FILED

MAY 15 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT AUGAFA, Petitioner - Appellant, v. UNITED STATES OF AMERICA, Respondent - Appellee.	No. 01-17498 D.C. No. CV-99-00806-HG CR-97-00394-1-HG MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

Argued and Submitted May 8, 2003
Honolulu, Hawaii

Before: GOODWIN, RYMER, and T.G. NELSON, Circuit Judges.

Scott Augafa appeals the district court's denial of his 28 U.S.C. § 2255 motion on the ground that his Fifth and Sixth Amendment rights to counsel and due process were violated by the magistrate judge's failure to appoint counsel for

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

part of a 28 U.S.C. § 2255 evidentiary hearing. The evidentiary hearing was to determine whether trial counsel was ineffective in advising Augafa about the safety valve, U.S.S.G. § 5C1.2, or failing properly to argue for safety valve relief at sentencing. However, as the district court held, Augafa's 1988 conviction for Harassment was properly included in his criminal history calculation. That ruling is not certified for appeal. The Harassment conviction put Augafa into a criminal history category of II, which made him ineligible for safety valve relief as a matter of law. U.S.S.G. § 5C1.2(a)(1). For this reason, he cannot have been prejudiced by counsel's failure (if any) to explain cooperation adequately. *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, neither the conduct nor outcome of the evidentiary hearing has any bearing on the relief sought in Augafa's § 2255 petition. The appeal is accordingly moot.

DISMISSED.