UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Criminal Case No. 13-20600
Honorable Paul D. Borman
Magistrate Judge David R. Grand

v.

FARID FATA,

Defendant/Petitioner.
_____/

ORDER SETTING EVIDENTIARY HEARING ON PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE [212]

HEARING WILL BE HELD ON MAY 17, 2019, BEGINNING AT 10:00 A.M.

I. Background

Pending before the Court is Petitioner/Defendant Farid Fata's ("Fata") Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody. (Doc. #212). Fata timely filed his § 2255 motion on May 22, 2018, along with: a memorandum of law (Doc. #212-1); his own declaration (Doc. #212-2); a declaration from one of his two former attorneys, Mark J. Kriger ("Kriger") (Doc. #212-3); an email chain between his attorneys and the government (Doc. #212-4); and an expert report (Doc. #214). The government filed a response on October 15, 2018, along with a declaration from Fata's former "lead attorney," Christopher A. Andreoff ("Andreoff"),[1] as well as his billing records. (Docs. #225, #225-2, #226). Fata filed a reply on November 16, 2018 (Doc. #227), and the undersigned was then referred this motion for a report and recommendation, pursuant to U.S.C. §636(b)(1)(B). (Doc. #229). On December 14,

[1] Although Fata refers to Andreoff as his "lead counsel," and the docket previously identified him as such, on July 31, 2015, the Court granted Andreoff's oral motion to withdraw as counsel. (Doc. #164).

2018, the government filed a memorandum of supplemental authority based on a recent Sixth Circuit case, *Logan v. United States*, 910 F.3d 864 (6th Cir. 2018). (Doc. #230). Fata filed a response to the supplemental memorandum on January 10, 2019. (Doc. #231).

In his § 2255 motion, Fata argues that Andreoff, provided constitutionally ineffective assistance by making "two distinct misrepresentations" which caused him to plead guilty when he otherwise would not have done so. First, Fata claims, "Andreoff advised [him] that there was no chance of success at trial, and the only chance for Fata was to plead guilty and throw himself on the mercy of the court to receive leniency." (Doc. #212-1 at 10). Second, Fata alleges that he entered into a guilty plea "unknowingly due to [Andreoff's] misrepresentations that Fata would receive a reduction under U.S.S.G. §5K1.1 if he pled guilty and cooperated with the government," which never occurred, as the government allegedly "rejected Fata's cooperation entirely, contradicting counsel's assurances." (*Id.* at 12).

II. Legal Standard

28 U.S.C. § 2255 provides, in relevant part:

> (a) A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed was in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(a).

An evidentiary hearing for a § 2255 motion "is required unless the record conclusively shows that the petitioner is entitled to no relief." *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir.1999) (internal citations omitted). The burden "for establishing an entitlement to an evidentiary hearing is relatively light." *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999).

"If a habeas petitioner presents a factual dispute, then 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" *Pola v. United States*, 778 F.3d 525, 532 (6th Cir. 2015) (internal citations omitted)). No hearing is required if the petitioner's allegations "cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact," *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (internal citations omitted). "But when a defendant presents an affidavit containing 'a factual narrative of the events that is neither contradicted by the record nor inherently incredible' and the government offers nothing more than 'contrary representations' to contradict it, the defendant is entitled to an evidentiary hearing." *Pola*, 778 F. 3d at 532-33 (internal quotations omitted).

III. Analysis

Fata contends that an evidentiary hearing on his motion is necessary, considering his specific factual allegation that "it was Mr. Andreoff's misadvice and misrepresentations that led [him] to enter his guilty pleas." (Doc. #212-1 at 15; *see also* Doc. #227 at 3-8). In his declaration, Fata writes, "Andreoff advised that he would be able to secure a sentence of 20 years as opposed to the life sentence the government was seeking." (Doc. #212-2 at 1-2). He further explains:

> Andreoff reassured me that if the government accepts my cooperation after the debriefing, I would receive a 50 percent sentence reduction. I acknowledge that it is within the government's discretion whether to make such a recommendation. However, Mr. Andreoff assured me that the government would not debrief me nor accept my cooperation until I pled guilty. Based on counsel's assurances related to cooperation, I agreed to plead guilty.
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> …
>
> Mr. Andreoff advised, influenced, and convinced me to plead guilty based on the foregoing. The idea of leniency and cooperation benefit was the catalyst that Mr. Andreoff created to create a false glamour of not dying in federal prison. Had I been properly advised by Mr. Andreoff with respect to the

> above, I would not have pleaded guilty and instead proceeded to trial as I had always intended to do.

(Doc. #212-2 at 4-5).

Fata and Kriger both assert that Kriger disagreed with Andreoff's advice that Fata should plead guilty. In his declaration, Kriger writes, "[a]lthough Dr. Fata was reluctant to plead guilty, he decided to follow the advice of my co-counsel and pled guilty without the benefit of a Rule 11 plea agreement. Because I felt that Dr. Fata should not plead guilty, I had Dr. Fata execute a written statement that he was pleading guilty against my advice." (Doc. #212-3 at 4).

Fata relies on *Lee v. United States*, 137 S. Ct. 1958 (2017) and *Hill v. Lockhart*, 474 U.S. 52 (1985) to argue that his allegations at least facially show ineffective assistance of counsel and resulting prejudice. *Hill* held that the *Strickland v. Washington*, 466 U.S. 668 (1984) test for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges, and *Lee* explored the proper prejudice inquiry in the context of a guilty plea. In *Lee*, despite the defendant's knowledge "that his prospects of acquittal at trial were grim," the Court found the proper inquiry regarding prejudice was "whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial," "[r]ather than asking how a hypothetical trial would have played out absent the error." *Lee*, 137 S. Ct. at 1965. Fata also relies on *Brady v. United States*, 397 U.S. 742, 755 (1970) to argue that his guilty plea was essentially involuntary because he agreed to enter it under the guise of his counsel's "unfulfilled or unfulfillable promises." (Doc. #212-1 at 12). Accordingly, Fata requests an evidentiary hearing.

The government opposes Fata's request for an evidentiary hearing, arguing that (1) "the motion and the files and records of the case conclusively show that [Fata] is entitled to no relief," and (2) Fata's affidavit is "either contradicted by the record or inherently incredible." (Doc. #225 at 7) (citing *Pola*, 373 U.S. at 5). In its supplemental brief, the government also argues that the

Sixth Circuit's recent decision in *Logan* forecloses Fata's claim entirely. In *Logan*, the Sixth Circuit explained, "conflicting advice undercuts [a] claim of ineffective assistance of counsel" because the Sixth Amendment "encompass[es] an affirmative right (the right to effective assistance of counsel at critical proceedings), not a negative right (the right to be completely free from ineffective assistance)." *Logan*, 910 F.3d at 870. According to the government, "[t]he record is clear that Mr. Andreoff and Mr. Kriger provided effective assistance to Fata" under this standard because even if "one attorney on a team of attorneys provided bad advice or if attorneys on a defense team presented conflicting advice, a defendant is not entitled to §2255 relief." (Doc. #230 at 1). The government also relies, in part, on Andreoff's signed declaration attached to its response, which refutes Fata's salient factual allegations.

Although *Logan* appears highly relevant to, and potentially dispositive of, the merits of Fata's § 2255 motion, the district court in that case held an evidentiary hearing as to the alleged conflicting advice Logan had received from his two attorneys. *Logan v. United States*, 257 F. Supp. 3d 880, 882 n.1 (W.D. Mich. 2017). Here, the declarations of Andreoff, Fata, and Kriger at least arguably create several factual discrepancies, the resolution of which will be aided by testimony. For example, Andreoff writes, "Contrary to Dr. Fata's statement, I never advised him that I could 'secure a sentence of 20 years as opposed to the life sentence the government was seeking.'" (Doc. #225-2 at 7). As another example, Fata declares, "Mr. Andreoff enforced the idea of pleading guilty by leading me to believe that I would receive leniency by entering guilty pleas. In contrast, Mr. Kriger disagreed with Mr. Andreoff's assessment, and recommended I proceed to trial." (Doc. #212-2 at 3). But, Andreoff asserts, "When the government made clear [] that a negotiated plea agreement would not be offered, I advised Dr. Fata to go to trial," and "Mr. Kriger and I advised against [] a plea, particularly in light of the fact that he would lose his

citizenship if he admitted to obtaining his naturalization illegally." (Doc. #225-2 at 8, ¶26, ¶27). Fata also alleges, "[b]ased on counsel's assurances related to cooperation, I agreed to plead guilty." (Doc. #212-2 at 4). In contrast, Andreoff asserts, "Mr. Kriger and I advised Dr. Fata that the government might not be interested in cooperation and that the issue of cooperation could only be visited after his guilty pleas were entered" (Doc. #225-2 at 9). Fata alleges, "Mr. Andreoff reassured me that if the government accepts my cooperation after the debriefing, I would receive a 50% sentence reduction." (Doc. #212-2 at 4). But Andreoff refutes this too, asserting instead, "In my experience, 50 percent constitutes significant cooperation credit; I would not and could not promise such a significant credit to any client. I certainly did not promise it to Dr. Fata." (Doc. #225-2 at 10).

Lastly, the government asserts that "the facts in Fata's own declarations refute his ineffective assistance claims," so "the Court can deny his claims without an evidentiary hearing." (Doc. #225 at 8). Although the government appears to make several persuasive arguments about some of Fata's averments, others at least arguably raise factual questions. For example, the government writes, "[n]othing in the record suggests that Mr. Andreoff misrepresented his choices," but this appears to discount and discredit certain averments in Fata's declaration about alleged promises and assurances by Andreoff, including, "Mr. Andreoff went so far in his promise of a positive result if I pled guilty in expectation of the non-existent cooperation benefit, that he even advised me to plead guilty to receiving kickbacks from Guardian Angel Hospice in which [sic] he agreed that I had built a strong defense against." (Doc. #212-2 at 5). Fata also provides a page of handwritten notes, purportedly signed by both Andreoff and Kriger, which reflects that the three had some sort of discussion about a "50% cooperation" credit. (Doc. #227-1 at 8). While the notes, on their face, do not contradict Andreoff's statement that he "did not promise [a 50%

cooperation credit] to Dr. Fata" (Doc. #225-2 at 10), the issue can be explored further through testimony at an evidentiary hearing.

In light of these factual issues, and in light of the importance of the issues raised in Fata's motion to all parties, holding an evidentiary hearing is the most prudent course of action. *See Logan*, 257 F. Supp. 3d at 882 n.1; *Martin v. United States*, 889 F.3d 827, 832 (6th Cir. 2018) (remanding for an evidentiary hearing on a §2255 motion containing factual allegations about deficiencies in the attorneys' advice). Accordingly, the Court will conduct an evidentiary hearing to further develop the record as to Fata's argument that Andreoff provided ineffective assistance of counsel in connection with his alleged misrepresentations to Fata that resulted in his decision to plead guilty.

Accordingly, on **May 17, 2019, beginning at 10:00 a.m.**, the Court will hold an evidentiary hearing regarding the alleged misrepresentations that form the basis for Fata's § 2255 motion. The evidentiary hearing will be held at the **United States District Court, Federal Building, 200 East Liberty Street, Ann Arbor, Michigan.** The government shall ensure Fata's appearance at the evidentiary hearing. The Court will serve a copy of this Order on attorney Andreoff.

IT IS SO ORDERED.

Dated: March 20, 2019
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 20, 2019.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager