

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>OTIS ANTONIO SMITH,</b>	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Case No. 7:06cv00391</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	<b>By: Hon. Michael F. Urbanski</b>
<b>Respondent.</b>	)	<b>United States Magistrate Judge</b>

**REPORT AND RECOMMENDATION**

Petitioner Otis Antonio Smith (“Smith”) brings this action under 28 U.S.C. § 2255, alleging that his counsel provided ineffective assistance by failing to object to certain information contained in the pre-sentence report and by failing to file a notice of appeal. By Order dated January 17, 2007, the court referred this matter to the undersigned Magistrate Judge, and directed that an evidentiary hearing be held to determine whether petitioner requested that his attorney, Anthony F. Anderson (“Anderson”), file an appeal.<sup>1</sup> By Order entered January 30, 2007, all dispositive motions were referred to the undersigned to submit proposed findings of fact and a recommended disposition. An evidentiary hearing was conducted on February 12, 2007.

Based on the evidentiary hearing testimony and the transcripts of Smith’s guilty plea and sentencing hearings, the undersigned concludes that petitioner has not met his burden of proving Anderson was ineffective for failing to file a notice of appeal. Smith has failed to present any credible evidence suggesting he instructed counsel to file a notice of appeal. The evidence

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<sup>1</sup>The court declined to address Smith’s other claim of ineffective assistance, finding that if counsel was ineffective for failing to file a notice of appeal all other claims should be dismissed without prejudice. However, as the undersigned finds counsel was not ineffective on the appeal issue, Smith’s remaining claim of ineffective assistance is addressed herein.

demonstrates that Smith entered into a plea agreement expressly waiving his right to appeal any sentencing guideline issues. As counsel was obviously aware of the provisions of the plea agreement, including the express waiver of the right to appeal on all sentencing guideline issues, the substantial benefit Smith received under the terms of the agreement, and that Smith risked losing both those benefits and the opportunity to reduce his sentence through a motion for substantial assistance if he filed a frivolous appeal and because Smith did not express any interest in appealing, the undersigned finds counsel had no affirmative duty to consult with Smith regarding an appeal. Further, in light of the substantial benefit Smith received for entering into the plea agreement and the potential for a reduction in his sentence if he continued to assist the government, the undersigned finds a rational defendant in Smith's position would not have appealed his sentence; thus, he was also not prejudiced by the alleged failure. Accordingly, the undersigned concludes counsel's failure to consult was not constitutionally deficient.

Additionally, the undersigned finds that despite Smith's contentions otherwise, at the sentencing hearing counsel made an articulated objection to the pre-sentence report's determination that Smith was subject to a criminal history career offender enhancement and counsel made extensive argument to the court that Smith was not a career offender; thus, counsel was not constitutionally deficient. Therefore, the undersigned recommends that respondent's motion to dismiss be granted and Smith's petition for relief be dismissed.

## **I.**

On October 18, 2004, Smith pled guilty to one count of conspiracy to distribute fifty (50) grams or more of cocaine base in violation of 21 U.S.C. § 846. Transcript of Guilty Plea Hearing, October 18, 2004 [hereinafter Guilty Plea Tr.] at 16. The plea agreement, signed by

petitioner, contained an express waiver of his right to appeal all sentencing guideline issues and a waiver of his right to collaterally attack his sentence. Plea Agreement ¶¶ 10-11. Those waivers were detailed again at the guilty plea hearing. Guilty Plea Tr. at 5, 11.

During the plea colloquy, Smith, among other things, stated under oath that he had received a copy of the indictment, that he had discussed the charges and his case with counsel, that he was fully satisfied with his counsel's representation, that he had read the entire plea agreement before he signed it, that he understood everything in the agreement, that no one had made any offers or different promises or assurances to him to induce entry of the plea, that no one had forced him to enter the guilty plea, that he understood the maximum penalties for the offenses charged, that he was waiving his right to appeal and to collaterally attack his sentence, and that his plea was knowing and voluntary. Guilty Plea Tr. at 7-13. Finding that Smith was fully competent and capable of entering an informed plea and that Smith's guilty plea was knowing and voluntary, the court accepted his plea, and ultimately sentenced him to 360 months followed by a term of supervised release. Guilty Plea Tr. at 17; Transcript of Sentencing Hearing, June 28, 2005 [hereinafter Sent. Hr. Tr.] at 38. Smith did not appeal.

Smith then filed this § 2255 motion on June 22, 2006, claiming counsel was ineffective for failing to object to the court's consideration of information in the pre-sentence report finding that he was a career offender and for failing to file an appeal. On January 17, 2007, the court entered a Memorandum Opinion and Order ordering an evidentiary hearing on the issue of whether Smith asked his attorney to file an appeal. Further, finding that the remaining claims in a habeas petition should be dismissed without prejudice if a district court grants a petitioner's habeas motion due to counsel's failure to file a direct appeal, the court did not reach the merits of

Smith's other ground for relief. See Docket Nos. 22, 23. An evidentiary hearing was held on February 12, 2007. See Docket No. 31.

## II.

Smith testified at the evidentiary hearing that Anderson never explained, either before he signed the plea agreement or prior to the plea hearing, that by entering into the plea agreement he was giving up his right to appeal and/or collaterally attack his sentence; thus, he did not understand the rights he was waiving.<sup>2</sup> Transcript of Evidentiary Hearing, February 12, 2007 [hereinafter Evid. Hr. Tr.] at 21. Although Smith recalled initialing and signing each page of the plea agreement and that Anderson briefly went over each page of the plea agreement, he contended that Anderson failed to fully explain any of the terms of the plea agreement, including the appeal and collateral attack waiver and the impact of those waivers on his rights. Id. at 20-21, 30-31, 40. Smith acknowledged, however, that these provisions were reiterated at the plea hearing by the judge and counsel. Id. at 33-35, 41. Further, despite his assertion that he was completely unaware of these provisions, Smith admitted that he was able to read, that he independently read many of the provisions of the plea agreement, including the paragraph acknowledging counsel had carefully reviewed every part of the plea agreement with him and that he was fully aware of the consequences of entering into the plea agreement, and that he skimmed the remainder of the plea agreement. Id. at 29-30, 40-42.

Smith testified that sometime after the guilty plea hearing, he reviewed the pre-sentence report with Anderson. Id. at 21. In reviewing that report, Smith recalled being surprised by the

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<sup>2</sup>The plea agreement was signed on September 20, 2004, while Smith was housed at the Roanoke City Jail, and the plea hearing was held on October 18, 2004.

drug weight attributed to him in the pre-sentence report and discussing this concern with Anderson. Id. at 22. He also recalled discussing with Anderson his prior state convictions which were determinative in the pre-sentence report's conclusion that he was subject to a career offender criminal history enhancement. Id. at 22-23. Nonetheless, he maintained that he disregarded the effect that information may have ultimately had on the length of his sentence, and he remained hopeful that his sentence would be reduced by a substantial assistance motion. Id. at 27, 32.

Following the sentence pronouncement, Smith testified that he was so surprised by the magnitude of his sentence, he asked Anderson to file an appeal. Id. at 24-26, 38. He also claims that within a week of the pronouncement he made a collect call to Anderson from the Roanoke City Jail, spoke to Anderson, and again informed him that he wanted Anderson to note an appeal. Id. Thereafter, he claims he had no further contact with Anderson. Id.

At the evidentiary hearing, Anderson testified that he could not specifically recall discussing with Smith his waiver of his right to appeal or collaterally attack his sentence either before the plea agreement was signed and/or prior to his waiver of those rights at the guilty plea hearing. Id. at 4. Additionally, he testified that he could not specifically recall going over with Smith the advantages or disadvantages of appealing. Id. at 4-5. However, Anderson did testify that his practice is to go over all the terms of the plea agreement with his clients before they sign the plea agreement. Id. at 4-5, 7-8, 17-18. This includes, (1) going over the specific facts of the case which would affect sentencing guideline calculations including, drug weight, career offender status, and role in the offense, and, thus, the defendant's ultimate sentence; (2) what agreeing to the terms of the plea agreement would ultimately mean for the defendant in terms of

the charges on which he would be convicted and which charges would be dismissed; (3) the rights the defendant was agreeing to waive by virtue of the plea agreement and, specifically, the defendant's waiver of his right to appeal and collaterally attack his sentence; and (4) going over the advantages and disadvantages of noting an appeal after the guilty plea was entered. Id. Anderson further testified that as he went over each page of the plea agreement with his client, he would have the client initial the bottom of each page and, after reviewing the entire agreement, he would have the client sign the back page. Id. at 18-19. He continued that only after fully explaining all the provisions of the plea agreement and after his client had initialed each page and signed the last page, would he too sign the last page. Id. Further, although Anderson could not recall going over this particular plea agreement with Smith, he testified that because Smith's initials were on each page, Smith's signature was on the last page, and his own signature was on the last page, he was confident that he had gone over all the provisions of the plea agreement with Smith. Id.

Anderson likewise testified that although he could not specifically recall discussing the pre-sentence report with Smith before the sentencing hearing, it was his practice to do so. Id. at 13. Nonetheless, he stated that that he recalled discussing the ramifications of the information contained in the pre-sentence report with Smith. Id. at 54. Specifically, he stated that contrary to his initial belief that Smith would receive a sentence of between twelve and fifteen years, after reviewing the information in the pre-sentence report he believed Smith would receive such a sentence only if the court sustained all of their objections to the pre-sentence report. Id. at 54. Anderson testified that he apprised Smith of this change in his expectations, but that Smith remained hopeful he would still receive a lesser sentence. Id. at 15, 54.

Anderson also testified that he could not recall whether Smith asked him to file an appeal after the sentence was pronounced. Id. at 8-9, 16. He testified, however, that had Smith requested he do so, he would have made a notation in Smith's file. Id. Additionally, because filing an appeal would have violated the terms of the plea agreement and would have jeopardized the likelihood of Smith receiving a motion for substantial assistance, he would have confirmed by means of a letter and/or a subsequent meeting with Smith that Smith truly wanted to appeal his sentence. Id. at 8-10, 48, 51. Anderson went on to explain that at the time of sentencing Smith was cooperating with authorities in the investigation of other criminal activity, and he and Smith hoped that this cooperation would result in a motion for substantial assistance. Id. at 11, 16, 50. However, noting an appeal would have jeopardized such a likelihood and would also have caused Smith to lose the other benefits of the plea agreement, namely the dismissal of the other charges in the indictment. Id. at 9-11, 52. Regardless, Anderson testified that in reviewing Smith's case file he found no notation that Smith expressed any desire to appeal his sentence immediately after the sentence pronouncement nor were there any notations or other evidence of phone calls, correspondence, or meetings with Smith or his family members regarding the filing of an appeal after the sentence pronouncement. Id. at 10-11, 49-53.

Additionally, Anderson testified that before the evidentiary hearing he reviewed his firm's phone call logs to verify that Smith had not made any calls to Anderson following the pronouncement of sentence. Id. at 43-44. Anderson testified that all collect calls received and accepted at his office from the Roanoke City Jail were logged in a spiral bound notebook. Id. at 43-44, 46-47, 51. Calls were neither logged nor accepted from the jail if the client's attorney was not available at the time the call was received. Id. at 43-44, 46-47, 49. Based on the

absence of any record in the phone log related to Smith, Anderson testified that he did not believe Smith had called and spoken to him following the pronouncement of the sentence. See id.

### III.

Criminal defendants have a Sixth Amendment right to “reasonably effective” legal assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel, a defendant must show first that counsel’s representation fell below an objective standard of reasonableness, and second, that counsel’s defective performance prejudiced defendant. Id. at 688, 694. This same test is applicable to those situations where trial counsel was allegedly ineffective by failing to file a notice of appeal. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). To establish a Sixth Amendment violation based on counsel’s failure to appeal, Smith must prove that counsel was ineffective, and but for that ineffectiveness, an appeal would have been filed. United States v. Witherspoon, 231 F.3d 923, 926 (4th Cir. 2000) (citing Flores-Ortega, 528 U.S. 470).

Where a defendant instructs his attorney to file an appeal and counsel fails to do so, counsel’s representation is per se ineffective. Witherspoon, 231 F.3d at 926; accord Flores-Ortega, 528 U.S. at 477 (“We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”). However, where the defendant neither instructs his attorney to note an appeal nor explicitly states that he does not wish to appeal, counsel’s deficiency in failing to appeal is determined by asking whether counsel consulted with defendant about an appeal. Flores-Ortega, 528 U.S. at 478; Witherspoon, 231 F.3d at 926.

Consult means “advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant’s wishes.” Flores-Ortega, 528 U.S. at 478. If counsel has consulted with defendant, the question of deficient performance is easily answered, as counsel performs in a professionally unreasonable manner only by failing to follow defendant’s express instructions with respect to an appeal. Id. If counsel has not consulted with defendant, the court must then determine whether counsel’s failure to consult with defendant itself constitutes deficient performance. Id.

Not every failure to consult results in constitutionally deficient performance. Id. at 479. Rather, counsel only has a constitutionally imposed duty to consult where there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or (2) that the defendant reasonably demonstrated to counsel that he was interested in appealing. Id. at 480. “Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.” Id. at 480. Nonetheless, despite the fact a defendant plead guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea agreement waived his right to appeal. Id.

**A.**

There is no evidence in the record, beyond Smith’s testimony, suggesting he asked Anderson to note an appeal. Smith contends he specifically asked Anderson to note an appeal immediately after the sentence pronouncement, and he made a second request to Anderson to

note an appeal, within seven days of the sentence pronouncement, via a collect call from the Roanoke City Jail. Anderson testified that had Smith asked him to file an appeal, Anderson would have made a notation in the case file and then followed up with a letter and/or a personal meeting with Smith, which too would have been documented in the case file. However, there are no such notations, correspondence, or evidence of subsequent meetings with Smith following the pronouncement of the sentence. Likewise, there are no entries in Anderson's firm's phone logs indicating Smith made any accepted collect calls to Anderson from the Roanoke City Jail after the sentence pronouncement. The cumulative impact of the lack of any documentation to support Smith's assertion leads the undersigned to conclude that Smith did not ask Anderson to file an appeal.

Thus, the issue becomes whether Anderson consulted with Smith regarding an appeal. The evidence suggests that other than discussing the plea agreement's waiver of the right to appeal, Anderson and Smith did not discuss the possibility of appealing the sentence.<sup>3</sup> However,

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<sup>3</sup>Despite Smith's testimony that Anderson did not fully explain the plea agreement and that he did not know he was waiving his right to an appeal, Smith concedes that he and Anderson reviewed each page of the plea agreement, he initialed each page only after he and Anderson had completed reviewing that page, and he signed the agreement only after Anderson had completely reviewed the entire agreement with him. Additionally, Smith testified that he is able to read and that he independently read portions of the plea agreement before signing the agreement. He also testified that he recalled that during the Rule 11 colloquy the judge asked him questions about the plea agreement and advised him that he was waiving his right to appeal and collaterally attack his sentence. This testimony is bolstered by the plea hearing transcript which demonstrates Smith represented to the court during the guilty plea hearing that he had read the entire agreement, that he and his attorney had fully reviewed each provision of the agreement, and he fully understood the rights he was waiving under the terms of the plea agreement. Accordingly, it is clear that Smith was fully aware that by entering the plea agreement he was waiving his right to appeal. See U.S. v. Lemaster, 403 F.3d 216, 220-223 (4th Cir. 2005) (holding that allegations in a habeas petition that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always "palpably incredible" and "patently frivolous or false.").

(continued...)

the undersigned concludes this does not amount to constitutionally deficient performance because there is no reason to believe that a reasonable defendant in Smith's circumstances would have wanted to appeal and Smith did not demonstrate any interest in appealing. In reaching this finding the undersigned finds most important the facts that Smith entered into a plea agreement and received certain benefits therefrom, there were no non-frivolous grounds for an appeal, and Smith did not demonstrate to counsel that he was interested in appealing.

**1.**

In consideration for Smith pleading guilty to count one of the indictment for conspiracy to distribute and possess with intent to distribute fifty (50) grams or more of a mixture or substance containing cocaine base, waiving his right to appeal any sentencing guideline factors or the court's application of sentencing guideline factors to the facts of his case, and waiving his right to collaterally attack his sentence, Plea Agreement at ¶¶ 2, 10, 11, the government dismissed four other counts in the indictment for possession with intent to distribute less than five grams of cocaine base. *Id.* at ¶ 3. Additionally, the plea agreement provided for a two level reduction in the offense level for sentencing purposes for acceptance of responsibility and that the government would recommend a sentence of incarceration at the low end of the applicable sentencing guideline range. *Id.* at ¶¶ 5,7. Finally, the agreement left open the possibility that Smith would receive a motion for substantial assistance for his efforts to aid the government. *Id.* at ¶ 17. In addition to the above noted benefits for entering into the agreement, the governmental also agreed to withdraw its information to enhance sentence under 21 U.S.C. § 851 and would move the court for an additional one level point reduction for acceptance of responsibility. The

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<sup>3</sup>(...continued)

combined benefit of the bargain to Smith was substantial - Smith now faced a mandatory minimum sentence of just ten years, rather than a mandatory minimum of twenty years with the § 851 enhancement on just count one of the indictment, and the risk that he would be sentenced to twenty additional years if convicted on the four other counts in the indictment in which he was charged was eliminated.

Smith received the benefits of his agreement. At the plea hearing the government moved to dismiss the remaining four counts of the indictment and recommended that Smith be sentenced at the low end of the guideline range. Guilty Plea Hr. at 4-5. Before sentencing, the government moved to withdraw the information for the § 851 enhancement and moved the court to apply an additional one level point reduction for acceptance of responsibility. Docket No. 222, 268. Smith was ultimately sentenced to 360 months, the minimum sentence in the guideline range as determined by his criminal history category. Sent. Hr. Tr. 35-39.

## 2.

Smith had no non-frivolous grounds on which to base his appeal.<sup>4</sup> At the sentencing hearing, counsel objected to certain information in the pre-sentence report. Specifically, counsel argued that the drug weight determination was inaccurate and that the determination that Smith was a career offender and that he played a managerial role in the conspiracy were unfounded.

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<sup>4</sup>Counsel testified at the evidentiary hearing that he believed his objections to the pre-sentence report were colorable claims which could have been raised on appeal had Smith not waived his right to appeal. Evid. Hr. Tr. 16. The only issue which Smith now contends should have raised on appeal related to the court's determination that he was a career offender. However, as noted herein the court properly determined that Smith was a career offender; thus, an appeal on such ground would have no merit. Further, counsel's testimony establishes that counsel was aware that Smith knowingly and voluntarily waived his right to appeal. Therefore, although this may have been a non-frivolous objection to information contained in the pre-sentence report, it did not provide a non-frivolous ground for appeal when considered in light of the appeal waiver.

Sent. Hr. Tr. at 4-12, 31-35. The court found counsel's arguments as to drug weight and the pre-sentence report's determination that Smith was a career offender unpersuasive.<sup>5</sup> Id. at 36. Smith now contends that his attorney should have noted an appeal based solely on the court's improper consideration of his state felony drug convictions in determining that he was a career offender and, thus, had a criminal history of VI.

Smith contends that his three prior felony drug convictions were consolidated for sentencing purposes and, therefore, should not have been counted as separate offenses in determining that he was a career offender and had a criminal history category of VI.<sup>6</sup> The sentencing guidelines provide that a defendant is a career offender if he was at least eighteen years old at the time of the instant offense, the instant offense is a felony crime of violence or a controlled substance offense, and the defendant had at least two prior felony convictions for either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1. Any predicate conviction, whether or not the defendant has been sentenced, must be counted. See U.S.S.G. §

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<sup>5</sup>The court sustained in part Smith's objection to the pre-sentence report's conclusion as to Smith's role in the offense and gave him a two point upward adjustment rather than a three point upward adjustment. Sent. Hr. Tr. at 36.

<sup>6</sup>Smith also argues that these offenses were improperly considered in determining his base level offense, thus, subjecting him to a base level of 37 rather than 32. However, this is clearly incorrect. The pre-sentence report found that the base level offense was 36 based on a drug weight of at least 500 grams, but less than 1.5 kilograms of cocaine base, with a plus two for possession of a firearm during a drug trafficking activity, a plus three for his role in the offense, and a minus three for his acceptance of responsibility. Pre-Sentence Report at ¶¶ 74-80. This resulted in an offense level of 38. Id. at ¶ 81. This was then compared with the offense level if the career offender enhancements were applied. When those enhancements were applied, the base offense level was 37 with a minus three for acceptance of responsibility, resulting in a final base level of 34. Id. at ¶¶ 82-83. Under U.S.S.G. § 4B1.1(b), because the base offense level without the career offender enhancement was greater, it was applied. Pre-Sentence Report ¶¶ 85-86. Accordingly, the allegedly wrongful consideration of his prior drug convictions was immaterial in determining Smith's base level offense.

4B1.2, cmt. n.3 (2004) (stating that the provisions of U.S.S.G. § 4A1.2 are applicable for the counting of convictions under U.S.S.G. § 4B1.1); see also U.S.S.G. § 4A1.2(a)(4) (2004) (stating that “[w]here a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence”); see also United States v. Hondo, 366 F.3d 363, 365 (4th Cir. 2004).

Smith was arrested for possession of a controlled substance with intent to distribute within 1000 feet of school property on February 5, 2002, for conduct committed the same day, and again on March 25, 2002, for conduct committed the same day. Smith was arrested a third time, on October 14, 2002, for distribution of a controlled substance within 1000 feet of a school on or about March 14, 2002. On or about March 10, 2003, Smith pled guilty to these charges, but he failed to appear for sentencing on May 2, 2003, and a warrant was issued for his arrest. Pre-Sentence Report at ¶¶ 90-94.

Smith now contends that Application Note 3 of U.S.S.G. § 4A1.2 mandates that because these sentences were consolidated for sentencing, they are related offenses which should not be counted separately for career offender enhancement purposes. However, Smith ignores the first provision of this note which states “sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense).” U.S.S.G. § 4A1.2, cmt. n.3. Thus, an intervening arrest occurs if the defendant is arrested between the time he committed the first offense and the time he committed the second offense. Id. Smith was arrested on February 5, 2002, for conduct also committed that day, for possession with intent to distribute heroin. Smith was arrested again on March 25, 2002, for conduct committed the same day, for possession with intent to

distribute heroin and cocaine base. As the February 5, 2002 arrest intervened between the two offenses, these offenses cannot be related. Likewise, although Smith was not arrested on the charge of distributing a controlled substance on March 14, 2002 until October 14, 2002, because the February 5, 2002 arrest occurred between the February 5, 2002 offense conduct and the March 14, 2002 offense conduct, those two offenses are unrelated.<sup>7</sup> See United States v. Huggins, 191 F.3d 532, 539 (4th Cir. 1999) (finding that because defendant was arrested on the first offense one month prior to committing the second offense, there was an intervening arrest and the offenses were not related).

Moreover, because there is no formal order of consolidation as to the February 5, 2002, March 14, 2002, and March 25, 2002 offenses, these offenses may be considered separately under the guidelines. United States v. Cook, 50 F.3d 294, 298 (4th Cir. 1995), cert. denied, 515 U.S. 1167 (1995) (holding that because there are many reasons for consolidating unrelated crimes for sentencing purposes, absent a formal order of consolidation all offenses will be considered separate and unrelated for purposes of determining whether a defendant has sufficient prior convictions to be labeled a career offender); United States v. Poole, 47 Fed. Appx. 200, 203 (4th Cir. 2002) (finding that the court need only make a legal inquiry as to whether a formal order of consolidation has been entered to determine if prior offenses are related for sentencing guideline purposes). Accordingly, it is evident that Smith's three drug convictions are not

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<sup>7</sup>The undersigned notes that some argument could be made that the March 14, 2002 distribution charge is related to the March 25, 2002 charge because there was no intervening arrest between those offense dates and the offenses appear to have been consolidated for sentencing. However, the court need not address this issue further because it is clear that the February 5, 2002 offense is not related to either of the March offenses. Therefore, Smith plainly has two previous unrelated controlled substance offenses, and he is subject to the career offender classification.

related for guideline purposes and were properly considered in determining whether Smith is a career offender.

As Smith was previously convicted of at least two prior felonies involving controlled substances, he was more than eighteen years old at the time of the instant offense, and the conviction at issue was for another controlled substance offense there was a clear basis for determining that Smith is a career offender subject to a criminal history category of VI. U.S.S.G. § 4B1.1. Accordingly, the undersigned finds this was not a meritorious issue for noting an appeal.

To the extent Smith argues these prior convictions were not properly considered in determining that he was a career offender because he had not yet been sentenced on those offenses, it is without merit. Smith concedes he pled guilty to the aforementioned crimes and was not sentenced only because he failed to appear for sentencing. Adjudications of guilt following a guilty plea are countable offenses under the sentencing guidelines regardless as to whether a sentence actually has been imposed. U.S.S.G. § 4B1.2. It is the guilt establishing proceeding and not the formal entry of judgment which determines whether there has been a countable offense. United States v. Pierce, 60 F.3d 886, 892 (1st Cir. 1995), cert. denied, 518 U.S. 1033 (1996). Accordingly, the undersigned finds the court properly considered Smith's prior felony convictions for drug related offenses in concluding that he is a career offender, making this another non-meritorious issue on which to note an appeal.

Smith knowingly, voluntarily, and expressly waived his right to appeal and his right to appeal the court's application of any of the sentencing guideline factors to the facts of his case.<sup>8</sup> Therefore, the only claims Smith could raise on appeal, despite his waiver, were that the sentence imposed was in excess of the maximum penalty allowed or was based on the consideration of a constitutionally impermissible factor such as race. United States v. Lemaster, 403 F.3d 216, 218 n.2 (4th Cir. 2005) (citing United States v. Marin, 961 F.2d 493 (4th Cir. 1992)). Smith was sentenced within the statutory maximum and at the low end of the sentence guideline range. Smith has not made any suggestion that he was sentence based upon consideration of any constitutionally impermissible factor. Accordingly, the undersigned finds that Smith had no non-frivolous grounds for appeal.

Moreover, Anderson and Smith both testified at the evidentiary hearing that after sentencing both remained hopeful that Smith's continued cooperation with the government would result in a motion for substantial assistance. Therefore, had Smith appealed his sentence, he faced losing the substantial benefits he received under the terms of his plea agreement and his opportunity to earn a substantial assistance motion. A reasonable defendant would not have jeopardized the benefits of his plea agreement and the potential for a sentence reduction to file a baseless appeal. Under these circumstances, there was no reason for counsel to believe Smith would be interested in filing an appeal.

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<sup>8</sup>To the extent Smith asserts his plea agreement was not knowing and voluntary, it is without merit. Smith's initials on each page of the plea agreement, his signature on the last page of the plea agreement, and his testimony during the plea hearing conclusively establish that he understood the terms of the plea agreement, including the appeal waiver. Lemaster, 403 F.3d at 222.

### 3.

Finally, following the sentence pronouncement, Smith made no efforts to demonstrate his interest in a filing an appeal on the record to the court or counsel despite being advised that although he had waived his right to appeal, he could still have noted an appeal by filing a notice of appeal with the clerk within ten days of the date of entry of judgment. Sent. Hr. Tr. 40-41. As noted above, although Smith alleges he later contacted Anderson at his office and asked him to appeal, the undersigned finds that the absence of any documentation or record of any communication between Smith and Anderson following the hearing belies this claim.

Smith testified because he was expecting to receive a sentence of between twelve and fifteen years, he was shocked and wanted to appeal when he received a sentence of 360 months. Anderson likewise indicated that before receiving the pre-sentence report, he too expected that Smith would be given a twelve to fifteen year sentence. However, after receiving the pre-sentence report, which contained information as to the actual drug weight, Smith's role in the conspiracy, and the career offender enhancement, his expectation changed. As Smith concedes Anderson reviewed those provisions of the pre-sentence report with him before the sentencing hearing which may have caused an upward departure in his sentence, his assertion that he was completely unaware of the potential sentence is not credible.

Further, it is clear that Smith was well aware of the potential sentence he faced when entering into the guilty plea. The plea agreement notes that the sentencing range for the count to which Smith was pleading guilty was from ten years to life imprisonment. Plea Agreement at ¶ 1. Smith was again advised at the plea hearing by the judge that he faced a sentence of at least

ten years and up to life in prison. Guilty Plea Tr. at 9. Thus, his claim of absolute shock instigating a desire to appeal rings hollow.

## B.

In light of all these considerations, the undersigned recommends the court find that Anderson was not constitutionally deficient in failing to consult with Smith about an appeal following the sentencing hearing. See Zaldivar-Fuentes v. United States of America, No. 7:06cv00465, 2007 WL 473993, at \*4 (W.D. Va. Feb. 7, 2007) (holding that where defendant entered a plea agreement waiving his right to appeal any sentencing guideline issue, there was no apparent non-frivolous ground for appeal, and the court apprised defendant of the right to appeal, counsel had no duty to consult); Barksdale v. United States of America, No. 2:05cv00245, 2006 WL 1117813, at \*9-10 (E.D. Va. April 26, 2006) (finding no duty to consult when defendant entered a guilty plea, there was no basis for an appeal, and an appeal would have jeopardized defendant's likelihood of receiving a motion for substantial assistance); United States v. Miles, No. 05-658, 2007 WL 218755, at \*8-10 (E.D. Pa. Jan. 26, 2007) (stating that when defendant entered a plea agreement waiving his right to appeal or collaterally attack his sentence except on the issue that his sentence exceeded the statutory maximum, counsel knew defendant was sentenced within the statutory maximum, and defendant did not demonstrate any interest in appealing his sentence, counsel had no duty to consult).

## IV.

Smith also asserts that counsel was ineffective for failing to make specific objections to information in the pre-sentence report related to the consideration of his prior offenses in

determining that he was a career offender.<sup>9</sup> To establish a claim of ineffective assistance of counsel at sentencing, Smith must demonstrate that Anderson's performance was deficient and that but for counsel's errors, he would have received a lesser sentence. Strickland, 466 U.S. at 687-88, 692-94.

Despite his contention to the contrary in his habeas petition, during the evidentiary hearing Smith testified that Anderson objected to the career offender enhancement in the pre-sentence report. Evid. Hr. Tr. at 23. The sentencing hearing transcript likewise reveals that Anderson made an extensive argument as to why Smith's prior convictions should not be considered countable convictions in making a career offender determination. Sent. Hr. Tr. 5-8, 32. Moreover, as noted above, Smith's prior felony drug convictions were properly considered by the court for determining the applicability of the career offender enhancement. Therefore, counsel's alleged failure was not prejudicial and does not amount to ineffective assistance.

## V.

Based on the foregoing, the undersigned finds that Smith has failed to establish any credible evidence which suggests that counsel provided constitutionally deficient assistance. Accordingly, the undersigned recommends that the respondent's motion to dismiss be granted and that Smith's motion for relief pursuant to 28 U.S.C. § 2255 be dismissed in its entirety.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that

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<sup>9</sup>Although little evidence was heard on this issue at the evidentiary hearing, because the undersigned recommends that Smith's claim that counsel was ineffective for failing to file a notice of appeal be dismissed, the undersigned will address Smith's remaining claim of ineffective assistance.

pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to petitioner and counsel of record.

**ENTER:** This 29<sup>th</sup> day of March, 2007.

/s/ Michael F. Urbanski  
United States Magistrate Judge