8th Cir. 2005)

POST-OFFENSE REHABILITATION

Here, the facts are that the AUSA and Petitioner's counsel knew of his Post-Offense Rehabilitation, and his teaching high school students about the wrongs of drug use and selling drugs, and the fact that the AUSA was present during some of the Petitioner's presentations to students at high school. (Exhibit-B). Significant post-offense rehabilitation is relevant in evaluating § 3553(a) factors. **United States v. Kapitzke**, 130 F.3d 820, 823-24 (8th Cir. 1997) Of course, the Court cannot place too much emphasis on post-offense rehabilitation, the fact that Ineffective Counsel never asked the Court nor presented evidence to that fact to the Court, the Petitioner was deprived of having the AUSA testimony as to his observations of the Petitioner's participation in high school classes and functions and the response to the Petitioner by those

students; therefore prejudiced him in the length of his sentence. **United States v. Gall**, 446 F.3d 884, 890 (8th Cir. 2006)

FIRST TIME OFFENDER

Here, the facts of this case are that the Petitioner is a first-time offender. Under 18 U.S.C. § 3553(a), it is a factor that can be taken into consideration by the Court at sentencing, when fashioning a sentence. In this case, Ineffective Counsel made no attempt to ask the Court to vary from the Guidelines based on the Petitioner being a first-time offender. Here, the facts are that first-time offenders are less likely to recidivate and; therefore, that factor can then affect the sentence the Judge is fashioning, but only if it is presented to the Court. That is it is not the Court's place to look for § 3553(a) factors, it is Petitioner's Ineffective Counsel's place to provide the Court at sentencing with evidence and witnesses (FACTS) as to the Petitioner being a first-time offender and the likelihood of recidivism. **United States v. Jensen**, 493 F.3d 997 (8th Cir. 2007) Here, Petitioner was prejudiced by Ineffective Counsel's failure to investigate and present to the Court reasons for first-time offender variance.

EMPLOYMENT HISTORY

Another § 3553(a) factor that could have been presented to the Court if Petitioner's Ineffective Counsel had investigated mitigation was the fact of the Petitioner's employment history.

In fact, any investigation would have found in **United States v. Big Crow**, 898 F.2d 1326 (8th Cir. 1990) that consistent efforts to overcome the adverse environment of the Pine Ridge Reservation and excellent employment history is mitigation circumstances not adequately taken into consideration by the Guidelines, and certain post-**Booker**, it is a factor that can be used, and Petitioner's counsel obviously did no research as to this § 3553(a) factor. That is,

Petitioner had employers that would have testified to his excellent employment history (Exhibit-B) and Petitioner told Ineffective Counsel of this issue prior to sentencing and Ineffective Counsel did nothing in mitigation for the Petitioner's sentencing. Here, then, Petitioner was prejudiced by Ineffective Counsel in that he had an opportunity for a variance in his sentence, but because of Ineffective Counsel he was deprived.

Obviously, from the facts in this case at sentencing, the Court continually warned Petitioner's counsel that he had the burden of proof on any issue he was raising and told him this more than one time at sentencing. (Exhibit-L) And, the fact is that in the beginning of the sentencing proceedings, the Court advised Ineffective Counsel that he was following **United States v. Haak**, 403 F.3d 997.

Also in the sentencing transcript is the fact that some of the Petitioner's family was available at sentencing; however, Ineffective Counsel did not call one (1) as a witness as to any of the statements that Ineffective Counsel presented to the Court. That is, Ineffective Counsel never contacted any persons or interviewed any persons to see if they would testify at the Petitioner's sentencing (Exhibits-B,C,D,E,F,N,O) that certainly had facts as to mitigation that Ineffective Counsel never presented to the Court for a downward variance, which prejudiced the Petitioner in the length of his sentence.

Here, then, the Petitioner raises a Due Process issue at this sentencing, **Chapman v. United States**, 500 U.S. 453 (1991, that is Ineffective Counsel violated his Due Process at sentencing. And, that is just the failure of Ineffective Counsel to bring to the Court's attention his substantial assistance and the 302's violated his Due Process rights, 241 F.3d @ 1052. That is the failure of the Government to fulfill its promise in the Plea Agreement and the Supplemental Plea Agreement is sufficient to attack his counsel as ineffective and have the Government abide by

their agreement. **Santobello v. New York**, 404 U.S. 257 (1971) and the United States Supreme Court recently in **Puckett v. United States,** 556 U.S. ___ (2009), failure to live up to the terms of the contract means the contract was **broken**. And, that means the Petitioner is entitled to enforcement of that contract by specific performance. Most strikingly is the fact that this Court is aware of all the legal shenanigans that have taken place, missing Plea Hearing Transcript, failure to present facts to the Court as to substantial assistance, failure to unseal Plea Agreement, failure to unseal Plea Transcript and Sentencing Transcript, failure to unseal Motion to Remand on Bond After Plea, all point to the facts that need to be presented to the Court as to why.

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Standard of Review

Strickland v. Washington, 466 U.S. 668 (1984)

Here, the fact is that the Petitioner's Ineffective Counsel attempted to make an argument on appeal that the District Court warned him would not work, but he continued with the useless argument. That is, the Petitioner also asked Ineffective Counsel how he could make such an argument when it had been OVERRULED ALREADY BY THE EIGHTH CIRCUIT.

That is, because of the issue of forced assimilation and the law in this Circuit, the Appellate issue was a dead issue on arrival at the Appellate Court, and blocked any further issues from being raised, because the Ineffective Counsel was so sure that they would win on appeal, negotiations stopped on any other issues for appeal.

Here, then, the facts are that Ineffective Counsel's prior appeal negotiated a Plea Agreement that foreclosed all appeals except for the jurisdiction issue, that had been previously foreclosed by Circuit Precedent and, therefore, even the one (1) argument that was raised by his Ineffective Counsel was moot.

Petitioner incorporates herein by reference his arguments on Ineffective Assistance of Counsel, Ineffective Assistance of Counsel at Sentencing, Preponderance of Evidence, Acceptance of Responsibility, Breach of the Plea Agreement, Failure to Investigate or Present Mitigation at Sentencing, Post-Offense Rehabilitation, First-Time Offender, Employment History, as if fully set forth.

CONCLUSION

Petitioner has set forth the fact that from the beginning of this and the hiring of Steve Rozan as counsel that he promised to the Petitioner and his family members that he would not do any jail time, a ruse that has now been exposed in other cases in other Courts in other States, that Steve Rozan failed to investigate his argument about jurisdiction, and if he had he would have found that under forced assimilation that his argument was a non-starter, and because of Steve Rozan's beliefs and ineffective counsel, he negotiated a Plea Agreement with the Government without protecting the Petitioner's rights therein, and that Steve Rozan was ineffective while representing the Petitioner before the Court at the Plea Hearing requiring there to be two (2) plea hearings because the Trial Court and the United States Attorney was required to assist his counsel in motions to file to keep the Petitioner out on bond after the Plea Hearing, and that Steve Rozan failed to even attempt to have the Government keep their end of the Plea Agreement by filing a Motion to Compel, Rule-35 or 5K1.1 Motions, and that at sentencing Steve Rozan failed to do any pre-sentence investigation of any kind in mitigation of Petitioner's sentence, or to call any witnesses or to present any evidence at sentencing even after being warned on two (2) occasions by the Trial Court, especially the fact that the Petitioner had assisted the Government over an 18-month period, and there were 302's filed as to that fact, and there were motions supported by the Government during that period of time to keep the Petitioner out to assist the

Government, and even after sentencing, Ineffective Counsel abandoned the Petitioner without ever telling him that he had lost his license to practice at the time that he prepared the Writ of Certiorari to the Untied States Supreme Court (Exhibits-X and Y) in violation of the Court's Order for Steve Rozan to notify his clients that he had been suspended from the practice of law, all the while leading Petitioner to believe that he was still represented.

And, the fact is that Petitioner's counsel, Steve Rozan, even during representation during plea negotiations and sentencing was investigated and sanctioned by certain State Boards as to his practice of law, including this Court and District.

For these reasons and the fact that the Trial Court and the United States Attorney have been involved in the Plea negotiations, drafting of motions, failing to unseal documents, there should be a hearing held, an appointment of a new Judge and United States Attorney, and taking of testimony as to the facts presented herein by the Petitioner.

Dated this 6th day of January, 2012.

Respectfully submitted,

Donroy Ghost Bear

FPC-Englewood
Donroy Ghost Bear, Petitioner

Donroy Ghost Bear
10199-273
F.P.C. Englewood
9595 W. Quincy Ave
Littleton Colo. 80123