

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL ACTION NO. 09-cr-74-1</b>
<b>v.</b>	:	
	:	<b>CIVIL ACTION NO. 14-cv-1761</b>
<b>JONATHAN BATTLES</b>	:	

**MEMORANDUM OPINION**

**RUFE, J.**

**January 5, 2016**

Defendant Jonathan Battles, now proceeding *pro se*, has filed two motions pursuant to 28 U.S.C. § 2255 seeking to vacate his sentence and obtain an evidentiary hearing based on the alleged ineffectiveness of his three attorneys. The Government opposes the motions and requests that they be dismissed or denied without hearing. For the reasons discussed below, Defendant has failed to establish that his attorneys were ineffective and thus his motions will be denied.

**I. FACTUAL AND PROCEDURAL HISTORY**

On February 5, 2009, Defendant and two co-defendants, Tamika Booker and Angelique Torres, were indicted with one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371, and one count of bank fraud, in violation of 18 U.S.C. § 1344. Ms. Torres and Ms. Booker pled guilty, while Defendant Battles pled not guilty. On May 4, 2009, after being indicted, but before trial, Defendant entered into a proffer agreement with the Government and spoke with the investigating agents.<sup>1</sup> The agreement provided, in the form of a letter signed by Defendant and his attorney, that:

[I]f [Defendant] is a witness or party at any trial or other legal proceeding and testifies or makes representations through counsel materially different from statements made or information provided during the “off-the record” proffer, the government may cross-examine your client, introduce rebuttal evidence and make representations based on

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<sup>1</sup> Ex. A to Gov’t Response at 2, Doc. No 194.

statements made or information provided during the “off-the-record” proffer. This provision helps to assure that your client does not abuse the opportunity for an “off the record” proffer, make materially false statements to a government agency, commit perjury or offer false evidence at trial or other legal proceedings.<sup>2</sup>

At trial, which began on May 3, 2010, the Government presented evidence that during the course of a romantic relationship with Ms. Torres, Defendant instructed Ms. Torres to steal checks from her employer, the City of Arlington, Texas, and send them to Defendant in Philadelphia.<sup>3</sup> The Government presented evidence that Defendant then gave these stolen checks to Ms. Booker, and that Ms. Booker deposited the checks into bank accounts that she opened in Philadelphia.<sup>4</sup> On May 5, 2010, the jury convicted Defendant on both counts.

On March 16, 2012, this Court sentenced Defendant to 60 months of imprisonment on the first count and, 120 months of imprisonment on the second count, to run concurrently, five years of supervised released, restitution of \$80,494, and a special assessment of \$200.<sup>5</sup> Defendant appealed to the Third Circuit, and on February 28, 2013 the Third Circuit affirmed his conviction and sentence.<sup>6</sup> On March 25, 2014, Defendant filed a Motion to Vacate, Set Aside or Correct his Sentence<sup>7</sup> and a Motion to Request an Evidentiary Hearing.<sup>8</sup>

## **II. LEGAL STANDARD**

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to

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<sup>2</sup> Ex. A to Gov’t Response at 2, Doc. No 194.

<sup>3</sup> Trial Tr. 5/4/2010 at 4-5, 12-16, 60, Doc. No. 101.

<sup>4</sup> Trial Tr. 5/4/2010 at 13-14, 35-36, Doc. No. 101.

<sup>5</sup> Sentencing Tr. at 131-137, Doc. No. 178.

<sup>6</sup> *United States v. Battles*, 514 F. App’x 242 (3d Cir. 2013).

<sup>7</sup> Doc. No. 191.

<sup>8</sup> Doc. No. 192.

vacate, set aside, or correct the sentence by asserting that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”<sup>9</sup> “Habeas corpus relief is generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.”<sup>10</sup>

It is within the district court’s discretion to determine whether it should order a hearing on a motion made under 28 U.S.C. § 2255.<sup>11</sup> In exercising this discretion, the court first must determine whether the movant “has alleged facts, viewed in the light most favorable to him, that, if proven, would entitle him to relief.”<sup>12</sup> Second, the court must determine whether a hearing is necessary to determine whether the factual allegations are true.<sup>13</sup>

### **III. DISCUSSION**

Defendant had three different attorneys over the course of this case, and he alleges that each attorney was ineffective. First, Defendant alleges that his pre-trial lawyer, Paul Perlstein, was ineffective for failing to investigate the case before advising him to attend the proffer session with the Government, and for failing to explain the consequences of attending the proffer session. Second, he alleges that his attorney at trial, Anne Dixon, whom Defendant subsequently retained, was ineffective for failing to investigate and for failing to advise him to plead guilty after the proffer session. Third, he alleges that his new attorney at sentencing, Lynanne Wescott,

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<sup>9</sup> 28 U.S.C. § 2255(a).

<sup>10</sup> *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

<sup>11</sup> *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989).

<sup>12</sup> *Gov’t of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 574 (3d Cir. 1994).

<sup>13</sup> *Id.*

was ineffective for failing to object to the inclusion of additional stolen checks to increase the amount of loss under the sentencing guidelines. In Defendant's reply brief, he withdraws his claim that Ms. Wescott was ineffective. As a result, the Court will only address Defendant's first two claims of ineffective assistance of counsel.

To establish that both pre-trial and trial counsel were ineffective, Defendant must demonstrate that each attorney's performance was deficient and that each deficiency caused him prejudice.<sup>14</sup> An attorney's performance is deficient only if it falls "below an objective standard of reasonableness" and such deficiency prejudices the defense only where "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."<sup>15</sup> Because Defendant cannot establish that he was prejudiced by the alleged deficiencies of his attorneys, his motions will be denied.

#### **A. Ineffectiveness of Attorney Perlstein**

Mr. Perlstein represented Defendant from March 24, 2009 until February 9, 2010. Defendant argues that Mr. Perlstein was ineffective because Mr. Perlstein never explained that the proffer could be used against Defendant at trial. The Government argues that this allegation is contradicted by the proffer agreement that Defendant signed, as it explained that the information Defendant gave could be used in limited circumstances at trial, including if he or his lawyer made representations that differed materially from the proffer information. Defendant does not dispute that he signed the proffer agreement or that the agreement explained circumstances in which the proffer could be used against him at trial. Moreover, Defendant does not claim that he was incapable of understanding the agreement or was in any way prevented

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<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007) (internal citations omitted).

<sup>15</sup> *Shedrick*, 493 F.3d at 299 (internal citations and quotations omitted).

from understanding it. As a result, the Court finds that counsel was not deficient, as Defendant was informed about the consequences of the proffer.<sup>16</sup>

Defendant's counsel still may have been deficient, however, in advising Defendant to attend the proffer session. Defendant argues that Mr. Perlstein was deficient in doing so because Mr. Perlstein knew that Defendant wanted to go to trial and because he did not investigate Defendant's case before advising him to attend the proffer session. "In assessing the reasonableness of a lawyer's advice regarding whether a defendant should attend a proffer session with the government, a court should consider whether the decision to meet with the government was strategic."<sup>17</sup> Courts have found that it is strategic to make a proffer in order to attempt plea negotiations,<sup>18</sup> to attempt to preclude indictment,<sup>19</sup> or to "lay the groundwork for a sentencing reduction for acceptance of responsibility or a departure for substantial assistance."<sup>20</sup> It can also be strategic to attend a proffer session even before counsel has reviewed discovery.<sup>21</sup> The record does not establish Mr. Perlstein's reasons for advising Defendant to proffer. Without

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<sup>16</sup> *United States v. Gilliard*, No. 04-cr-355, 2009 WL 4043288, at \*4 (E.D. Pa. Nov. 20, 2009) (holding that the defendant's counsel was not deficient for allegedly failing to explain the disadvantages of attending a proffer session where the defendant signed a proffer letter which explained that the proffer could be used against him at trial).

<sup>17</sup> *FNU LNU v. United States*, No. 09-cr-543, 2015 WL 5893723, at \*7 (S.D.N.Y. Oct. 7, 2015).

<sup>18</sup> Notably, contrary to Defendant's claims that his counsel was ineffective for advising him to attend the proffer session without the guarantee of a plea agreement, it may be a reasonable strategy to use the proffer as a basis for beginning plea negotiations. *Gilliard*, 2009 WL at \*3 (finding lawyer's advice to attend proffer session strategic where lawyer testified that it "allow[ed] [the defendant] to explore all of his options, including cooperation and a plea agreement."); *Reich v. United States*, No. 07-cv-2406, 2010 WL 10373, at \*4 (E.D.N.Y. Jan. 4, 2010); *See also Cohen v. United States*, No. 01-cr-1208, 2013 WL 5882923, at \*4 (S.D.N.Y. Oct. 29, 2013).

<sup>19</sup> *Reich*, 2010 WL 10373, at \*4.

<sup>20</sup> *United States v. Lewis*, 117 F.3d 980, 984 (7th Cir.1997).

<sup>21</sup> *Blake v. United States*, 723 F.3d 870, 881-82 (7th Cir. 2013).

this information and accepting Defendant's allegations as true,<sup>22</sup> the Court cannot determine whether it was strategic to advise a Defendant who did not wish to plead guilty, who was already indicted, and who wished to proceed to trial, to attend a proffer session that might affect his ability to present evidence at trial.

However, even if defense counsel erred in advising Defendant to attend the proffer session, Defendant conclusively fails to establish that he suffered prejudice from this alleged deficiency. Defendant argues that he was prejudiced by this proffer session because, without the proffer agreement, Defendant could have introduced three pieces of evidence at trial that would have established reasonable doubt.

First, Defendant argues that the proffer prevented him from calling Ms. Booker to testify that she conspired with Ms. Torres without Defendant's knowledge, which would have established reasonable doubt. Defendant admits that he made self-incriminating statements at the proffer session<sup>23</sup> and a report from the investigating agent in the case confirms that Defendant admitted his role in the conspiracy, including both Ms. Torres and Ms. Booker, at the proffer session.<sup>24</sup> As a result, unless Defendant claims that he failed to tell the truth at the proffer session,<sup>25</sup> he must be arguing that without the proffer, he would have been able to introduce perjured testimony from co-defendant Booker. Defendant was not prejudiced by a proffer that precluded him from presenting perjured testimony because "there is no right whatever-

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<sup>22</sup> *United States v. Travillion*, 759 F.3d 281, n.23 (3d Cir. 2014) ("In a pro se § 2255 petition, as here, we must accept as true the allegations of the petitioner, unless they are clearly frivolous.") (internal citations and quotations omitted).

<sup>23</sup> Def's Motion at 4, 6, Doc. No. 191.

<sup>24</sup> Investigating Agent Report of Proffer Meeting 5/4/2009.

<sup>25</sup> Defendant did not allege in this Motion that he did not tell the truth at the proffer session.

constitutional or otherwise-for a defendant to use false evidence”<sup>26</sup> and there is no reason to believe that counsel would have introduced this testimony given ethical rules that prohibit lawyers from knowingly presenting false evidence.<sup>27</sup> Moreover, Defendant’s arguments as to Ms. Booker’s potential testimony are merely speculative and are thus insufficient to establish that he was prejudiced.<sup>28</sup>

Second, Defendant argues that the proffer limited the government’s disclosure requirements under *Brady v. Maryland*<sup>29</sup> and the Jencks Act<sup>30</sup> and that without the proffer, the Government would have been required to disclose three DVD recordings of police interviews with Ms. Torres. Defendant argues that he could have impeached Ms. Torres’s testimony at trial using these recordings. However, Defendant cites no facts or authority for the proposition that the proffer limited the Government’s *Brady* and Jencks obligations. This was not the basis for the Court’s ruling on Defendant’s post-verdict Motions that these recordings were immaterial under *Brady* and did not prejudice Defendant. Instead, the Court held that the Government’s failure to disclose these DVD recordings was inadvertent and immaterial because Defendant had summaries of two of the interviews and the summaries provided “ample material with which the

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<sup>26</sup> *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Courts in other circuits have also held that defendants are not prejudiced by proffer agreements that prevented them from presenting perjured testimony. *United States v. Laird*, 591 F. App’x 332, 337 (6th Cir. 2014) (“it is questionable whether [counsel] could have ethically presented any witnesses to advance Laird’s vacation defense, which she knew to be contradicted by Laird’s proffer.”); *Murph v. United States*, 12 F. Supp. 3d 557, 569 (E.D.N.Y. 2014) (“the Court is reluctant to find that failing to suborn perjury constitutes ineffective assistance of counsel or a cognizable basis of prejudice.”) (internal citations and quotations omitted); *Susi v. United States*, No. 07-cr-119, 2015 WL 1602074, at \*7 (W.D.N.C. Apr. 9, 2015).

<sup>27</sup> Pennsylvania Rule of Professional Conduct 3.3 (“A lawyer shall not knowingly...offer evidence the lawyer knows to be false.”).

<sup>28</sup> *Collins v. Meyers*, 77 F. App’x 563, 565-66 (3d Cir. 2003) (“Our confidence in the outcome shall not be undermined by mere speculation about what a witness might have said. Instead, there must be a plausible showing of how the testimony of a witness would have been both material and favorable.”) (internal citations omitted).

<sup>29</sup> 373 U.S. 83 (1963).

<sup>30</sup> 18 U.S.C. § 3500.

defense could challenge Torres's credibility, and Torres's lies and omissions were explored both in Torres's direct testimony and on cross examination."<sup>31</sup> As a result, not only was Defendant's inability to use this evidence at trial not caused by his counsel's alleged deficiency in advising him to proffer, but this Court has already held<sup>32</sup> and the Third Circuit has affirmed,<sup>33</sup> that Defendant was not prejudiced by his inability to introduce this evidence at trial.<sup>34</sup>

Third, and finally, Defendant argues that contrary to the Government's claim at trial, it would have been impossible for him to call the bank to transfer funds from the account in which Ms. Booker deposited the stolen checks. At trial, Stephanie Commini, an investigative analyst for Commerce Bank, testified that a phone call was placed from Defendant's phone to Commerce Bank's interactive voice response system (IVR), a system that allows customers to check the balance of their account, transfer funds, and perform a number of other account functions.<sup>35</sup> Defendant claims that because Ms. Commini testified at trial that access to the account was denied because an invalid PIN (personal identification number) was entered, it would have been impossible to access the account by phone. However, this argument would not have advanced Defendant's claimed defense. Even if it is impossible to perform a transaction on the account by phone without the correct PIN, that Defendant's phone was used in an attempt to do so linked Defendant to the conspiracy and the bank fraud, as the Government argued at

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<sup>31</sup> Memorandum Opinion at 11-12, Doc. No. 160.

<sup>32</sup> Memorandum Opinion at 11-12, Doc. No. 160.

<sup>33</sup> *Battles*, 514 F. App'x at 252.

<sup>34</sup> The standard for the materiality of a *Brady* violation is the same as the standard for prejudice in an ineffectiveness of counsel claim. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ([The] touchstone of materiality is a reasonable probability of a different result.") (internal citations and quotations omitted); *Marshall v. Hendricks*, 307 F.3d 36, 53 (3d Cir. 2002).

<sup>35</sup> Trial Tr. 5/3/2010 at 91-93, Doc. No. 100.

closing.<sup>36</sup> Moreover, Defendant does not allege that the proffer agreement prevented him from defending against this evidence nor does he explain how without the proffer agreement, he would have been able to improve his defense on this issue.<sup>37</sup> As counsel's alleged deficiency is unrelated to this claim of prejudice and as there is no reasonable probability that this argument would have altered the result at trial, Defendant was not prejudiced by his counsel's alleged deficiency.

Because Defendant's allegations, even if true, conclusively fail to establish that Mr. Perlstein was ineffective, this claim will be denied without hearing.<sup>38</sup>

### **B. Ineffectiveness of Attorney Dixon**

Attorney Dixon represented Defendant from February 3, 2010 through trial. Defendant argues that Ms. Dixon was ineffective for failing to advise Defendant to plead guilty, with or without a plea agreement, as he claims that the proffer agreement eliminated any possibility of succeeding at trial. The Government does not claim that this alleged failure was reasonable, but instead argues that Defendant was not prejudiced by it. The Government contends that Defendant has not demonstrated a reasonable probability that he would have entered a guilty plea or that he

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<sup>36</sup> Tr. 5/5/2010 at 23, Doc. No. 102 (“So, now less than two days later, first thing in the morning you see a phone call. Commerce Bank keeps a record of who is calling into their automated system to check their bank accounts, and there is a phone call, 7:57 a.m., somebody is calling in to check on Tamika Booker’s account. What phone number is calling in to check on that? 215-439-2780. Jonathan Battles is calling to see what happened to that money and trying to transfer it. Now, the record shows that he didn’t have the right pin number, so he couldn’t do anything with it. But, why is he calling in to check on Tamika Booker’s account two days after she deposited that check unless he is the one who gave her the check.”).

<sup>37</sup> Defendant also notes that as he was romantically involved with Ms. Booker, she may have used his phone. Again, Defendant does not explain how the proffer agreement would have changed his argument on this point at trial. Moreover, Defendant’s trial counsel did argue in closing that there were a number of possibilities with respect to this phone call. Trial Tr. 5/5/2010 at 39, Doc. No. 102 (“You heard testimony about two accounts. She had one that was her own, she had a personal checking account, and then there was the other account that was created in order to negotiate the vendor check. So, this call is in relation to that personal account, and we obviously know a number of possibilities.”).

<sup>38</sup> *Weatherwax*, 20 F.3d at 574 (“When ineffectiveness of counsel is the alleged basis for habeas relief...we examine the existing record to determine whether all non-frivolous claims, accepted as true, conclusively failed to show ineffective assistance of counsel.”) (internal brackets, quotations, and citations omitted).

would have received a more favorable sentence had he pled guilty. Defendant responds that he would have received a reduction in his guideline sentence for acceptance of responsibility had he pled guilty.

To establish prejudice in the plea process, Defendant “must demonstrate that, but for his trial attorney’s alleged ineffectiveness, he would have likely received a lower sentence.”<sup>39</sup> The Third Circuit has held that a defendant may be prejudiced by his counsel’s failure to advise him that he could enter into an open plea because the Defendant likely would have received a reduction in the guideline sentence for acceptance of responsibility if he had entered an open plea instead of going to trial.<sup>40</sup> However, Defendant here cannot show that he would have received a lower sentence by pleading guilty. At sentencing, after considering the guideline sentencing range, the Court specifically stated that the sentence was not based on the guidelines: “What I think is fair happens to be within the guidelines, but that’s not why I am choosing it, and I say so on this record.”<sup>41</sup> Instead, the Court stated that the sentence imposed was necessary to protect the public from Defendant’s crimes, and to deter Defendant from committing these offenses again, as his previous sentences of “18 months, 24 months, 46 months, plus additional months for violation have not dissuaded him from committing additional frauds.”<sup>42</sup> There is no reasonable probability that a change in the guidelines sentencing range would have altered the sentence.<sup>43</sup> The reasons for the Court’s sentence of 120 months of imprisonment, to protect the

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<sup>39</sup> *United States v. Booth*, 432 F.3d 542, 546-47 (3d Cir. 2005).

<sup>40</sup> *Id.* at 548-49.

<sup>41</sup> Sentencing Tr. at 128, Doc. No. 178.

<sup>42</sup> Sentencing Tr. at 122, 127-28, Doc. No. 178.

<sup>43</sup> If Defendant had received a two-level reduction for acceptance of responsibility, his total offense level would have been reduced from 25 to 23. *See* U.S.S.G. § 3E1.1 (2011); Presentence Investigation Report at 40. As his criminal history category was VI, his guidelines sentencing range would have been reduced from 110-137 months to 92-115 months. *See* U.S.S.G. Ch. 5, Pt. A (2011); Presentence Investigation Report at 40.

public and deter Defendant, remain applicable even if Defendant had pled guilty, especially in light of Defendant's extensive criminal history. Defendant does not give any reason to suggest otherwise. As a result, Defendant has failed to establish a reasonable probability that he would have received a more favorable sentence had he pled guilty and thus has failed to establish that he was prejudiced by counsel's alleged deficiency.<sup>44</sup>

#### **IV. CONCLUSION**

For the reasons stated above, Defendant's claims conclusively fail to establish that his pre-trial or trial counsel was ineffective. As a result, his motion will be denied without a hearing. Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue.<sup>45</sup>

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<sup>44</sup> Defendant also claims that Ms. Dixon failed to properly investigate his case. The only harm Defendant claims from this alleged failure is that it prevented Ms. Dixon from advising Defendant to plead guilty. Because the Court holds that Defendant suffered no prejudice from his counsel's alleged failure to advise him to plead guilty, his claim that counsel failed to properly investigate must also fail.

<sup>45</sup> 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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v.	:	
	:	<b>CIVIL ACTION NO. 14-cv-1761</b>
<b>JONATHAN BATTLES</b>	:	

**ORDER**

**AND NOW**, this 5th day of January 2016, upon consideration of Defendant's *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 [Doc. No. 191] and Defendant's *pro se* Motion to Request an Evidentiary Hearing [Doc. No. 192], the briefing in support thereof, and the response thereto, it is hereby **ORDERED** that for the reasons set forth in the accompanying Memorandum Opinion the motions are **DISMISSED**. No certificate of appealability shall issue, and no evidentiary hearing shall be held. The Clerk is directed to **CLOSE** this case.

**IT IS SO ORDERED.**

**BY THE COURT:**

*/s/ Cynthia M. Rufe*

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**CYNTHIA M. RUFÉ, J.**