UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JOSHUA DOBSON, Petitioner	)	Docket No. 1:12-cr-42,
v.	)	Judge Collier
UNITED STATES OF AMERICA Respondent	)	

MOTION OF JOSHUA DOBSON TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Petitioner Joshua Dobson hereby moves this Honorable Court to vacate, set aside, or correct the sentence previously imposed in this cause against him, pursuant to 28 U.S.C. § 2255. The petitioner would show that he received ineffective assistance of counsel in connection with the pre-trial and trial proceedings previously had in this cause. Petitioner Joshua Dobson would further show that there is a reasonable probability that, but for, his prior counsel's deficiencies and failure to render reasonably effective assistance, the result of the proceedings previously conducted would have been different. Petitioner respectfully asks that this Honorable Court conduct an Evidentiary Hearing on this Motion, and that his convictions and sentence be vacated, set aside, or corrected, and that he be awarded a new trial.

PROCEDURAL HISTORY

Petitioner Joshua Dobson would show that on or about May 01st, 2012, he and a former business associate, Paul Gott, III, were charged with conspiracy to commit wire fraud and money laundering, including seven (7) counts of wire fraud and four

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(4) counts of money laundering. The case proceeded to trial in September of 2013, and at the conclusion of the trial, the jury returned convictions for one (1) count of conspiracy to commit wire fraud and money laundering, in violation of 18 U.S.C. § 371, 1343, & 1957; along with three (3) counts of wire fraud, in violation of 18 U.S.C. § 1343; and two (2) counts of money laundering, in violation of 18 U.S.C. § 1957. The petitioner's indictment and subsequent conviction arose out of claims that he engaged in a mortgage fraud scheme in which a company he was involved in, The Southern Group, made down payments for purchasers of real properties without disclosing such facts to various lenders.

A protracted sentencing hearing was subsequently conducted, and this Honorable Court eventually concluded that the losses incurred as a result of the defendant's participation in the alleged schemes amounting to eleven million, eight hundred thousand dollars ($11, 800,000.00). The petitioner and his co-defendant argued to this Honorable District Court that he should only consider losses presented to the jury, and not acquitted or uncharged conduct, but this Court overruled the objections, and concluded that the sentencing guidelines required it to determine the amount of loss, resulting from the conspiracy alleged in count 1, on which the defendants were convicted. This Honorable Court did consider relevant and uncharged conduct.

This Honorable Court concluded that the resulting sentencing guidelines applicable to Joshua Dobson ranged from 151 – 188 months. After granting a Motion for a Variance, this Court eventually sentenced the petitioner to 126 months of

imprisonment and 5 years of supervised probation, and also ordered him to pay three-million ninety-one thousand, six hundred fifty dollars and 56 cents, $3,091,650,56 in restitution.

The petitioner and his co-defendant, Paul Gott, III appealed their convictions and sentences to the 6th Circuit Court of Appeals. The 6th Circuit affirmed the convictions and sentences in *United States vs. Dobson,* 626 F. App' x 117 (6th Cir. 2015).

The petitioner now brings this Motion pursuant 28 U.S.C. § 2255, and asks this Court to vacate or otherwise set aside the sentence previously imposed in this cause. The petitioner would show that he received ineffective assistance of counsel, in violation of his rights guaranteed to him by the 6th Amendment to the United States Constitution. The petitioner claims and will show that his trial counsel did not properly advise him with respect to the applicable sentencing guidelines, and that his trial counsel did not advise him as to his potential exposure with respect to potential time in prison if he exercised his constitutional right to a trial by jury, went to trial, and lost. The petitioner avers and charges, and will show, that he was denied his right to make an informed decision as to whether or not to accept a plea offer made to him by the government, as he was not advised as to the potential sentencing exposure he has faced.

STANDARD OF REVIEW

The Sixth Amendment to The United States Constitution guarantees criminal defendants to the right to the assistance of counsel during their criminal proceedings. *Strickland v. Washington*, 466 U.S. 668 684-85, 104 Supreme Court 2052 (1984).

This right extends to the plea bargaining process, during which defendants are "entitled to the effective assistance of competent counsel." *Lafler vs. Cooper*, 132 Supreme Court 1376, 1384 (2012). "The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Id @ 1388.*

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the 6th Amendment, a petitioner has the burden of proving that;

1) Counsel's performance was deficient, and;

2) The deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

There are two (2) components to the Strickland Test for violations of a defendant's right to the effective assistance of counsel. :

- *First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by The 6th Amendment.*

- *Second, the defendant must show that the deficient performance prejudiced the defense. Strickland v. Washington*, 466 U.S. @ 687.

In *Hill v. Lockhart*, 474 U.S. 52 , 106 S. Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court held that the test established in Strickland, which addresses ineffective assistance of counsel at the trial stage, applies equally to the plea bargaining process. *Hill 474 US @ 58-59.*

FACTUAL BASIS FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner would show that he was not properly advised by his trial counsel regarding what type of actual sentence or prison time he may facing, after he was indicted, Petitioner Joshua Dobson has submitted an Affidavit which is filed along with this Motion and Dobson's Affidavit sets forth in detail the various communications and conversations he had with his trial counsel, attorney Chris Townley.

As set forth in Joshua Dobson's Affidavit, after he was indicted, Dobson retained attorney Chris Townley to represent him in connection with the criminal indictment handed down against Dobson. As set forth in Dobson's attached Affidavit, attorney Townley never advised Dobson as to what type of actual sentence or time he could be facing if he went to trial and lost. *(Dobson's Affidavit ¶ 3).* Dobson will testify that after his indictment, his attorney Chris Townley talked to the government prosecutor, and Townley represented to Dobson that the government would agree to a sentence of around one (1) year if he would cooperate with the government, plead guilty, and testify against others involved in his business. *(Dobson's Affidavit ¶ 3).* Dobson was not interested in a plea offer of that nature and told his attorney that he would go to trial. *(Dobson's Affidavit ¶ 4).* Dobson would show that prior to trial, his attorney did

not advise him as to what the potential punishment or what sentencing guidelines would apply to him if it went to trial and lost. (*Dobson's Affidavit ¶ 5).*

Dobson would also show that shortly before trial, he did talk with his attorney and tried to find out what type of potential jail time he might be facing if he went to trial and lost. At this time, his attorney, Chris Townley had plea discussions and negotiations with assistant U.S. attorney, John McKoon, and Townley represented to Joshua Dobson that the government had made a plea offer to the effect that if Dobson would plead guilty, the government would allow him to plead guilty and he would be facing between two (2) to four (4) years in prison. (*Dobson's Affidavit ¶ 6).* Dobson turned down that plea offer, but did so without knowing what his actual sentencing exposure would be, as his attorney did not advise him, at any time, that Dobson could possibly be facing in excess of ten (10) years in federal prison if he went to trial and lost. (*Dobson's Affidavit ¶ 6).*

Dobson would show that he was convicted by a jury and that even after the jury verdict came in on the guilt and innocent phase of his trial, his attorney had never advised him or discussed with him anything having to do with the applicable sentencing guidelines, specific of his conduct, loss amount, relevant conduct, and how those factors may affect or apply to any potential sentence enhancement. (*Dobson's Affidavit ¶ 8).* Dobson would show that his attorney never advised him that the amount of total losses claimed by the government to have been incurred, including relevant conduct losses, could be used against him to substantially enhance his punishment. Dobson only learned this after he and Townley met for a pre-sentence report interview with probation officer

Turney. It was only after this meeting that Townley explained to Joshua Dobson, for the first time, the term 'relevant conduct' and how it could affect or otherwise apply to sentencing. (*Dobson's Affidavit ¶(s) 9, 10 & 11).* After the sentencing hearing, Dobson was sentenced to 126 months federal prison. Dobson would show that he never had any idea, nor was he ever advised by his trial attorney, that he could possibly be facing a prison term in excess of ten (10) years. (*Dobson's Affidavit ¶ 12).* Dobson would show that had his trial attorney ever advised him that he potentially be facing a sentence in federal prison in excess of ten (10) years, he would have accepted the plea offered to him by the government, which was relayed to him by his trial counsel, which would have called for him to serve between 2 and 4 years in prison. (*Dobson's Affidavit ¶ 13).*

Petitioner Joshua Dobson submits that he was denied, based upon ineffective assistance of counsel, of his right to make an informed decision regarding whether or not to accept the government's plea offer. (*Dobson's Affidavit ¶ 14).*

LEGAL AUTHORITY AND ARGUMENT

The petitioner submits that his trial counsel did not advise him, prior to trial, of the potential sentencing exposure he faced if he went to trial and was convicted of the charges outstanding against him. If the petitioner's trial attorney did not advise him at any time prior to trial about the applicable sentencing guidelines and his potential sentencing exposure, then the petitioner's trial attorney was deficient, and the deficiency resulted in objectively unreasonable and constitutionally ineffective assistance of counsel at the pre-trial stage of the proceedings. See United *States vs. Smith, 348 F. 3d 545, 552-53 (6th Circuit 2003*), which explains that a defense counsel's

failure to fully inform the defendant of the available options in the context of a plea offer, constitutes ineffective assistance when an attorney does not adequately explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.

Although "The decision to plead guilty – first, last, and always – rests with the defendant, not his lawyer." The Sixth Circuit has maintained that "The attorney has a clear obligation to fully inform his client of the available options." *Id @ 552.* "A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available. *USA vs. Smith, 348 F. 3d @ 553.* The petitioner submits that his trial counsel did not advise him of or discuss with him, his potential sentencing exposure. This establishes that his trial attorney's performance was deficient and satisfies the first prong of the 2-part Strickland Test for ineffective assistance of counsel. The petitioner would also show at the Evidentiary Hearing, which he requests be scheduled, that he was prejudiced by the failure of his trial counsel to advise him as to his sentencing exposure and advise him regarding the applicable federal sentencing guidelines, and how losses may be calculated.

In this cause, the petitioner claims that he received ineffective assistance of counsel related to the plea bargaining stage of his criminal proceeding. In a case such as this, the 2nd-part of the Strickland Analysis, i.e., the "prejudice prong", focuses on

whether counsel's constitutionally ineffective performance effected the outcome of the plea process. *Hill vs. Lockhart* 474 US 52, 59 (1985), accord *Lafler vs. Cooper* 132 Supreme Court 1376 (2012).

Once the petitioner has satisfied the 1st prong of Strickland by establishing that trial counsel's performance was constitutionally defective, the threshold showing the prejudice required to satisfy the 2nd prong is comparatively low – in such cases, the prejudice prong is satisfied if there is a "reasonable probability" that the defendant would has accepted the government's plea offer, but for counsel's ineffective assistance, or inadequate advise. *Lafler, 132 Supreme Court @ 1385*; see also *Hodges vs. Colson, 727 F. 3d 517, 550 (6th Circuit 2013).*

If reasonable minds could conclude that a fully informed defendant would have accepted the government's plea offer, then the defendant is entitled to relief. Moreover, if counsel failed to provide the defendant with an estimated range of the penalties that could result from a trial conviction, the prejudice prong is presumptively established if the difference between the length of the sentence proposed by the government's plea offer, and the sentence imposed after a trial conviction was substantial. See *Morris v United States 470 F. 3d @ 602.*

A substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised client would have accepted the prosecution's offer. *Sawaf vs. United States 570 F. Appx 544 (6th Circuit 2014).*

The petitioner has averred in his 2255 Motion and Supporting Affidavit that he would have accepted the government's plea offer had he been properly informed as to his potential sentencing exposure. To meet the prejudice prong of the Strickland test in the context of a rejected plea offer, a defendant must show that but for the ineffective assistance of counsel, there is a reasonable probability that the plea offer would have been presented to the court, ie, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances, that the Court would have accepted its' terms and that the conviction or sentence, or both, under the offer's terms would have been less severe that under the judgment and sentence that in fact, were imposed. *Lafler v Cooper, 132 Supreme Court 1376, 1385 (2012*). A reasonable probability, as the Supreme Court has previously defined the term, is a probability sufficient to undermine confidence in the outcome. *Strickland 466 US @ 694*. This burden is relatively low, being less than a preponderance of the evidence. See *Williams v Taylor 529 US 362, 405-06 (2000),* which noted that a state court decision applying a preponderance of the evidence standard to a question of attorney competence would be contrary to Strickland's holding that the prisoner need to only demonstrate a reasonable probability of a different outcome. See also *Cornwell vs. Bradshaw, 559 F. 3d 398, 405 (6th Circuit 209),* explaining that a reasonable probability is less than a preponderance of the evidence.

The Supreme Court has also held that the simple fact of a higher sentence after trial is sufficient to demonstrate prejudice. *See Lafler, 132 Supreme Court @ 1387,* "Prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."

Also, the 6th Circuit has recognized that a substantial disparity between the plea offer and the post-trial sentence provides evidence that the defendant would have accepted the plea. See Smith, 348 F. 3d @ 552 " recognizing the 6th Circuit's adoption of this evidentiary principal in the case involving a sixty (60) month plea offer Vs. a 156 month sentence. In this case, the petitioner could have and would have accepted a plea offer of between 2 to 4 years, but, based upon the failure of his trial lawyer to fully advise petitioner of his sentencing exposure, he eventually received a sentence in excess of ten (10) years. This difference is certainly a substantial disparity and resulted in extreme prejudice to the petitioner.

CONCLUSION

The petitioner would respectively show that prior to trial, he turned down a plea offer made to him by the government, as communicated to him through his trial counsel, Chris Townley, which would have called for the petitioner to serve between 2 & 4 years in federal prison. When petitioner Dobson rejected that plea offer made by the government, he had not been advised and was totally unaware that his potential sentencing exposure was in excess of ten (10) years. The petitioner was denied his constitutional right to make an informed decision as to whether or not to accept the plea offer made to him by the government, and would in fact have accepted the plea offer had he known, and been advised by his trial counsel, that if he went to trial and lost, he could potentially face sentencing exposure in excess of ten (10) years.

The petitioner was denied his constitutional right to effective assistance of counsel and respectively asks this Court to vacate and/or otherwise set aside the conviction and sentence previously imposed against him in this cause, and grant him a new trial.

Respectfully Submitted,

TIDWELL, IZELL & RICHARDSON

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CERTIFICATE OF SERVICE

I certify that this document was submitted by electronic mail to the following counsel, this 25th day of August, 2016.

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