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

02-CR-C

David D. Dowd, Jr.
Judge

May 20, 2002

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Mr John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the U S. Courts
One Columbus Circle, N E.
Washington, DC 20544-0001

Dear John,

It was good to talk with you, even though you had to remind me of the current plight of the Indians--as in Cleveland--not Native Americans.

I write with my concern about issues that arise from the claim of an uncommunicated offer by the prosecution to a defendant's counsel to accept a plea of guilty to reduced charges or to a plea to a proposed information that may not include all the potential charges that the government may subsequently charge. When I say "uncommunicated" that means that the defendant's counsel allegedly did not communicate the offer to the client.

I have now presided over two cases where issues relating to the subject have involved considerable time on my behalf. The first case is the DaBelko case that originated in the Northern District of Ohio, and the second case is the Ponder case that originated in the Middle District of Florida. My first involvement in DaBelko began some ten years after the trial, over which Judge George White of this district presided. Judge White rejected DaBelko's Section 2255 action but the Sixth Circuit reversed. By the time the 2255 action was returned, Judge White had retired and the case was assigned to me. That case involves a trial where the claim was made that DaBelko's retained counsel had failed to adequately advise DaBelko of the risks involved in proceeding to trial and after there had been some plea discussions between DaBelko's retained counsel and the assigned AUSA. By the time I conducted the required evidentiary hearing after the reversal and remand from the Sixth Circuit, DaBelko's retained counsel was unable to assist because he had serious Alzheimer problems I denied relief as set forth in the enclosed opinion which is also published at 154 F Supp 2d 1156 (N D.Ohio 2000). Later, the issues were compromised by a subsequent entry which is also enclosed

The Ponder case is one in which I presided over in the Middle District of Florida I conducted the suppression hearing, then took the guilty pleas and conducted the sentencing after Ponder's retained counsel was permitted to withdraw. At the sentencing hearing, it developed that the AUSA had written a letter to Ponder's retained counsel and suggested a single-count information. After the retained counsel did not reply, a five-count indictment was returned and

Ponder pled to all five counts after I denied the motion to suppress. The eventual surfacing of the pre-indictment guilty plea offer eventually led to a 2255 action by Ponder which I rejected. The 11th Circuit reversed and remanded, and so I conducted an evidentiary hearing as directed by the 11th Circuit. I denied relief I enclose a copy of the 11th Circuit's ruling and my ruling after the evidentiary hearing.

I am concerned that a whole new cottage industry involving alleged non-communicated plea offers will develop The district court is not permitted to engage in plea discussions as we all know I have taken to a form of self-help in which I inquire if an offer to accept a plea agreement has been directed to defendant's counsel prior to a contested trial, question the defendant if he or she has been apprized of the offer and then direct that the proposed plea offer be secured under seal. I suppose that arguably one could argue that such a process is a violation of the admonition to not be involved in plea discussions. But, I devoted a substantial amount of judicial time to the DaBelko and Ponder cases, and I am reluctant to continue to be committed to additional time in similar cases.

So this letter is for the purpose of proposing a modification of Rule 11 to allow the district court to be engaged in a process whereby he or she may inquire, prior to trial, as to whether the prosecution has advanced a proposal for a guilty plea agreement and has such a proposal been communicated to the defendant. Then, I would suggest a means by which the essence of the proposal could be secured under seal in the event of a future dispute

I enclose the relevant documents in the DaBelko and Ponder cases.

Please my best wishes to the members of the Advisory Committee

Yours very truly,

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

DDD:flm
Enclosures

NOT RECOMMENDED FOR PUBLICATION

No. 98-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD DABELKO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: **WELLFORD, SILER, and GILMAN**, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge. 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.
>
> . . . .
>
> 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.

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*, ___ F.3d ___, 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 (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 (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.* at1207-09. 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).

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*, 117 S.Ct. 2508 (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.

More than this, the government goes on to argue that DaBelko "was aware that guideline range negotiations included at least 20 years."[1]

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

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[1]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."

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 (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.

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

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)

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)

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)

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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> * * * * * *
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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
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> *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.
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> 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
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> 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

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IN THE UNITED STATES COURT OF APPEALS NOV 13 2001

FOR THE ELEVENTH CIRCUIT

No. 01-10053

D. C. Docket Nos. 00-00477-CV-T-23E
98-00220-CR-T-2

WILBERT PONDER,
a.k.a. Wilbert Ponder, II, etc.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 9, 2001)

Before ANDERSON, Chief Judge, HULL, and FAY, Circuit Judges.

PER CURIAM:

This is an appeal from a denial of a motion for post-conviction relief, pursuant to 28 U.S.C. § 2255. Wilbert Ponder ("Appellant") pled guilty to an indictment charging him with possession of 2337 grams of cocaine base ("crack cocaine") with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count One); possession of cocaine, in violation of 21 U.S.C. § 844 (Count Two); possession of marijuana, in violation of 21 U.S.C. § 844 (Count Three); possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924 (Count Four); and carrying a firearm in relation to a crime of violence and drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Five). Ponder argues that the district court erred by failing to hold an evidentiary hearing to determine whether or not he was given ineffective assistance of counsel. Whether counsel's assistance was ineffective is a mixed question of law and fact, which we review de novo. Strickland v. Washington, 466 U.S. 668, 698 (1984). Further, the district court findings are subject to a clearly erroneous standard. Id. After reviewing the parties' briefs and the record in this matter, we remand to the district court with specific directions to hold an evidentiary hearing to make factual findings regarding the events that occurred prior to, and during sentencing.

On September 16, 1998, Appellant entered a plea of guilty to all five counts in the indictment pursuant to a plea agreement. The district court ordered a pre-sentence report and scheduled sentencing for December 9, 1998. Prior to sentencing, Ponder

requested that his attorney, Mr. Pines, be removed from his case. The district court granted Ponder's motion and appointed Mr. Hill, the Federal Public Defender, to represent him.

During the sentencing hearing, the government advised the court of pretrial negotiations between the government and Mr. Pines, Ponder's first attorney. The government represented it had made an offer in writing specifying that in exchange for Ponder's cooperation, the government would charge him with only one count, possession of the cocaine base. Ponder alleged that the negotiations between the government and Mr. Pines were never mentioned to him, nor was he aware of any offer made by the government until he was to be sentenced by the district court.

The district court then sentenced Ponder to serve 151 months imprisonment as to Count One, 24 months imprisonment each as to Counts Two and Three, and 120 months imprisonment as to Count Four; Counts One through Four to be served concurrently. Furthermore, the district court sentenced Ponder to serve 29 months imprisonment as to Count Five, to be served consecutively with the sentences imposed in Counts One through Four. Ponder did not file a direct appeal from his conviction or sentence.

However, Ponder did file a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In its August 17, 2000, Memorandum Opinion, the

district court acknowledged that Ponder had not alleged in his section 2255 motion that his counsel had been ineffective for failing to communicate the government's plea offer. The district court raised this issue sua sponte, and ordered the parties to attend a status conference for the purpose of discussing whether an evidentiary hearing should be conducted. The district court concluded that there was insufficient evidence to determine whether Ponder was prejudiced as a result of counsel's failure to communicate the government's plea offer. In so concluding, the court did not hold an evidentiary hearing, denied Ponder's section 2255 motion, and issued a certificate of appealability.

Ponder argues that the district court erred by failing to hold an evidentiary hearing to determine whether counsel was ineffective by not informing him of the pre-indictment plea offer. Further, Ponder argues that even if his claim was procedurally defaulted, he may nonetheless raise it because his counsel's ineffective assistance prejudiced him.

The government argues that Ponder procedurally defaulted on his ineffective assistance of counsel claim because he entered into a plea agreement with an appeal waiver provision. The government maintained that because both Ponder and Mr. Hill, as Ponder's second attorney, were fully informed of the plea offer before the district court pronounced his sentence, Ponder waived his right to challenge his guilty plea to

the five counts. Furthermore, the government argues that because the quantity of cocaine was never contested, Ponder's base offense level would have been the same, and therefore he didn't suffer prejudice.

Before we can reach a decision on the merits of both Ponder's and the government's arguments, we must ascertain precisely what occurred in the district court. The district court must hold an evidentiary hearing in order to make factual findings regarding whether Mr. Pines, Ponder's first attorney, advised the defendant of the plea offer by the government. If the district court determines that Ponder was indeed advised of the offer, and there was a decision to reject it, there would be a procedural bar to his claim and no ineffective assistance by Mr. Ponder's first attorney.

However, if the first lawyer did not advise the defendant of the offer by the government, then factually, what did happen? Did the defendant learn of it from a second source? Did Mr. Hill, Ponder's second attorney, know about the offer prior to sentencing? At sentencing, we know that Mr. Hill and Ponder were informed about the government's plea offer because it is discussed in the sentencing transcript. However, did Mr. Hill make a tactical decision at sentencing to not ask about withdrawing the guilty plea and simply argue for the lowest sentence? When Mr. Ponder through Mr. Hill asked the district court to use the fact of the uncommunicated, prior plea offer to one count in its sentencing decision rather than asking to withdraw the plea to five

counts, did Mr. Ponder thereby waive his right to challenge, in a § 2255 motion, his guilty plea to the five counts and to ask that th efirst plea offer now be reinstated?

Moreover, if Mr. Ponder was not advised of the plea offer, the district court needs to ascertain whether, based on the facts, Mr. Pines, Ponder's first lawyer, was ineffective and whether the defendant was prejudiced under the Strickland standard. Further, depending on the answers to the questions in the above paragraph, the district court may need to determine whether Mr. Hill, Ponder's second lawyer, was ineffective and whether the defendant was prejudiced under the Strickland standard. In order to establish a claim for relief based upon ineffective assistance of counsel, petitioner must meet the two-pronged test of Strickland v. Washington, 466 U.S. 668, 687 (1984): (1) petitioner must show that his counsel's representation was deficient, and (2) petitioner must show that this deficient representation prejudiced him. Therefore, if Mr. Ponder was not advised of the plea offer and depending on the answers to the questions in the above ~~paragraph~~, the district court must determine, based on the facts, whether either lawyer was deficient and whether this resulted in prejudice to the defendant.

In light of the foregoing, we reverse and vacate the district court's order dated November 17, 2000, and the separate judgment dated November 17, 2000, both of which denied and dismissed Mr. Ponder's § 2255 motion, and REMAND this § 2255 motion to the district court for an evidentiary hearing limited to the pre-indictment plea

offer and the issues discussed herein and for further proceedings consistent with this opinion.

REMANDED.

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DOWD, J.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Wilbert Ponder,	)	
	)	CASE NO. 8:00-CV-477-T-23E
Petitioner-Defendant,	)	8:98-CR-220-T-23E
	)	
v.	)	MEMORANDUM OPINION
	)	
United States of America,	)	
	)	
Respondent-Plaintiff.	)	
	)	

I. INTRODUCTION

The undersigned judge, stationed in the Northern District of Ohio, was initially assigned to the criminal case against Wilbert Ponder in September of 1998. Previously, on June 2, 1998 a five-count indictment was returned against Mr. Ponder based on the events of May 1, 1998 which are summarized in this Court's opinion filed on September 11, 1998 following an evidentiary hearing on September 10, 1998 in response to Ponder's motion to suppress. A copy of the Court's opinion denying the motion to suppress is attached as Appendix No. 1. On September 16, 1998 Ponder entered guilty pleas to the five counts in the indictment.

Sentencing was delayed until January 26, 1999. On January 22, 1999 Ponder's retained counsel, Raymond Pines, filed a motion to withdraw as counsel for Ponder.[1] The January 26 sentencing hearing was postponed awaiting appointment of new counsel for Ponder. Attorney Robert C. Hill was appointed as new counsel for the defendant, and Hill entered his appearance

[1]The Court granted the motion to withdraw and ordered Pines to deposit $10,000 as part of his retainer with the clerk to help underwrite the expense of newly appointed counsel. Pines complied with the order.

on February 8, 1999. The sentencing hearing was conducted on March 8, 1999. Ponder was sentenced to a term of 180 months after the Court departed downward based on the government's substantial assistance motion.

At the sentencing hearing, Attorney Hill initially argued that the Court should depart downward far enough to support a sentence of only ten years. AUSA Robert Stickney then revealed that Ponder had been given an opportunity, prior to his indictment, to plead guilty to a single count information. Attorney Hill then replied and identified the May 29, 1998 letter of Attorney Stickney as the vehicle by which the government's pre-indictment plea offer had been submitted. In the letter the government agreed to proceed on a single count information charging Ponder with possession with intent to distribute cocaine base or "crack" cocaine in violation of 21 U.S.C. § 841 (a)(1). A copy of the Stickney letter is attached as Appendix No. 2.

This revelation led to Ponder's subsequent § 2255 action. The undersigned judge has continued to be involved in the subsequent action. Eventually, the undersigned dismissed the § 2255 action finding that an evidentiary hearing was not necessary because in the Court's view, Ponder could not satisfy the second prong of the Strickland v. Washington, 466 U.S. 668 (1984) landmark decision. However, the 11th Circuit disagreed and remanded the case for an evidentiary hearing limited to the pre-indictment plea offer and the issues discussed in the 11th Circuit opinion.

II. FACT ISSUES ADDRESSED IN THE EVIDENTIARY HEARING OF FEBRUARY 13, 2002

A. DID RAYMOND PINES ADVISE PONDER OF THE PRE-INDICTMENT PLEA OFFER?

Extensive testimony was offered on this issue by Raymond Pines, Ponder's sister, Kimberly Ponder, and the defendant. Pines testified that in some manner he had advised the defendant of the substance of Stickney's pre-indictment guilty plea offer, but was unable to testify that he had shown the defendant the Stickney letter of May 29, 1998 nor was he able to give any details surrounding when and in what setting he had advised the defendant of the Stickney offer. The defendant denied any knowledge of the Stickney letter or offer and offered testimony that he would have accepted the pre-indictment offer had it been communicated to him by Pines. Kimberly Ponder offered testimony that she was the telephone conduit between Pines and the defendant, that she had been a third-party participant in numerous phone calls initiated by the defendant and which included Pines, and that Pines had never discussed any guilty plea offer by the government.

Against this background, repetition of specific dates is appropriate. Ponder was arrested on May 1, 1998. He was ordered detained by a magistrate judge on May 7, 1998. Pines was retained by the defendant's family during the month of May on the recommendation of an incarcerated prisoner who was confined at the same institution where the defendant was detained. Pines entered his formal notice of appearance on May 29, 1998, the same day that the Stickney letter offering the pre-indictment plea was dated. The five-count indictment to which the defendant entered his plea of guilty was returned on June 2, 1998.

Mr. Pines was not certain as to the date he was retained, but indicated a belief that he had in some manner notified Mr. Stickney of his retention and prior to May 29, the date of the Stickney letter and Pines' notice of appearance. However, Mr. Pines was certain that the

defendant had no interest in guilty plea discussions during the end of May, but rather was focused on attempting to gain a suppression of the fruits of the search of his automobile.

Mr. Pines had succeeded in obtaining a retainer of either $25,000 or $20,000 to defend Mr. Ponder. It seems apparent to the Court that neither Mr. Pines or Mr. Ponder was interested in guilty plea negotiations at the time the Stickney letter was received by Mr. Pines. However, the Court is unable to declare that Mr. Pines in any meaningful way discussed or advised Mr. Ponder as to the proposed pre-indictment guilty plea as set forth in the Stickney letter.

B. DID PONDER LEARN OF THE PRE-INDICTMENT PLEA OFFER FROM A SECOND SOURCE, AND IF SO, WHEN?

Mr. Robert Hill testified that he knew about the Stickney offer and letter prior to the sentencing hearing and discussed the fact of the offer with the defendant. Hill also indicated that he suggested to the defendant that he might wish to file a motion to withdraw his guilty plea to the five counts, but that the defendant chose to go forward with the sentencing hearing rather than file a motion to withdraw the guilty pleas. The defendant disagreed with Hill and testified that the first time he heard of the Stickney letter was at his sentencing hearing.

The statements of counsel at the sentencing hearing bear repeating. As previously indicated, AUSA Stickney first revealed the fact of the pre-indictment guilty plea agreement in expressing reservations about the extent of the downward departure that the Court should grant. He stated as follows:

> MR. STICKNEY: Your Honor, there was preindictment [sic] negotiations, plea negotiations, with the defendant where he

> was given the opportunity to cooperate.[2] Not normally is a case charged from the very beginning like this. This is why we're allowed superceding indictments where we can charge the again [sic][3] counts and the other factors and the 851. And generally when our office charges an 851 we stand by it all the way through. The defendant was given the ability to cooperate from the beginning and he refused through his attorney; I think it was Ray Pines at the time. And he filed his motions to suppress which were denied by the Court. So he wasn't cooperating from the very beginning.
>
> When he determined he was going to cooperate his cooperation wasn't as valuable as it could have been. Just by luck did Jimmy Bunch, the prosecutor in our office, indict his supplier, Mr. Mohamid. And Jimmy Bunch listed Mr. Ponder as a witness in that case and was intending to possibly call him if necessary. If it hadn't been for that we wouldn't be in this position because I could not file a 5K1 motion for the defendant. He wasn't cooperating from the beginning that's why the 851 was filed for the enhancement. When he late in the day decided to cooperate just by luck he got listed on a witness list for Mohamid. And it took some argument within our office, Your Honor, for that to even qualify, since he wasn't required to testify. But believing good conscious [sic] and fairness to the defendant that since his name was on the witness list we believe that that could have had an impact on Mr. Mohamid in getting him to plead guilty. We think it's appropriate that he get the two level, one, that the minimum mandatory not apply on his drug sentences and, two, the 851; the Court is not required to enhance as far as the 851, 821 U.S. Code, Section 851, and, third, the consecutive sentence for having the gun the defendant possessed; we believe one year off of that sentence is appropriate.

(Sentencing Transcript, pp. 11-13) (emphasis added).

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[2]AUSA Stickney did not describe the letter of May 29, 1998 which contained the pre-indictment guilty plea offer.

[3]It is the Court's belief that the court reporter's transcript of AUSA Stickney's remarks is incorrect where the word "again" appears. In the Court's view, the word stated by AUSA Stickney was "gun."

Against the background that AUSA Stickney had not mentioned his letter of May 29, 1998, Mr. Hill replied in part, as follows:

> MR. HILL: The government informed you that they had made an offer for a preindictment [sic] to Mr. Ponder. The Court is aware that I am Mr. Ponder's second attorney and Mr. Ponder was represented before and there was some problems in that representation. There was an offer by the government to Mr. Pines in a letter dated May 29th, 1998, where the government, in return for Mr. Ponder's cooperation, offered to allow him to plea to a single charge under 21 U.S.C. Section 841 (a) 1 and specifically indicated that if he did that they wouldn't bring the 924 general charge or the enhancement under 851. Mr. Ponder advises me that Mr. Pines never told him about this offer and that had he been so informed his actions in this case would have been different. So I would ask the Court to take that into consideration as well in fashioning his sentence.

(Sentencing Transcript, pp. 18-19) (emphasis added).

The statement of Mr. Hill at the sentencing hearing, specifically describing the May 29 letter (Appendix 2), supports his testimony at the evidentiary hearing of March 4, 2002.

Consequently, the Court finds that the defendant had knowledge about the pre-indictment guilty plea offer of AUSA Stickney prior to his sentencing hearing conducted on March 5, 1999.

C. DID MR. HILL, PONDER'S SECOND ATTORNEY, KNOW ABOUT THE PRE-INDICTMENT PLEA OFFER PRIOR TO THE SENTENCING?

The answer is yes. See discussion under Subsection B.

D. WHENEVER MR. HILL LEARNED OF THE PRE-INDICTMENT PLEA OFFER, DID MR. HILL MAKE A TACTICAL DECISION AT SENTENCING TO NOT ASK ABOUT WITHDRAWING THE GUILTY PLEAS TO THE FIVE COUNTS AND SIMPLY ARGUE FOR THE LOWEST SENTENCE?

The answer is yes and the defendant, with knowledge of the pre-indictment guilty plea offer, agreed with Mr. Hill not to move to withdraw his previously entered guilty pleas to the five counts in the indictment as entered on September 16, 1998. See discussion under Subsection B.

E. WHEN MR. PONDER THROUGH MR. HILL ASKED THE DISTRICT COURT TO USE THE FACT OF THE UNCOMMUNICATED, PRIOR PLEA OFFER TO ONE COUNT IN ITS SENTENCING DECISION RATHER THAN ASKING TO WITHDRAW THE PLEA TO FIVE COUNTS, DID MR. PONDER THEREBY WAIVE HIS RIGHT TO CHALLENGE, IN A § 2255 MOTION, HIS GUILTY PLEA TO THE FIVE COUNTS AND TO ASK THAT THE FIRST PLEA OFFER NOW BE REINSTATED?

In the opinion of the Court, the answer to this question is in the affirmative. Furthermore, the Court finds, even if the pre-indictment plea offer to a single count had been clearly communicated to the defendant prior to his indictment on June 2, 1998, he would have rejected the pre-indictment plea offer at that time. The Court finds that the defendant, during the period from May 29, 1998 to June 2, 1998 was of the belief that the anticipated motion to suppress would be granted.

III. CONCLUSION

The Court finds that the defendant, Wilbert Ponder, is not entitled to relief under the provisions of 28 U.S.C. § 2255. However, the Court will issue a certificate of appealability on the sole issue of whether the defendant is entitled to habeas relief because his retained counsel failed to provide timely to the defendant a copy of the May 29, 1998 letter of the assigned AUSA Robert Stickney agreeing to accept a plea of guilty to a single count information.

IT IS SO ORDERED.

5/4/02
Date

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

FILED
EC

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DOWD, J.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

United States of America,	)	
	)	
Plaintiff,	)	CASE NO. 98-220-CR-T-23(E)
	)	
vs.	)	MEMORANDUM OPINION AND ORDER
	)	
Wilbert Ponder,	)	
	)	
Defendant.	)	

Before the Court is defendant Wilbert Ponder's Motion to Suppress, as amended (Docket Nos. 16, 22) and the government's memorandum in opposition. On September 10, 1998, the Court conducted an evidentiary hearing on the motion.

Ponder seeks an order suppressing the following evidence:

> (a) A quantity of alleged cocaine purportedly found on the person of the accused and vehicle operated by the accused, after both were stopped and detained by a DEA agent in Hillsborough County, Florida. Immediately prior to and during the stop of the vehicle, the accused was the driver and only occupant of the vehicle with the permission of the owner and/or owner's agent.
>
> (b) Any and all personal identification, and physical objects, confiscated from the person or clothing of the accused by the DEA agent.
>
> (c) Any and all statements made by the accused after he was detained by the DEA agent in this cause and/or after he was confronted with the aforementioned physical evidence that was seized.
>
> (d) Any and all physical evidence seized by the law enforcement agents from the accused of [sic] the vehicle.

24

(e) Any and all scientific analysis of whatever kind or nature obtained as a result of any and all scientific tests of whatever kind or nature, conducted on the evidence described in the paragraphs above.

(Amended Motion at pp. 1-2).

For the reasons discussed below, Ponder's motion is DENIED.

FACTUAL BACKGROUND

On March 13, 1998, at approximately 9:15 a.m., DEA Special Agent Kevin McLaughlin was driving his unmarked vehicle southbound on the Veterans Expressway, on his way to work. While approaching the Waters Avenue toll booth, McLaughlin observed a dark green Ford Explorer also traveling southbound. The Explorer had tinted windows and expensive-looking wide chrome wheels.

Agent McLaughlin contacted Hillsborough County via radio and requested a license plate check on the Ford Explorer. The check indicated that the vehicle belonged to Israel Garcia, a 68-year-old man, and that there were no warrants outstanding on the vehicle. A second owner was also designated, but without a date of birth.

Agent McLaughlin decided to pass the vehicle and go on to work; however, as he did so, he noticed through the half-open driver's window a driver who was much younger than 68. The driver has since been identified as the defendant. McLaughlin also observed that the defendant, the vehicle's only occupant, was holding a "blunt" cigar in his left hand. From his extensive law enforcement experience, McLaughlin knew that "blunt"

cigars are often smoked by marijuana users, who empty the tobacco out of the cigar and then fill the hollowed-out cigar with marijuana. McLaughlin also noticed that the defendant was holding the "blunt" pinched between two fingers with the lit end facing him and that he would deeply inhale the smoke and hold it in before exhaling. The manner in which the defendant was holding the "blunt" and inhaling the smoke suggested to McLaughlin that the defendant was smoking marijuana.

Agent McLaughlin has been a DEA special agent for six and one-half years. Prior to that, he served for six years with the City of Savannah Police Department. Based on his extensive training and experience, McLaughlin developed a well-founded suspicion that the defendant's "blunt" cigar contained marijuana.

Agent McLaughlin followed the Ford Explorer as it left Veterans Expressway and proceeded northbound on I-275. He activated his blue lights and siren, pulling over the vehicle. The defendant exited I-275 on the northbound Dale Mabry exit and stopped his vehicle at the bottom of the exit ramp. McLaughlin pulled his vehicle directly behind the stopped vehicle.

The defendant, using profanity and acting belligerent, exited his vehicle and started to approach McLaughlin's vehicle. He was holding what appeared to be paper documents. Agent McLaughlin sounded his horn and motioned to the defendant to stand behind his own vehicle. Instead the defendant attempted to get back into the Ford

Explorer. McLaughlin again blew his horn and motioned. He then exited his unmarked vehicle and approached the defendant.

The defendant was continually moving and appeared nervous to McLaughlin, who identified himself as a federal agent and asked the defendant if he was carrying any weapons. Receiving a negative answer, McLaughlin asked the defendant to put his hands on the back of the Ford Explorer so that he could pat him down for weapons. McLaughlin felt a soft bulge in the right front pants pocket of the defendant. He suspected it was marijuana. Upon his inquiry as to what was in the pocket, the defendant said: "I don't know. Why don't you look." When asked by McLaughlin whether he could remove the object, the defendant responded, "Go ahead."

Agent McLaughlin then removed two plastic bags from the defendant's right pocket. One bag contained a green leafy material which McLaughlin suspected was marijuana. The other bag contained a white powder substance, which he suspected was cocaine.

Agent McLaughlin asked the defendant what the bags contained. The defendant lunged at McLaughlin and a struggle ensued. McLaughlin struck the defendant several times in the face and the defendant fell to the ground. McLaughlin drew his revolver, but the defendant jumped up and escaped, running toward a wooded area on the east side of the exit ramp.

While waiting for backup, McLaughlin searched the defendant's vehicle and seized from the back seat a shoebox containing an amount of cocaine base later determined to be in excess of 2300 grams, an unlit cigar still in its plastic tube, a fully loaded 9-mm revolver with a laser sight, and several documents.

DISCUSSION

The Fourth and Fourteenth Amendments are implicated here because stopping a vehicle and detaining its occupant constitutes a seizure, even though the purpose of the stop is limited and the resulting detention brief. United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); cf. Terry v. Ohio, 392 U.S. 1, 16 (1968).

Under Terry, law enforcement officers may stop and briefly detain a person to investigate a reasonable suspicion that he is involved in criminal activity, even though probable cause is lacking. 392 U.S. at 30.

> The Terry rationale also permits police officers to stop a moving automobile based on a reasonable suspicion that its occupants are violating the law. United States v. Hensley, 469 U.S. 221, 226, 105 S.Ct. 675, 678, 83 L.Ed.2d 604 (1985); United States v. Sharpe, 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985). Reasonable suspicion is determined from the totality of the circumstances, United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), and from the collective knowledge of the officers involved in the stop. United States v. Cotton, 721 F.2d 350, 352 (11th Cir.1983), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Although this

> standard is considerably less demanding than proof of wrongdoing by a preponderance of the evidence and less than probable cause, the Fourth Amendment nevertheless requires that the police articulate facts which provide some minimal, objective justification for the stop. Sokolow, 490 U.S. at 7. Such facts may be derived from "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

United States v. Williams, 876 F.2d 1521, 1524 (11th Cir. 1989); see also, United States v. Briggman, 931 F.2d 705, 709 (11th Cir.), cert. denied, 502 U.S. 938 (1991) (court "must give due weight to the officer's experience").

The defendant here challenges the initial stop, the search of his pocket, and the search of his vehicle. Each will be examined separately.

Initially, the Court finds McLaughlin's uncontradicted testimony to be credible.

Regarding the initial stop, Agent McLaughlin had reasonable suspicion to believe the defendant was committing a crime when he observed what the defendant was holding and the manner in which he was holding and using it. McLaughlin's law enforcement experience made him quite familiar with the common practice of marijuana users to hollow out a regular cigar and fill the cavity with marijuana, creating a "blunt" cigar. Further, he knew from experience that these "blunt" cigars were held differently than ordinary tobacco cigars. He observed the defendant holding his cigar in that different manner, which is consistent with marijuana use. Finally, McLaughlin also observed the manner in which the

defendant was inhaling the smoke produced by the "blunt" cigar and holding it in his lungs for longer than tobacco smoke is typically held, a method that McLaughlin's experience told him suggested marijuana use. Agent McLaughlin's experience must be given "due weight" by the Court when determining whether his decision to stop the Ford Explorer and its driver was reasonable. Briggman, supra. Under the circumstances, this Court concludes that the initial stop did not violate defendant's Fourth and/or Fourteenth Amendment rights.

Regarding the search of the defendant's pocket, again there were specific, articulable facts to support the pat-down that led to the discovery of the two plastic bags in his pocket. The Third Circuit has recently held that a passenger's "attempt[ ] to exit the vehicle," "furtive hand movements," and "refusal to obey the officers' orders" fully justify a limited pat-down for weapons. United States v. Moorefield, 111 F.3d 10, 14 (3d Cir. 1997). In light of the facts known to McLaughlin at the time, a pat-down was essential to his safety.

An officer may seize contraband detected during a protective pat-down Terry search. See Minnesota v. Dickerson, 508 U.S. 366 (1993) (warrantless seizure of contraband detected during a lawful pat-down is justified by same practical considerations that inhere in plain view context). In this case, the defendant gave consent to search his pocket when he said, "Why don't you look?" Consent is a "recognized exception to the requirements of probable cause and a search warrant." United States v. Harris, 928 F.2d

1113, 1117 (11th Cir. 1991) (citing United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981)). Accordingly, the Court concludes that the pat-down, the search of the defendant's pocket, and the seizure of the two plastic bags did not violate the defendant's Fourth or Fourteenth Amendment rights.

As regards the search of the vehicle, the Eleventh Circuit has a two-pronged test to justify a warrantless search of a vehicle: "(1) there is probable cause to believe the vehicle contains contraband or other evidence which is subject to seizure under the law, and (2) exigent circumstances necessitate a search or seizure." United States v. Talley, 108 F.3d 277, 281 (11th Cir. 1997) (quoting United States v. Campbell, 920 F.2d 793, 795 (11th Cir.1991); United States v. Banshee, 91 F.3d 99, 102 (11th Cir.1996), cert. denied, --- U.S. ---, 117 S.Ct. 752 (1997)).

In this case, Agent McLaughlin observed the defendant, while driving, in possession of what he reasonably believed was a marijuana "blunt" cigar. This observation, coupled with the discovery of both marijuana and crack cocaine in the defendant's pocket, and the defendant's subsequent struggle and flight from the stopped vehicle, warranted the Agent's reasonable belief that the vehicle contained additional contraband.

"[T]he ability of a vehicle to become mobile is sufficient to satisfy the exigency requirement." United States v. Nixon, 918 F.2d 895, 903 (11th Cir. 1990) (quoting United States v. Alexander, 835 F.2d 1406, 1409 (11th Cir.1988)).

In this case, the two-part test has been met.

Another question, not raised by the parties, is whether the defendant, who fled the scene and abandoned his vehicle prior to the search, retained his expectation of privacy in the vehicle. The governing principle has been stated in United States v. Colbert, 474 F.2d 174 (5th Cir. 1973).

> One has no standing to complain of a search or seizure of property he has voluntarily abandoned. . . . Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. . . . The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

Id. at 176. In addition, this principle justifies "a police search of a car that was left on the highway by a fleeing suspect after a [police] chase." United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978) (citing Goldberg J., dissenting in United States v. Colbert, 474 F.2d at 186, citing Edwards v. United States, 441 F.2d 749 (5th Cir. 1971)).

Under this case law, the defendant cannot challenge the search of the Ford Explorer which he abandoned on the highway when he fled from Agent McLaughlin.

Accordingly, the search of the Ford Explorer did not violate the defendant's Fourth or Fourteenth Amendment rights.

CONCLUSION

For the reasons set forth above, the defendant's motion to suppress, as amended (Docket Nos. 16, 22) is DENIED.

IT IS SO ORDERED.

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

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Reply to: Tampa

May 29, 1998

VIA FACSIMILE and U.S. MAIL
813/225-3404

Raymond Pines, Esq.
601 E. Twiggs Street
Suite 100
Tampa, Florida 33602

Re: United States v. Wilbert Ponder

Dear Mr. Pines:

Based on our conversation this week, I am delaying the indictment of Mr. Ponder until you have had the opportunity to present him with the government's negotiated plea offer. Specifically, the government will charge Ponder in a single count Information with possession with the intent to distribute cocaine base or "crack" cocaine, in violation of 21 U.S.C. § 841(a)(1).

The government has sufficient evidence to charge Ponder with violations of 18 U.S.C. § 924(e), 18 U.S.C. § 922(g), and based on his prior record, the government is prepared to file an Information pursuant to 21 U.S.C. § 851. The defendant must fully cooperate with the government and sign our office's standard plea agreement to fulfill his part of the bargain.

Sincerely,

CHARLES R. WILSON
United States Attorney

By: Robert W. Stickney
ROBERT W. STICKNEY
Assistant United States Attorney

RWS/bjc

DOWD, J.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Wilbert Ponder, Petitioner-Defendant, vs. United States of America, Respondent-Plaintiff.	)	CASE NOS. 8:00-CV-477-T-23E 8:98-CR-220-T-23E JUDGMENT ENTRY AND CERTIFICATE OF APPEALABILITY

For the reasons set forth in the memorandum opinion filed contemporaneously with this judgment entry, the petition of Wilbert Ponder for relief pursuant to the provisions of 28 U.S.C. § 2255 is DENIED. The petition is DISMISSED.

The Court finds that the defendant, Wilbert Ponder, is not entitled to relief under the provisions of 28 U.S.C. § 2255. However, the Court issues a certificate of appealability on the sole issue of whether the defendant is entitled to habeas relief because his retained counsel failed to provide timely to the defendant a copy of the May 29, 1998 letter of the assigned AUSA Robert Stickney agreeing to accept a plea of guilty to a single count information.

Further, the Court certifies, pursuant to 28 U.S.C. §1915(a)(3), that an appeal from this decision could be taken in good faith.

IT IS SO ORDERED.

5/6/02
Date

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

Copies Mailed: 6-28-01
Judge USM
Mag. J. Prob.
M. Tim PTS
By: DOWD, J.

COPY

FILED
01 JUN 28 PM 1:17
U.S. DISTRICT COURT
N.D. OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard DaBelko,	)	
	)	CASE NO. 4:97CV1076
Petitioner-Defendant,	)	4:89CR171
	)	
v.	)	ORDER
	)	
United States of America,	)	
	)	
Respondent-Plaintiff.	)	
	)	

The Section 2255 petition of Richard DaBelko, from his conviction and sentence to a term of 292 months, was denied by this Court by an opinion filed on December 18, 2000 and following a remand from the Sixth Circuit directing this Court to conduct an evidentiary hearing. The petitioner then filed a motion seeking reconsideration of the December 18 order in lieu of filing a notice of appeal based on this Court's Certificate of Appealability.

While the motion for reconsideration was under consideration, the Court was advised that the parties were attempting to negotiate a settlement of the dispute which would result in a reduced sentence from the 292 months. Eventually, the parties submitted a written plea agreement which called for the petitioner to plead guilty, but with the understanding that the sentencing range would be from 235 months to 293 months with the government not opposing a sentence at the low end of the range, i.e., 235 months.

The "Plea Agreement" signed by the petitioner-defendant Richard DaBelko, his counsel Cheryl J. Sturm and AUSA Ronald B. Bakeman provided in part as follows:

5. The defendant understands that sentencing is within the discretion of the Court and that the Court is required to consider any and all applicable sentencing guideline provisions. Specifically, the defendant understands that in determining the applicable sentencing guidelines, the Court shall consider the defendant's relevant conduct including, but not limited to, relevant conduct reflected in the counts to be dismissed and/or uncharged conduct.

6. The defendant further understands the United States' obligation to provide all information in its files regarding the defendant, including charged and uncharged criminal offenses, to the United States Probation Office.

7. The defendant and government agree and stipulate for the purpose of this case that the amount of cocaine possessed and/or distributed during the course of the conspiracy by the defendant and/or reasonably foreseeable and jointly undertaken by the defendant was approximately 40 kilograms (see: U.S.S.G. § 2D1.1).

The parties further agree and stipulate that the defendant was a supervisor of his brother in the charged criminal activity which included less than five (5) persons (see: U.S.S.G. § 3B1.1(c)).

The parties further agree and stipulate that the defendant possessed a dangerous weapon during the course of the foregoing charged criminal activity (see: U.S.S.G. § 2D1.1(b) (1)).

The parties further agree and stipulate that no other specific offense characteristics or adjustments for victim or obstruction of justice are applicable.

8. Based on the foregoing stipulated facts, the defendant and the government agree and stipulate that the defendant's adjusted offense level (subtotal) for Count 1 is 38, for purpose of Sentencing Guidelines calculations.

9. The parties agree and stipulate that the defendant, by executing the foregoing plea agreement is entitled to a two (2) level credit for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a).

10. The parties agree and stipulate that the defendant is a Criminal History III.

11. The parties agree and stipulate that there is no legal or factual basis for either an upward or downward departure in the instant case.

Based on the agreed offense level of 36 and a Criminal History Category III, the sentencing range pursuant to the agreement of the parties is 235 months to 293 months.

The Court indicated to counsel that it would not vacate the conviction but only the sentence if, in fact, the parties were in agreement to a sentence of 235 months and each party would agree to forego any appeal from the agreed reduced sentence. In open court, the petitioner indicated that he understood the agreement and was prepared to forego any appeal of this Court's ruling of December 18, 2000 in exchange for the reduced sentence of 235 months. The government also agreed to not appeal the vacation of the sentence of 292 months previously imposed by Judge White.

As a consequence of the agreement of the parties, the motion of the petitioner to reconsider the order of December 18, 2000 is GRANTED, but as to the sentence only and the conviction is not affected by the agreement. The convictions remain in effect. The sentence of 292 months is vacated. As indicated by the amended judgment of sentence in Case No. 4:89CR171, the petitioner Richard DaBelko was resentenced to a term of 235 months with credit for time already served on the previous sentence of 292 months.

IT IS SO ORDERED.

6/28/01
Date

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

understands that if the Court imposes a sentence different from what is recommended, the defendant will not be permitted to withdraw the guilty plea.

Guideline Calculations

5. The defendant understands that sentencing is within the discretion of the Court and that the Court is required to consider any and all applicable sentencing guideline provisions. Specifically, the defendant understands that in determining the applicable sentencing guidelines, the Court shall consider the defendant's relevant conduct including, but not limited to, relevant conduct reflected in the counts to be dismissed and/or uncharged conduct.

6. The defendant further understands the United States' obligation to provide all information in its files regarding the defendant, including charged and uncharged criminal offenses, to the United States Probation Office.

7. The defendant and government agree and stipulate for the purpose of this case that the amount of cocaine possessed and/or distributed during the course of the conspiracy by the defendant and/or reasonably foreseeable and jointly undertaken by the defendant was approximately 40 kilograms (see: U.S.S.G. §2D1.1).

The parties further agree and stipulate that the defendant was a supervisor of his brother in the charged criminal activity which included less than five (5) persons (see: U.S.S.G.

§3B1.1(c)).

The parties further agree and stipulate that the defendant possessed a dangerous weapon during the course of the foregoing charged criminal activity (see: U.S.S.G. §2D1.1(b)(1)).

The parties further agree and stipulate that no other specific offense characteristics or adjustments for victim or obstruction of justice are applicable.

8. Based on the foregoing stipulated facts, the defendant and the government agree and stipulate that the defendant's adjusted offense level (subtotal) for Count 1 is 38, for purpose of Sentencing Guidelines calculations.

9. The parties agree and stipulate that the defendant, by executing the foregoing plea agreement is entitled to a two (2) level credit for acceptance of responsibility pursuant to U.S.S.G. §3E1.1(a).

10. The parties agree and stipulate that the defendant is a Criminal History III.

11. The parties agree and stipulate that there is no legal or factual basis for either an upward or downward departure in the instant case.

Sentencing

12. The parties agree and stipulate that the defendant's sentencing guideline range, based on the foregoing stipulated facts, is between 235-293 months.

13. Both parties reserve the right of allocution at sentencing. However, the Government agrees not to make any sentencing recommendation within the guideline range of 235-293 months.

14. The defendant understands that the Court, within its discretion, may order the defendant to pay a fine, that the Court may order the defendant to pay costs of incarceration and/or supervised release, and that the Court may order the defendant to make restitution to any victim(s) of the offense. The costs of incarceration, supervised release, and orders of restitution will be determined by the Court after an investigation by the federal Probation Department.

15. The government agrees that following sentencing in this matter that it will move this Court to dismiss Counts 7, 19, and 20, in the Superseding Indictment and the Indictment.

The government further agrees to dismiss the Enhancement filed in the instant case pursuant to 21 U.S.C. §851.

Waiver of Appellate Rights, Defenses and Habeas Corpus Rights

16. The defendant waives his right to file a direct appeal pursuant to Title 18, United States Code, Section 3742, regarding objections to the Court's entry of judgment against defendant and imposition of sentence, provided the Court sentences the defendant pursuant to the provisions of the plea agreement.

17. Defendant hereby waives his right to raise and/or file

post-conviction writs of habeas corpus (28 U.S.C. §2255) concerning any and all matters pertaining to the within prosecution, including but not limited to: filing of motions, assertion of all defenses both as to the criminal charges, understanding of charges, voluntary nature of plea, and probable cause determinations.

18. Specifically, the defendant waives his right to appeal Judge David D. Dowd, Jr.'s December 18, 2000, decision regarding the defendant's 2255 Motion.

19. In the event the defendant's guilty plea is rejected, withdrawn, vacated, or reversed at any time, the United States will be free to prosecute the defendant for all charges of which it has knowledge, and any charges that have been dismissed because of this Plea Agreement will be automatically reinstated. In such event, defendant waives any objections, motions, or defenses based upon the Statute of Limitations, the Speedy Trial Act, or constitutional restrictions on bringing charges.

Factual Basis for Guilty Plea

20. The defendant agrees that if this matter were to proceed to trial, the United States could prove the following facts beyond a reasonable doubt, and that these facts accurately represent his readily provable offense conduct and specific offense characteristics.

21. That during the period alleged in Count 1 of the

Superseding Indictment that the defendant knowingly and intentionally conspired and agreed with Howard Blum, Francis DaBelko, and others, to distribute cocaine in greater Warren, Ohio, area. It was the role of the defendant to supply "front" money to Howard Blum in order that Blum may purchase kilogram quantities of cocaine from Carol Eckman and Phillip Christopher. The defendant would instruct his brother, Francis DaBelko, to accompany Blum when picking up the cocaine and to store cocaine at his residence. On May 9, 1989, Blum and Francis DaBelko purchased approximately three (3) kilograms of cocaine from Phillip Christopher with monies received from Richard DaBelko. Richard DaBelko received two (2) of the three (3) kilograms and instructed his brother, Francis DaBelko to store the two (2) kilograms of cocaine at his house. On May 17, 1989, Richard DaBelko possessed two (2) kilograms of cocaine at his brother's residence. Additionally, the defendant possessed at his residence on May 17, 1989, two guns, a scale and drug proceeds(previously forfeited pursuant to a separate order). The evidence would further show beyond a reasonable doubt that Howard Blum and Richard Dabelko received approximately 40 kilograms of cocaine from either Carol Eckman and/or Philip Christopher, with the intent to redistribute the same to their respective cocaine distribution customers.

22. The defendant, Richard DaBelko, further acknowledges that the above outline of his conduct does not set forth each and every act he committed in furtherance of the offense to which he is pleading guilty nor does it set forth each and every act that was part of the same course of conduct and common scheme and plan as the offense of conviction, and that the government could prove other acts evidencing his agreement and knowing participation with other persons in the conspiracy alleged in the indictment.

ACKNOWLEDGMENT

23. The defendant acknowledges that his offer to plead guilty is freely and voluntarily made and that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to induce him to plead guilty. The defendant further declares that he is not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair his ability to fully understand the terms and conditions of the plea agreement. This Plea Agreement sets forth the full and complete terms and conditions of the agreement between the defendant and

the government. The defendant further declares that he is fully satisfied with the assistance provided by his attorney.

4-6-01
Date

Richard DaBelko
Richard DaBelko
Defendant

STATEMENT OF ATTORNEY

24. As attorney for the defendant, I have discussed this case and the plea agreement with my client in detail and have advised the defendant of all matters within the scope of Federal Rule of Criminal Procedure 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea. No assurances, promises, or representations have been given to me or to the defendant by the United States or by any of its representatives which are not contained in the written agreement. This Plea Agreement sets forth the full and complete terms and

conditions of the agreement between the defendant and the government.

4-23-01
Date

Cheryl J. Sturm, Esq.
Attorney for Defendant

APPROVED:

5/15/00
Date

EMILY M. SWEENEY
United States Attorney

Ronald B. Bakeman
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APPROVED:

Date

DAVID D. DOWD, JR.
UNITED STATES DISTRICT JUDGE

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

United States of America,	)	
	)	
Plaintiff-Respondent,	)	CASE NO. 4:89CR171
	)	4 97CV1076
vs	)	
	)	MEMORANDUM OPINION
Richard Dabelko,	)	
	)	
Defendant-Petitioner	)	

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, 466 U.S. 668, 687-88 (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 (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 why its former offer . . . should not be reinstated." Id at 1209 (Ryan J., concurring).

> 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.
>
> ***
>
> 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 (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, No. 98-3247, 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 count did not allege an amount of cocaine that would be attributable to any one conspirator.[1] 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)(l)(A)(ii), five or more kilograms of cocaine called for a sentence of not less than 10 years in prison

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)(l)(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

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[1]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.

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 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 , Nos. 90-3926/3969/4126, 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 at the sentencing by Elmer Guiliana and Phillip Korey Prior to the trial, Bakeman and Milano engaged in guilty plea discussions on several occasions.[2] 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.[3] The guilty plea discussions between Bakeman and Milano did not reach the stage where Bakeman

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[2] See Evidentiary Hearing Transcript (hereafter "TR") at 6-10.

[3] See TR at 48

would have presented a proposed guilty plea agreement to his supervisors for the necessary approval.[4]

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.[5]

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.[6]

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.[7] 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).

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

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[4]See TR at 38-39

[5]See TR at 12, 29-30, and 41.

[6]See TR at 20-21.

[7]See TR at 28, 37

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.[8] 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.

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 with the petitioner in any of the meetings.[9] Milano did not tell the petitioner that he was facing a mandatory minimum of 20

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[8]See the testimony of AUSA Bakeman beginning at TR page 37, line 22 to page 41, line 25

[9]See TR at 67-68.

years if convicted.[10] Milano did not inform the petitioner as to the consequences of the Section 851 enhancement.[11]

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.[12]

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."[13] The petitioner also testified that Milano told him that the government "had a weak case against him."

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.[14]

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

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[10]See TR at 68.

[11]See TR at 69.

[12]See TR at 70.

[13]See TR at 71.

[14]See TR at 72

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.[15]

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.[16]

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 (1984) and Turner v. State, 858 F.2d 1201 (6th Cir. 1988).

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,

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[15]See TR at 43.

[16]See TR at 42.

were in their infancy in 1990, the Supreme Court had decided that the Sentencing Guidelines passed constitutional muster.[17]

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 Guidelines. Milano, although an excellent courtroom trial lawyer,[18] 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.

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

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[17]See Mistretta v. United States, 488 U.S. 361 (1989).

[18]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.

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.

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, 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 [19]

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

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[19]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

guilty plea [20] However, the Criminal Rules provide in no uncertain terms that the district court is not to participate in guilty plea negotiations.[21] 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.

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

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[20] See Fed.R Crim.P 11(c) and (d)

[21] See Fed.R.Crim.P. 11(e) (1)

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.

Third, the petitioner was advised by his counsel that the government's case was "weak" and he would be "crazy" to 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.[22]

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

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[22]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."

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.

IV. Certificate of Appealability.

This dispute arguably raises novel issues that have not been given serious appellate consideration. In its order remanding this Section 2255 case for an evidentiary hearing, the Sixth Circuit aptly described the sentence of 292 months as "draconian." Consequently, this Court will issue a certificate of appealability in the view that further appellate review is justified. The certificate of appealability will be limited to the issue of whether a Section 2255 petitioner who stands trial on a not guilty plea and receives a "draconian" sentence of 292 months by a proper application of the Sentencing Guidelines is entitled to a remedy in the form of a new trial or a re-sentencing based on the ineffective assistance of counsel in a scenario where his counsel advised the petitioner that the government's case was "weak," mistakenly substantially minimized the suggestion of the government's attorney as to what the government indicated it would consider for a guilty plea and failed to negotiate with the government's attorney on the application of the Sentencing Guidelines as to the quantity of cocaine to be assigned to the petitioner, the petitioner's role in the offense and the issue of whether weapons found in the petitioner's possession should

call for a two-level increase, and where the undersigned finds that the petitioner would not have accepted a hypothetically negotiated guilty plea agreement calling for a sentence less than the sentence ultimately imposed.

IT IS SO ORDERED.

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

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

United States of America,	)	
	)	
Plaintiff-Respondent,	)	CASE NO 4 89CR171
	)	4.97CV1076
vs.	)	
	)	JUDGMENT ENTRY AND
Richard Dabelko,	)	CERTIFICATE OF APPEALABILITY
	)	
Defendant-Petitioner	)	

For the reason set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, the petition of Richard Dabelko for relief pursuant to the provisions of 28 U S C. §2255 is DENIED and the case is CLOSED.

CERTIFICATE OF APPEALABILITY

The Court finds that the petitioner has made a substantial showing of the denial of a constitutional right, i e., the denial of the effective assistance of counsel in a scenario where his counsel advised the petitioner that the government's case was "weak," mistakenly substantially

minimized the suggestion of the government's attorney as to what the government indicated it would consider for a guilty plea and failed to negotiate with the government's attorney on the application of the Sentencing Guidelines as to the quantity of cocaine to be assigned to the petitioner, the petitioner's role in the offense and the issue of whether weapons found in the petitioner's possession should call for a two level increase, and where the undersigned finds that the petitioner would not have accepted a hypothetically negotiated guilty plea agreement calling for a sentence less than the sentence ultimately imposed.

Further, the Court certifies, pursuant to 28 U.S.C. §1915 (a)(3), that an appeal from this decision could be taken in good faith.

IT IS SO ORDERED.

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

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

July 5, 2002

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

Re: *Proposed Amendment to the Federal Rules of Criminal Procedure Rule 11, 02-CR-C*

Dear Judge Dowd:

Thank you for your letter of May 20, 2002, proposing an amendment to Criminal Rule 11 that would allow the court to inquire, prior to trial, whether the government has proposed a guilty plea agreement and whether that agreement has been communicated to the defendant. A copy of your letter and report were sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your continuing interest in the work of the committee.

Sincerely,

Peter G. McCabe