UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v. **Criminal Case Number 8:08-cr-126-EAK-TBM-1**
Civil Case Number 8:12-cv-630-T-17TBM

ABRAM THOMPSON ,
Defendant-Petitioner.
_____________________________________/

DEFENDANT-PETITIONER ABRAM THOMPSON'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Defendant-Petitioner ABRAM THOMPSON ("Thompson"), by his undersigned counsel, William Mallory Kent, herewith files his proposed findings of fact and conclusions of law based on the pleadings and evidence presented at the evidentiary hearing conducted in this matter January 30, 2014.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 8, 2010, a federal grand jury in Tampa, Florida, returned a superseding indictment against Thompson and two others. The indictment charged Thompson with conspiring to possess with the intent to distribute five kilograms or more of cocaine, and 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 846 (count one), and possessing with the intent to distribute 500 grams or more of

cocaine, also in violation of 21 U.S.C. § 846 (count two). Doc. cr-28. On December 1, 2008, Thompson proceeded to trial. A jury found him guilty of both counts of the superseding indictment on December 12, 2008. Doc. cr-166. On March 27, 2009, this Court sentenced Thompson to 360 months incarceration. Docs. cr-195, cr-202. Thompson filed a notice of appeal on April 4, 2009. Doc. cr-207. On December 27, 2010, the Eleventh Circuit affirmed Thompson's conviction and sentence but vacated co-defendant's Powell's conviction and life sentence on the basis of a suppression issue. *United States v. Powell*, 628 F.3d 1254 (11th Cir. 2010).[1]

Thompson filed a timely and sufficient, counseled petition under 28 U.S.C. § 2255, to vacate and set aside his conviction and sentence in this case, which raised several grounds, all but one of which have heretofore been denied by this Court. CR-20. This Court set the matter for an evidentiary hearing as to Thompson's first ground, to determine whether Petitioner's counsel adequately advised him of the merits of the plea agreement that had been offered by the Government, which Petitioner rejected and then took his case to trial. Cr-20.

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[1] On remand, Powell entered a guilty plea pursuant to a written plea agreement, CR-303, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure for an agreed upon sentence of 300 months, and the Court accepted the plea agreement and Powell was sentenced to 300 months. Cr-333. Apparently that sentence is not final in a practical sense, because the docket shows a continuing series of post-conviction pleadings which hint at a possible further reduction in sentence. See Cr-334, 336, 337, 338, 339, 340 and 341.

Thompson claims that his counsel did not adequately advise him of the benefits of pleading guilty versus going to trial. Further, Thompson claims that had he taken the plea offered by the government and not gone to trial, he would have received a more favorable sentence than the sentence he actually received. This Court found that Thompson had properly and sufficiently alleged both deficient performance and resulting prejudice. Cv-20.

The Supreme Court has ruled that an attorney's failure to communicate a plea offer to his client, or to advise his client adequately about an existing plea offer, may constitute ineffective assistance of counsel. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); see also Id. at 1406 (stating that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2009)). Claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland, which requires defendants to show both deficient performance and resulting prejudice. See *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

To show deficient performance, a § 2255 movant must show that defense counsel breached his duty to promptly communicate formal offers from the prosecution that may have allowed the defendant to accept a plea on favorable terms

and conditions. *Fyre*, 132 S. Ct. at 1408. In *Frye*, the Supreme Court held that "when defense counsel allow[s] an offer to expire without advising the defendant or allowing him to consider it, defense counsel [has] not render[ed] the effective assistance the Constitution requires." Id.

In the instant sworn motion, Thompson claimed that defense counsel failed to adequately explain the benefits of a guilty plea on the application of the federal sentencing guidelines. Doc. cv-9 at 7. As Thompson pointed out, the government had presented no sworn statements from defense counsel rebutting this claim, but instead relied on the presumption that since trial counsel was experienced, the Court should assume that he rendered adequate advice in this area. Because there was no evidence on the record supporting either Thompson's or the government's position (other than Thompson's sworn allegation), this Court set this issue for an evidentiary hearing.

Thompson bears the burden of proving, by a preponderance of evidence, that counsel's performance was unreasonable. *Chandler*, 218 F.3d at 1313 (citation omitted). "Counsel's competence...is presumed, and the [defendant] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Id. at 1314 n.15 (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986)).

In *Frye*, the Supreme Court conclusively held that defense counsel has a duty

to promptly communicate favorable plea offers from the prosecution to their clients. *Frye*, 132 S. Ct. at 1408. However, the Court declined to define the duties and responsibilities of defense counsel in the plea bargain process. Id. The Court also declined to define these duties in *Lafler* because all parties conceded that defense counsel's performance was deficient. *Lafler*, 132 S. Ct. at 1384.

However, in *Frye*, the Court did suggest that there is a greater need for scrutiny of claims alleging ineffective assistance of counsel where a defendant has rejected, rather than accepted, a plea offer. Compare *Frye*, 132 S. Ct. at 1406 ("[A]cceptance of a plea offer [is] a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered, the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against claims that the plea was the result of inadequate advice."), with id. at 1407 ('When a plea offer has lapsed or been rejected... no formal court proceedings are involved...the plea-bargaining process is often in flux, with no clear standards or timeliness and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event.). In sum, the *Frye* Court concluded that "criminal defendants require effective counsel during plea

negotiations," *Frye*, 132 S. Ct. at 1407-08 (emphasis added), noting that "anything less... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Frye*, 132 S. Ct. at 1408 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964) (internal quotation marks omitted).

As such, Thompson's sworn motion claiming inadequate advisement regarding the government's plea offer, if found to be true, would constitute deficient performance. Although it is true, as the government argues, that "defendants have no right to be offered a plea... nor a federal right that the judge accept it," *Lafler*, 132 S. Ct. at 1387 (quoting *Frye*, 132 S. Ct. at 1388-89), in this context, this argument is "beside the point," see id., because "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Lafler*, 132 S. Ct. at 1387 (quoting *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)). In his reply, Thompson claimed that by filing a sworn § 2255 motion, he has provided an adequate factual basis that requires the Court to grant an evidentiary hearing on this issue. Doc. cv-19 at 2. This Court agreed and set the matter for an evidentiary hearing on this basis.

This Court found that an evidentiary hearing was necessary because “the motion and the files and records of the case [did not] conclusively show that the

prisoner is entitled to no relief." 28 U.S.C. § 2255(b). This Court found that Thompson had met his burden of establishing the need for an evidentiary hearing. *Birt v. Montgomery,* 725 F.2d 587, 591 (11th Cir. 1984) (*en banc*). "I[f] [a defendant] alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." *Aron v. United States*, 291 F.3d 708, 714-15 (11th Cir. 2002) (internal quotation marks and citations omitted). However, a "district court is not required to hold an evidentiary hearing where [a defendant's] allegations are affirmatively contradicted by the record, or the claims are patently frivolous." Id. at 715; see also *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008).

Further, this Court found that Thompson's claims under this ground were cognizable under *Frye* and *Lafler*, and if proven true, would entitle him to relief. Because the record contained no evidence contradicting Thompson's claims, and this Court could not adequately assess Thompson's claims without further factual development, Thompson's request for an evidentiary hearing was granted. See *Wiley v. Wainwright*, 709 F.2d 1412, 1413 (11th Cir. 1983) ("Where, as here, the relevant factual issues [are] not developed...a hearing by the district court is mandated.").

In addition to claiming that counsel performed deficiently, Thompson also alleged that he was prejudiced by counsel's failure to adequately advise him about the

merits of the government's plea offer. Doc. cv-9 at 7. Specifically, Thompson claimed that if defense counsel had advised him to do so, he would have pled guilty in order to receive a lesser sentence. Id. In its response, the government contended that Thompson has failed to demonstrate any prejudice with respect to his counsel's alleged failure to inform him of the potential consequences of proceeding to trial as opposed to entering a guilty plea because he did not demonstrate a reasonable probability that but for counsel's alleged deficiencies, he would not have pled guilty anyway. Doc cv-16 at 11.

However, in the present context, "having to stand trial, not choosing to waive it, is the prejudice alleged." *Lafler*, 132 S. Ct. at 1385. To show prejudice resulting from deficient performance, a defendant must show a reasonable probability that a plea to a lesser charge or a sentence of less prison time would have procured a more favorable end result than the one actually imposed. Id.; *Frye*, 132 S. Ct. at 1409. Where a plea offer has lapsed or been rejected, the showing of reasonable probability is two-fold: (a) a defendant must demonstrate a reasonable probability he would have accepted the earlier plea offer had he been afforded effective assistance of counsel, and (b) a defendant must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." *Frye*, 132 S. Ct. at 1409. Operating under the presumption that

prosecutors and judges in most jurisdictions are familiar with the boundaries of acceptable plea bargains and sentences, the Supreme Court concluded that it should not generally be difficult to objectively assess whether an intervening circumstance would likely cause prosecutorial withdrawal or judicial rejection of a plea agreement. *Frye*, 132 S. Ct. at 1410.

By alleging prejudice in the present sworn motion to vacate, Thompson had provided a factual basis demonstrating that he would have accepted the earlier plea offer had he been afforded effective assistance of counsel. Because the record contained no evidence contradicting Thompson's claims, and this Court could not adequately assess Thompson's claims without further factual development, Thompson's request for an evidentiary hearing on the prejudice prong was also granted. See 28 U.S.C. 2255(b) (A district court shall hold an evidentiary hearing on a habeas petition "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."); see also *Wiley v. Wainwright*, 709 F.2d at 1412, 1413 (11th Cir. 1983) ("Where, as here, the relevant factual issues [are] not developed...a hearing by the district court is mandated.").

Further, the Court found, prior to the evidentiary hearing, that nothing in the record suggests that the prosecution would have withdrawn its former plea offer, or that the court would have rejected it. In *Frye*, the defendant's commission of a

criminal offense between the lapse of the prosecution's plea offer and a later entered guilty plea led the Court to conclude that the prosecution may not have adhered to the original plea agreement unless required to do so by state law. Id. at 1411. There is no allegation of similar intervening circumstances in the present case.[2]

Lafler is more analogous to the allegations in the present case. In *Lafler*, defense counsel communicated the favorable plea offer to the defendant, who rejected it on the advice of counsel. *Lafler*, 132 S. Ct. at 1383. After the plea offer had been rejected, the defendant was found guilty of the charges by a jury trial and subsequently received a harsher sentence than offered in the rejected plea bargain. Id. There, the government conceded that counsel's advice regarding the plea offer constituted deficient performance. Id.

In *Lafler*, the Court considered appropriate remedies for defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial. See *Lafler*, 132 S. Ct. at 1388-89. The Court stated that where "the sole advantage a defendant would have received under the plea is a lesser sentence... the court may conduct an evidentiary hearing to determine

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[2] Indeed, in this regard, Thompson notes the fact that Powell, who went to trial with Thompson and was sentenced to *life imprisonment* (in comparison to Thompson's 360 month sentence), on remand was offered by the Government a Rule 11(c)(1)(C) plea agreement for 300 months, and this after having taken the Government through both trial and appeal.

whether the defendant has shown a *reasonable probability* that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial or something in between." Id. Thompson had alleged a sufficient basis for an evidentiary hearing and it was on this record and on the basis of these conclusions by this Court that the matter proceeded to an evidentiary hearing.

At the evidentiary hearing three witnesses testified, (1) Abram Thompson, Defendant-Petitioner, (2) Brent Armstrong, Petitioner's trial counsel, and (3) Morris Bornstein, Petitioner's co-counsel at trial. Prior to the evidentiary hearing the parties had stipulated that the Government had offered Thompson a written plea agreement. [GX-2]

The Government presented attorney Armstrong as a witness. Attorney Armstrong could not specifically recall that he had ever discussed the Government's proposed plea agreement with Thompson, but he did not doubt that he would have at least discussed with Thompson that the Government had tendered a proposed plea agreement although he may not have actually shown it to Thompson. [Cv-37-66]

The plea agreement [GX-2] was sent under cover of a letter dated August 29, 2008. The Government had written a letter dated September 25, 2008 which set a

deadline of October 17, 2008 for accepting the plea agreement, but attorney Armstrong did not recall ever seeing that letter. [Cv-37-66-67; GX-2; GX-3; Cv-37-71-72] According to attorney Armstrong's time records, he visited with Thompson the same day as the date on the cover letter which came with the plea agreement and only met with him one other time before the plea deadline, and he did not know if he had received the plea deadline letter at the time of that meeting. He recorded 8/10's of one hour for that meeting, and that time included the time required to clear security, get to the jail attorney conference room, wait for the client to be brought, meet with the client and exit the facility. [Cv-37-71-77]

In these two meetings the advice was given and decision made to reject the plea agreement and take the case to trial and in no meeting did attorney Armstrong ever advise Thompson that he was likely to lose at trial and therefore that he should accept the Government's proposed plea agreement.

Attorney Armstrong testified that he never gave Thompson an evaluation of the likelihood of conviction, *instead, he told Thompson that the case was "indeed a triable case"*:

> Q. *Did you ever give to him an evaluation of the likelihood Of conviction, for example, did you tell him that it was 80 percent likely he would be convicted or 50 percent likely he would be convicted or anything like that*?

A. *No*.

Q. *Is that something that you would ordinarily do in a case such as Mr. Thompson's*?

A. *No*, I would express the strong points of the defense and the weak points of the defense. The strong points of the government, weak points of the government. If the weak were strong, I would tell him you very likely are going to be convicted at trial. If the evidence wasn't strong, I would point that out. This is not a slam dunk. This is not necessarily a conviction. But if I perceived that it was, if the evidence was so strong that the likelihood of success was very, very low, I would definitely tell the client that. But if on the flip side it was a triable case, I would tell him it's a triable case. I would try and be very accurate in my estimation of what would happen at trial, but I would not put a percentage on the chances of success.

Q. Do you recall whether you made any such analysis or had any such discussion with Mr. Thompson?

A. Well, I've already told -- testified that I talked about Mr. Bernstein being an important component of the government's case, and that he was subject to impeachment. There were -- you know, there were other strong points to the defense. I don't know if I specifically remember them now, *but it was a triable case. It was indeed a triable case*. And I -- once he decided he wanted to go to trial, I tried to be accurate in my thoughts about the strength/weaknesses of the case, and that we had some good things to argue, and the Government had some good things to argue. So that's what I would tell any client before trial.

[Cv-37-69-70; emphasis supplied]

Attorney Armstrong testified that especially in court appointed cases, such as this, that a client will question the attorney's loyalty if he pushes for the client to enter a plea or accept a plea agreement, so once he explains the option to the client, he may

not ever bring it up again, if the client's initial response is that he wants to go to trial and that is consistent with his time records. [Cv-37-67-68]

Attorney Armstrong and co-counsel Bornstein met with Thompson at the jail the week before trial. [Cv-37-69] At that meeting sentencing guidelines and potential sentences were discussed. [Cv-37-69] Attorney Bornstein joined as co-counsel in this case to fulfill the requirement to serve on the CJA court appointment panel. Although he was new to the CJA panel, he had over thirty years experience in criminal defense and had been a former state prosecutor. [Cv-37-80-82] Attorney Armstrong was his law partner. [Cv-37-81]

In their meeting, attorney Bornstein relied on attorney Armstrong to give the client advice, he served more as an "observer." [Cv-37-89] Attorney Bornstein certainly did not give Thompson any advice about whether he should plead guilty or take the case to trial instead. [Cv-37-90] Attorney Bornstein thought attorney Armstrong very well may have described the case to Thompson as being "triable." [Cv-37-91]

Attorney Bornstein testified:

> So I, again, would not be shocked to find -- to be told that Mr. Armstrong did say the case was triable. This case was not without hope given, what I recall, being among other things, Mr. Bernstein's extremely checkered background, his criminal past, the consideration, the benefits that he was receiving by testifying and so on and so forth.

> So you know, as I say, this case was not what I would consider to be categorically hopeless. But I have to say that given what I recall both in my own evaluation and certainly Mr. Armstrong's discussions about the strengths of the government's case, and especially with regard to the magnitude of the penalty, that Mr. Thompson faced if convicted, [Thompson was estimated to face life on the guidelines] you know, that issue certainly factors into, in my judgment, whether, you know, a client should be counseled to seek a plea or not.

[Cv-37-92]

Attorney Bornstein agreed that the "prospects of success in a federal criminal trial are small, a drug trial." [Cv-37-92-93] Specifically as to advice that a case is triable, attorney Bornstein agreed that what a lawyer means when he says a case is triable is simply that "there is something that we can say [argue], *but we're still probably going to lose*." [Cv-37-93] Further, attorney Bornstein agreed that he had no idea what Thompson understood when attorney Armstrong described the case to him as being "triable."

In this particular case, attorney Bornstein agreed that the fact that Thompson faced 30 years to life if found guilty was "a very important factor" if not a controlling factor in weighing whether to recommend to the client that he should plead guilty rather than go to trial. [Cv-37-95-96] Therefore, when you factor in the severity of the sentence if convicted after trial, the at best unpredictability of the result and the rarity of a not-guilty verdicts in general and in this particular case, attorney Bornstein

testified that *there should have been a recommendation made to Thompson that he plead guilty*.

Attorney Bornstein took rather detailed and careful contemporaneous notes of the attorney client conferences between Thompson and his attorneys. [GX-4, GX-5] Nowhere in any of the attorney's notes was there ever any reference to any advice being given to Thompson that he plead guilty. [Cv-37-99-100] Nor were there any notes, correspondence, memos to the file or any other record of any communication being made to Thompson by attorney Armstrong in connection with the Government's proposed plea agreement or otherwise, that Armstrong ever advised Thompson to accept the Government's plea agreement and plead guilty or after the deadline for the plea agreement had expired, any advice that Thompson plead guilty without benefit of a plea agreement. [Cv-37-100-101][3]

Armstrong's advice was limited to explaining options and telling Thompson that his case was triable:

> well, I have to say I don't have a really specific recollection of conferences I had with Mr. Thompson. I think I met with him at least 15 times over the course of my representation of him. But I would have done what I explained earlier, I would have explained to him the process. I would have explained to him arraignment. He probably already waived arraignment at that point in time. I'm not sure. But I

[3] Indeed there was no evidence that the plea agreement had ever been sent to Thompson or a copy provided to him. [Cv-37-101]

> would have explained what a status conference was and wouldn't necessarily -- probably would not have been brought to the status conference. I would explain discovery and I would go over discovery with him. I would talk to him about it at some point during the course of the representation pleading guilty, and I'm quite certain I did that versus going to trial, the benefits of pleading guilty. The certainty of pleading guilty versus the uncertainty of trial. And then, depending upon the decision he made, and he made a decision to go to trial, then I worked the case up for trial and we did go to trial.

[Cv-37-61-62]

Indeed, attorney Armstrong was emphatic that he saw his role as making sure the client understood he had the *option* of pleading guilty and the *option* of going to trial and making sure that the client understood the consequence of each option, but especially as a court appointed attorney *he did not "try[. . .] to talk the client into pleading guilty*." [Cv-37-68; emphasis supplied]

This testimony was consistent with that of Thompson, who testified that attorney Armstrong never gave him any firm advice one way or the other whether to plead guilty or to go to trial. [Cv-37-12; Cv-37-16] However, as Thompson explained, he had never been to trial before in his life, had never had a case in federal court before, and he was looking to his attorney to evaluate the case for him and if attorney Armstrong had told him that the Government's case was overwhelming and that in the attorney's judgment, based on his years of experience that he was going to be convicted at trial, therefore he should plead guilty, he would have followed that

advice.[4] Indeed, Thompson testified that he had six prior convictions in state court and in each case his defense counsel had advised him to plead guilty, and he had followed his counsel's advice and pled guilty.

Having presided over the trial of this Case the Court finds that the evidence against Thompson was overwhelming and the likelihood of conviction at trial was very high if not a near certainty. The Court agrees with the testimony of attorney Bornstein that the circumstances of this case, the strength of the Government's case, the likelihood of conviction, the potential life penalty following a guilty verdict, meant that the attorney should have recommended to Thompson that he accept the Government's proposed plea agreement and the Court finds that any reasonably competent criminal defense attorney would have done so. On the facts of this case counsel had a duty to advise Thompson in the strongest possible terms that it was counsel's advice, based on his years of experience and training, that Thompson plead guilty. Anything less constituted deficient performance. Attorney Armstrong's performance in this respect was deficient.

Additionally, the Court finds that Thompson was prejudiced by Armstrong's

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[4] This testimony is consistent with attorney Armstrong's characterization of Thompson as "reticent" and "deadpan." Armstrong did not characterize Thompson as strong willed, obstinate, obdurate or unwilling to listen. Instead he was "quiet" and would "discuss" the case and evidence. [Cv-37-63]

deficient performance. The Government had tendered a proposed plea agreement. The Court finds that had Armstrong properly advised Thompson to accept the plea agreement and explained the true likelihood of conviction at trial, given Thompson's prior record of accepting the advice of counsel to plead guilty in his prior state cases, and given the sentencing differential resulting from a plea versus a trial conviction, Thompson would have followed his counsel's advice, and that had he done so, the sentence in this case would have been substantially less, sufficient to find that Thompson was prejudiced by his counsel's deficient performance, because he would have pled guilty under the plea agreement and would have received a substantially lower sentence.

Therefore, the Court grants Thompson's motion as to ground one, vacates his plea, judgment and sentence, and directs that the Government re-tender the previously proposed plea agreement to Thompson and that the case be reset on the Court's trial calendar, with a status conference before the Magistrate Judge at a time to be determined, with a plea deadline to be set at that status conference and that Thompson be given the option of accepting the Government's proposed plea agreement should he now so choose.

Respectfully submitted,

s/William Mallory Kent

WILLIAM MALLORY KENT
The Law Office of William Mallory Kent
1932 Perry Place
Jacksonville, Fl 32207
904-398-8000
kent@williamkent.com
Florida Bar Number 260738

Certificate of Service

I HEREBY CERTIFY that on May 1, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: W. Stephen Muldrow at w.stephen.muldrow@usdoj.gov, and Josie Thomas at Josie.Thomas@usdoj.gov.

s/William Mallory Kent
William Mallory Kent