

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-7917

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RICHARD HARRY ROBERTSON, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (CR-02-19; CA-04-121)

Submitted: February 7, 2007

Decided: March 5, 2007

Before MICHAEL, KING, and DUNCAN, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Richard Harry Robertson, Jr., Appellant Pro Se. Thomas Richard Ascik, Amy Elizabeth Ray, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Harry Robertson, Jr., appealed the district court's order dismissing his 28 U.S.C. § 2255 (2000) motion, and we granted a certificate of appealability on Robertson's claim that his counsel was ineffective by failing to appeal his conviction despite Robertson's request that he do so.* For the reasons that follow, we vacate the district court's order as to Robertson's ineffective assistance of counsel claim and remand for further proceedings.

Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the district court shall hold a prompt hearing to determine the issues and make findings of fact and conclusions of law as to the movant's claims. 28 U.S.C. § 2255. A hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed material facts and a credibility determination is necessary to resolve the issue. See United States v. Witherspoon, 231 F.3d 923, 925-27 (4th Cir. 2000); United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993).

In its informal brief to this court, the Government concedes "that the record before the district court raised a

*In the same order, we denied a certificate of appealability and dismissed Robertson's appeal with respect to his remaining claim that his sentence violated United States v. Booker, 543 U.S. 220 (2005).

genuine issue of material fact as to whether trial counsel's performance was per se ineffective under Peak. Accordingly, the district court's summary dismissal of this claim without resolving the dispute was in error." We agree. Accordingly, we vacate the district court's order as to Robertson's ineffective assistance of counsel claim and remand that claim for further proceedings. We grant Robertson leave to proceed in forma pauperis on appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED