UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

File No. 08-CR-00364 (RHK/AJB)

MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR SET ASIDE SENTENCE AND FOR NEW SENTENCING HEARING IN ACCORDANCE WITH 28 U.S.C. 2255

Thomas Joseph Petters,

Defendant.

FACTS

On October 2, 2008, a Complaint was filed in the U.S. District Court for the District of generally alleging Defendant Thomas Petters' complicity in a fraud scheme. The next day, on October 3, 2008, the Government requested by Motion that Defendant Petters be arrested/detained, and that a detention hearing be continued for a period of three days. The Court entered an Order for Temporary Detention on October that same day and Defendant Petters was taken into custody.

On October 5, 2008, Defendant Petters' attorney, Jon Hopeman, spoke via telephone with Assistant U.S. Attorney John Marti. Mr. Marti informed Mr. Hopeman that the Government would offer Defendant Petters a 30-year sentencing cap in exchange for his plea of guilty, with the amount of alleged loss to remain open and without any motion for downward departure on the part of the Government in accordance with section 5K of

the U.S. Sentencing Guidelines.[1] Later that same day, Mr. Marti contacted Mr. Hopeman by telephone to reiterate the Government's offer of a 30-year sentencing cap. Mr. Marti also offered to show Mr. Hopeman certain evidence intended for presentation at Defendant Petters' detention hearing.[2]

On December 1, 2008, Defendant Thomas Petters was indicted in the U.S. District Court for the District of Minnesota with 20 counts of alleged criminal activity including wire fraud, mail fraud, money laundering and the conspiracy to commit such offenses. On December 10, 2008, Defendant Petters met with Mr. Hopeman at the U.S. Attorney's Office to discuss strategy and a theory of defense. During that meeting, Mr. Hopeman falsely informed Defendant Petters that he "had received no plea offer from the [G]overnment, despite the fact that some weeks ago, after [their] November proffer session, John Marti told [Mr. Hopeman] that he would be making an offer."[3]

On December 17, 2008, Mr. Hopeman met with Mr. Marti at a coffee shop in the downtown Minneapolis skyway. During that meeting, Mr. Hopeman told Mr. Marti that he wanted an offer from the Government. Mr. Marti once again informed Mr. Hopeman that the Government was offering a 30-year sentencing cap with the guideline calculations to remain open. Mr. Hopeman informed Mr. Marti that "as a matter of personal pride" he did not feel he could advise Defendant Petters to accept any such offer because his "professional integrity would not allow [him] to do so."[4]

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1 See Internal Memorandum of Jon Hopeman dated October 28, 2008, Attached as Exhibit A.
2 See Internal Memorandum of Jon Hopeman dated October 28, 2008, Attached as Exhibit B.
3 See Internal Memorandum of Jon Hopeman dated January 30, 2009, Attached as Exhibit C, page 2.
4 See Internal Memorandum of Jon Hopeman dated January 30, 2009, Attached as Exhibit D, pages 1-2.

A superseding indictment was filed on June 3, 2009. A jury trial commenced on October 29, 2009. On December 2, 2009, the jury convicted Defendant Petters on all charges. On April 10, 2010, Defendant Petters was sentenced to serve 50 years in prison. Suffice it to say, Mr. Hopeman never informed Defendant Petters of the Government's offer. This is proven three ways. **First**, during sentencing proceedings on **April 10, 2010**, Defendant Petters alluded to the fact that, to his knowledge, the Government had given him no choice but to proceed to trial:

> Since the day October 3rd when I was arrested in 2008, I have wanted Nothing more than to help recover assets for the victims who lost so much. I offered early on through my lawyers to help the prosecutors. Their response was we don't need your help. A life sentence. And then I decided to come here and we were in here in this trial.[5]

Second, on or about **June 12, 2012**, Ms. Shauna Kieffer met with Mr. Hopeman for lunch to discuss Mr. Petters' case. Specifically, Ms. Kieffer met with Mr. Hopeman to discuss possible issues that might be raised in post-conviction proceedings. Mr. Hopeman informed Ms. Kieffer of the Government's offer for a 30-year cap and that he did not communicate the offer to Mr. Petters "because it was not a respectable offer …."[6] Mr. Hopeman also informed Ms. Kieffer that he could not personally be involved in any post-conviction petition due to the potential conflict of interest because of his ineffective assistance in this regard.[7] **Finally**, Mr. Petters has executed a sworn affidavit attesting to the fact that he was never informed of the Government's offer.[8]

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5 Transcript of Sentencing Hearing dated April 9, 2010 (Document 431), page 34.
6 See Affidavit of Shauna Faye Kieffer dated March 19, 2013, Attached as Exhibit E, pages 1-2.
7 Id. at page 2.
8 See Affidavit of Thomas Petters, Attached as Exhibit F, page 1.

JURISDICTION AND BASIS

28 U.S.C. § 2255 provides that "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States … or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence."[9] Defendant Petters so moves this Court on grounds that the sentence imposed violates the U.S. Constitution and/or is otherwise subject to collateral attack due to **1)** ineffective assistance of counsel in failing to notify Defendant Petters of the Government's plea offer, and **2)** the sentence imposed being cruel and unusual insofar as it is disproportionate to the crimes of conviction.

9 28 U.S.C. 2255(a).

ARGUMENT

I. Defendant Petters received ineffective assistance of counsel.

A defendant has been deprived of their Sixth Amendment right to effective assistance of counsel when "counsel's representation fell below an objective standard of reasonableness" and the poor performance prejudiced their defense.[10] Defendant Petters' former attorney, Jon Hopeman, provided constitutionally deficient counsel when he failed to communicate a plea offer to Defendant Petters prior to trial. In the case of Missouri v. Frye[11], accepted for review and decided well after Defendant Petters' conviction and during the pendency of his direct appeal, the U.S. Supreme Court addressed this precise issue for the first time. Specifically, the Court stated as follows:

> The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. … The reality is that plea bargains have become so central to the administration of the criminal justice system that **defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages**. Because ours "is for the most part a system of pleas, not a system of trials," … it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... **horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long.** That is what plea bargaining is. It is not some adjunct to the criminal justice system; **it *is* the criminal justice system.**"[12]

As for the first prong of the Strickland test, the Court ruled that, as a general rule, defense counsel has an affirmative duty to communicate formal offers for settlement from the prosecution to the accused defendant. If defense counsel fails to do so either entirely or before a time-limit for acceptance has lapsed, the defendant has received

10 Strickland v. Washington, 466 U.S. 668, 687-88 (1984).
11 Missouri v. Frye, 132 S.Ct. 1399, 182 2.L.Ed.2d 379 (2012).
12 Id. at 1407 (internal citations omitted) (emphasis added).

ineffective assistance of counsel.[13] In so holding, the Court noted that, while not determinative, various standards of professional responsibility ought to be considered as important guides. Specifically, the Court singled out the American Bar Association for recommending that defense counsel "promptly communicate and explain to the defendant all plea offers made" by the prosecuting attorney.[14] The State of Minnesota, meanwhile, requires essentially the same behavior. Rule 1.4 of the Rules of Professional Conduct requires that an attorney shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent … is required."[15] More particularly:

> If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel … a proferred plea bargain in a criminal case **must promptly inform the client of its substance** unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.[16]

Given that Mr. Hopeman failed to communicate an offer extended at lease three times by the Government, and that such failure was not motivated by a predisposition on the part of Defendant Petters but by Mr. Hopeman's sense of pride, the first prong of the Strickland test has been satisfied.

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13 Id. at 1408.
14 Id, quoting ABA Standards For Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999).
15 Rule 1.4(a)(1), MRPC.
16 Id., Comment [2] (emphasis added).

As for the second prong, that of prejudice, the defendant must first show a reasonable probability that they would have accepted the offer to plead guilty in accordance with the terms offered prior to trial.[17] The defendant must also demonstrate that "there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented."[18] In this case, Defendant Petters' has attested by sworn affidavit that he **would** have accepted the Government's offer, without additional conditions, and plead guilty in accordance with that offer had it been communicated to him by Mr. Hopeman.[19] There is certainly a reasonable probability that the prosecution would not have prevented the acceptance or implementation of the plea offer, as demonstrated by Mr. Marti communicating the offer not once or twice but **three times** to Mr. Hopeman. There is also nothing in the record to indicate that the trial court would have refused acceptance of the offer. But for Mr. Hopeman's ineffective assistance, Defendant Petters would have received far shorter sentence than currently imposed. As such the second prong of the Strickland test has also been satisfied.

17 Frye, 132 S.Ct. at 1410.
18 Id.
19 Exhibit F, pages 1-2.

II. Defendant Petters' sentence is unconstitutionally cruel and unusual insofar as it is disproportionate to the crimes of conviction.

The Eighth Amendment to the U.S. Constitution protects against cruel and unusual punishments. When applied to non-capital offenses, the Amendment "has a narrow proportionality principle" which does not require strict proportionality but does forbid extreme sentences disproportionate to the crime(s) of conviction.[20] Defendant Petters' sentence of 50 years, for an offense involving an estimated $900 million in losses to victims[21], is grossly disproportionate to any person similarly situated and is therefore both cruel and unusual. For example:

- United States v. Reynolds: Larry Reynolds, an alleged accomplice or co-conspirator of Defendant Petters, was convicted of conspiracy to commit money laundering, allegedly laundering over $12 billion over a seven-year period. The advisory guideline range recommended a sentence between 210 and 240 months. Reynolds was sentenced to serve 130 months.[22] Reynolds is serving a sentence approximately 1/5 the duration of Defendant Petters'.
- United States v. Edwards: Charles Edwards, Board Chairman and owner of ETS Payphones, Inc., was indicted on eighty-three counts of wire fraud, money laundering and conspiracy to commit such offenses for an alleged ponzi scheme involving $320 million in losses to investors. He was

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20 Ewing v. California, 538 U.S. 11, 11 (2003), quoting Hamelin v. Michigan, 501 U.S. 957, 996-997 (1991), (Kennedy, J. concurring in part and concurring in judgement).
21 While the U.S. Probation Department estimated total losses of approximately $900 million, any final accurate amount is still a matter of some controversy. See, e.g. Order dated June 3, 2010 (Document #459), pages 2-6.
22 United States v. Reynolds, 643 F.3d 1130, 1132-1133 (8th Cir. 2011).

convicted by a jury of fifty-seven counts, and was sentenced to serve 156 months in prison.[23] Although the amount of loss in Edwards' case is slightly more than one third the alleged loss in the instant case, the length of Edwards' sentence is one fourth that of Defendant Petters'.

- United States v. Podlucky: Gregory Podlucky was charged with multiple counts of mail fraud, wire fraud, money laundering and conspiracy for a scheme involving over $800 million. He pled guilty to one count of mail fraud and was sentenced to serve 20 years in prison, less than one half the length of Defendant Petters' sentence.[24]
- United States v. Dreier: Marc Dreier, an attorney, was charged with multiple counts of mail fraud, wire fraud, money laundering and conspiracy for an investment fraud ponzi scheme involving approximately $700 million. He was sentencing to serve 20 years in prison, less than one half the length of Defendant Petters' sentence.[25]

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23 United States v. Edwards, 536 f.3d 747, 748-755.
24 United States v. Podlucky, 2:09-CR-00279 (W.D.Pa); Stephanie Gleason, *Forermer Le-Nature's CEO's Luck Has Run Out,* The Wall Street Journal, Bankruptcy Beat, October 25, 2011 (http://blogs.wsj.com/bankruptcy/2011/10/25/former-le-natures-ceos-luck-has-run-out/), Attached as Exhibit G.
25 United States v. Dreier, 1:09-CR-00085 (S.D.N.Y.); Benjamin Weiser, *Lawyer Gets 20 Years in $700 Million Fraud,* The New York Times, July 14, 2009 (http://www.nytimes.com/2009/07/14/ nyregion/14dreier.html), Attached as Exhibit H.

- United States v. Madoff: Bernard Madoff was charged with, and pled guilty to, eleven counts of various fraud-related crimes (wire fraud, mail fraud, securities fraud, etc.) and money laundering for a ponzi scheme involving losses of approximately $18 billion. He was sentenced to serve 150 years in prison.[26] Madoff's sentence, if imposed proportional to the sentence ordered in the instant case in terms of dollar loss, would have Defendant Petters serving a sentence of approximately eight years.

Taken together, these five cases demonstrate the grossly disproportionate length of Defendant Petters' sentence, and the original sentence should be modified accordingly at a new sentencing hearing to comport with the dictates of the Eighth Amendment.

26 United States v. Madoff, 1:09-CR-00213 (S.D.N.Y.).

CONCLUSION

Because Defendant Petters received ineffective assistance of counsel during the pretrial stages of this case and was prejudiced as a result, his conviction(s) should be vacated and a new plea hearing should be scheduled whereby he should be allowed to plead guilty in accordance with the Government's previous offer(s) of a 30-year cap. At a minimum, a new sentencing hearing should be scheduled (and a new PSR ordered) to reflect a plea of guilty in accordance with such offer. Further, because Defendant Petters sentence of 50 years' imprisonment is grossly disproportionate to the offenses of conviction when compared to similarly situated defendants, any new (or modified) sentence ordered by this court should reflect a significant reduction from the current sentence of 50 years.

Respectfully submitted,

MESHBESHER & ASSOCIATES, PA

By: s/ Steven J. Meshbesher
Steven J. Meshbesher
Attorney I.D. No. 127413
Kevin M. Gregorius
Attorney I.D. No. 0328315
Attorneys for the Defendant
225 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 332-2000

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