



## USA v. Sawaf

2013 | Cited 0 times | E.D. Kentucky | March 27, 2013

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY

SOUTHERN DIVISION

LONDON CRIMINAL ACTION NO. 6:01-47-KKC CIVIL ACTION NO. 6:09-7104-KKC UNITED STATES OF AMERICA PLAINTIFF v. MEMORANDUM OPINION AND ORDER ALI HADI SAWAF DEFENDANT

\*\*\*\*\* and recommendation that his 28 U.S.C. § 2255 motion be denied without an evidentiary hearing.

st for an evidentiary hearing limited to the issue of his trial counsel the plea offer. A hearing was held in August 2012. request for an evidentiary hearing on the other two issues was denied. Applying the Strickland framework, the Court ultimately concludes that even assuming Defendant was provided deficient performance by his counsel, he simply cannot prove any prejudice. Therefore, bjections (DE 184) (DE 183) are sustained in part and overruled in part. motion to vacate (DE 166) is DENIED. I. BACKGROUND

Defendant, Ali Hadi Sawaf, corpus, pursuant to 28 U.S.C. § 2255 alleging that the performance of his trial counsel, Russell Alred, was constitutionally ineffective. 1

This case has a lengthy and complicated history. A full summary of this case from

1 While similar, a § 2255 motion is not a petition for a writ of habeas corpus. In re Hanserd, 123 F.3d 922, 925 (6th Cir. 1997) Sawaf specifically seeks the remedies provided by § 2255; he moves the Court to vacate his sentence 2001 to the present objections can be found in the Sixth Circuit opinion United States v. Sawaf, 129 F. App -41 (6th Cir. 2005), and need not be repeated in full.

On appeal, t , the sentencing guidelines calculation, and the pill count. Id. at 141-142, 144-146. The case was remanded, however, for resentencing in the context of the advisory sentencing guideline scheme set forth in United States v. Booker, 543 U.S. 220 (2005). Id. at 143. On remand, the Court heard arguments as to the relevant 18 U.S.C. § 3553(a) factors, but determined that the same sentence of 20 years in prison was appropriate under the advisory scheme as it had been under the mandatory guideline scheme. Sawaf appealed again, and the Sixth Circuit remanded for a third sentencing because, at the second sentencing hearing, Sawaf was not afforded his right of allocution. (DE 127).



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At his third sentencing, Sawaf was represented by counsel, John P. Chappell. Again, the appropriate advisory guideline range was determined to be 235 months to 293 months. At the hearing, Sawaf made clear his belief that he had done nothing wrong. Sawaf I would say I prescribe a regimen for the good of my patients according to my judgment and ability. Sawaf also went

The jury found three counts not guilty. That means I had good faith, I was entrapped (DE 159 at 13).

During his allocution at the third sentencing hearing, Sawaf also discussed rejecting a plea offer from the government. Sawaf stated that his response to the offer was to the

and then re-sentence him. See also *In re Gregory*, 181 F.3d 713, 714 (6th Cir. 1999) provided collateral post-. . . that you would be punished severely to go to trial, I would have taken a different course. But I have to live with myself. g. (DE 159 at 16 (emphasis added)). Sawaf concluded I may speak with an accent, but I want to tell the world and the Iraqi people that I serve the people. The (DE 159 at 19). Again, Sawaf was sentenced to 20 years in prison.

Sawaf appealed this third sentence and ultimately, the United States Supreme Court denied certiorari. (DE 165). Sawaf now has filed a motion to vacate that sentence under 28 U.S.C. § 2255 alleging that the performance of his counsel at trial and on his first two appeals, Russell Alred, was constitutionally ineffective in three ways. (DE 166). First, Sawaf argues that Alred failed to properly determine his adjusted offense level. Second, Sawaf claims that Alred failed to properly consult

and advise him about a plea offer from the government by not explaining the relevance and impact of the Sentencing Guidelines. Third, Sawaf contends that Alred failed to investigate and call as witnesses medical documents reputation within the medical community.

The magistrate judge recommended an evidentiary hearing. (DE 183). Sawaf objected to each of the magistrate judge's recommendations and argued that he was entitled to an evidentiary hearing on all issues. (DE

184). A prisoner who files a § 2255 motion challenging a finding and conclusion 28 U.S.C. § 2255. The Court granted request for an evidentiary hearing before his trial, Alred failed to fully advise him of the probable punishment under the Sentencing Guidelines which were at that time mandatory. (DE 191; DE 206). The ineffective assistance of counsel claims not at issue in the evidentiary hearing will be addressed first, followed by a discussion of the claim regarding the plea offer. II. DISCUSSION

A petitioner a basis for relief: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render *Mallett v. United States*, 334 F.3d 491, 497 (6th Cir. 2003) because he claims that his constitutional right to effective assistance of counsel was violated.



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Sawaf must prove these allegations by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). To prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland v. Washington* test. 466 U.S. 668 (1984). See also *Mallett*, 334 F.3d at 497 (applying *Strickland* in context of § 2255 motion). First, the *Strickland*, 466 U.S. at 688. Second, the deficient performance must have

prejudiced the defendant. *Id.* at 687.

A. Failure to Sawaf argues that his counsel was ineffective because (DE

166 at 5). Sawaf was convicted of eight drug-related counts. charged Sawaf with knowingly distributing Schedule II, III, and IV controlled substances by writing or approving prescriptions that were not in the usual course of his particular practice. The remaining seven counts involved particular prescriptions issued by Defendant to law enforcement officers working in an undercover capacity. Sawaf argued at trial, at sentencing, and on appeal that the pill count should have been limited to the number of pills charged in the indictment, without consideration of the relevant conduct considered in Count 1. *Id.* at 144-45. unpersuasive in light of the trial testimony from pharmacists who filled Defendant's prescriptions and the detailed application of the sentencing guidelines by the probation officer for each of the counts for which Defendant was convicted. *Id.*; see also 21 U.S.C. § 841(b)(1)(C) (providing maximum penalties for illegal distribution or dispensation of schedule II, III, and IV controlled substances without regard to the quantity of drugs involved).

T which the Guidelines d *Setser v. United States*, 132

S.Ct. 1463, Sawaf was

convicted of Count 1 which charged him with knowingly distributing Schedule II, III, and IV controlled substances by writing or approving prescriptions that were not in the usual course of his particular practice. This count was not limited to specific prescriptions, so all prescriptions not written for a medical purpose constituted relevant conduct.

The initial PSR concluded that Sawaf wrote prescriptions without a legitimate medical purpose for 87,760 pills/tablets of Schedule II and III controlled substances. These prescriptions Kentucky, Tennessee, and Virginia. (DE 88, PSR maintained under seal, at 9). The original PSR based this conclusion on the documentation of prescription medication provided by the United States Attorney, the testimony from pharmacists at trial, and testimony at trial of experts who stated prescriptions for controlled substances had a medical basis. (*Id.* at 9-10). Alred timely filed

objections to the PSR's pill count calculation. Before sentencing, the probation officer reviewed objections and revised the PSR favorably to Sawaf. The probation officer clarified that . The Court rejected argument that only the number of pills listed in the indictment should be counted. After



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announcing that the total offense level was 36, the Court asked if there was any objection to the Guidelines calculation, and the following exchange took place:

Mr. West: Not from the United States, your honor. Mr. Alred: Your Honor, we just renew our objection that none of the pills should be a counted ---

The Court: Your objection is noted for the Record. Mr. Alred: Thank you. The Court: Based on the pill count cited by the Court, do you object to this calculation utilized?

Mr. Alred: No, your Honor. (DE 107 at 14). Sawaf now claims that Alred sentencing. (DE 166). Specifically, Sawaf argues that Alred should have forced the government

to present evidence that every prescription was written without a medical purpose and hired an expert witness to investigate each prescription to conte . The count in one way, but not in the particular manner that Sawaf proposes, was not objectively

unreasonable (DE 183) and the Court

At trial, the government presented overwhelming evidence that from October/November substances were written without a medical purpose and could therefore be included as relevant

conduct. For example, Dr. Douglas Kennedy, a pain management expert with extensive experience prescribing controlled substances in Kentucky testified, that he reviewed a sample of 50 patient files seiz Trial Tr. at 738-39) and c the records viewed above, there appears to be no evidence that the practice of medicine was occurring Id. at 757). Dr. Kennedy testified that a d occasionally prescribe an antibiotic or antihistamine . . . . [e]ach of the patients received (Id.) Dr. Kennedy testified as one would expect for evaluating, diagnosing and tre Id.) Every ived potent opioid and/or anxiolytic medication for no apparent reason other than a

Id.) Dr. Kennedy concluded that of the 50 patient files he reviewed, every single prescription for controlled substances was not issued in the usual course of professional medical practice. (Id. at 759).

On cross-examination, Alred did not attack the factual basis fo medical opinion. This strategic decision was not objectively unreasonable because all of the evidence at that Sawaf was not practicing medicine, but simply writing prescriptions based on subjective complaints. Numerous Harlan pharmacists testified

them with no medical basis.

At trial, Alred tried to attack through the testimony of seven patients and Dr. Sawaf himself. , however, only supported Dr. prescriptions for a legitimate medical purpose. For example, one



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patient, Danny Ball, testified that he received a prescription for pain pills from Dr. Sawaf to treat his back pain caused by an enlarged prostate. (Trial Tr. 1184-85). Ball did not make an appointment with Dr. Sawaf. Rather, he just walked in and received pain medication from Sawaf without the benefit of a prostate exam. (Id. at 1185).

Dr. Sawaf also testified and adamantly defended his method for prescribing controlled substances. For example, he testified that he did not need x-rays or other diagnostic test results to prescribe controlled substances. (e.g. Trial Tr. 1347, 1349-50, 1357). Sawaf testified that he did not need to take patients I told . Further, Sawaf admitted that his office had no basic equipment such as a scale, a blood pressure cuff, or an examination table. (Trial Tr. 1364-65). Despite these obvious deficiencies, Sawaf defended his practice of seeing patients and prescribing controlled substances. Additionally, Sawaf testified that he would prescribe controlled substances to patients who admitted they were addicted to those same controlled substances to addiction] symptoms, withdrawal symptoms for a short period of time until they get further .

Upon review of his patient files, Sawaf attempted to explain why he prescribed controlled substances to particular patients. For example, Sawaf read from s file, a Mr. Taylor, recently released from the Trillium addiction center. Dr. Sawaf was discharged yesterday and placed on methadone. He is recovering now with craving for Oxycontin. Bow flex and knee pain. He was placed on Oxycontin for dependence withdrawal symptoms. Assessme . Sawaf testified that rather than calling the drug treatment center, he (Id.). Remarkably, Sawaf treated his patient, a recovering addict, for drug withdrawal symptoms only one day after the patient was released from a drug treatment center.

At trial, Alred questioned Dr. Kennedy about the time frame in which patient files were compiled and prescriptions were written. Alred established that the earliest file was dated September, 2000. (Id. at 775). Based on this line of questioning, Alred succeeded in reducing the time period in which the court considered relevant conduct at sentencing.

Alred chose not to call an expert witness at trial or sentencing to contest the evidentiary basis for the pill count at sentencing. Sawaf argues that this strategic decision constitutes ineffective assistance of counsel, and in support, he cites two Seventh Circuit cases decided years after Alred See United States v. Chube, 538 F.3d 693, 705-06 (7th Cir. 2008); United States v. Rosenberg, 585 F.3d 355, 357-58 (7th Cir. 2009). In those cases, the Seventh Circuit held that the district court may not rely on sampling or extrapolation. See, e.g., Chube, 538 F.3d at 705. ( or a prescription to be included in relevant conduct, the court must evaluate the facts surrounding that particular prescription and explain why those facts render it unlawful ).

As evidence that Alred should have objected to the factual basis for the pill count, Sawaf submits the sworn declarations of two doctors, who he claims would have been willing to testify they had been called by defense counsel. (DE 180 at 6-9). The declarations, however, do not establish that these doctors have any actual knowledge of whether October/November 2000 until February 2001 were



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written for an actual medical purpose. Sawaf presents no evidence that any of his prescriptions from this period were issued for an actual medical purpose.

At the time of his sentencing, prior to Chube, the Sixth Circuit permitted a district court to

United States v. Leal, 75 F.3d 219, 229 (6th Cir. 1996) abrogated on other grounds by United

States v. Kennedy e the extrapolation was not objectively unreasonable because such extrapolation was permissible. Moreover, the evidence overwhelmingly supported the extrapolation. decision not to investigate hiring expert witnesses to challenge the legitimacy of individual

prescriptions was not objectively unreasonable because the evidence was overwhelming that there were no legitimate prescriptions and Sawaf has offered nothing to the contrary. Having heard the evidence, it is difficult to imagine that behalf when confronted with the facts of this case.

B. Failure To Investigate Additional Doctors to Testify at Trial and Sentencing Next, Sawaf argues that his attorney was ineffective by failing to investigate doctors and call them as witnesses to opine about his reputation within the medical community. The Court d recommendation on this issue (DE 183 at 15-17) (DE 184 at 12-14). The Court adopts the magistrate Sawaf at the Daniel Boone Clinic to serve as character witnesses was not objectively unreasonable. that clinic was never an issue and could not have affected the trial or sentencing. Sawaf was convicted for what he did after he left the Daniel Boone Clinic, and so failing to investigate possible character witnesses who were familiar with his history at the Daniel Boone Clinic is not objectively unreasonable.

C. Failure to Advise in Plea Bargaining Finally, Sawaf argues that Alred was ineffective for failing to advise him of the application of the Sentencing Guidelines before he rejected a plea offer and proceeded to trial. The Court held an evidentiary hearing on this issue in August 2012. Even assuming Sawaf has to vacate must be denied because he was not prejudiced by performance. The evidence demonstrates that even with effective counsel, Sawaf would not have accepted the g a offer because Sawaf asserted, and most importantly, continues to assert that he is innocent.

It is undisputed that before trial, the government offered Sawaf a plea deal in which the government would effectively limit the relevant conduct and recommend that Sawaf be sentenced to 41 months in prison. Sawaf was informed of this offer, rejected it, and went to trial. (DE 203, Agreed Stipulations of Fact). Sawaf argues that the advice and counsel he received in relation to the plea offer constituted ineffective assistance of counsel.

In his initial motion, Sawaf argued that Alred did not advise him of the statutory maximum penalty that applied in his case. Specifically, Sawaf stated that Alred did not explain that he convicted, he could receive a sentence of up to 20 years on the drug Id. at 13). Sawaf did not allege that Alred never told him about the federal Sentencing Guidelines, but that Alred Sawaf that if he proceeded to trial . .



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. he would be exposed to a sentence 3 to 4 times . . . longer

than the 5 year sentencing recommendation offered (Id. at 13). Sawaf stated . Alred never advised me that the statutory maximum sentence if I was convicted at trial on the drug charges would be at least 20 years, and that I could realistically be facing 20 Id. at 3). The government that he did not know he faced a 20 year maximum and cited affidavit in which Alred states that he explained the statutory maximum to Sawaf. (DE 173 at 3). Additionally, the government noted that the indictment set forth the maximum penalties (DE 1) and that Sawaf was given a copy of the indictment at arraignment. (DE 12).

Sawaf now argues Sentencing Guidelines were at least 235 to 293 months . . . . As a consequence, Dr. Sawaf could

not make an informed d Unlike his initial motion, cing Guidelines. (DE 179 at 3-5).

The magistrate judge, understandably, only addressed initial motion and affidavit that he was not advised of the statutory maximum before rejecting plea offer. (DE 183 at 11-15). Sawaf objected to the mag recommendation because it did not discuss subsequent argument that he was not advised

of the Guidelines before rejectin (DE 184 at 1-7). Sawaf was granted an evidentiary hearing on this limited issue. 2

Defendants have a Sixth Amendment right to counsel that extends to the plea-bargaining process. *Lafler v. Cooper*, U.S. , 132 S.Ct. 1376, 1384 (2012). Id. (internal quotation marks omitted). -part *Strickland v. Washington* test applies to challenges to guilty *Lafler*, 132 S.Ct. at 1384 (quoting *Hill v.*

2 The court is cognizant of the fact that on February 25, 2013, United States Supreme Court recently granted certiorari on this issue in *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012). *Lockhart*, 474 U.S. 52, 57 (1985)). The first part of the test, deficient performance *Hill*, 474 U.S. at 58 (1985).

The second part, prejudice, Id.

1. Deficient Performance *Strickland Hill*, 474 U.S. at 57 (quoting

*Strickland*, 466 U.S. at 688). In the context of pl attorney has a clear obligation to fully inform h[is] client of the available options. *United States v. Smith*, 348 F.3d 545, 552 (6th Cir. 2003). [T]he failure to convey a plea offer constitutes ineffective assistance but in the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines, more is required. Id. at 552-53 (citation omitted) criminal defendant has a right to expect at least that his attorney will . . . explain the sentencing exposure the defendant will face as a consequence of exercisin Id. The importance of the federal Sentencing Guidelines makes it almost impossible to fully explain the sentencing exposure of





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each option available without completely exploring the ranges of penalties under likely guideline scoring scenarios, given the information available to the defendant and his lawyer at the time. *Id.* (citing *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)). Sentencing Guidelines have become a critical, and in many cases,

basic content of the Guidelines (including the definition and implications of career offender status).

A hearing was held in August 2012 in an effort to clarify the extent of Alred about the federal Sentencing Guidelines before Sawaf rejected offer. At the hearing, Sawaf testified that he was never advised of the maximum statutory penalty or the likely Guidelines sentence he would face if convicted at trial. Sawaf testified that Alred informed him only of plea offers of 44 months and 41 months based on limiting the relevant conduct to 11,000 pills and 3,000 pills, respectively. Sawaf said that in response to each offer, he asked Alred to negotiate for a lower sentence. Sawaf testified that he never heard the word guideline and never saw a Guidelines book or Guidelines table prior to sentencing. Sawaf books. It cost me \$380 (Tr. 27).

At the hearing, but offered little substance in his testimony. Alred simply could not remember that. Although he recalled having access to online tools such as Westlaw and LexisNexis, Alred could not recall whether he had a copy of the federal criminal code or the federal Sentencing Guidelines when the case started in 2001. (DE 212 at 50). Alred [redacted] going over did not recall going over the Guidelines with Sawaf. (*Id.* at 51). He was certain that he allowed Sawaf to make the ultimate decision about whether to accept the plea offers. (*Id.* at 59; 79). best summarized with the I specifically remember telling him about the statutory ranges, the G (*Id.* at 61.) Alred remembered making objections to the pill count at sentencing, but did not recall discussing with Sawaf relevant conduct and how the number of pills would be calculated at sentencing. (*Id.* at 73-74).

Stephanie Sawa -in-law, also testified at the August 2012 hearing that she met Alred at his office on December 29, 2003. In that meeting, Stephanie Sawaf says (DE 212 at 95-96). Sawaf points to this testimony in

support of his assertion that Alred did not advise him of the Sentencing Guidelines, and there is no evidence in the record to contradict this conclusion. Alred does not remember advising Sawaf of the Guidelines something that should be routine in every federal criminal defense. More importantly, Alred did not reflect standard defendant about the Guidelines. (*Id.* at 60-61). Therefore, the testimony of Sawaf and his daughter-in-law remains unrefuted by Alred. Portions of their testimony, however, are contradicted by the record and call into doubt their memory or truthfulness.

Sawaf maintains that he was not advised of the statutory maximum he faced if convicted, stating that I never advised me that the statutory maximum sentence if I was convicted at trial on the drug charge Decl. 3). At the evidentiary hearing, Sawaf continued to assert that he does not remember being advised of the statutory maximum by either the magistrate judge at arraignment or by Alred.





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However, the arraignment held on August 9, 2001, in front of U.S. Magistrate Judge J.B. Johnson states that a copy of the indictment was given to the defendant and that the defendant waived a reading of the indictment. (DE 12). Sawaf entered into evidence a copy of his indictment with the penalty page missing as proof that he was not informed of the maximum penalties he faced. The Court is not persuaded by this evidence.

Sawaf also states in his declaration did not know about or understand the federal Sentencing Guidelines, but that he had just spent

several hundred dollars [I think he said \$380] on books about Federal Criminal Law and/or the Federal Sente . Stephanie Sawaf also testified that she met Alred on December 29, 2003, and he had recently purchased a new copy of the Guidelines. Regardless of whether Alred properly advised Sawaf about the Guidelines before trial, Alred was effective in arguing Guidelines issues at sentencing. Al , arguments at sentencing, and general discussion of sentencing issues demonstrate a grasp of the sometimes complicated Sentencing Guidelines that contradicts claims that he did not own or had just recently purchased the Guidelines Manual before sentencing.

Alred prevailed on objections to the PSR that resulted in a reduction of the Guidelines range from 360-life to 235-293 months. (DE 107 at 17). Alred successfully argued that the maximum sentence was the statutory maximum of 240 months and not the Guidelines range. (DE 107 at 2). Alred succeeded in limiting the pill count by arguing that prescriptions from before September 2000 and the prescriptions from the acquitted counts should not be considered by the Court. (DE 107 at 3). trial testimony did not warrant an obstruction of justice enhancement because his testimony did

-5). Alred also prevailed in arguing against a six- Sawaf was the only individual who engaged in criminal conduct. (DE 107 at 5-7). Alred

unsuccessfully argued that Sawaf did not abuse a special skill or a position of trust because the skill or position of trust was part of the charge. (DE 107 at 8). Alred then objected criminal history based on the inclusion of prior convictions. (DE 107 at 12). Finally, Alred argued in favor of mitigating factors and reiterated his objection that only pills charged in the indictment should be included in the relevant conduct. (DE 107 at 13-14).

Alth of the Guidelines, there is no evidence in the record that Alred advised Sawaf about the actual implications of a Guideline Sentence before trial. Sawaf of the implications of the Guidelines in the context of renders performance objectively unreasonable and constitutionally ineffective. However, because Sawaf

suffered no prejudice, he is not entitled to relief.

2. Prejudice To establish Strickland prejudice, Strickland, 466 U.S. at 694. This means that the



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defendant must show the

defendant would have accepted the plea offer; the prosecution would not have withdrawn the plea offer; the court would have accepted its terms; and the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence actually imposed. *Lafler*, 132 S.Ct. at 1385. The Sixth Circuit has significant disparities between penalties offered in a plea and penalties of a potential sentence in *United States v. Morris*, 470 F.3d 596, 602 (6th Cir. 2006) (citing *Griffin v. United States*, 330 F.3d 733, 737 between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a defendant would have accepted the plea offer). *Griffin*, 330 F.3d at 737 (quoting *Dedukovic v. Martin* ).

Here, there is a significant disparity between the penalty offered in the plea, 41 months, and the 240 month sentence imposed on Sawaf after trial. Even assuming, however, that Sawaf was inadequately advised of the mandatory guideline range, Sawaf was not prejudiced by inadequacy. The facts of this case demonstrate that even with proper advice, Sawaf would not have entered a plea of guilty. The evidence against Sawaf was overwhelming. Yet, even now before this Court, Sawaf maintains his innocence.

The Sixth Circuit has expressed conflicting views of actual innocence impacts prejudice prong. See *Humphress v. United States*, 398 F.3d 855, 859 (6th Cir. 2005) (finding defendant did not establish reasonable probability that he would have pleaded guilty because of his assertions of innocence at trial); *Comrie v. United States* had not established defendant that he was innocent [and] wanted to go to trial ); *White v. United States* (holding that defendant was not prejudiced by constitutional errors in the plea process because he

did not plead guilty to the indictment, and repeatedly indicated that he

In other cases, however, the Sixth Circuit has held that innocence does not prove . . . that he would not have accepted a guilty plea. *Griffin*, 330 F.3d at

738 (citing *North Carolina v. Alford*, 400 U.S. 25, 33 (1970)). *Griffin* reasoned that would lose their ability to make any deal with the government sense to say that a defendant must admit guilt. *Id.* Another Sixth Circuit panel appropriately summarized the somewhat conflicting case law: protestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing. *Smith*, 348 F.3d at 552.

The record supports this. Sawaf would not have pleaded guilty even if he had been advised of the likelihood of a twenty-year prison term if he was convicted at trial. protestations of innocence before and during trial, alone, do not prove that a defendant would not have accepted a plea with effective advice. This case, however, is unique in that at the evidentiary hearing, Sawaf unequivocally adopted his trial testimony, in which he maintained that he prescribed narcotics for a legitimate medical



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purpose. reasoning applied to protestations of innocence before accepting a plea and throughout trial. See Griffin, 330 F.3d at 738. Here, Sawaf not only asserted his innocence at trial, but also at two sentencing hearings and at an evidentiary hearing on the present § 2255 petition. Griffin and Morris and demonstrate that he was not prejudiced by the ineffective counsel.

Although Sawaf was able to recall in remarkably specific detail his interactions with Alred to support his motion regarding ineffective counsel, his memory failed when it came to portions of his own trial testimony. Sawaf was asked about his trial testimony at the evidentiary hearing in which he maintained that all of his prescriptions were written for a medical purpose. Unlike his memory with almost every other aspect of the case, Sawaf stated he did not remember his own testimony or the questions at trial because he did not have a transcript in front of him. (DE 212 at 43).

A physician for 35 years, I respect my Then later, at the evidentiary hearing in 2012 Sawaf recalled, I said it (DE 212 at 43)(emphasis added). At his third sentencing, on March 8, 2007, Sawaf again asserted his innocence and said that after he was offered the 41 month ple it to the jury, because I . However, at the evidentiary hearing, Sawaf stated he could not recall this prior testimony. (DE 212 at 43-44). Finally, Sawaf was asked what happened to the state charges that were originally brought against him. Referring to those charges, Id. at 44). While arguing to this Court that he would have pleaded guilty only if he was given more effective counsel by Alred, Sawaf inexplicably maintains that when he pleaded guilty to the state charges while represented by Alred he was coerced to do so.

Other than the presumption created by the significant disparity between the plea offered and the ultimate sentence, the only evidence that Sawaf would have pleaded guilty was his own statement at the evidentiary hearing that he would have done so. This statement is totally self- serving and contradictory to other statements in which Sawaf maintained his innocence. This late statement is insufficient to overcome the mountain of evidence that Sawaf believed and still believes that he is innocent and would not have pleaded guilty even if he was properly advised about the impact of the Guidelines.

Sawaf relies entirely on the prejudice if there is a substantial disparity between the plea offered and the penalty imposed following trial. (DE 210 at 2, DE 207 at 4, DE 184 at 4-6). Saw complete reliance on Morris, Griffin, and Smith fails for two reasons.

First, these cases create only a presumption of prejudice and do not require a finding of prejudice if there is a substantial disparity between the plea offered and the penalty imposed following trial. See Morris, 470 F.3d at 602; Griffin, 330 F.3d at 738; Smith, 348 F.3d at 552. The significant disparity creates a presumption of prejudice and is strong evidence of prejudice, but it does not require a finding of prejudice.

Second, these cases only trial, during trial, and at sentencing but not at a later evidentiary hearing where the defendant must prove that he would have pleaded guilty given effective assistance of



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counsel. See Morris, 470 Strickland claim that he maintained his innocence in discussions with his attorney pursuant to the state court Griffin, 330 F.3d at 738 (stating that although defendant asserted his innocence evidentiary hearing to determine the factual issues and circumstances surrounding the plea

offer ); Smith 348 F.3d at 552 (s innocence are not dispositive of the question . . . [and] do not, by themselves justify summary

Declarations of innocence at an evidentiary hearing in support of a § 2255 petition can be relevant to determining Strickland prejudice. See Humphress, 39 assertions of his innocence at trial lend

(emphasis added). However, unlike the defendants in Morris, Griffin, and Smith Sawaf protested his innocence at the evidentiary hearing and adopted his prior trial testimony and allocutions. later claim that he would have accepted a guilty plea, Griffin, 330 F.3d at 738, do not apply here. In addition to declaring his innocence at all prior stages, Sawaf is still proclaiming his innocence in conjunction with his claim that he would have accepted a guilty plea if only he had received better advice. present declarations of innocence undermine his present claim that he would have pleaded guilty if he had received effective counsel. At best, Sawaf is asking this Court to allow him to perjure himself and admit guilt to a crime that he believes he did not commit.

Finally, Griffin and Smith are distinguishable because in those cases the district judge evidentiary hearing. See Griffin, 330 F.3d at 739-40; Smith 348 F.3d at 552. Moreover, the

other cases that caution against using prior declarations of innocence are cases in which the district court found that the defendant had proved prejudice despite prior declaration(s) of innocence. See Morris, 470 F.3d at 603; Dedvukovic, 36 at 798.

Sawaf repeatedly maintained his innocence before trial. Sawaf was twice afforded the right of allocution and both times he unmistakably asserted that he was innocent. Moreover, in his second plea offer and said that he rejected it and wanted the case to go to the jury because he did not do anything wrong. These clear and repeated declarations of innocence distinguish this case from Morris, Griffin, and Smith. At the evidentiary hearing, Sawaf adopted all of his prior testimony and reasserted his belief that he is innocent. Given these continued assertions of innocence, it is unmistakably clear that Sawaf would not have pleaded guilty even if Alred had informed him of the likelihood of a 20-year prison term if convicted at trial because his Guideline range would be larger than the statutory maximum. component of prejudice prong and an indispensable element of his ineffective assistance of counsel claim. Because Sawaf cannot prove prejudice his claim must be denied. III. CONCLUSION

For all of the reasons stated above, IT IS HEREBY ORDERED as follows: (1) The Report and Recommendation of the Magistrate Judge (DE 183) is ADOPTED, in



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part, and INCORPORATED by reference; (2)

DENIED; (3)

are SUSTAINED, in part, and OVERRULED, in part; (4) This proceeding is DISMISSED and STRICKEN active docket; and (5) A separate, final, and appealable Judgment shall issue.

This 27 th

day of March, 2013.

