

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
vs. :
IFEDOO NOBLE ENIGWE : NO. 92-00257

M E M O R A N D U M

DUBOIS, J.

JULY 16, 1997

This matter is before the Court on the Motion of defendant, Ifedoo Noble Enigwe, to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("2255 Motion"). For the reasons set forth below, defendant's § 2255 Motion will be denied.

I. BACKGROUND¹

This case arises out of defendant's importation of heroin into the United States. On May 6, 1992, a Grand Jury in the Eastern District of Pennsylvania returned a four count indictment against Ifedoo Noble Enigwe, a/k/a "Damien," charging him with: conspiracy to import heroin, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1)(A), and 963 (Count I); importing, and aiding and abetting the importation of heroin, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1)(A) and 18 U.S.C. § 2 (Count II); and aiding and abetting travel in foreign commerce for the purpose of importing heroin into the United States, and thereafter willfully

¹ A more detailed version of the background of this case is set forth in this Court's Opinion of September 11, 1995. United States v. Enigwe, Crim. A. No. 92-00257, 1995 WL 549110 (E.D. Pa. Sep. 11, 1995).

performing and attempting to perform acts to facilitate the importation of heroin, in violation of 18 U.S.C. §§ 2 and 1952(a)(3) and 21 U.S.C. § 952(a) (Counts III and IV). Defendant's trial took five days, and on August 7, 1992 he was convicted by a jury on all four counts of the indictment.

Defendant filed several motions for a new trial, all of which were denied. On August 13, 1993, the Court sentenced defendant to 235 months in prison, five years of supervised release, a fine, and a special assessment. The Third Circuit affirmed the conviction and sentence in an unpublished Memorandum dated April 28, 1994.

Defendant filed a pro se Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255, on August 24, 1994. The Court conducted an evidentiary hearing on the Motion on November 23 and 28, 1994. Defendant proceeded pro se at that hearing and both defendant and his trial counsel, Joseph Capone, testified. The Court denied the § 2255 Motion by Memorandum and Order dated September 11, 1995. United States v. Enigwe, Crim. A. No. 92-00257, 1995 WL 549110 (Sep. 11, 1995 E.D. Pa. 1995). On September 26, 1995, defendant filed a Motion for Reconsideration Pursuant to Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure. The Motion for Reconsideration was denied on March 1, 1996 by Memorandum and Order. United States v. Enigwe, No. Crim. A. 92-00257, 1996 WL 92076 (E.D. Pa. Mar. 1, 1996).

Defendant appealed the denial of his § 2255 Motion. One of the arguments raised on appeal was that this Court should have appointed counsel to represent defendant at the evidentiary

hearing. The government agreed with plaintiff's contention and filed a Motion to Remand to the District Court. The Third Circuit, by Order dated July 23, 1996 treated the government's Motion

as a motion for summary action pursuant to Local Appellate Rule 27.4 and Chapter 10.6 of [the Third Circuit's] Internal Operating Procedures[and ruled that t]he district court's order entered September 12, 1995, which denied appellant's motion under 28 U.S.C.

§ 2255, to vacate, set aside or correct sentence, is vacated and the matter is summarily remanded to the district court. Upon remand, the district court should appoint the appellant [defendant] counsel as mandated by Rule 8(c) of the Rules Governing § 2255 Proceedings and hold a new evidentiary hearing." United States v. Enigwe, C.A. No. 95-1984 (3d Cir. July 23, 1996) (unpublished order).

Pursuant to the Third Circuit's Order, this Court appointed counsel to represent defendant. An evidentiary hearing on defendant's § 2255 Motion was held on February 20 and 21, 1997 and on June 3, 1997. Defendant testified on February 20th and his trial counsel, Capone, testified on February 20th and 21st. The hearing was continued to June 3rd, at which time the Court was to hear closing arguments and the testimony of a former Federal Defender, L. Felipe Restrepo, who had been assigned to represent defendant before the Federal Defender Association disqualified itself and Capone was appointed in its stead. A Verification reflecting Restrepo's brief involvement with defendant's case was submitted to the Court in March, and an Affidavit supplementing that Verification was submitted at the June 3rd hearing. Defendant agreed that the Court's consideration of those two documents obviated the need for Restrepo to testify at that hearing. Thus, only closing arguments and comments on ancillary matters were heard

on June 3rd.

II. DISCUSSION

Defendant's pro se filings urge the Court to grant defendant's § 2255 Motion for a number of reasons. However, as is explained below, after the appointment of counsel defendant agreed not to proceed on most of the grounds set forth in his pro se filings but rather to present only the two issues his attorney believed had merit, each of which is discussed below.

A. Defendant Agreed Not to Proceed on the Grounds Set Forth in His Pro Se Filings

During the first day of the evidentiary hearing, defendant's attorney told the Court that defendant had decided to drop his pro se filings and rely solely on his attorney. Transcript of February 20, 1997, at 3 ("Feb. 20 Tr."). The Court verified that information by asking defendant "You've filed a number of pro se papers with the Court. The files are full of them. What is your position with respect to those pro se papers? And in that connection, your attorney has said you're not proceeding on the basis of those pro se papers?" Id. at 4. Defendant replied: "Well, your Honor, my position today is that I have reviewed the papers filed by my attorney, and I have decided to take his advice and drop the pro se pleadings and just rely on his representation." Id. (emphasis added).

On April 16, 1997 the Court received a copy of a letter

defendant sent to his attorney, dated April 14, 1997. In that letter defendant expressed his concern that counsel's efforts on his behalf did not seem calculated to result in a sufficient reduction in defendant's sentence. Defendant wrote: "I would like to remind you [counsel] that I waived all my other issues because you told me, in the presence of a witness, that you will try to get me under nine years." Letter from Ifedoo Noble Enigwe to Christopher Warren, Esq. 1 (Apr. 14, 1997) (emphasis original). In light of this letter the Court decided to once again colloquy defendant as to whether he wanted to argue all of the theories set forth in his pro se filings.

When the evidentiary hearing was continued on June 3, 1997 the Court addressed the April 14th letter. Transcript of June 3, 1997, at 5-34. ("June 3 Tr."). After questioning defense counsel on the issue, the Court conducted an extensive colloquy of defendant, as follows:

THE COURT: Well, now I'll hear from you regarding this so-called promise. Did anyone promise you a nine-year sentence or did anyone say I'll try to get you a nine-year sentence?

MR. ENIGWE: Yes, Your Honor. Mr. Warren told me that he will try to get me under nine years. But, as time went on, you know, we were going through the guideline stuff. So, but when he argued level 34, I felt that it -- you know, it contradicted that statement he made. So, --

THE COURT: All right. I want you to assume that you might not get a sentence of nine years. You might not get any reduced sentence at all. I might deny your petition. Assume that and tell me what you want to do regarding all of these other issues. If you wish to go forward with them, we'll give you an opportunity to do that. If you're prepared to go forward now, we'll do it now. If you need more time, we'll give you more time. You tell me what you want to do. But, you're going to do

it now.

MR. ENIGWE: Yes sir.

THE COURT: You had an opportunity -- if Mr. Warren said this and I haven't heard from him on it, but I can tell you now I want you to assume that that doesn't happen, that you're not going to get nine years and you might not get any reduction in your sentence at all, I might deny the petition. Now, knowing that that -- those are possibilities, what do you want to do with regard to these other issues? And, if you want to go forward with them and you're ready to do it now, we'll do it now. And, if you want more time to think about them, and brief them or do whatever you want to do, I'll consider that request as well. You tell me.

MR. ENIGWE: Well, Your Honor, knowing everything you've said now and knowing that with the denial of the motion that I still have 235 months, I', still going to waive all those claims and I'm still going to shake Mr. Warren's hand as a good lawyer. And, I'm doing that knowingly, voluntarily and intelligently today. Id. at 30-31 (emphasis added).

After defendant's waiver only two issues remain to be addressed in this Memorandum: 1) The alleged ineffectiveness of defendant's trial counsel in advising defendant as to whether he should plead guilty without a plea agreement and 2) The alleged ineffectiveness of defendant's trial counsel in advising defendant whether he should testify at trial.

B. Standard for Ineffectiveness

Defendant's ineffective assistance of counsel claim is controlled by Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, Justice O'Connor explained that such a claim requires that a defendant establish two things:

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 Sixth Amendment [to the Constitution of the United

States]. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death penalty resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687.

To establish the first prong of the Strickland test a defendant must show that counsel's performance was so deficient that it fell below "an objective standard of reasonableness." Id. at 687-688. To establish the second prong, prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

For the reasons that follow, the Court concludes that defendant's counsel was not ineffective.

C. Advice With Respect to Pleading Guilty Without a Plea Agreement

1. Capone's Advice Fell Below an Objective Standard of Reasonableness

Defendant contends that his trial counsel, Capone, was ineffective in advising him with respect to whether he should have pled guilty without the benefit of a plea agreement (an "open plea"). The government argues that Capone was, in light of defendant's consistent and adamant assertions of his innocence, objectively reasonable in the advice he gave, and thus not ineffective.

Capone testified extensively at the evidentiary hearing.² In the course of that testimony, Capone touched upon every aspect of his relationship with defendant. The Court is, at this time, only concerned with the advice Capone gave defendant with respect to whether defendant should plead guilty without the benefit of a plea agreement. Capone summarized that advice at the hearing: "I would say that I advised him basically not to take an open plea [and] to go to trial." Transcript of February 21, 1997, at 8. ("Feb. 21 Tr.>"). As became clear during the cross-examination of Capone, that advice fell below an objective standard of reasonableness.

Capone explained at the evidentiary hearing that he advised defendant not to plead guilty because defendant would get "the same" sentence whether he pled guilty or went to trial and was convicted:

BY MR. WARREN:

Q Well, let me ask you this, sir. Did you tell Mr. Enigwe on June 16th, 1992, that an open plea made no sense whatsoever, because he would receive the same sentence with that plea that he would get if he went to trial and was convicted.

A [Mr. Capone] Did I tell him that on June 16th?

Q Yes.

A No, I don't believe I told it to him on June 16th.

Q Did you tell him that at any time?

A Yes. I told him -- and when I use the word same -- may I explain my answer?

THE COURT: Absolutely.

MR. WARREN: Well, it -- okay. Go ahead.

THE COURT: Yes. If he answers yes, and he said yes to your question, "Did you tell him that at any time," he can explain the answer. Go ahead.

THE WITNESS: Yes, I essentially told him that. And

² The Court recognizes that in 1995 Capone pled guilty to making a false statement on a bank loan application and will consider that conviction in judging Capone's credibility.

when I say the same, I meant in my heart to this man, that if he would have pled open, that he would have been hit with everything the Government had to offer him.

When I say offer him, of course, and we've been through it already, but all of the additional ramifications and nuances of the Guidelines, including as much weight as they could throw on him, including his role in the offense, including anything else they could do. And that's exactly what I meant when I said the same.

And when I say the same, I meant, you know, if there was a difference between maybe a two point reduction or two points up -- when you're talking about 20 years of the your life, maybe 18 or maybe 22 in my opinion and in explaining my answer, I don't think it makes much of a difference, to me that would be the same.

If I had to spend 18 years or 20 years in jail, guess what, to me it basically is the same. That's what I meant. Feb. 21 Tr., at 5-6.

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and then to offer his informed opinion as to what plea should be entered." Von Moltke v. Gillies, 332 U.S. 708, 721 (1948). "Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). The same rationale applies where, as in this case, a defendant is advised by his attorney as to whether he should enter an open plea or proceed to trial.

In this case, Capone told defendant that he risked no additional sentence exposure by going to trial. That statement is simply untrue. Eighteen, twenty and twenty-two years are not "the same." Capone's position is not one a reasonable attorney would take.

Defendant's sentence was calculated using the 1991 United States Sentencing Guidelines ("USSG"), beginning with a base offense level of thirty-two. That offense level was increased by four levels, to thirty-six, pursuant to USSG § 3B1.1(a) because the Court concluded that defendant was "an organizer or leader of a criminal activity that involved five or more participants." An additional two level enhancement was added pursuant to USSG § 3C1.1 because the Court concluded that defendant had perjured himself at trial. Thus, the total offense level used to calculate defendant's sentence was thirty-eight. As a first time offender, defendant was placed in Criminal History Category I. The range for a defendant in Criminal History Category I with a total offense level of thirty-eight is 235 to 293 months. Defendant was sentenced to 235 months because the Court concluded that such a sentence would fulfill all of the goals of sentencing.

Had defendant pled guilty he could not have given testimony inconsistent with the jury's verdict and would not have been subject to the perjury enhancement. Had he been sentenced without a two level enhancement for perjury his total offense level would have been thirty-six and his sentencing range 188 to 235 months. And, had defendant received a sentence at the low end of that range, he would have received a sentence just under four years less than the sentence at the low end of the range within which he was sentenced. That alone establishes that Capone's characterization of defendant's likely sentence as "the same" whether he entered an open plea or proceeded to trial falls below an objective standard

of reasonableness. Moreover, had defendant pled guilty and accepted responsibility he would have been entitled to a two level reduction pursuant to USSG § 3E1.1, which would have resulted in a total offense level of thirty-four and a sentencing range of 168 to 210 months. That sentencing range is not objectively "the same" as the sentencing range considered by the Court at defendant's sentencing.

Accordingly, the Court concludes that Capone's advice fell below an objective standard of reasonableness when he advised defendant that, in essence, he would derive no benefit from an open plea. The Court concludes only that Capone's advice fell below an objective standard of reasonableness when he failed to explain to defendant that the sentence he would receive by agreeing to an open plea would likely be less than the sentence he would have received if he was tried and found guilty. The Court does not conclude that Capone's advice fell below an objective standard of reasonableness because he did not provide defendant a detailed comparison of the sentencing ranges applicable in those two scenarios.

Although defendant has satisfied the first prong of Strickland, he is entitled to a reduction in his sentence only if Capone's advice resulted in actual prejudice. For the reasons that follow, the Court concludes that no such prejudice resulted from Capone's advice.

2. Capone's Advice Regarding an Open Guilty Plea Did Not Prejudice Defendant

To establish prejudice,

[Enigwe] need not prove with absolute certainty that he would have pleaded guilty, that the district court would have approved the plea arrangement, and that he therefore would have received a lesser sentence. Strickland v. Washington does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only "reasonable probability" that that is the case. United States v. Day, 969 F.2d 39, 45 n.8 (3d Cir. 1992) (citations omitted).

The Third Circuit has not yet had occasion to determine whether the "reasonable probability" standard requires a defendant to produce objective evidence supporting his claim that he would have pled guilty had counsel properly advised him. See id., at 45-46. This Court need not answer that question because it does not find credible defendant's testimony that he would have pled guilty had he been advised properly and rejects the "objective evidence" he offers in support of that testimony.

When defendant was asked if he would have pled guilty had Capone advised him properly, he testified as follows:

Q [Mr. Warren] Sir, if you had known that by pleading guilty and accepting responsibility for your conduct, your sentence would have been 151 to 188 months, would your decision to go to trial have been different?

A Of course.

Q Well, how so? What would have been different?

A It would have been different because, you know, once I see the difference in what I could get going to trial as opposed to what I could get pleading guilty, you know, even though the 151 months is not one day but comparing it with the 235 months, I would definitely plead guilty.

Q All right. Now, sir, you sit up there convicted of those crimes, right?

A Uh-huh.

Q How's the Judge to know that you're not just giving him the benefit of hindsight, that the only reason you're saying this is because you went to trial and got convicted and now you want the benefit of a deal?

A Well, this is not altogether hindsight because if I had the benefit of the good advice to start with, then I

would have had everything in front of me to make my, you know, my decisions on, you know, as opposed to just being led into something -- a landmine that I have no idea about and then -- that is hindsight, you know, being led into that landmine. Feb. 20 Tr., at 39-40.

The Court does not find this testimony credible. Defendant adamantly and consistently professed his innocence and asserted he was a victim of mistaken identity before, during, and after his trial. Feb. 20 Tr., at 86 ("Q [Mr. Nugent, Assistant United States Attorney] [D]id he [defendant] maintain that he was innocent to you [Capone] throughout the pretrial stages of this case? A [Mr. Capone] Throughout the case -- throughout -- Q Throughout the trial he maintained his innocence to you? A Yes, throughout the case. Q Throughout the post-trial motions, he maintained his innocence to you? A Yes, he did.").

In a June 17, 1992 letter to Capone, defendant wrote that "I have categorically denied the commision [sic] of those crimes or having associated with those individuals that alleged the conspiracy." Exhibit G-1, Letter from Ifedoo Noble Enigwe to Joseph P. Capone, Esq. 3 (June 17, 1992). On July 23, 1997, defendant wrote another letter to Capone, in which defendant wrote "Let us do this the right way, please I am innocent and wish that no small mistakes will render me into a prejudiced trial." Exhibit G-3, Letter from Ifedoo Noble Enigwe to Joseph P. Capone, Esq. 1 (July 23, 1997) (emphasis added). At the February 1997 evidentiary hearing Capone testified that "I gave, at our initial meeting, Mr. Enigwe several options. I said, look, you could plead guilty open, you could cooperate and plead guilty, you can go to trial. Mr.

Enigwe from the first day I met him professed his innocence. And that was it." Feb. 20 Tr., at 82 (emphasis added). Throughout the hearing Capone consistently testified that defendant had always professed his innocence and had never been willing to even consider pleading guilty. See Feb. 20 Tr., at 83, 86, 89, 94-95, 108, 116-118; Feb. 21 Tr., at 8, 34, 65, 67, 69. The Court, having heard defendant make such assertions on many occasions, finds Capone's testimony on this issue credible.

The government introduced further evidence suggesting that defendant was never willing to plead guilty. During the second day of the evidentiary hearing, February 21, 1997, the government read the following into the record:

MR. NUGENT: Answers to Interrogatories, Special Agent Ortman [of the Drug Enforcement Agency], specifically interrogatory number one, Agent Ortman's response.

THE COURT: Read it into the record.

MR. NUGENT: "Question: Do you remember telling me [defendant] to be prepared to have a round table talk with yourself, agent Rogers and AUSA Roland Jarvis"? [sic]

THE COURT: And the me there is Mr. Enigwe?

MR. NUGENT: Correct.

THE COURT: And the answer?

MR. NUGENT: "Answer: Agent Ortman never told Enigwe to be prepared to 'have a round table talk.' Agent Ortman advised Enigwe that after Enigwe's consultation with counsel, all parties could meet if Enigwe and his counsel wanted to discuss a possible plea and cooperation. [sic]

"By way of further response Enigwe repeatedly and adamantly denied to Agent Ortman any involvement in the charged offenses or any knowledge of any drugs."

MR. WARREN: And for the record, on behalf of Mr. Enigwe, I have no objection to the Court considering the interrogatory answer in lieu of Agent Ortman's live testimony. Feb. 21 Tr., at 82-83 (emphasis added) (quoting Government's Response to Defendant's Request for Admission Pursuant to Rule 6, Rules Governing § 2255

Motions (Document No. 182, filed Feb. 6, 1997) (filed in response to Defendant's Pro Se Motion for Leave of Court to Allow Defendant's Request for Admission Pursuant to Rule 6, Rules Governing § 2255 Motions (Document No. 173, filed August 22, 1996)).

Furthermore, defendant's testimony with respect to his dealings with Restrepo suggests that defendant was not willing to plead guilty at any time and should not be believed now. Defendant testified that

Q [Mr. Nugent] Okay. Let's ask it another way, Mr. Enigwe, if Mr. Restreppo³ had gone over the Guidelines with you, is it your testimony today that you would [sic] have pled guilty?

A If Mr. Restreppo had advised me and then I look at the difference between going to trial and pleading guilty, with the difference as we calculated it [at this hearing], yes, I would conceded that I will [sic] not go to trial." Feb. 21 Tr., at 53-54.

However, Restrepo's Verification states that he "ha[s] reviewed the contents of Mr. Enigwe's file provided to me [Restrepo] by the [Federal] Defender Association. My notes reflect that the guideline range of 121 to 151 months was specifically discussed with Mr. Enigwe." Verification of L. Felipe Restrepo Pursuant to 28 U.S.C. § 1746 (Document No. 192, filed Mar. 17, 1997), at ¶ 8; see also Affidavit of L. Felipe Restrepo (submitted at the June 3, 1997 hearing), at ¶ 4 ("I took notes during my meeting with Mr. Enigwe and they reflect that I advised him that the sentencing range that applied to his case was 121 to 151 months imprisonment."). That is, Restrepo states, subject to penalty of perjury, that he did discuss the USSG with defendant--in direct

³ The proper spelling of this name is Restrepo.

contradiction of defendant's testimony. Moreover, the range mentioned by Restrepo is a range similar to that which defendant now contends would have induced him to plead guilty--yet he did not consider a deal at that time. The Court concludes that Restrepo is credible and defendant is not credible.

Defendant contends that there are two pieces of objective evidence that corroborate his testimony. First, defendant argues that Capone's testimony at the November 23, 1994 evidentiary hearing on the § 2255 Motion that defendant trusted Capone's advice as to whether to plead guilty is objective evidence. Second, defendant points to Capone's November 23, 1994 testimony that, pursuant to Capone's advice, defendant abandoned a defense based on the theory that the object of the conspiracy was diamond smuggling, not heroin importation. Considering all of the evidence in the case, the Court concludes that the so-called objective evidence to which defendant points does not support his position.

In the first place, Capone's testimony at the November 23, 1994 evidentiary hearing must be put in context. At that hearing, Capone described the state of his relationship with defendant in June of 1992, shortly after their first meeting. Capone testified that "you [defendant] felt a good rapport between the two of us. I think you trusted my advice as to whether it should be a plea or whether it should be a trial and you were bent on going to trial. You did not want to cooperate with the Government." See Transcript of November 23, 1994, at 95. That defendant took Capone's advice not to enter an open plea--advice that did not conflict with

defendant's assertions of innocence--is simply not evidence that defendant would have taken Capone's advice had Capone recommended a guilty plea--advice that conflicts with defendant's assertions of innocence. In fact, it is clear that defendant rejected Capone's advice that he should accept a plea bargain. See Feb. 21 Tr., at 32-36 ("Q [Mr. Nugent] Now, when you met Mr. Enigwe at Fairton on August 1st, 1992, did you discuss the Government's proposed cooperation agreement? A [Mr. Capone] Yes. Q Did you tell him you thought he should take it. A Yes. Q Did you tell him why you thought he should take it? A Yes."); see also Feb. 20 Tr., at 82-83, 87-92, 127-132. Thus, the first objective evidence relied upon by defendant does not support his position.

The Court reaches the same conclusion with respect to the evidence that defendant agreed to follow Capone's advice and abandon a defense based on the theory that the object of the conspiracy was diamond smuggling as opposed to heroin importation. Defendant was very active in his defense, as evidenced by the numerous letters he wrote to Capone in which he suggested theories for his defense, sometimes including case citations in support thereof. See Exhibits G-1, G-3, and G-4 (letters from defendant to Capone). On the other hand, there is no evidence that defendant blindly followed Capone's advice. Rather, the evidence suggests that defendant carefully considered Capone's advice on a number of issues, discussed that advice with Capone, and then made decisions.

It is always difficult for a court to explain on a cold piece of paper what transpired in a courtroom. In particular, it is

always difficult to explain why some or all of a witness' testimony rings true and some or all of the testimony of another does not. The Court has had much experience with defendant and has heard his consistent assertions of his innocence. In light of the inconsistencies discussed above, defendant's prior assertions of innocence, the evidence provided by Restrepo and Special Agent Ortman, and with the benefit of having actually heard defendant's testimony, the Court concludes that his testimony that he would have pled guilty had Capone been effective is not credible. Thus, defendant was not prejudiced by Capone's ineffectiveness and is not entitled to a modification of his sentence.⁴

D. Capone Was Not Ineffective in Advising Defendant as to Whether He Should Testify at Trial

Defendant also argues that Capone was ineffective in advising him as to whether he should testify at his trial. As was discussed earlier, defendant's base offense level was increased by two levels pursuant to USSG § 3C1.1 because the Court concluded that defendant had perjured himself at trial. Defendant contends that he never would have testified had counsel told him of the perjury enhancement, and thus never would have received the enhancement.

⁴ The Court recognizes that defendant's prior assertions of innocence do not preclude a finding in this case that he would have accepted a guilty plea had he been properly advised by Capone. See Kates v. United States, 930 F.Supp 189, 192 (E.D. Pa. 1996) (concluding that a defendant, despite his assertions of innocence, would have pled guilty had he been properly advised by his attorney). However, the evidence presented does not convince the Court that defendant would have accepted a guilty plea had he been properly advised by counsel.

Therefore, argues defendant, Capone was ineffective and defendant was prejudiced by the two level increase in his offense level. The government contends that Capone was not ineffective and did, in fact, inform defendant of the perjury enhancement.

A significant portion of defendant's testimony focused on a meeting he had with Capone close to the date of the trial. Feb. 20 Tr., at 22-27. That testimony included a discussion of whether Capone properly advised defendant as to whether he should testify and as to the existence of the perjury enhancement. Questioned by his counsel and the Court, defendant's testimony was inconsistent as to whether Capone 1) told him he had the right not to testify and 2) encouraged him to testify. Id., at 24-25. The Court does not find that portion of defendant's testimony credible. On the other hand, Capone testified that he advised defendant to take the witness stand because he did not believe that the jury would accept defendant's misidentification defense in the absence of defendant's testimony. Id., at 93-94. The Court finds this testimony credible and concludes that Capone's advice with respect to whether defendant should testify did not fall below an objective standard of reasonableness.

Capone testified that he discussed the perjury enhancement in detail with defendant and also advised him that, in his opinion, the enhancement was unconstitutional. Feb. 21 Tr., at 36-39. In addition, Capone testified that he told the defendant to tell the truth:

Q [Mr. Warren] Did you believe that Mr. Enigwe was

going to commit perjury when he took the stand?

A [Mr. Capone] No.

Q You thought he was going to tell the truth, right?

A I told him to tell the truth.

Q Okay. Why then would you advise him about enhancements for something you didn't think he was going to do?

A I have a duty to do that under the law. Id. at 39.

Defendant, on the other hand, testified that Capone said absolutely nothing to him about the perjury enhancement before he testified at trial. Feb. 20 Tr., at 26, 40, 59-60.

The Court finds Capone to be credible when he testified that he told defendant to tell the truth and advised him of the possibility of a perjury enhancement. The Sixth Amendment does not require that defense counsel give a detailed explanation of the USSG to his client. See Day, 969 F.2d at 43 ("We do not suggest that, to comply with the Sixth Amendment, counsel must give each defendant anything approaching a detailed exegesis of the myriad arguably relevant nuances of the Guidelines."). Under all of the circumstances of the case, the Court concludes that the advice Capone gave with respect to the perjury enhancement comports with the requirements of the Sixth Amendment and did not fall below the objective standard of reasonableness.

III. CONCLUSION

For the reasons set forth above, the Court will deny the Motion of defendant, Ifedoo Noble Enigwe, to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255.

An appropriate order is hereby entered.

~~IN THE UNITED STATES DISTRICT COURT~~

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

vs. :

IFEDOO NOBLE ENIGWE : NO. 92-00257

O R D E R

AND NOW, to wit, this 16th day of July, 1997, upon consideration of the Motion of defendant, Ifedoo Noble Enigwe, to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 109, filed August 24, 1994), Government's Supplemental Memorandum Filed Pursuant to This Court's Order Dated March 3, 1997 (Document No. 191, filed March 17, 1997), and Defendant's Post-hearing Memorandum of Law in Support of Motion to Vacate Sentence (Document No. 193, filed March 19, 1997), and related submissions of the parties, following an evidentiary hearing held on February 21 and 22, 1997 and continued on June 3, 1997, for the reasons set forth in the Memorandum accompanying this Order, **IT IS ORDERED** that the Motion of defendant, Ifedoo Noble Enigwe, to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is **DENIED**.

BY THE COURT:

JAN E. DUBOIS, J.