

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

UNITED STATES OF AMERICA

v.

ANTHONY WILLIAMS

:
:
:
:
:
:
:

CRIMINAL ACTION

No. 11-223-1

MEMORANDUM OPINION

PRATTER, J.

JANUARY 30, 2019

This matter is before the Court on remand from the Third Circuit Court of Appeals for consideration of Anthony Williams’s claim that he received ineffective assistance of counsel when his previous counsel allegedly failed to communicate a plea offer. Pursuant to 28 U.S.C. § 2255, Mr. Williams seeks to vacate his conviction and sentence and asks the Court to direct the Government to reopen plea discussions with Mr. Williams. Because the Court determines that the assistance provided by Mr. Williams’s prior counsel was not unconstitutionally deficient, the motion is denied.

PROCEDURAL HISTORY

On April 12, 2011, a grand jury in this District indicted Mr. Williams for conspiracy to commit access device fraud and bank fraud, in violation of 18 U.S.C. § 371 (Count 1); 13 counts of access device fraud, in violation of 18 U.S.C. § 1029(a)(2) (Counts 2–14); three counts of bank fraud, in violation of 18 U.S.C. § 1344 (Counts 15–17); four counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Counts 18–21); and one count of identity theft, in violation of 18 U.S.C. § 1028(a)(7) (Count 22). Doc. No. 1. Following a jury trial before this Court, on December 6, 2012, Mr. Williams was convicted of conspiracy (Count 1), ten counts of

access device fraud (Counts 2–3 and 5–12), three counts of bank fraud (Counts 15–17), four counts of aggravated identity theft (Counts 18–21), and one count of identity theft (Count 22). On April 25, 2013, the Court sentenced Mr. Williams to a total term of 259 months.¹ In addition, the Court imposed a five-year period of supervised release following his imprisonment as well as a special assessment and restitution. *See* Doc. No. 471.

The Third Circuit Court of Appeals affirmed the judgment and conviction on October 31, 2014. About six months later, on April 7, 2015, Mr. Williams filed a petition under 28 U.S.C. § 2255 to vacate the conviction and set aside or correct his sentence. Doc. No. 648. The Court denied Mr. Williams’s petition without holding an evidentiary hearing. Doc. Nos. 688–89. Mr. Williams subsequently filed a *pro se* motion to reconsider denial of his § 2255 petition, under Federal Rule of Civil Procedure 60(b). In the motion to reconsider, Mr. Williams attached, for the first time, a January 4, 2012 letter from counsel for the Government to Mr. William’s prior Counsel, Kerry Kalmbach. Doc. Nos. 690, 716. According to Mr. Williams, he was previously unaware of the January 4, 2012 letter, which (among other things) outlined the terms of a potential plea offer. *Id.* On January 27, 2017, the Court denied Mr. Williams’s motion to reconsider as a second or successive § 2255 motion. *See* Doc. Nos. 730–31.

After Mr. Williams appealed both the denial of his petition and the denial of his motion to reconsider, the Third Circuit Court of Appeals granted a certificate of appealability on one issue: “whether [Mr. Williams’s] § 2255 motion states a valid claim of the denial of a constitutional right

¹ Mr. Williams’s sentence is as follows: “60 months on count 1, terms of 120 months on each of counts 2, 3, and 5 through 12, and 22, terms of 23 5 months on counts 15 through 17, to be served concurrently, and terms of 24 months on each of counts 18 through 21 to be served concurrently to each other, but consecutively to the terms imposed on counts 1, 2, 3, and 5 through 12, 15 through 17, and 22, to the extent necessary to produce a total term of 259 months.” Doc. No. 471.

as to his claim that pretrial counsel was ineffective for failing to communicate a plea offer.” Doc. No. 735. Shortly thereafter, the Government filed a motion for summary remand from the Third Circuit Court of Appeals, in which the Government (1) recommended vacating this Court’s order denying § 2255 relief and (2) sought an evidentiary hearing on whether Mr. Williams’s trial counsel had contemporaneously discussed with Mr. Williams the January 4, 2012 letter. *See* Government’s Motion for Summary Remand and for Permission to Be Excused from Filing a Brief, *United States of America v. Williams*, 17-1665 (3d. Cir. 2018). The Court of Appeals granted the Government’s motion, vacated the order denying Mr. Williams’s motion to reconsider, and remanded the case to this Court for “further consideration of the claim regarding the alleged plea offer.” Doc. No. 749. On June 14, 2018, the Court held an evidentiary hearing on Mr. Williams’s § 2255 motion.

FINDINGS OF FACT

Shortly after Mr. Williams’s indictment, on May 17, 2011, United States Magistrate Judge David Strawbridge appointed attorney Kerry Kalmbach to represent Mr. Williams, pursuant to the Criminal Justice Act. *See* Doc. No. 100.²

Mr. Kalmbach is now, and was at the time of his appointment, an experienced criminal defense lawyer. Mr. Kalmbach, a former public defender in Chester County, began practicing criminal law in 1974. *See* Tr. at 6, 18. Although he initially focused his practice on state criminal matters, Mr. Kalmbach has practiced federal criminal law for at least the last 26 years. *Id.*

² Mr. Kalmbach represented Mr. Williams for just under a year, until Mr. Williams made a *pro se* motion for the appointment of new counsel. On May 8, 2012, the Court held a hearing and granted the motion. *See* Doc. Nos. 300, 304. On May 9, 2012, the Court appointed Peter Levin to serve as Mr. Williams’s new attorney. Doc. No. 304.

For several months after his appointment, Mr. Kalmbach was unable to determine where Mr. Williams was in custody. When Mr. Kalmbach tracked down Mr. Williams, Mr. Williams was being held at Southern State Correctional Facility in New Jersey, where Mr. Williams was serving a ten-year sentence for related state charges. Mr. Kalmbach met with Mr. Williams at least four times, the first of which occurred on October 5, 2011 at Southern State. After the initial meeting, Mr. Kalmbach contacted Frank Costello, the Assistant United States Attorney prosecuting Mr. Williams and asked Mr. Costello for a “statement of [the] case and evidence against [Mr. Williams].” Tr. at 10. On January 4, 2012, Mr. Costello responded to that request via email, attaching a letter (dated January 4, 2012) and a proposed proffer agreement.³ The letter (1) described the facts of the case and charges against Mr. Williams, and (2) outlined the terms of a prospective “plea agreement.” See Gov’t Memo, Ex. 1. The Government said the following about a potential plea:

As you requested, if your client is willing to enter into a plea agreement, I will seek approval for the government to decline to recommend the imposition of consecutive terms of imprisonment on the aggravated identity counts. I will also consider a stipulation to a 3-point enhancement for the defendant’s role in the offense (as a manager or supervisor) rather than the 4-point enhancement set forth above for organizer or leader. In that instance, the estimated range, with acceptance would be 130-162 months.

Id.

At the evidentiary hearing, Mr. Kalmbach testified repeatedly that he (1) gave or showed Mr. Williams a copy of the January 4, 2012 letter and (2) discussed the terms of the January 4, 2012 letter with Mr. Williams.⁴ Mr. Kalmbach’s recollection is that, after he conveyed the terms

³ The letter is in the record as Exhibit 1 to the Government’s Memorandum, but neither counsel for Mr. Williams nor the Government could locate the proffer agreement, and so the Court has not seen or considered the proffer agreement itself.

⁴ See Tr. at 11 (Q. Did you meet with Mr. Williams after getting this letter? A. I did. Q. And did you give him a copy of it? A. I did. Q. Did you talk to him about it? A. I did. Q. And

of the letter to Mr. Williams, Mr. Williams was not interested in any plea deal.⁵ Mr. Kalmbach's testimony, that he informed Mr. Williams about the potential plea offer included in the January 4, 2012 letter, is also corroborated by two subsequent letters that Mr. Kalmbach sent to Mr. Williams, from the same time Mr. Kalmbach was representing Mr. Williams.

On March 2, 2012, Mr. Kalmbach wrote to Mr. Williams:

“It is important that you keep in mind that if you elect to go to trial and not plead guilty, the Government will withdraw its offer **set forth in the Plea Agreement that I gave you**. This will result in you doing more time if you are convicted at trial [than] [sic] you would receive if you accept the plea offer.”

Gov't Memo., Ex. 2 (emphasis added). Mr. Kalmbach testified that although the March 2, 2012 letter referred to the plea as a “plea agreement,” Mr. Williams was aware that the Government and Mr. Kalmbach never actually reached an agreement about the specific terms of a plea deal, and Mr. Williams himself never agreed to the terms of a deal; instead, all discussions were tentative and the plea would have more properly been described as a “proposal for a plea agreement.” Tr.

did he express any interest at that time in a plea? A. He did not.”); *id.* at 17 (“Q. And as you said, you gave him a copy of the January 4th letter and reviewed that with him, Government's Exhibit 1? A. I did. That was my whole purpose of asking for it.”); *id.* at 21 (Q. Right. Do you remember going to Southern State to see Mr. Williams to talk about the letter which is Government Exhibit 1? A. I do.”); *id.* at 23 (“Q. Do you remember reviewing Government Exhibit 1, the January letter? A. Yes. Q. With Mr. Williams? A. Yes.”); *id.* at 24 (“Q. Do you think you discussed each of the three different parts of that letter with Mr. Williams? A. Yes. Q. And do you think - - were you satisfied that he understood each of them when you discussed them with him? A. Yes.”).

⁵ See *id.* at 11 (Q. Did you meet with Mr. Williams after getting this letter? A. I did. Q. And did you give him a copy of it? A. I did. Q. Did you talk to him about it? A. I did. Q. And did he express any interest at that time in a plea? A. He did not.”); *id.* at 36 (“Q. All right. When you discussed the option of pleading guilty with Mr. Williams, did you ever explicitly discuss the option of pleading guilty without cooperating? A. I don't recall. I honestly don't recall Mr. Williams ever being amenable to pleading to anything.”).

at 26–27.⁶ More importantly, the March 2, 2012 letter confirms that Mr. Kalmbach “gave” Mr. Williams the plea offer.

Similarly, on April 13, 2012, Mr. Kalmbach wrote to Mr. Williams:

“We need to make a decision as to whether or not you are going to go to trial or enter a plea. **As I previously indicated to you**, the plea that has been negotiated results in a lower guideline sentence [than] [sic] if you would go to trial and be successful at being found guilty only for the lesser amount we discussed.”

Gov’t Memo., Ex. 3 (emphasis added).⁷ Like the March 2, 2012 letter, the April 13, 2012 letter suggests that Mr. Kalmbach and Mr. Williams had previously discussed a plea offer.

Although, at the evidentiary hearing, Mr. Williams denied ever discussing the January 4, 2012 letter with Mr. Kalmbach,⁸ Mr. Williams has not coupled his denials with any evidence

⁶ See *id.* at 26-27. (“Q. Well, the plea agreement -- who are the parties to this plea agreement? You referred, as you correctly pointed out a moment ago in your later letters, to this document, this page of the document as a plea agreement. A. I did. Q. Who was in agreement about this? A. I don’t think anybody ever agreed to it. Q. Oh, I see. A. And I don’t think anybody was in agreement with it. Certainly Mr. Williams wasn’t. Q. Okay. A proposal for a plea agreement? A. I think that’s accurate.”); see also *id.* at 25 (“I know, though, that I explained that this is what the Government was willing to do, that I had no formal plea agreement.”).

⁷ It is not clear, based on the record and based on the testimony of Mr. Williams and Mr. Kalmbach, whether Mr. Williams ever received either the March 2, 2012 letter or the April 13, 2012 letter. Mr. Kalmbach sent the March 2, 2012 letter to Mr. Williams at Southern State, shortly before Mr. Williams’s hearing in this Court on March 7, 2012. Mr. Williams testified that he did not receive the March 2, 2012 letter because he was transferred into federal custody for the March 7, 2012 hearing. See *id.* at 55. Mr. Williams also testified that he did not receive the April 13, 2012 letter. See *id.* at 61–62. Regardless of whether Mr. Williams received either letter, however, the *content* of both letters confirms that, in 2012, Mr. Kalmbach contemporaneously recalled discussing the terms of a plea deal with Mr. Williams. In other words, even if Mr. Williams never received either letter, the letters still represent Mr. Kalmbach’s then present sense impression that he had already showed the plea offer to Mr. Williams and that he discussed the plea offer with Mr. Williams.

⁸ See, e.g., *id.* at 51 (“Q. Did Mr. -- was that the first time when you found [the January 4, 2012 letter] in the pile of paper that Mr. Levin gave you about this case? A. Right. That was the first time I laid eyes on it. Q. The first time you had ever seen it? A. Yes. Q. Mr. Kalmbach never brought that document to you at Southern State? A. No.”); *id.* at 52–53 (“Q. So at any time after January 5 of 2012, did Mr. Kalmbach mail you a copy of this document? A. No. Q. Accompanied by a letter from him telling you what it was and what -- calling your attention to anything important about it or anything like that? A. No. Q. Never saw it before Mr. Levin gave

calling into question Mr. Kalmbach's contemporaneous descriptions of relaying the proposal for a plea agreement to Mr. Williams.

Mr. Williams has essentially two arguments about why his version of events is the most believable, but neither argument is persuasive.

First, Mr. Williams asserts that his testimony is more credible than Mr. Kalmbach's testimony, because he more accurately recalls individual details about their interactions than does Mr. Kalmbach. But Mr. Williams does not explain why or how his recollection in 2018 is more accurate and more credible than Mr. Kalmbach's letters from March and April of 2012, each of which was written within months of the meetings between Mr. Kalmbach and Mr. Williams and reflect Mr. Kalmbach's knowledge and recollection at the time.

Second, Mr. Williams points to a January 6, 2015 letter from Mr. Kalmbach to Mr. Williams as evidence that Mr. Kalmbach's current recollection is inaccurate. This letter, written by Mr. Kalmbach in response to a letter from Mr. Williams around the time that Mr. Williams was preparing his initial *pro se* § 2255 petition, states that in 2015, Mr. Kalmbach had "absolutely no recollection, and [he] believe[d] there never was, any offer of 13 years to [Mr. Williams] in exchange for [Mr. Williams's] cooperation. . . . [Mr. Williams] [is] correct that [Mr. Kalmbach] never mailed to or showed [Mr. Williams] any drafted offer because there was none." Reply Br., Ex. 1. As with his current testimony, Mr. Williams does not explain why the January 6, 2015 letter, written nearly three years after Mr. Kalmbach's March 2, 2012 and April 13, 2012 letters, is the more reliable representation of whether Mr. Kalmbach showed Mr. Williams the terms of

it to you with a lot of other papers in your case; is that it? A. No. Q. So the first time -- again, the first time you saw this letter? A. Would have been when I discovered it in my discovery. I guess it was in 2014. Q. Prior to sentencing or after when you got that paperwork from Mr. Levin? A. After sentencing.")

the Government's potential plea offer. At the evidentiary hearing, counsel for Mr. Williams also failed to ask Mr. Kalmbach any questions about the 2015 letter.

The after-the-fact recollections included in Mr. Williams's testimony and Mr. Kalmbach's January 6, 2015 letter are not enough to outweigh or rebut Mr. Kalmbach's contemporaneous recollections from the March 2, 2012 and April 13, 2012 letters. Because Mr. Williams did not present evidence to rebut the Government's showing, the Court finds that Mr. Kalmbach (1) gave or showed Mr. Williams a copy of the proposal for a plea agreement and (2) timely discussed with Mr. Williams the terms of the proposal for a plea agreement.

CONCLUSIONS OF LAW

In *Missouri v. Frye*, 566 U.S. 134 (2012), the Supreme Court held that “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Id.* at 145. Courts applying *Frye* must conduct a two-step analysis: (1) Whether defense counsel failed to communicate a formal offer of a plea, *id.*, and (2) Whether the defendant suffered prejudice as a result of that failure. *See id.* at 147–49. If the defendant can establish an affirmative answer at each step, then the defense counsel's actions would amount to ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Here, the Court can stop after the first step. As established above, the record does not support a conclusion that Mr. Williams's first defense attorney, Mr. Kalmbach, failed to communicate the at-issue plea offer.⁹ Because Mr. Williams cannot satisfy the first step of *Frye*, his ineffective assistance of counsel claim fails.

⁹ Because the Court determines that Mr. Kalmbach adequately conveyed the plea offer to Mr. Williams, the Court need not decide whether the at-issue plea offer here was a “formal offer,” *see Frye*, 566 U.S. at 145, and if not, whether *Frye* also extends to informal offers. *See, e.g., Merzbacher v. Shearin*, 706 F.3d 356, 369–70 (4th Cir. 2013) (“[T]here may be cases in which a petitioner can show *Strickland* prejudice despite the incipience of the plea offer he did not

CONCLUSION

The record before the Court supports the conclusion that Mr. Williams's first trial attorney, Mr. Kalmbach, complied with his constitutional obligations by conveying to Mr. Williams the terms of the proposed plea offer outlined by the Government in its January 4, 2012 letter to Mr. Kalmbach. For that and all the foregoing reasons, Mr. Williams's motion is denied. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

accept[.]”); *cf. Shnewer v. United States*, 703 F. App'x 85, 88 n.1 (3d Cir. 2017) (avoiding issue of whether *Frye* and *Strickland* apply to informal plea offers, but acknowledging that “some emerging case law from other jurisdictions . . . appears to expand trial counsel's duty to convey formal plea offers, which the Supreme Court recognized in *Frye*, to informal offers and even, possibly, to informal plea negotiations.”). The Court also does not address the related question of whether Mr. Williams satisfied the prejudice prong of *Frye* and *Strickland*.

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

UNITED STATES OF AMERICA

v.

ANTHONY WILLIAMS

:
:
:
:
:
:
:

CRIMINAL ACTION

No. 11-223-1

ORDER

AND NOW, this 30th Day of January, 2019, pursuant to the Mandate issued by the Third Circuit Court of Appeals (Doc. No. 749), upon consideration of Mr. Williams’s *Pro Se* Motion to Vacate/Set Aside/Correct His Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 648), the Government’s Response in Opposition Thereto (Doc. No. 656), Mr. Williams’s *Pro Se* Motion for Relief and to Alter or Amend the Judgment under Federal Rule 60(b) (Doc. No. 690), the Government’s Response Thereto (Doc. No. 703), Mr. Williams’s Amended Rule 59(c) and 60(b) Motion (Doc. No. 716), the evidentiary hearing held on June 14, 2018, Mr. Williams’s Post-Hearing Memorandum in Support of his § 2255 Motion (Doc. No 769), the Government’s Post-Hearing Response (Doc. No. 775), and Mr. Williams’s Reply to the Government’s Response (Doc. No. 779), and for the reasons discussed in the accompanying Memorandum, it is hereby

ORDERED that:

1. Mr. Williams’s motion to vacate his sentence under § 2255 is **DENIED**;
2. There is no probable cause to issue a certificate of appealability; and
3. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge