United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

11/26/03

03-CR-6

David D. Dowd, Jr.
Judge

November 20, 2003

(330) 375-5834
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Honorable Edward E. Carnes
United States Court of Appeals
500-D Frank M. Johnson, Jr. Federal
Courthouse Annex
One Church Street
Montgomery, AL 36104

In Re: Criminal Rule 11 (c)(1) and the provision that "The court must not participate in these discussions" as referring to Guilty Plea Agreements.

Dear Judge Carnes,

I am sending this letter to you in your capacity as the Chairperson of the Criminal Rules Advisory Committee. I am also sending a copy to John Rabiej who is assigned by the Administrative Office of the Courts to assist the various advisory committees on rules.

There has been a growing trend in the Sixth Circuit to require evidentiary hearings in cases arising under 28 U.S.C. § 2255 when the defendant contends that he was denied the effective assistance of counsel on the basis that the offer of the government to engage in a negotiated guilty plea discussions was rebuffed or not communicated to the defendant by his counsel.

The purpose of my letter is to suggest that the Committee should consider a proposed amendment to Criminal Rule 11 (c)(1) by adding after the sentence declaring that "the court must not participate in these discussions," the following language by eliminating the period after the word discussions and replacing the period with a comma and then adding the following language: "but may question whether the defendant has been fully advised as to any government proposed guilty plea agreement."

Now permit to discuss the Sixth Circuit jurisprudence that has developed over the past several years.

1. The unpublished opinion in the case of *Dabelko v United States*, No. 98-3247, 2000 WL 571957 (6th Cir. May 3, 2000). A copy of the opinion is attached. In Dabelko, the Sixth Circuit reversed our district court in a Section 2255 case because the district court did not hold an evidentiary hearing after the petitioner alleged that he had been denied the effective assistance of counsel when his counsel allegedly failed to communicate a proposal of the government for a

guilty plea. On remand, the case was assigned to me, and I conducted a lengthy evidentiary hearing and then wrote a decision which is published. *See United States v. Dabelko*, 154 F.Supp.2d 1156 (N.D. Ohio 2000).

2. The next case of importance is *Griffin v. United States,* 330 F.3d 733 (6th Cir. 2003). In *Griffin* I was the trial judge and I denied the request for an evidentiary hearing in the subsequently filed *pro se* Section 2255 action because of the defendant's repeated protestations of innocence, first to the Probation Department at the time the Presentence Report was prepared and again at sentencing. The Sixth Circuit reversed and remanded for an evidentiary hearing. At that point, I recused because of my prior fact determinations that I had spread on the record. The judge to whom the case was then transferred appointed counsel for the petitioner, and the petitioner was returned to the district for the required evidentiary hearing. At the hearing, the petitioner invoked the Fifth Amendment. He was then denied relief again. A copy of the *Griffin* opinion is also attached.

As a consequence of the Sixth Circuit rulings in *Dabelko* and *Griffin,* many judges of this district are now inquiring on the record as to whether guilty plea negotiations have been conducted or whether the government has tendered a written guilty plea agreement to the defendant when it becomes apparent that the defendant has elected to go to trial. In my court, I require the proposed guilty plea agreement to be placed under seal after it has been initialed by counsel for both parties, and I inquire of the defendant if he or she has been provided a copy or had the opportunity to discuss the proposed plea agreement with his or her counsel, does he or she understand the agreement, and has he or she made the decision to go to trial.

Against that background of caution in light of *Dabelko* and *Griffin*, a third decision of the Sixth Circuit was published on November 3, 2003 in *Smith v. United States*, __F.3d __, No. 01-5215, 2003 WL 22469973 (6th Cir. Nov. 3, 2003) and a copy is enclosed. On November 17, 2003, I circulated a memorandum to my fellow judges, a copy of which is enclosed.

As a consequence of the decision in *Smith,* it now seems clear to me, to avoid the prospect of evidentiary hearings in Section 2255 cases where the subsequent claim is that the petitioner's trial counsel failed to properly explain the potential sentencing consequence, is to inquire further about the government's view as to what the worst case sentencing scenario for the defendant will be if he or she is convicted as charged. This must be done in the presence of the defendant to be effective. Then, if the defendant does enter a plea of guilty after such a discussion, then the argument on direct appeal or in a subsequent 2255 action will be that the district court violated Criminal Rule 11 (c)(1) in its present form.

Against that belief, I now respectfully suggest that the proposed amendment would give the district court judge some cover if the proposed questioning takes place and against the background that the district court is not to participate in guilty plea discussions.

I suggest that the problems created by the Sixth Circuit jurisprudence will become well known in the prison libraries and will cause a substantial increase in Section 2255 cases suggesting a denial of the effective assistance of counsel in those cases where the defendant-petitioner stands trial and is convicted with a subsequent sentence that exceeds the sentence that would have resulted had the government's rejected plea agreement been accepted.

The cost in resources when an evidentiary hearing is mandated is considerable. The petitioner-defendant must be transported back to the district by the U.S. Marshal and then additional marshal time is required to jail the petitioner and transport the petitioner back and forth to court. Counsel must be appointed and time must be devoted by the district court to the evidentiary hearing.

It may take a number of years before the predicted avalanche develops, but a stitch in time seems justified. I suggest that my proposed amendment or some variation of the proposal would be an improvement. I recognize that the committee may disagree, but I appreciate any consideration that the committee extends to my proposal.

Thank you.

Yours very truly,

David D. Dowd, Jr.
U.S. District Judge

DDD.flm
Enclosures

cc: Mr. John K. Rabiej w/enclosures
All Judges and Magistrate Judges of the Northern District of Ohio w/o enclosures

211 F 3d 1268 (Table)
Unpublished Disposition

(Cite as: 211 F.3d 1268, 2000 WL 571957 (6th Cir.(Ohio)))

NOTICE THIS IS AN UNPUBLISHED OPINION

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Richard DABELKO, Petitioner-Appellant,
v
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 98-3247.

May 3, 2000

On Appeal from the United States District Court for the Northern District of Ohio.

Before WELLFORD, SILER, and GILMAN, Circuit Judges

WELLFORD, Circuit Judge

**1 Petitioner, Richard DaBelko, moved, under 28 U S.C § 2255, to vacate or to correct a 1990 sentence of 292 months for violations of 21 U.S C §§ 846, 841, and 843(b), affirmed by a panel of this court on January 9, 1992, in Nos. 90-3926/3969/4126. DaBelko received a much more severe sentence than did his co-defendants, including his brother, in a substantial cocaine conspiracy and distribution scheme DaBelko claims in the action in district court ineffective assistance of counsel in that he alleged his attorney did not tell him about the consequences of his past felony record and other sentencing factors when he decided to go to trial rather than to plead guilty The indictment charged DaBelko (and his brother) with possession with intent to distribute cocaine--1959 grams.

In the prior opinion on appeal, this court had this to say about the sentencing disparity between the co-defendants

> The difference in the sentencing between Blum and the co-defendant's results from the following dissimilarity of criminal records and conduct. 1) Blum's cooperation with the government, 2) the trial court's awareness of additional quantities of cocaine that could not be used against Blum under U S.S G. § 1B1 8, but could be considered by the court as relevant conduct under § 1B1 3 as it relates to these appellants, 3) Blum was credited for accepting responsibility while the appellants were not, 4) Richard DaBelko had a prior drug trafficking conviction, which pursuant to 21 U.S C § 851 enhances the penalty; and 5) Richard DaBelko's sentence was increased because a firearm was found with his scales and money as part of his drug trafficking activity Given these factors, the district court did not err in refusing to depart downward for the sole purpose of harmonizing sentences where the defendants had dissimilar criminal records and conduct

We added, with respect to the quantity of cocaine attributed to DaBelko:

> The indictment charges defendants with a conspiracy beginning as early as March 1989 through May of 1989. The defendants argue that the amount of cocaine involved from March to May 1989 was 6 5 kilograms, which would make their base offense level 32. At trial, however, the conspiracy was recognized as extending back at least as far as early 1987, which expanded the amount of cocaine to 40 kilograms and raised the base offense level to 34.
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> .
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> However, here the trial court was not clearly erroneous in finding by the preponderance of the evidence that the conspiracy involved the distribution of 40 kilograms of cocaine. Blum testified about the date of the beginning the conspiracy, who the supplier was (Carol Eckman), how frequently trips were made (every 6 to 8 weeks), the amount of cocaine received per trip (3 to 5 kilograms) and the length of the relationship (lasted until August 1988) Blum also testified about the defendants' use of a new supplier (Philip Christopher) starting in September 1988, how often transactions occurred with him (again every 6 to 8 weeks) and the amount of cocaine (3 kilograms) Making conservative

estimates from this information (3 kilograms every 8 weeks) a total of 27 kilograms (nine trips at 3 kilograms) and 15 kilograms (5 trips at 3 kilograms) creates a conspiracy involving at a minimum of 42 kilograms Given these figures, the trial court was not clearly erroneous in basing its sentencing calculations on 40 kilograms of cocaine.

**2 DaBelko also argued unsuccessfully on appeal other elements of his guidelines levels--the finding that he was a supervisor of his brother in the conspiracy and the enhancement for his possession of a firearm during his drug trafficking, *see United States v Moreno,* 899 F 2d 465, 430 (6th Cir.1990), as well as the filing shortly before trial of a special information, under 21 U.S C § 851(a), relating to his prior convictions.

In this proceeding, DaBelko claims that his nearly twenty-five year sentence was imposed, rather than a much lesser plea bargain which may have been effectuated, by reason of ineffective assistance of counsel DaBelko was represented at trial by one counsel, Milano, and by two others at sentencing. A fourth has represented him in this proceeding. In essence, this proceeding involves the following contention set out in DaBelko's brief

> Prior to trial, Mr Milano failed to provide Mr DaBelko with sufficient, accurate, reliable information with which to make an informed choice whether to plead guilty or stand trial Moreover, Mr Milano did not fulfill his obligations, leaving Mr DaBelko to make decisions on his own without accurate information and advice of counsel

DaBelko also asserts that it was error for the district court not to have held a hearing on his contentions *See* 28 U S C § 2255 (requiring, among other things, that the district court "grant a prompt hearing [to] determine the issues and make findings of fact" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"), *Amiel v United States,* 209 F.3d 195, 2000 WL 378880 (2d Cir Apr 13, 2000)

To establish his ineffective assistance of counsel claim, petitioner must first "show that counsel's representation fell below an objective standard of reasonableness " *Strickland v Washington,* 466 U S 668, 687-88, 104 S Ct 2052, 80 L.Ed.2d 674 (1984). Next he must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the . offer and pled guilty " *Turner v State,* 858 F 2d 1201, 1206 (6th Cir 1988), *vacated on other grounds,* 492 U S 901 (1989), *see Hill v Lockhart,* 474 U S 52, 57, 106 S Ct 366, 88 L Ed 2d 203 (1985) Plaintiff must show this by objective evidence *See Turner,* 858 F 2d at 1206, *Hill,* 474 U.S at 59-60. Then, the government may show by "clear and convincing evidence that the trial court would not have approved the plea arrangement " *Turner,* 858 F.2d at 1209. If petitioner were to establish the bases for showing ineffective assistance of counsel, the remedy for such violation would then have to be considered, including whether a new trial should be ordered *See id* at 1207-09. Under the unique facts of that case if relief were to be ordered, a hearing might be required "at which the [government] is required to show cause why its former offer should not be reinstated." *Id* at 1209 (Ryan, J., concurring)

**3 In light of the government's argument in the instant appeal, contrary to the facts in *Turner,* it is not a given that the United States may actually have made a specific offer which DaBelko was prepared to accept regardless of his counsel's advice, or lack thereof The burden is upon DaBelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel.

We recognize that in this type of controversy a decision favorable to the defense may encourage defendants to reject plea offers, and then in the event of an unfavorable sentencing outcome with a greater penalty than offered by the prosecution, seek to overturn the sentence based upon alleged ineffective assistance of counsel We must be cautious and careful in such cases in imposing appropriate burdens not to give defendants easy avenues to obtain a second bite at the apple at the penalty stage once they have acknowledged guilt or it has been determined by the factfinders. Petitioner argues that he was constitutionally entitled to reasonable and competent advice of counsel (or advice from the prosecutor or the court) about minimum or maximum sentence exposure in the event of a guilty plea and that his chosen counsel failed to fulfill this obligation *See United States v Gordon,* 156 F 3d 376 (2d Cir 1998), *United States v Day,* 969 F.2d 39 (3d Cir.1972); *see also Paters v United States,* 159 F 3d 1043 (7th Cir.1998) The district court concluded, we believe properly, that

> [p]rior to trial a defendant is entitled to rely on his counsel to make an independent examination of the facts, circumstances, pleadings and law involved and then offer his informed opinion as to what plea should be entered [*Boria v Keane,* 99 F 3d 492, 497 (2d Cir 1996), *cert denied,* 521 U S 1118, 117 S Ct 2508, 138 L Ed 2d 1012 (1997)]

A complicating factor in this case was a dispute concerning the quantity of cocaine for which petitioner would be held responsible under the indictment The

amount determined by the sentencing judge would have a great bearing on the ultimate sentence imposed The question is whether DaBelko or his lawyer knew about the drug quantity guidelines potential, or should have known, at the critical time. The quantity determined by the district court was affirmed, in any event, in our previous opinion on the merits.

The district court found that "[t]here is nothing in the record showing that the government *would have been interested in plea bargaining* with him." (emphasis added) Further, the district court found no plea bargain was, in fact, offered to defendant What does the government say to this? Counsel for the government "stated at sentencing that 'there were very intense plea negotiations " ' Moreover, the government's brief adds·

> These negotiations focused on guideline ranges and the many factors which might have had an impact on those ranges, including (1) amounts of cocaine attributable to the defendant, (2) his role in the offense, and (3) possession of weapons. The parties, however, were never able to agree on these factors

**4 More than this, the government goes on to argue that DaBelko "was aware that guideline range negotiations included at least 20 years." [FN1]

> FN1. DaBelko admits, at least by inference, that his counsel mentioned another person's receiving a twenty-year sentence, but DaBelko said he "couldn't believe . that I was facing this kind of time."

The government's argument is that to the extent it offered DaBelko any plea bargain, it offered not to file the § 851(a) special information in exchange for DaBelko's guilty plea and to le DaBelko plead guilty and face a sentencing range under the guidelines for which the minimum was almost twenty years. DaBelko on the other hand, argues that his attorney never told him that once the government filed the special information, no sentence under twenty years would be possible if DaBelko was convicted (Indeed, DaBelko insists that even after he was convicted, his attorney professed not to understand why DaBelko was subject to a minimum sentence of twenty, rather than ten, years) We believe the district court, in light of this, was incorrect in stating that the government was not interested in a plea bargain, and that *no* plea bargain was even offered to DaBelko The petitioner conceded at sentencing that had he known the government was proposing a twenty-year minimum, he was unsure what his response would have been--"maybe" he would have made a different decision His sentencing counsel responded that "we didn't anticipate that the Court would use as a base level the 40 kilograms of cocaine."

Did the district court err in not holding a hearing in light of these circumstances? It certainly would have been preferable to have afforded petitioner a hearing. But, even if we were to hold that it was error not to have held a hearing, was such a failure a reversible error? DaBelko maintains that he was never served with (and personally did not know about) the special information seeking enhanced penalties as a repeat offender. Presumably his counsel did have such knowledge The record does not reflect that the government filed a response in district court to petitioner's motion to vacate, set aside, or correct sentence, and the district court made no reference to any response in its memorandum and order denying the motion

The issue is a close one, but we have found error in the district court's important findings that the government was not interested in a plea bargain, and that none was made or offered. Petitioner has indicated enough in his motion that his counsel may not have made an adequate examination of the facts and circumstances about guilt and sentence enhancement. His counsel may not have made an adequate, minimal examination of the applicable guidelines law so as to advise DaBelko about his serious exposure in light of circumstances involving a prior drug conviction, extent of the conspiracy and quantity of drugs, and possession of a firearm in connection with drug activities

DaBelko received a draconian sentence in this case, approved by this court in the direct appeal Without deciding at this juncture the *Strickland v Washington,* 466 U S 668, 104 S Ct. 2052, 80 L Ed 2d 674 (1984), issues, we believe in our oversight capacity it is appropriate to order a hearing in the district court to reconsider the issues raised and to determine whether DaBelko has carried his burden to demonstrate ineffective assistance of counsel, as claimed

**5 We therefore VACATE the decision of the district court and REMAND for a hearing consistent with this opinion

211 F 3d 1268 (Table), 2000 WL 571957 (6th Cir (Ohio)), Unpublished Disposition

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154 F Supp 2d 1156
(Cite as: 154 F.Supp.2d 1156)

United States District Court,
N D Ohio,
Eastern Division

UNITED STATES of America,
Plaintiff-Respondent,
v
Richard DABELKO, Defendant-Petitioner.

No. 4:97CV1076.
No. 4:89CR171.

Dec 18, 2000

Defendant convicted of conspiracy to distribute and possess with intent to distribute cocaine, possession of cocaine with intent to distribute, and use of communication facility to facilitate felony filed motion to vacate The United States District Court for the Northern District of Ohio, White, J , denied motion Defendant appealed The Court of Appeals vacated and remanded The District Court, Dowd, J , held that (1) counsel's representation with respect to communicating accurately the text of guilty plea discussions with government fell below objective standard of reasonableness, but (2) defendant failed to establish that, had he been properly advised by trial counsel, he would have accepted plea agreement

Motion denied

West Headnotes

[1] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

Counsel's representation of defendant with respect to communicating accurately the text of guilty plea discussions with government fell below an objective standard of reasonableness, as required to support ineffective assistance of counsel claim, when counsel informed defendant of possibility that prosecution would enter into plea agreement, but misrepresented discussions by substantially minimizing the substance of the plea discussions and failed to advise defendant accurately as to consequences of conviction in terms of years of incarceration faced by defendant under impact of Sentencing Guidelines U S C A Const Amend 6; U S S G § 1B1 1 et seq , 18 U S C.A

[2] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

Defendant failed to establish that he would have accepted plea agreement had he been properly advised by trial counsel of impact of Sentencing Guidelines on his potential sentence if he proceeded to trial, and thus failed to establish that counsel's ineffectiveness with respect to advising defendant about plea discussions warranted relief, when government had never offered to permit defendant to plead guilty under agreement providing for sentence of less than approximately 20 years of confinement and defendant had rejected what he believed was offer providing for 10 years' imprisonment. U S.C A. Const Amend. 6, U S.S.G. § 1B1.1 et seq , 18 U S C A.

[3] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

Trial counsel's advice that government's case was weak and defendant would be "crazy" to accept plea bargain offer of 10 years' incarceration did not constitute ineffective assistance of counsel, even though, in hindsight, advice appeared to be misguided U S C A Const.Amend 6.

***1157** Ronald B Bakeman, Office Of The U S Attorney, Cleveland, OH, for Respondent.

Cheryl J. Sturm, Chadds Ford, PA, Petitioner.

MEMORANDUM OPINION

DOWD, District Judge.

I. Introduction.

Presently before the Court is the petition of Richard Dabelko ("petitioner") for relief under the provisions of 28 U S C § 2255 Petitioner's basic claim is that he was denied the effective assistance of his lawyer, Jerry Milano, who represented him at trial in 1990 and failed to communicate accurately the status of guilty plea negotiations that preceded the trial, presided over by Judge George White, as a result of which he was convicted and sentenced to 292 months The petitioner's conviction and sentence were affirmed by the Sixth Circuit on January 9, 1992 in its Case Nos 90-3926, 3969 and 4126

The petitioner's action pursuant to 28 U S C § 2255

was filed in 1997 and dismissed by Judge George White without requesting a response from the government The petitioner filed an appeal to the denial, and the Sixth Circuit remanded the case to the district court for an evidentiary hearing As Judge White had retired, the case was reassigned to this branch of the Court. The Court conducted an evidentiary hearing on August 22, 2000 in which the petitioner, Ron Bakeman, the assigned AUSA for the 1990 trial, Attorney Phillip Korey and petitioner's former secretary, Susan Jeffers, testified. Dabelko's trial attorney did not testify as it was stipulated that he has no memory of the proceedings, and the Court understands that Mr Jerry Milano suffers from Alzheimers Disease The Court ordered a transcript of the evidentiary hearing and directed post hearing briefs and reply briefs which have been filed The case is now at issue

The Court conducted the evidentiary hearing mindful of the Sixth Circuit's opinion in the § 2255 case in which it stated in part as follows

> To establish his ineffective assistance of counsel claim, petitioner must first "show that counsel's representation fell below an objective standard of reasonableness " *Strickland v Washington,* ***1158** 466 U S 668, 687-88, 104 S.Ct 2052, 80 L Ed 2d 674 (1984). Next he must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the ... offer and pled guilty " *Turner v State,* 858 F.2d 1201, 1206 (6th Cir 1988), *vacated on other grounds,* 492 U S 902, 109 S Ct 3208, 106 L Ed 2d 559 (1989), *see Hill v Lockhart,* 474 U.S 52, 57, 106 S.Ct. 366, 88 L Ed.2d 203 (1985). Plaintiff must show this by objective evidence. *See Turner,* 858 F 2d at 1206; *Hill,* 474 U S. at 59-60, 106 S Ct 366. Then, the government may show by "clear and convincing evidence that the trial court would not have approved the plea arrangement " *Turner,* 858 F.2d at 1209 If petitioner were to establish the bases for showing ineffective assistance of counsel, the remedy for such violation would then have to be considered, including whether a new trial should be ordered. *See id* at 1207-09 Under the unique facts of that case if relief were to be ordered, a hearing might be required "at which the [government] is required to show why its former offer should not be reinstated " *Id* at 1209 (Ryan J , concurring)
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> In light of the government's argument in the instant appeal, contrary to the facts in *Turner,* it is not a given that the United States may actually have made a specific offer which DaBelko was prepared to accept regardless of his counsel's advice, or lack thereof The burden is upon DaBelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel.
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> The issue is a close one, but we have found error in the district court's important findings that the government was not interested in a plea bargain, and that none was made or offered Petitioner has indicated enough in his motion that his counsel may not have made an adequate examination of the facts and circumstances about guilt and sentence enhancement. His counsel may not have made an adequate, minimal examination of the applicable guidelines law so as to advise DaBelko about his serious exposure in light of circumstances involving a prior drug conviction, extent of the conspiracy and quantity of drugs, and possession of a firearm in connection with drug activities.
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> DaBelko received a draconian sentence in this case, approved by this court in the direct appeal. Without deciding at this juncture the *Strickland v Washington,* 466 U.S. 668, 104 S.Ct 2052, 80 L Ed 2d 674 (1984), issues, we believe in our oversight capacity it is appropriate to order a hearing in the district court to reconsider the issues raised and to determine whether DaBelko has carried his burden to demonstrate ineffective assistance of counsel, as claimed

Richard Dabelko v United States, 211 F 3d 1268, slip op at 3-4, 7 (6th Cir May 3, 2000)

II. Fact Findings.

The Court makes the following fact findings to aid in its analysis and for possible appellate review.

1 The indictment was filed on June 13, 1989 and named nine defendants including the petitioner A superseding indictment was filed on November 29, 1989 The superseding indictment charged the petitioner with conspiracy to distribute and possessing with intent to distribute cocaine in Count One, the substantive offense of possessing with intent to distribute 1,959 grams of cocaine on May 17, 1989 in Count Seven, and two Counts (19 and 20) for using a communication facility to facilitate acts constituting a felony. The conspiracy ***1159** count did not allege an amount of cocaine that would be attributable to any one conspirator [FN1] However, it was the position of the government that the amount of cocaine chargeable to the petitioner, for guilty plea discussion purposes, was between 15 and 50 kilograms of cocaine Pursuant to the provisions of 21 U S C. § 841(b)(1)(A)(ii), five or more kilograms of cocaine called for a sentence of not

less than 10 years in prison

FN1 Count One in the superseding indictment alleged a series of overt acts describing in paragraphs 3, 12, 43, 45, 46, and 47 varying amounts of cocaine which collectively exceeded nine kilograms

2 Eight other defendants, Howard Blum, Francis Dabelko, Alfred Conti, John Burcsak, Phillip Christopher, Stanley Miller, Dominic Palone, Jr., and Charlie Treharn, were named in the indictment and superseding indictment. Blum, Burcsak, Christopher, Miller, Palone and Treharn entered pleas of guilty.

3. On May 24, 1990, six days before the jury trial began on May 30, 1990 for the petitioner, his brother Francis Dabelko and Alfred Conti, the prosecution filed notice of an enhancement under the provisions of 21 U S C § 851 which charged that, if the petitioner was convicted of Count One of the indictment, the United States would rely upon a previous conviction of the petitioner for the purpose of involving the increased sentencing provisions of Title 21, Section 841(b)(1)(A) of the United States Code The previous conviction for trafficking in drugs was obtained in the Court of Common Pleas, Trumbull County, Ohio on November 2, 1984

4 The petitioner was convicted of Counts 1, 7, 19 and 20 following the jury trial and sentenced to a term of imprisonment of 292 months based on an offense level of 38 and a Criminal History of III, setting up a range of 292 months to 365 months The district court determined the base offense level to be 34 based on a finding that the petitioner was chargeable with 40 kilograms of cocaine, an additional two levels for role in the offense and two additional levels for the weapon A paragraph in the petitioner's presentence report added two levels for the weapons and stated.

Richard DaBelko possessed drug paraphernalia at 1916 Sheridan Ave., Warren, Ohio. *Note* On 11/20/90, the government advised this probation officer that two loaded weapons were found with the drug paraphrenalia [sic] in the defendant's bedroom a 380 semi-automatic Colt pistol and a .22 Sterling Arms

5 The other two defendants who stood trial with the petitioner, Francis Dabelko and Alfred Conti, were also charged with a quantity of cocaine of 40 kilograms

(a) The co-defendant, Francis Dabelko, was charged with a base offense level of 34 based on 40 kilograms of cocaine and given a two-level reduction for a minor role in the offense; with a Criminal History of I, he was at a range of 121 to 151 months and he received a sentence of 121 months.

(b) The co-defendant, Alfred Conti, was charged with 40 kilograms of cocaine, with an offense level of 34, and granted a two-level reduction for a minor role, his Criminal History of II produced a range of 135 to 168 months, and he received a sentence of 135 months

6. Howard Blum, the cooperating and testifying defendant, was held responsible for 3 5 to 5 kilograms of cocaine for an offense level of 30; four additional levels were added for role in the offense, less two levels for acceptance of responsibility, to an adjusted level of 32 less six levels that the sentencing entry says were based on ***1160** the plea agreement but which appear to be for substantial assistance. Blum was then at offense level 26 with a Criminal History of III, which resulted in a range of 78 to 97 months. He received a sentence of 96 months

7. Phillip Christopher, who pled guilty within a few days of the start of the jury trial for the petitioner, was charged with 5 to 15 kilograms of cocaine for an offense level of 32; with a Criminal History of V, a reduction of four levels for acceptance of responsibility and another two levels for substantial cooperation produced a range of 130 to 162 months. He received a sentence of 144 months to be served concurrently with a sentence in another case

8 The remaining defendants, Treharn, Palone, Burcsak and Miller, received much smaller sentences ranging from 36 months to a split sentence for Miller

9. The petitioner, Francis DaBelko and Alfred Conti all appealed their convictions and sentences to the Sixth Circuit which affirmed the convictions and sentences in an unpublished opinion filed on January 9, 1992 in its Case Nos. 90-3926, 3969 and 4126 The per curiam opinion summarized the evidence in the following paragraphs

Evidence of defendants' guilt of possession of and conspiracy to distribute cocaine came from searches of their residences as well as court-authorized monitoring of their conversations, extensive law enforcement surveillances, and the testimony of co-conspirator Howard Blum Executing a search warrant on Richard Dabelko's residence, the police found two scales, both covered with a white powdery substance that later tested positive for cocaine, three weapons, and over $35,000 in cash The search

warrant on Francis Dabelko's home produced 1,900 grams of cocaine and seven brown paper bags with his finger prints, as well as a personal telephone directory containing the telephone number of an identified supplier of cocaine. At Conti's home, the police found 19 grams of cocaine, drug paraphernalia and a scale covered with white powder. The police also confiscated a suitcase containing approximately 810 grams of cocaine from the house of Conti's sister

The district court had authorized the interception of phone conversations over the telephones located at Richard Dabelko's residence, Conti's residence, and Howard Blum's jewelry business. It also authorized the installation of a listening device at Blum's business Twenty conspiratorial conversations involving some or all of the three appellants were played to the jury. Topics of conversation included meetings to pick up money to pay their cocaine supplier, meetings to pick up the cocaine, delivering the cocaine to the "stash" house, discussing debts from the sale of cocaine, and other topics related to conspiracy to distribute cocaine

Finally, co-conspirator Howard Blum testified regarding the workings of the conspiracy Based on Blum's cooperation with federal law enforcement officials, a superseding indictment was filed against Richard DaBelko The government informed Richard that they intended to request the court to enhance his penalties based upon his prior conviction for drug trafficking, if he was convicted for either conspiracy or possession of cocaine with intent to distribute

United States v Francis Dabelko, et al, 952 F 2d 404, slip op at 2-3 (6th Cir January 9, 1992).

10 Ron Bakeman was the assigned AUSA for Case No. 4 89CR171 Jerry Milano represented the petitioner in pre-trial matters and at the trial which led to the petitioner's conviction. Following his conviction but prior to sentencing, the petitioner changed lawyers and was represented ***1161** at the sentencing by Elmer Guiliana and Phillip Korey Prior to the trial, Bakeman and Milano engaged in guilty plea discussions on several occasions [FN2] In the U S Attorney's Office to which Bakeman was assigned, the practice as to guilty plea agreements was for the assigned AUSA to present the proposed guilty plea agreement to a supervisor for approval [FN3] The guilty plea discussions between Bakeman and Milano did not reach the stage where Bakeman would have presented a proposed guilty plea agreement to his supervisors for the necessary approval [FN4]

FN2 *See* Evidentiary Hearing Transcript (hereafter "TR") at 6-10

FN3 *See* TR at 48.

FN4 *See* TR at 38-39.

11. Bakeman considered defendant Howard Blum and the petitioner to be the persons at the top of the pyramid in connection with the nine-defendant conspiracy [FN5]

FN5. *See* TR at 12, 29-30, and 41.

12. Bakeman was unwilling to enter into a final plea agreement with the petitioner's brother and co-defendant, Francis Dabelko, unless the petitioner also agreed to plead guilty because the government's case demonstrated that Francis possessed quantities of cocaine but, in Bakeman's view, was acting for the petitioner in the possession [FN6]

FN6. *See* TR at 20-21

13. Bakeman initially offered testimony that the proposed guilty plea discussions with Milano were anchored in an application of the Sentencing Guidelines They were based on a quantity of cocaine to be charged to the petitioner (50 to 150 kilograms), the petitioner's role in the offense (an increase of two levels), an increase of two levels for a gun, and a two-level reduction for acceptance of responsibility, and did not include the Section 851 enhancement based on the prior record of the petitioner [FN7] Subsequently, Bakeman corrected his initial testimony and indicated that the plea discussions were based on 15 to 50 kilograms of cocaine (*See* TR at 37).

FN7. *See* TR at 28, 37

14 The drug quantity table in the Sentencing Guidelines Manual effective November 1, 1989 provided for a level 34 for "at least 15 KG but not less than 50 KG of cocaine " The drug quantity for the cocaine being discussed by Bakeman during the plea discussions with Milano was 15 to 50 kilograms of

cocaine, with a resulting base offense level of 34 An adjusted offense level of 36 would have resulted from adding two levels for petitioner's role in the offense and two levels for possession of the weapons, less two levels for acceptance of responsibility. Since the petitioner had a Criminal History of III, the sentencing range would have been 235 to 293 months.

15 Milano constantly attempted to bargain for a guilty plea agreement with Bakeman that would result in a specific number of years, but never responded to an analysis of the guideline applications being discussed by Bakeman [FN8] The Bakeman-Milano discussions, to the extent the discussions can be described as plea negotiations, never focused on the quantity of the cocaine to be charged to the petitioner or the petitioner's role in the offense or the relevancy of the weapon

FN8. *See* the testimony of AUSA Bakeman beginning at TR page 37, line 22 to page 41, line 25

16 There was never a meeting of the minds between Bakeman and Milano as to any guilty plea agreement.

17 The petitioner, free on bond, met with Milano approximately six times before the trial Milano did not discuss the applicability of the Sentencing Guidelines ***1162** with the petitioner in any of the meetings [FN9] Milano did not tell the petitioner that he was facing a mandatory minimum of 20 years if convicted. [FN10] Milano did not inform the petitioner as to the consequences of the Section 851 enhancement. [FN11]

FN9 *See* TR at 67-68

FN10. *See* TR at 68.

FN11. *See* TR at 69

18 At the evidentiary hearing, the petitioner testified that Milano told him, apparently prior to trial, that Bakeman had made an offer of 121 to 154 months and the petitioner then told Milano to see if the government would go for eight years [FN12]

FN12. *See* TR at 70

19 At the evidentiary hearing, the petitioner testified that he asked Milano if he should accept or reject the offer Milano described as offered by Bakeman, he related that Milano told him that "I would be crazy to accept the offer." [FN13] The petitioner also testified that Milano told him that the government "had a weak case against him "

FN13. *See* TR at 71

20. The first time the petitioner grasped the fact that he was facing a sentence of 20 years or more was after the jury found him guilty and his bond was revoked. [FN14]

FN14 *See* TR at 72

21. Petitioner's trial counsel, Jerry Milano, did not understand the operation of the Sentencing Guidelines in a complex cocaine conspiracy case involving multiple defendants and the ensuing issues dealing with quantity of the cocaine attributable to a particular participant convicted of the conspiracy, or the impact of a role in the offense determination, or the impact of a finding that weapons were associated with the petitioner's participation in the conspiracy. [FN15]

FN15 *See* TR at 43

22 When Bakeman was engaged in guilty plea discussions with Milano, he was of the opinion that he had a very strong case against the petitioner. [FN16]

FN16 *See* TR at 42

23 If the plea discussions between Milano and Bakeman had developed to the stage where the proposal of Bakeman, anchored in the Sentencing Guidelines, had been reduced to writing and approved by Bakeman's supervisors and then presented to the petitioner, the petitioner, encouraged by Milano's opinion about the weakness of the government's case, would have rejected such a written plea agreement

III. The Conclusion Based on the Findings of Fact and the Application of the Teachings of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Turner v. State,* 858 F.2d 1201 (6th Cir.1988).

[1] To establish his ineffective assistance of counsel claim, the petitioner's first burden was to establish that Milano's representation with respect to communicating accurately the text of the guilty plea discussions Milano had with Bakeman fell below an objective standard of reasonableness. Even though the Sentencing Guidelines, first effective on November 1, 1987, were in their infancy in 1990, the Supreme Court had decided that the Sentencing Guidelines passed constitutional muster. [FN17]

FN17 *See Mistretta v United States,* 488 U S 361, 109 S Ct 647, 102 L.Ed.2d 714 (1989).

Lawyers undertaking to represent a defendant charged in criminal court had a responsibility, even as early as 1990, to become informed and knowledgeable with respect to the operation of the Sentencing ***1163** Guidelines Milano, although an excellent courtroom trial lawyer, [FN18] failed in this responsibility Although Milano did inform the petitioner of the possibility that the prosecution would enter into a guilty plea agreement, he misrepresented the discussions by substantially minimizing the substance of the guilty pleas discussions *Turner v State, supra,* teaches that a petitioner such as Dabelko, must "establish that there is a reasonable probability that, but for the incompetence of counsel, he would have accepted the offer and pled guilty." As stated in the Sixth Circuit's opinion remanding this case for an evidentiary hearing: "[T]he burden is upon Dabelko to show that the prosecution made him a specific plea bargain that he was ready to accept had he received effective assistance of counsel " *Richard Dabelko v United States, supra,* slip op at 4.

FN18 As of 1990, Jerry Milano was an experienced criminal trial lawyer In this Court's view, Milano enjoyed a reputation as an excellent trial lawyer One of his well-known trial victories is briefly described in *Levine v Torvik,* 986 F 2d 1506, 1509-10 (6th Cir 1993). In the *Levine* case, as counsel for the defendant Levine in a state criminal case, Milano achieved a not guilty by reason of insanity verdict in Cuyahoga County Common Pleas Court in a highly publicized case in which Levine kidnapped, shot and killed Julius Kravitz, a prominent Cleveland citizen, and seriously injured Kravitz's wife

In the petitioner's brief, filed after the evidentiary hearing and in support of relief, alternative arguments are advanced First, the petitioner appears to argue that, had Milano accurately advised the petitioner about the strength of the government's case, the petitioner would not have rejected the ten-year offer That argument is predicated on a fact proposition that this Court has rejected. The Court has found no credible evidence that AUSA Bakeman proposed a guilty plea agreement that would have called for a ten-year sentence.

[2] Alternatively, the petitioner argues that Milano was ineffective in failing to perceive the strength of the government's case and in failing to negotiate with AUSA Bakeman on the quantity of drugs to be assigned to the petitioner, as well as other issues, in the calculation of the adjusted base offense level The petitioner argues that, had such a process been employed by Milano and competent advice provided, he would have entered into a guilty plea agreement that would have resulted in a sentence significantly below 20 years, rather than the 292 months he received as a consequence of Milano's ineffective assistance in failing to assess properly the government's case and in failing to negotiate for a guilty plea agreement that would have reduced the adjusted base offense level.

That alternative proposition has not been recognized as a basis for relief. Translated the petitioner, who puts the government to the test of proving its case based on the defendant's not guilty plea, contends that he is entitled to a reduced sentence by establishing that his retained counsel mistakenly analyzed the strength of the government's case and then refused to negotiate with the government on a guilty plea agreement that the petitioner now claims he would have accepted even though in excess of the allegedly rejected offer he was mistakenly advised the government had suggested

The record before the Court strongly suggests that the petitioner would not have accepted a guilty plea agreement if the alternative scenario he now suggests had taken place The testimony of AUSA Bakeman indicates that Francis Dabelko, the petitioner's brother, would have successfully negotiated through his counsel a guilty plea agreement that would have resulted in a

much lower sentence than the 121 months he received after standing trial, ***1164** except for the fact that Bakeman was unwilling to agree to such a sentence absent Francis Dabelko's cooperation or the willingness of the petitioner to plead guilty The fact that the petitioner was unwilling to plead guilty to what he believed was a ten-year offer supports the conclusion that the petitioner would not have pled guilty under a scenario where his sentence would have been substantially in excess of 10 years, assuming a successful negotiation effort by Milano to reduce the sentence to a figure approaching 15 years. [FN19]

FN19 Had Milano entered into guilty plea negotiations with Bakeman anchored in the application of the Sentencing Guidelines, it is quite within the realm of probability that the government would have, in consideration of a guilty plea, agreed to eliminate the weapons as an additional two level addition, stayed with the quantity of cocaine at 15 to 50 kilograms and with the two level reduction for acceptance of responsibility. The adjusted offense level would then have been 34 and with a Criminal History of III, the sentencing range would have been 188 to 235 months. Since Judge George White sentenced the petitioner at the low end of the range after he stood trial, it seems likely that he would also have chosen the low end of the range under the scenario outlined.

At the very core of criminal proceedings in federal court are guilty plea discussions The Sentencing Guidelines have served to increase meaningful plea discussions and, in the vast majority of the cases, those plea discussions result in a guilty plea agreement The Criminal Rules of Procedure require careful monitoring of the process by the district court in the taking of the guilty plea. [FN20] However, the Criminal Rules provide in no uncertain terms that the district court is not to participate in guilty plea negotiations [FN21] There is no procedure in place to monitor guilty plea discussions (that may or may not result in the preparation of a written plea agreement) which do not result in a guilty plea, but rather a trial There are no procedures in place to insure that a defendant is given accurate information about the impact of the Guidelines in the event of a conviction, except during the process of taking a guilty plea Even if there were such a procedure, it would be indeed a hazardous undertaking because some of the sentencing factors, such as quantity of drugs attributable to the defendant, his role in the offense, his acceptance of responsibility, and a possible enhancement for a weapon, would be speculative

FN20. *See* Fed R.Crim.P 11(c) and (d)

FN21 *See* Fed.R.Crim P. 11(e)(1)

The case at hand highlights the vacuum a defendant such as Dabelko falls into when his counsel, for whatever reason (be it ignorance, reluctance to master the Sentencing Guidelines, or the defendant's protestations of innocence), fails to guide the defendant with accurate information about the perils of trial versus a guilty plea agreement. In this vacuum, the Court has made three critical findings of fact.

First, Bakeman, on behalf of the government, never offered to permit the petitioner to plead guilty under any agreement that would have resulted in a sentence less than approximately 20 years of confinement.

Second, Milano, the petitioner's trial counsel, failed to advise the petitioner accurately as to the consequences of a conviction in terms of the years the petitioner was facing under the impact of the Sentencing Guidelines. That fact finding, as previously indicated, leads to the conclusion that the petitioner was denied the effective assistance of counsel by such a failure

[3] Third, the petitioner was advised by his counsel that the government's case was "weak" and he would be "crazy" to ***1165** accept the offer of ten years. That advice, which on hindsight appears to have been misguided, does not constitute the ineffective assistance of counsel

Those three fact findings lead to the dispositive conclusion that, had the petitioner been advised accurately as to the guilty plea representations as advanced by Bakeman, i.e , an application of the Sentencing Guidelines calling for a sentence of approximately 20 years, he would have rejected the Bakeman guilty plea agreement proposal and proceeded to trial [FN22]

FN22 The Court is of the view that counsel have since become far more sophisticated in dealing with the representation of defendants in a drug conspiracy case involving multiple defendants, cooperating defendants and

> evidence developed from court-monitored wiretaps under Title III In 1989, this branch of the Court presided over such a case in which over 30 defendants were joined in a single indictment. Eleven of the defendants went to trial in a single trial and all were convicted or pled guilty during the trial. The Sixth Circuit, in an unpublished opinion in Case No. 89-4098, affirmed the convictions on October 31, 1991. The sentences of the defendants who went to trial ranged from 300 months to 84 months This year the Court was assigned a cocaine conspiracy involving approximately 30 defendants and six court-authorized Title III wiretaps and, eventually, cooperating defendants The Court, mindful of the vacuum described in this opinion and the decision of the Sixth Circuit remanding this case for an evidentiary hearing, conducted the arraignment of all defendants at one sitting and gave a short discussion on the sentencing issues that arise in a cocaine conspiracy case including quantity of the drugs chargeable to a defendant, the role of a convicted defendant in the conspiracy, the credit for acceptance of responsibility That case, No 1.00CR257, has been completed by guilty pleas of all defendants except for two who were dismissed by the government. The Court is of the view that, had the petitioner here had the benefit of those years of experience that defense lawyers have developed since the late 80's, the outcome in the petitioner's case would probably have been less "draconian."

Consequently, the Court finds that the petitioner has failed to meet the burden imposed by the Sixth Circuit to establish that he would have accepted the proposed plea agreement suggested by Bakeman and rejected by Milano. Therefore, the ineffective assistance of Milano does not justify the remedy of a reduced sentence

If, in fact, the vacuum that the Court has described requires some remedial action, such remedial action requires appellate direction in the use of its supervisory powers or an appropriate modification of the Criminal Rules of Procedure

The petitioner's application for a writ is DENIED

IT IS SO ORDERED

154 F Supp 2d 1156

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330 F 3d 733
2003 Fed App 0177P
(Cite as: 330 F.3d 733)

United States Court of Appeals,
Sixth Circuit

Phillip GRIFFIN, Petitioner-Appellant,
v
UNITED STATES of America,
Respondent-Appellee

No. 01-3818.

Submitted: March 14, 2003.
Decided and Filed. June 4, 2003.

After defendant's drug trafficking convictions were affirmed on direct appeal, 210 F 3d 373, 2000 WL 377346, defendant moved to vacate. The United States District Court for the Northern District of Ohio, David D Dowd, Jr , J , denied motion. Defendant appealed pro se The Court of Appeals, Cohn, District Judge, held that evidentiary hearing was required to determine whether there was a reasonable probability that defendant would have accepted government's plea offer if defense counsel had communicated the offer to him

Reversed and remanded

West Headnotes

[1] Criminal Law ⚿1451
110k1451 Most Cited Cases

To warrant relief in a motion to vacate, defendant must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict 28 U.S C A § 2255

[2] Criminal Law ⚿1451
110k1451 Most Cited Cases

Relief on a motion to vacate is warranted only where a defendant shows a fundamental defect which inherently results in a complete miscarriage of justice 28 U S C A § 2255

[3] Criminal Law ⚿1139
110k1139 Most Cited Cases

The Court of Appeals reviews the denial of a motion to vacate de novo 28 U.S.C.A. § 2255.

[4] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

In a claim for ineffective assistance of counsel when defendant pleaded guilty, in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial U S.C.A. Const Amend. 6

[5] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

A defense attorney's failure to notify his client of a prosecutor's plea offer constitutes defective performance, for purpose of claim for ineffective assistance of counsel under the Sixth Amendment. U S C A Const Amend. 6

[6] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

Defendant's repeated declarations of innocence did not prove that he would not have accepted a guilty plea, in prosecution for drug trafficking offenses, for purpose of determining if defense counsel's failure to advise defendant of plea offer prejudiced defendant, as required to prove ineffective assistance of counsel U S C A. Const Amend 6

[7] Criminal Law ⚿393(1)
110k393(1) Most Cited Cases

A defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. U S C A. Const.Amend 5

[8] Criminal Law ⚿1655(6)
110k1655(6) Most Cited Cases

Evidentiary hearing was required to determine whether there was a reasonable probability that defendant convicted of drug trafficking offenses would have accepted government's plea offer if defense counsel had communicated the offer to him, in proceeding on motion to vacate, based upon ineffective assistance of counsel, gap between five-year sentenced offered and 156-month sentence imposed was significant, and

defendant was unaware that codefendants were going to testify against him in exchange for lesser sentences, suggesting that he would have accepted plea offer had he been fully informed. U S.C A. Const Amend 6, 28 U S C A. § 2255.

[9] Criminal Law ⚿1189
110k1189 Most Cited Cases

The Court of Appeals must exercise caution in ordering an evidentiary hearing on remand of appeal of denial of motion to vacate, since it may encourage defendants to try to manipulate the criminal justice system 28 U S.C A § 2255

***734** Joseph M. Pinjuh, United States Attorney (briefed), Cleveland, OH, for Petitioner-Appellee.

Phillip Griffin (brief), Bradford, PA, pro se

Before MOORE and GIBBONS, Circuit Judges, COHN, District Judge. [FN*]

FN* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation

OPINION

COHN, District Judge

This is a habeas case under 28 U.S C § 2255 Phillip Griffin (Griffin), proceeding *pro se,* appeals from the district court's denial of his motion under section 2255. Griffin was convicted of distribution of cocaine base, his conviction was affirmed on appeal. He says that his trial counsel failed to tell him of a plea offer and argues that this constituted ineffective assistance of counsel. The government argues that the record shows that Griffin would not have accepted a plea offer even if he had been told about it

For the reasons that follow, we reverse the decision of the district court and remand the case for an evidentiary hearing

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Griffin was indicted on four counts of distribution of cocaine base under 21 U S C § 841 and for a criminal forfeiture action under 21 U S C § 853. At his arraignment he pleaded not guilty The district court held a hearing on Griffin's motion to suppress evidence seized during a search of his mother's home and on his motion to dismiss the distribution counts. The district court denied both motions

Approximately two weeks prior to the trial date, the Assistant United States Attorney (AUSA) telephoned Griffin's trial counsel to discuss a plea agreement The AUSA indicated that he thought a five ***735** year sentence would be possible The government says that the plea agreement was contingent on Griffin cooperating with the authorities. Griffin's attorney responded--in that telephone conversation--that Griffin maintained his innocence and would not plead guilty Griffin says that his attorney never mentioned the plea offer to him Griffin's attorney does not recall any plea offer being made. Griffin says his attorney also never discussed his potential sentence exposure with him

Griffin went to trial before a jury His codefendants, Brooke Thompson (Thompson) and Keith Walker (Walker), entered cooperative agreements with the government Both pleaded guilty, Thompson received a three year sentence and Walker received a six and a half year sentence. Both testified at Griffin's trial, and Griffin says their testimony destroyed his defense Griffin's attorney never informed him that they were going to testify

The district court granted Griffin's motion for a directed verdict as to counts three and four The jury found Griffin guilty of counts one and two and entered a special verdict on the forfeiture action.

After he was convicted, Griffin obtained new counsel. His new attorney approached the government regarding Griffin's possible cooperation. Griffin executed a a proffer letter and agreed to make a statement During the proffer, Griffin admitted selling drugs in the past but stated that he stopped some time in 1994 or 1995 He continued to deny his involvement in the offense for which he was convicted The AUSA and a special agent advised Griffin that they doubted his veracity and terminated the proffer

Griffin maintained his innocence in the preparation of the Presentence Investigation Report, which did not suggest any reductions for acceptance of responsibility At the sentencing hearing he said

> I think--I know I'm innocent of this action. And I didn't get those two guys any drugs I was getting blamed for something I didn't do. And I'm going to prove that I did it And I ain't never been in trouble with no law or anything like that. And they trying to get me ten years to life for something I didn't even

do I shouldn't get no more than about two or three years for something like this . If I knew I could have got on that stand to--told a lie to get three years, I would have did the same thing too But I knew I was innocent, and I didn't have to get up on the stand and tell any lie

J A. 169-70

The district court sentenced Griffin to 156 months custody, five years supervised release, and a $200 00 special assessment The district court also entered a final order of forfeiture. Griffin appealed his sentence; this Court affirmed the judgment of conviction in an unpublished opinion *United States v Griffin,* No 98-4364, 2000 WL 377346 (6th Cir. Apr.6, 2000) (unpublished)

The AUSA mentioned the plea offer to Griffin's appellate attorney prior to oral argument before this Court on direct appeal, saying that he was surprised Griffin did not accept the offer in light of the large amount of prison time he faced Griffin's appellate attorney did not discuss the issue with Griffin until after the appeal Griffin now says that given the potential sentence he faced, he would have accepted the plea offer had he known about it

After learning about the plea offer, Griffin asked his trial attorney about it. The attorney wrote in reply

I have no recollection of any deal being offered for you to me I do recall telling you that if a deal were sought from the government it would have to include your willingness to be a witness *736 for the government As to this, while I do not have any recollection of having told you, as I have others, the fact is that I prefer not to represent informers Indeed, more than once I have backed away from clients who wanted me to engineer a deal that would entail me being privy to efforts made by the client to inveigle someone into committing a crime so that the client could benefit from their arrest.

This is not to say I have never represented an informer I have never done so under the circumstances that were present when I represented you I simply refuse to be conscripted into the war on drugs as a federal agent I personally do not approve of many of their methods And I believe the guidelines are not only unfair, but slanted against black people

J A 54-54 Griffin's trial attorney also signed an affidavit in connection with this habeas motion stating,

I have no recollection of having been told by anyone that the government was offering the defendant, Phillip Griffin, a five (5) year sentence or, for that matter, a sentence of any set number of years On the other hand, I do recall being told by Phillip Griffin that he wanted to go to trial Obviously he was convinced, as I was, that his arrest and the searches centralized in [sic] his case were illegal. Also, Phillip Griffin advised me that those who would be testifying against him would have to lie. Unfortunately for him the jury convicted him

Also, I recall indicating to him that to make a deal with the government in this case he would have to implicate other people This he said he could not do because he would have to lie

J A. 37.

Griffin filed a habeas petition. The district court denied the petition, finding that "Griffin's statements at sentencing clearly demonstrate that he was not prepared to accept a specific plea bargain at the time of the trial "

II. DISCUSSION

[1][2][3] To warrant relief under section 2255, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v Abrahamson,* 507 U S 619, 637, 113 S Ct. 1710, 123 L Ed.2d 353 (1993) Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice " *Davis v United States,* 417 U S 333, 346, 94 S Ct 2298, 41 L Ed.2d 109 (1974). Claims of ineffective assistance of counsel are appropriately brought by filing a motion under section 2255 *United States v Galloway,* 316 F 3d 624, 634 (6th Cir 2003) We review the denial of a section 2255 motion *de novo Lucas v O'Dea,* 179 F 3d 412, 416 (6th Cir.1999).

[4] To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must establish two elements: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceedings would have been different *Strickland v Washington,* 466 U S 668, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id* The *Strickland* standard applies to guilty pleas as well *Hill v Lockhart,* 474 U S 52, 57, 106 S Ct 366, 88 L Ed 2d 203 (1985)

In the context of guilty pleas, the first half of the *Strickland v Washington* test is nothing more than a restatement of the standard of attorney competence *737 The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's

> constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial

Id at 58-59, 106 S Ct. 366 It is therefore easier to show prejudice in the guilty plea context because the claimant need only show a reasonable probability that he would have pleaded differently. *See Ostrander v Green,* 46 F 3d 347, 352 (4th Cir 1995) *overruled on other grounds by O'Dell v Netherland,* 95 F 3d 1214, 1222 (4th Cir.1996). [FN1]

> FN1 As the court in *Ostrander* explained, [T]he district court applied the wrong legal standard to Ostrander's ineffective assistance claim It used the *Strickland v Washington* test instead of the more specific *Hill v Lockhart* standard for guilty pleas induced by ineffective assistance There is a significant difference between the tests Under *Strickland,* the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill,* the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial *Id*

[5] A defense attorney's failure to notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment and satisfies the first element of the *Strickland* test. *See Turner v State,* 858 F 2d 1201, 1205 (6th Cir.1988) (agreeing with the district court that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment"), *vacated on other grounds,* 492 U S 902, 109 S Ct 3208, 106 L Ed.2d 559 (1989), *reinstated,* 726 F.Supp. 1113 (M D Tenn 1989), *aff'd,* 940 F 2d 1000 (6th Cir 1991). [FN2]

> FN2 *See also United States v Blaylock,* 20 F 3d 1458, 1465-66 (9th Cir 1994) ("If an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, *a fortiori,* failure even to inform defendant of the plea offer does so as well"), *United States v Rodriguez,* 929 F 2d 747, 753 (1st Cir 1991) ("there is authority which suggests that a failure of defense counsel to inform defendant of a plea offer can constitute ineffective assistance of counsel on grounds of incompetence alone, even absent any allegations of conflict of interest"), *Johnson v Duckworth,* 793 F 2d 898, 902 (7th Cir.1986) ("in the ordinary case criminal defense attorneys have a duty to inform their clients of plea bargains proferred by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments"), *United States ex rel Caruso v Zelinsky,* 689 F.2d 435, 438 (3d Cir 1982) ("a failure of counsel to advise his client of a plea bargain constitutes a gross deviation from accepted professional standards").

The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice *See id* at 1206

> Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement. Nevertheless, it has been held, as the district court recognized, that a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer. It follows that the district court did not err in relying on such a disparity, along ***738** with the unrefuted testimony of the petitioner, to support its conclusion that habeas relief was required in this case.

Dedvukovic v Martin, 36 Fed.Appx 795, 798 (6th Cir.2002) (unpublished) In *Dedvukovic,* we found that where the defendant swore that his attorney never explained the significance of the government's plea offer to him, his attorney had no indication in her file that she had properly advised him of the offer and could not recall having done so (though it was her customary practice to do so), and there was a substantial disparity between the penalty offered by the government and the penalty called for by the indictment, the defendant showed a reasonable probability that he would have pleaded guilty had he received proper advice *Id* at 797-98

The government concedes that it made at least a tentative plea offer and does not dispute on appeal that Griffin's counsel did not inform him of it It argues

only that the record does not support Griffin's claim that he would have pleaded guilty if he had known of the plea offer The government notes that "the record is replete with Griffin's protestations of his own innocence," including his testimony at the suppression hearing and at sentencing, his statements to the probation officer responsible for writing the presentence report, and his failure to cooperate with the government post-conviction Griffin says he would have accepted the plea if he had known about it and his potential sentencing exposure Griffin argues that the district court should at least have held an evidentiary hearing to determine the factual issues and circumstances surrounding the plea offer.

[6][7] Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. *See North Carolina v Alford,* 400 U S 25, 33, 91 S.Ct 160, 27 L.Ed 2d 162 (1970) ("reasons other than the fact that he is guilty may induce a defendant to so plead, . and he must be permitted to judge for himself in this respect" quoting *State v Kaufman,* 51 Iowa 578, 2 N W 275, 276 (Iowa 1879)) Defendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment Finally, Griffin could have possibly entered an *Alford* plea even while protesting his innocence *See id* These declarations of innocence are therefore not dispositive on the question of whether Griffin would have accepted the government's plea offer.

The government further argues that even if Griffin had accepted the tentative plea offer, it would have been withdrawn by the government based on his failure to provide substantial assistance. The government says the offer would have been contingent on Griffin's successful cooperation with law enforcement and argues his failure to reach a post-conviction deal means he could not have reached a plea agreement before trial [FN3] The government's claim that it would have rescinded its plea offer cannot be substantiated on the current record If Griffin's attorney told him of the plea offer and explained the plea process to him, we cannot say, given ***739** the disparity in sentences and the evidence arrayed against him, that he would not have changed his mind and accepted the plea Griffin says his protestations of innocence were the result of his inexperience with the criminal justice system and not a reflection of his unwillingness to plead and we cannot find otherwise based on the evidence before us On the current record, it is impossible to tell whether Griffin would have been sufficiently cooperative to obtain the government's assent to the possible plea agreement

> FN3 The government says that inherent in its offer is the notion that his cooperation with the authorities would have constituted substantial assistance under section 5K1 1 of the Sentencing Guidelines.

[8] There is sufficient objective evidence in the record to warrant an evidentiary hearing to determine whether there is a "reasonable probability" that Griffin would have accepted the plea offer if he knew about it. The gap between his potential sentence if convicted and the plea offer is sufficient to merit an evidentiary hearing. *See Dedvukovic, supra* at 798, *see also United States v Gordon,* 156 F 3d 376, 380-81 (2d Cir 1998); *United States v Blaylock,* 20 F.3d 1458, 1466-67 (9th Cir 1994) The fact that he was unaware that his codefendants were going to testify against him in exchange for substantially lesser sentences is further evidence suggesting he might have accepted the plea offer had he been fully informed *See Boria v Keane,* 99 F.3d 492, 497 (2d Cir 1996) (finding there was a reasonable probability that a defendant would have accepted a plea offer if his attorney had provided his professional opinion that it was "almost impossible" for a defendant in his position to obtain an acquittal) We have granted an evidentiary hearing where an offender did not know the government was proposing sentence enhancements despite the offender's concession "at sentencing that had he known the government was proposing a twenty-year minimum, he was unsure what his response would have been-'maybe' he would have made a different decision " *Dabelko v United States,* No. 98-3247, 2000 WL 571957, at *4 (6th Cir May 3, 2000) (unpublished)

[9] We recognize that we must exercise caution in ordering an evidentiary hearing, since it might encourage defendants to try to manipulate the criminal justice system to obtain the advantage of a trial with its chance of acquittal as well as the advantage of a plea with its lesser sentence *See id* at *3. This concern, however, is mitigated by the fact that

> [m]ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity Deliberate ineffective assistance of counsel is not only unethical, but

> usually bad strategy as well For these reasons and because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate Moreover, to the extent that petitioners and their trial counsel may jointly fabricate these claims later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings
>
> *United States v Day,* 969 F.2d 39, 46 n 9 (3rd Cir 1992).

We are convinced that an evidentiary hearing is warranted under the circumstances here Griffin has presented a potentially meritorious claim for ineffective assistance of counsel, and he deserves the right to develop a record to show there is a reasonable probability he would have accepted the plea.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is REVERSED and the case is REMANDED for an evidentiary hearing on the question of whether there is a reasonable probability that Griffin ***740** would have accepted a plea offer if he had known about it

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2003 WL 22469973
--- F 3d ---
(Cite as: 2003 WL 22469973 (6th Cir.(Ky.)))

United States Court of Appeals,
Sixth Circuit

Eddie D SMITH, Petitioner-Appellant,
v
UNITED STATES of America,
Respondent-Appellee

No. 01-5215.

Argued March 12, 2003.
Decided and Filed Nov 3, 2003

Federal prisoner whose conviction of causing another to engage in sexual intercourse by use of force, engaging in sexual intercourse with a person in detention and with intent to abuse, and making a false statement under oath to an Administrative Law Judge (ALJ) was affirmed on appeal moved to vacate his sentence The United States District Court for the Eastern District of Kentucky, Karl S Forester, Chief Judge, denied the motion, and movant appealed The Court of Appeals, David M Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation, held that: (1) movant's protestations of innocence throughout his trial did not, by themselves, justify summary denial of his motion to vacate without an evidentiary hearing on his claim that defense counsel was ineffective for failing to advise him to accept plea bargain offer, (2) counsel's alleged failure to insist that, in light of overwhelming evidence of guilt, movant plead guilty and accept plea bargain offer, was not a proper basis upon which to find deficient performance by defense counsel, (3) factual questions as to nature and quality of the advice movant received from counsel before he made his final decision to reject the government's proposed plea bargain entitled movant to a hearing on his claim that defense counsel was ineffective for failing to advise him to accept the plea bargain offer, and (4) remand to different judge was not warranted.

Vacated and remanded

[1] Criminal Law ⚿1652

110k1652 Most Cited Cases

A hearing on a motion to vacate is mandatory unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U S.C.A § 2255.

[2] Criminal Law ⚿1652
110k1652 Most Cited Cases

[2] Criminal Law ⚿1656
110k1656 Most Cited Cases

The postconviction relief statute does not require a full blown evidentiary hearing in every instance; rather, the hearing conducted by the court, if any, must be tailored to the specific needs of the case, with due regard for the origin and complexity of the issues of fact and the thoroughness of the record on which the motion is made 28 U S C A § 2255

[3] Criminal Law ⚿1610
110k1610 Most Cited Cases

When a trial judge also hears collateral proceedings, that judge may rely on his recollections of the trial in ruling on the collateral attack

[4] Habeas Corpus ⚿742
197k742 Most Cited Cases

A habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims when there is a factual dispute

[5] Criminal Law ⚿1655(6)
110k1655(6) Most Cited Cases

Defendant's protestations of innocence throughout his trial on several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard did not, by themselves, justify summary denial of his motion to vacate without an evidentiary hearing on his claim that defense counsel was ineffective for failing to advise him to accept plea bargain offer, and for failing to interview and call as a defense witness an inmate who would have testified that the government's witnesses fabricated the stories about defendant 28 U S C A § 2255

[6] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

Defense counsel's alleged failure to insist that, in light of overwhelming evidence of guilt of defendant charged with several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard, defendant plead guilty and accept plea bargain offer, was not a proper basis upon which to find deficient performance by defense counsel as required to establish an ineffective assistance of counsel claim U S.C.A Const Amend 6

[7] Criminal Law ⚿641.13(5)
110k641 13(5) Most Cited Cases

Although defense counsel may provide defendant an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial or plead guilty must be made by defendant

[8] Criminal Law ⚿641.13(2.1)
110k641 13(2 1) Most Cited Cases

An attorney representing a criminal defendant has a clear obligation to fully inform her client of available options U S C A Const Amend 6

[9] Criminal Law ⚿641.13(2.1)
110k641 13(2 1) Most Cited Cases

A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available U.S.C.A. Const.Amend. 6

[10] Criminal Law ⚿641.13(7)
110k641 13(7) Most Cited Cases

A criminal defendant has the right to be informed by counsel as to the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his counsel at the time U S C A. Const Amend 6.

[11] Criminal Law ⚿1655(6)
110k1655(6) Most Cited Cases

Factual questions as to nature and quality of the advice defendant received from counsel before he made his final decision to reject the government's proposed plea bargain on several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard entitled defendant to a hearing on his claim that defense counsel was ineffective for failing to advise him to accept the plea bargain offer. U.S.C A Const Amend 6, 28 U S C.A § 2255

[12] Criminal Law ⚿641.13(5)
110k641.13(5) Most Cited Cases

The failure of defense counsel to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance, as required to establish ineffective assistance of counsel claim. U.S C.A Const Amend. 6.

[13] Criminal Law ⚿1192
110k1192 Most Cited Cases

Appellate court's authority to remand to a different judge to preserve the appearance of fairness is an extraordinary power and should be rarely invoked 28 U.S.C A. § 2106.

[14] Criminal Law ⚿1192
110k1192 Most Cited Cases

The factors that the Court of Appeals considers in deciding whether to exercise its authority to remand to a different judge to preserve the appearance of fairness are (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. 28 U.S.C.A § 2106

[15] Criminal Law ⚿1192
110k1192 Most Cited Cases

Remand to different judge was not warranted, on remand from postconviction relief movant's appeal of denial of relief so that district court could hold hearing on movant's ineffective assistance of counsel claim, district judge was probably in a superior position to evaluate the claims, since he presided over movant's criminal trial U.S.C A Const Amend 6, 28 U S C A § 2106.

ARGUED Cheryl J Sturm (argued and briefed), Chadds Ford, PA, for Appellant

Charles P Wisdom, Jr (briefed), Assistant United

States Attorney, John Patrick Grant, Assistant United States Attorney, Lexington, KY, for Appellee

Before MOORE and CLAY, Circuit Judges, LAWSON, District Judge [FN*]

OPINION

LAWSON, District Judge

*1 The petitioner appeals the denial of his motion to vacate sentence filed under 28 U S C. § 2255. He was convicted by a jury of several counts of sexual misconduct perpetrated against female inmates at a federal prison while he was employed at the facility as a prison guard. He also was found guilty of lying during a hearing into his misconduct before the Merit Systems Protection Board. The principal ground for Smith's motion is that his attorney was constitutionally ineffective because he failed to properly advise and counsel Smith concerning a pretrial guilty plea offer made by the government that would have resulted in a sentence considerably shorter than the 262 months Smith ultimately received We believe that the factual record before the district court is not sufficient to properly adjudicate the motion. We therefore vacate the lower court's judgment and remand for an evidentiary hearing

I

On April 20, 1995, a federal grand jury sitting in the Eastern District of Kentucky returned a multi-count indictment against petitioner Eddie D. Smith A superseding indictment was handed down on August 16, 1995, which charged Smith with eight counts of sexual misconduct and one count of perjury. Counts one through five alleged that Smith engaged in sexual acts by force with four different inmates while he was employed as a correctional officer at the Federal Medical Center (FMC) in Lexington, Kentucky, all in violation of 18 U S C § 2241(a)(1) Counts six and seven charged that Smith engaged in sex acts with one of the previously-named inmates while she was under his authority, contrary to 18 U S C § 2243(b) Count eight alleged that Smith engaged in sexual contact with yet a different inmate while she was officially detained and under his supervision in violation of 18 U.S.C § 2244(a)(4) Finally, count nine alleged that, on or about January 12, 1994, Smith gave false material testimony under oath before United States Administrative Law Judge Jack E Salyer, during a Merit Systems Protection Board proceeding concerning the removal of Smith from his position as a correctional officer at the Lexington Medical Center, contrary to 18 U S C. § 1621

At his arraignment, Smith was represented by the same attorney that had appeared for him at the prior proceeding before the Merit Systems Protection Board in which Smith was removed from his job with the Bureau of Prisons on account of the same misconduct that led to his indictment Smith contends, and the government does not dispute, that sometime before the indictment was returned, the prosecution offered to allow Smith to plead guilty to a one-count information charging perjury with a maximum recommended sentence of twenty months, in exchange for abandoning the prosecution of the sexual misconduct offenses Smith did not accept that offer About one month after his arraignment, his lawyer withdrew and attorney Andrew M. Stephens was appointed to represent Smith Stephens avers that the guilty plea offer remained open until approximately ten days before trial

*2 Trial commenced on September 25, 1995 Smith testified on his own behalf, and maintained his innocence of the charges However, the jury convicted Smith as charged on all counts but count seven, for which he was found not guilty On March 8, 1996, Smith was sentenced to multiple terms of 262 months imprisonment on counts one, two, three and five, with thirty-six months of supervised release to follow; twelve months imprisonment on count six, with three months of supervised release, six months imprisonment on count eight, with three years of supervised release, and sixty months imprisonment on count nine, with three years of supervised release Count four was dismissed on the government's motion. The sentences were all to be served concurrently We affirmed Smith's convictions on direct appeal on March 20, 1998 in an unpublished opinion *United States v Smith,* No 96-5385, 1998 WL 136564 (6th Cir Mar 19, 1998)

On March 5, 1999, the petitioner filed a motion seeking to vacate, set aside, or correct his sentence pursuant to 28 U.S C. § 2255. In the motion Smith alleges that defense counsel was ineffective for failing to advise him to accept the twenty-month guilty plea agreement offered by the government, and for failing to interview and call as a defense witness a FMC inmate who would have testified that the government's witnesses fabricated the stories about Smith Smith further contended in the motion that his convictions violated the Fifth Amendment's prohibition against double jeopardy

The government responded to the motion on April 20,

1999, attaching an affidavit of attorney Stephens The affidavit states that Stephens' conversations with predecessor counsel indicated that Smith was aware, prior to the filing of the indictment, that an offer was on the table for a guilty plea to the perjury charge Stephens Aff. at 1, J A. at 69. The affidavit further states that "Mr Smith had been fully active in participation of the pension denial hearings and his potential wrongful termination It is also relevant to the undersigned that Mr. Smith's wife accompanied him on every office conference, discovery conference, and discovery investigation conference of which there were at least fifteen or twenty " *Ibid.* "At no time," Stephens insists, "during the course of lengthy investigations, review of literally reams of documents and travel between various Federal Correctional Institutions accomplished by the undersigned in investigation and defense of this case, did Mr Smith ever consider the entry of a guilty plea." Stephens Aff at 2, J.A at 70 The affidavit speculates that "Smith at some point was attempting to save face in front of his wife during the pendency of their marriage and thus, that maybe [sic] the motivation for his denial of any desire to entry [sic] a guilty plea " *Ibid* Stephens also states, somewhat cryptically, that "[i]t would be incorrect for Mr. Smith to assert that their [sic] wasn't some talk of a guilty plea since the offer was made and held open by the United States until approximately ten days before trial " *Ibid*

***3** The evidence against Smith, Stephens insists, was overwhelming He further states that he prepared with Smith more than he has with any other client When the guilty plea offer was discussed, "it was discussed with disgust " Stephens Aff. at 4, J.A. at 72 There was no doubt in his mind, Stephens states, that Smith "never considered a plea though a plea was discussed " Stephens Aff at 3-4, J A. at 71-72 "[N]ever ever was undersigned counsel directed to explore negotiated plea offers even though same was made " Stephens Aff at 3, J A at 71

On March 28, 2000, Magistrate Judge James B Todd filed a report recommending that the motion be denied After considering the petitioner's exceptions to that report, and the government's response to those exceptions, the district court adopted the report in an Opinion and Order filed January 11, 2001 No evidentiary hearing was conducted in the lower court The district court denied the motion on the ground that the petitioner had failed to show prejudice as required by *Strickland v Washington,* 466 U S 668, 694, 104 S.Ct 2052, 80 L Ed 2d 674 (1984), because there was no "objective evidence in the record demonstrating a reasonable probability that, but for his counsel's lack of advice, he would have accepted the government's offer." Opinion and Order at 3; J A at 112 The district court reasoned that Smith was aware of the government's offer and rejected it, and instead protested his innocence at trial (which resulted in a two-point offense level enhancement for obstruction of justice), and therefore it was unlikely that he would have pleaded guilty even if he had received proper advice from his attorney. *Ibid* The district court also rejected Smith's claim that Stephens was ineffective for failing to interview a witness, and that prosecuting Smith following the administrative job-removal proceedings violated the Double Jeopardy Clause

The district court's judgment against the petitioner was timely appealed on February 5, 2001 The issues raised relate only to the question of whether Stephens' advice to Smith concerning the government's guilty plea offer was constitutionally adequate, and whether the district court erred by not conducting an evidentiary hearing to resolve that question

II

On appeal of the district court's denial of a motion to vacate, alter, or amend sentence pursuant to 28 U S.C. § 2255, we review the lower court's legal conclusions *de novo* and its factual findings for clear error *Nagi v United States,* 90 F.3d 130, 134 (6th Cir 1996). The district court's decision whether to hold an evidentiary hearing on a Section 2255 motion is reviewed under the abuse of discretion standard. *Arredondo v United States,* 178 F 3d 778, 782 (6th Cir 1999)

[1][2][3][4] A prisoner who files a motion under Section 2255 challenging a federal conviction is entitled to "a prompt hearing" at which the district court is to "determine the issues and make findings of fact and conclusions of law with respect thereto " 28 U S C. § 2255. The hearing is mandatory "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Fontaine v United States,* 411 U.S 213, 215, 93 S Ct. 1461, 36 L Ed 2d 169 (1973) (citation omitted) *See also Blanton v United States,* 94 F 3d 227, 235 (6th Cir.1996) (holding that "evidentiary hearings are not required when . the record conclusively shows that the petitioner is entitled to no relief "). The statute "does not require a full blown evidentiary hearing in every instance Rather, the hearing conducted by the court, if any, must be tailored to the specific needs of the case, with due regard for the origin and complexity of the issues of fact and the thoroughness of the record on which (or perhaps, against which) the section 2255 motion is made " *United States v Todaro,* 982 F 2d 1025, 1030 (6th Cir.1993) Furthermore, "when the trial judge also

hears the collateral proceedings that judge may rely on his recollections of the trial in ruling on the collateral attack " *Blanton,* 94 F 3d at 235 (citing *Blackledge v Allison,* 431 U S 63, 74 n. 4, 97 S Ct. 1621, 52 L.Ed.2d 136 (1977)). However, "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims " *Turner v United States,* 183 F.3d 474, 477 (6th Cir.1999) (citing *Paprocki v Foltz,* 869 F 2d 281, 287 (6th Cir.1989)) We have observed that a Section 2255 petitioner's burden "for establishing an entitlement to an evidentiary hearing is relatively light " *Id* at 477

*4 Here, Smith seeks a hearing on the question of whether his attorney was constitutionally ineffective Such claims are guided by the now familiar two-element test set forth by the Supreme Court in *Strickland v Washington,* 466 U S 668, 104 S Ct. 2052, 80 L.Ed.2d 674 (1984) First, a petitioner must prove that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment " *Id* at 687, 104 S Ct. 2052. The Court explained that to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." *Id* at 690, 104 S Ct 2052 Second, a petitioner must show that counsel's deficient performance prejudiced the petitioner A petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial " *Id* at 687, 104 S Ct 2052

The Supreme Court has applied this test to evaluate the performance of attorneys representing guilty-pleading defendants, with special attention to the second element

> The second, or "prejudice," requirement . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v Lockhart, 474 U S 52, 59, 106 S Ct 366, 88 L Ed 2d 203 (1985)

In this case, the trial court summarily rejected Smith's ineffective assistance of counsel claim for failure of proof on this second element The lower court found that a defendant's "own self-serving testimony" that he would have pleaded guilty if properly advised is not sufficient, in addition, the lower court required that the defendant also present "objective evidence" to establish prejudice. Opinion and Order at 3, J A at 112. However, we recently stated "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement " *Griffin v United States,* 330 F 3d 733, 737 (6th Cir 2003) (quoting *Dedvukovic v Martin,* 36 Fed Appx. 795, 798 (6th Cir.2002) (unpublished))

[5] The district judge in this case, who also presided over Smith's trial, found that Smith was aware of the plea offer, rejected it, and maintained his innocence throughout the proceedings, including to the point of testifying under oath at trial that he did not engage in the conduct described by his accusers, which earned him a two-point enhancement of his offense level for obstruction of justice at sentencing This point was addressed in *Griffin* as well, where we observed that defendants may enter a guilty plea while maintaining innocence under *North Carolina v Alford,* 400 U.S. 25, 33, 91 S.Ct 160, 27 L.Ed 2d 162 (1970) (stating that "reasons other than the fact that he is guilty may induce a defendant to so plead . . and he must be permitted to judge for himself in this respect"), many defendants believe that they must maintain innocence right up to the point of pleading guilty in order to fortify their bargaining positions, and the Fifth Amendment gives defendants the right to assert their innocence throughout a trial. *Griffin,* 330 F.3d at 738 We concluded, therefore, that it "does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea .. These declarations of innocence are not dispositive on the question " *Ibid* Protestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing. *See Cullen v United States,* 194 F.3d 401, 404-07 (2d Cir.1999)

*5 In *Griffin,* there was no dispute over the fact that the petitioner's trial counsel failed to convey a pretrial guilty plea offer, and that the petitioner proceeded to trial, where he testified that he was innocent The panel noted that the substantial disparity between the five-year sentence offered by the government and the 156 months Griffin ultimately received was enough to warrant further exploration of the issue at an evidentiary hearing of the question of the reasonable likelihood that Griffin, competently advised, would have pleaded guilty *Griffin,* 330 F 3d at 739 Other panels in this and other circuits have pointed to the

disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer, despite earlier protestations of innocence *See Magana v Hofbauer,* 263 F.3d 542, 552-53 (6th Cir.2001) (finding the difference between a ten- and twenty-year sentence significant), *United States v Day,* 969 F.2d 39 (3d Cir.1992) (finding ineffective assistance of counsel when trial counsel mistakenly described the penalties at trial as ten years rather than the twenty-two years the defendant received at sentencing, and where a plea offer of five years had been made); *United States v Gordon,* 156 F 3d 376, 377-81 (2d Cir 1998) (holding that the wide disparity between the ten-year sentence recommended by the plea agreement and the seventeen-and-a-half years the defendant did receive was objective evidence that a plea would have been accepted)

[6][7] In this case, the petitioner concedes that he was aware of the government's guilty plea offer. However, citing *Boria v Keane,* 99 F 3d 492 (2d Cir 1996), Smith contends that his attorney was ineffective because, in light of the overwhelming evidence of guilt, the attorney did not insist that Smith plead guilty and accept the twenty-month plea bargain We do not believe this to be a proper basis upon which to find deficient performance by defense counsel The decision to plead guilty--first, last, and always--rests with the defendant, not his lawyer Although the attorney may provide an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction

[8][9][10] On the other hand, the attorney has a clear obligation to fully inform her client of the available options We have held that the failure to convey a plea offer constitutes ineffective assistance, *see Griffin,* 330 F 3d at 734, but in the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines, more is required A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available In a system dominated by sentencing guidelines, we do not see how sentence exposure can be fully explained without completely exploring the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his lawyer at the time *See United States v Day,* 969 F.2d 39, 43 (3d Cir 1992) (observing that "the Sentencing Guidelines have become a critical, and in many cases, dominant facet of federal criminal proceedings" such that "familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation ") The criminal defendant has a right to this information, just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law.

***6** [11] The record in this case leaves us in considerable doubt over the nature and quality of the advice Smith received before he made his final decision to reject the government's proposed plea bargain. Attorney Stephens' affidavit states that Smith was aware of a plea offer, and that Smith was predisposed against a plea to save face in front of his wife, but it does not state that Stephens actually discussed the terms of the agreement with Smith. More importantly, the affidavit does not state that Stephens informed Smith of the dramatically higher sentence potential (over ten times as much incarceration) to which Smith was exposed if he were convicted of even one of many charges. The affidavit does not claim that Stephens at any time expressed to Smith how unlikely he was to prevail at trial

Stephens stated in his affidavit that Smith "knew by virtue of letters sent from [Stephens] to him possibility [sic] of the steep sentence which he ultimately got " Stephens Aff, J A at 71 However, the only such correspondence in the record came from Stephens *after* the trial. In his October 17, 1995 letter, Stephens wrote to Smith "I wanted to formally advise you of what I believe the relevant sentencing guideline provisions are and to confirm with you the substance of my meeting with [the probation officer] and to give you your various options at this point " Letter of Oct 17, 1995 from Stephens to Smith, J.A at 105 There is no reference in the letter to earlier conversations or to pretrial discussions of the sentencing potential in the case. There is no other evidence that Smith's sentencing exposure upon conviction of the charges in the superseding indictment--information that, in our view, was necessary for a proper consideration of the guilty plea offer-- was ever conveyed to Smith before trial

[12] The failure of defense counsel to "provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance." *Moss v United States,* 323 F 3d

445, 474 (6th Cir 2003) *See also Magana,* 263 F.3d at 550 (holding that the defense counsel's erroneous advice concerning sentence exposure "fell below an objective standard of reasonableness under prevailing professional norms"), *Day,* 969 F.2d at 43 (holding that incorrect advice about sentence exposure as a potential career offender undermined the defendant's ability to make an intelligent decision about whether to accept a plea offer) Whether the petitioner had this information before he rejected the plea offer is also an important factor in the consideration of the reasonable likelihood that a properly counseled defendant would have accepted the government's guilty plea offer.

Smith should have been given the opportunity at an evidentiary hearing to develop a record on these factual issues in the lower court

III

[13][14] The petitioner asks that the matter be remanded to a different judge to preserve the appearance of fairness. Although we have the authority to grant that request under 28 U S C. § 2106, it is an "extraordinary power and should be rarely invoked." *Armco, Inc v United Steelworkers of America, AFL-CIO, Local 169,* 280 F 3d 669, 683 (6th Cir.2002) (citation omitted) The factors that we consider are "(1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness " *Sagan v United States,* 342 F 3d 493, 501 (6th Cir.2003) (citations omitted) *See also Brown v Crowley,* 312 F 3d 782, 791- 92 (6th Cir.2002)

*7 [15] None of these factors support the request to remand this case to a different district court judge. The record contains no evidence that the district court judge would have difficulty considering the case on remand in an objective manner. In fact, he is probably in a superior position to evaluate the claims, since he presided over Smith's criminal trial His familiarity with the case is no evidence of a lack of propriety or fairness, since, as we observed earlier, the habeas judge may rely on his or her memory of the trial when relevant to the issues on collateral review *See Blanton,* 94 F 3d at 235. To require a different district court judge to become familiar with the factual and procedural history of this case would waste judicial resources

For the foregoing reasons, we **VACATE** the judgment of the district court denying the petitioner's motion to vacate his sentence under 28 U S C § 2255, and **REMAND** to the district court for an evidentiary hearing

FN* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation

2003 WL 22469973 (6th Cir.(Ky)), 2003 Fed App. 0387P

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
JUDGE DAVID D. DOWD, JR.

To: All Judges and Magistrate Judges of the Northern District of Ohio

From: Judge David D. Dowd, Jr.

In Re: Making a Record in a Criminal Case where a Guilty Plea has been offered and Rejected

Date: November 17, 2003

Dear Judges,

1. I have reviewed this issue with the judges of this court in the aftermath of the decision in *Griffin v. United*, 330 F.3d 733 (6th Cir. 2003) and now a new decision has come from the Sixth Circuit that bears reading as now the 6th Circuit has added fuel to the fire which arguably makes an evidentiary hearing required in a subsequent 2255 case where the defendant knows about and rejects a guilty plea offer and then gets hammered by the sentence. The constitutional claim is the denial of the effective assistance of counsel. *See* the slip opinion in *Smith v. United States,____F.3d_____*, filed on November 3, 2003. *See* 2003 Fed. App. 0387P (6th Cir.).

2. AUSA Bernard Smith sends weekly memos to the U.S. Attorneys regarding recent opinions of the Sixth Circuit, and he has accurately summarized the *Smith* opinion as follows:

1. Smith v. United States, No 01-5215 (6th Cir., filed 11/3/03)(Moore, Clay, LAWSON), is a fairly important case ineffective assistance of counsel 2255 case involving the question of adequate advice to a defendant about a plea offer from the government. Defendant was convicted of sexually assaulting/molesting federal female inmates at FMC Lexington and perjury before the MSPB when he was fired from federal employment. The government offered him a 20-month deal before trial; he went to trial, was convicted and got 262 months, including an upward adjustment for trial perjury. His trial attorney filed an affidavit stating that defendant rejected the 20-month offer and wanted to maintain "face" with his wife by denying the allegations. Nonetheless, the court remanded for an evidentiary hearing. Defendant stated that he would have accepted the plea if properly advised and, the Court held, the fact that he protested his innocence at trial does not foreclose this argument. In light of the disparity between the sentences offered and actually imposed, it is a fair inference that a properly advised defendant might have accepted a deal. In addition (here is the "news" in this opinion), under the sentencing guidelines system, merely conveying an offer to a defendant is not enough. Because of the complexity of the guidelines, a defendant is entitled to an explanation from his attorney, factoring in the quality of the government's evidence, of what a guidelines sentence would be after trial as opposed to the government's pretrial offer. On this record, the Court cannot determine if the defendant received this explanation, so a hearing is necessary.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JAN - 5 2004

December 19, 2003

Honorable David D. Dowd, Jr.
United States District Court
2 South Main Street
Akron, OH 44308

RE: Actions Taken by the Advisory Committee on Criminal Rules

Dear Judge Dowd:

Thank you for your proposal to amend Criminal Rule 11, requiring the court to ask whether the prosecution had made a plea offer and whether that offer was communicated to the defendant. The Advisory Committee on Criminal Rules considered your proposal at its October 15-16, 2003, meeting.

After much discussion, the Committee declined to adopt your proposal. One member agreed with your point but thought that the issue did not have to be addressed in a rule. Other members noted that similar problems may exist and concluded that it would be difficult to cover all possible contingencies in a rule amendment.

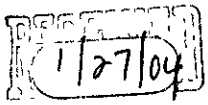
The Committee also revisited your suggestion that Criminal Rule 41 be amended to require the preparation of a transcript of sworn testimony presented to the magistrate judge in requesting a search warrant. At its April 1998 meeting, the Committee initially considered your proposal and decided to defer it pending further study. At its October 2003 meeting, the Committee discussed your proposal and agreed that no change to the rule was necessary at this time.

Thank you again for your suggestions. We appreciate your interest in the federal rulemaking process and welcome any proposals that you may have in the future.

Sincerely,

Peter G. McCabe
Secretary

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308



David D. Dowd, Jr.
Judge

January 21, 2004

(330) 375-5834
Fax: (330) 375-5628

Mr. Peter G. McCabe
Secretary to the Rules Committee
Rules Committee Support Office
OJP-RCSO - Room 4-170
Administrative Office of the US Courts
Washington, DC 20544

In Re: My Rejected Proposal of November 20, 2003 to Amend Criminal Rule 11(c)(1)

Dear Peter,

Your December 19, 2003 letter received in my chambers on January 5, 2004 has been forwarded to me in Naples where I am enjoying the fruits of senior status. A copy of your letter is attached. Also attached is a copy of my November 20 proposal.

The first paragraph of your letter of December 19, 2003 describes my proposal as *requiring the court to ask whether the prosecution has made a plea offer and whether that offer has been communicated to the defendant.* I sincerely hope that my proposal was not presented in that vein. To the contrary, my proposal was to *authorize* but not to *require.*

My November 20 proposal was simply to add the following phrase to Rule 11(c)(1): "but may question whether the defendant has been fully advised as to any government proposed guilty plea agreement."

In any event, most if not all, the judges in my district are now engaging in the suggested inquiry when the defendant indicates that he or she has elected to stand trial. And I predict that eventually such a practice, without the modification of Rule 11, will result in appellate review by a defendant who then elects to accept the government's offer after the inquiry by the court.

As to the issue involving Criminal Rule 41, frankly I had forgotten my interest in the problems I outlined in my letter of February 18, 1998.

My best wishes.

Yours very truly,

David D. Dowd, Jr. flm

David D. Dowd, Jr.
U.S. District Judge

DDD.flm
Enclosures

cc: Judge Edward Carnes w/enclosures
Mr. John K. Rabiej w/enclosures
All Judges and Magistrate Judges of the Northern District of Ohio w/McCabe's letter of December 19, 2003 only

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

February 18, 2004

Honorable David D. Dowd, Jr.
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

RE: *Your Proposal to Amend Criminal Rule 11(c)(1)*

Dear Judge Dowd:

Thank you for your letter of January 21, 2004, regarding your proposal to amend Criminal Rule 11(c)(1). Please rest assured that the Advisory Committee did consider your proposed amendment in the light you intended — that the court be *authorized* to question the prosecutor as to whether the defendant has been advised of any government-proposed guilty plea agreement. My response to you was based on the draft minutes of the Committee's October 15-16, 2003, meeting, which I have enclosed. Your letter alerted us that the draft minutes are inaccurate; this will be addressed at the Committee's next meeting in May 2004.

Thank you again for your letter and best wishes. I'm glad to hear that you're enjoying the fruits of senior status!

Sincerely,

Peter G. McCabe

Enclosure

cc: Honorable Edward E. Carnes

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 15-16, 2003
Gleneden Beach, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Gleneden Beach, Oregon on October 15 and 16, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Wednesday, October 15, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laural Hooper of the Federal Judicial Center; Judge John Roll and Magistrate Judge Tommy Miller, former members of Committee; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J. Prof. Nancy J. King participated by telephone.

Judge Carnes recognized Judges John M. Roll and Tommy E. Miller and thanked them for their six years of dedicated service on the Committee. He also noted that Judge Tashima's term on the Standing Committee had ended in September 2003, and welcomed

brief discussion, Judge Carnes stated that it was clear that there was a consensus not to continue any consideration of the issue.

D. Rule 10. Proposal by Magistrate Judge W. Crigler re Guilty Plea at Arraignment

At its Fall 1994 meeting, the Reporter said, the Committee had briefly considered a proposal from Magistrate Judge Crigler (then a member of the Committee) regarding the ability of a magistrate judge to take guilty pleas at arraignments. Although there was apparently an agreement to place the item on a future agenda, it was not directly addressed as an agenda item at any later meeting. Several members pointed out, however, that the issue had been discussed, at least indirectly, in the context of other proposed amendments, including the pending addition of proposed new rule 59. Following brief discussion, Judge Bucklew moved that the proposal be removed from the docket. Judge Battaglia seconded the motion, which carried by a unanimous vote.

E. Rule 11. Proposal by Mr. Richard Douglas, Senate Foreign Relations Committee re Advising Defendant of Collateral Consequences (Immigration) of Guilty Plea

The Reporter indicated that in 2001, Mr. Richard Douglas, a staff member of the Senate Foreign Relations Committee, recommended that the Committee consider an amendment to Rule 11 that would require the judge to inform the defendant that a guilty plea might affect the defendant's immigration status. The Reporter stated that although his specific proposal had not been considered, the issue had been raised on prior occasions, and rejected, as recently as the April 2003 meeting. Judge Friedman spoke on behalf of the proposal and suggested that the Committee reconsider its opposition to the amendment. Following brief discussion, Judge Carnes concluded that a clear consensus had formed to reject the proposal and to change the docket sheet to reflect the fact that the issue had been "completed."

F. Rule 11. Proposal by Judge David Dowd re Determining Whether Plea Agreement was Communicated to Defendant

In 2002, the Reporter stated, Judge Dowd, a former member of the Committee, had written to Mr. Rabiej suggesting that Rule 11 be amended to require that the judge inquire as to whether the prosecution has made a plea offer and whether that offer was ever communicated to the defendant. The matter had been referred to the Chair and the Reporter but had not been discussed at any prior meetings. Mr. Campbell stated that he did not believe that this issue needed to be addressed in a rule; other members noted that similar problems might exist and that it would be difficult to cover all possible contingencies in the rule. Following additional discussion, Judge Carnes stated that there was a consensus to list the proposal as having been "completed," on the docket sheet.