UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BRANDI R. THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

Civil Case No.

Crim. Case No. 3:06CR00217-001

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT CONVICTION AND SENTENCING BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. §2255

COMES NOW the Petitioner, Brandi R. Thompson (hereinafter "Thompson"), as a pro se, pursuant to 28 U.S.C. §2255, and files this Memorandum in Support of her Motion to Vacate, Set Aside or Correct her conviction and sentence in Criminal Case No. 3:06CR 00217-001.

Per the Supreme Court in Haines v. Kerner, 404 U.S. 519, 30 L Ed 2d 652, 92 S. Ct 594 (1972), pro se pleadings are to be construed and held to a less stringent standard than formal pleadings drafted by lawyers; if the Court can reasonably read pleadings to state a valid claim on which litigant can prevail, it should do so despite failure to cite proper legal authority, confusing legal theories, poor syntax, and sentence structure, or litigant's unfamiliarity with pleading requirements.

Petitioner Thompson respectfully urges this Honorable Court to grant all and the most liberal considerations with respect to her 28 U.S.C. §2255 petition.

Thompson is not an attorney, but is proceeding pro se, to safeguard her Constitutional rights and in the best interests of

lawful justice.

Thompson further requests this court to take mandatory judicial notice under Federal Rules of Evidence 201(d) of the fact that the Supreme Court has recently decided Boumediene v. Bush, No. 06-1195 (2008), in which it was held courts may no longer rely on the Military Commissions Act to prevent federal criminal defendants from being meaningfully heard. If executive authority has been so abused in the instant case in the past, such maneuvers may no longer be tolerated according to the Supreme Court due to their unconstitutionality.

STATEMENT OF JURISDICTION

Federal law provides an avenue for those whose sentences have been lengthened unconstitutionally. Title 28 U.S.C. §2255 is a statute that provides a remedy for the redress of federal constitutional violations in a federal court. "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States...may move the Court which imposed the sentence to vacate, set aside, or correct the sentence..." per 28 U.S.C. §2255. While the statute alludes to vacating or setting aside a "sentence", the courts construe the statute to also allow a prisoner to vacate or set aside his or her "sentence". See Davis v. United States, 417 U.S. 333, 41 L. Ed 2d 109, 94 S. Ct 2298 (1974); Ward v. United States, 995 F. 2d 1317, 1322 (6th Cir., 1993); Bousley v. United States, 523 U.S. 614, 140 L Ed 2d 828, 118 S Ct 1604 (1998).

Thompson believes her best opportunity to obtain fair and substantial justice regarding her conviction and sentence is through this petition, as the federal judiciary is oath-bound to the U.S. Constitution pursuant to 28 USC §453.

STATEMENT OF ISSUES

I. INEFFECTIVE ASSISTANCE OF COUNSEL

II. BRADY VIOLATION AND ABUSE OF CHARGING AUTHORITY

III. UNREASONABLE AND UNLAWFUL SENTENCE

STATEMENT OF CASE

The Criminal Complaint of Special Agent Sean Connor of the U.S. Secret Service dated October 23, 2006, charged Thompson with Access Device Fraud, in violation of 18 USC §1029(a)(1) and 18 USC §1029(a)(2).

Thompson worked at Custom Wood Products from December 1, 2004, through April 5, 2005, as a bookkeeper in Baton Rouge, Louisiana. From September 5, 2006, through November 7, 2006, Thompson was employed with Jordan Traditions.

On November 9, 2006, an indictment was brought against Thompson charging her with two counts. Count One was Bank Fraud in violation of 18 USC §1344 for alleged credit card fraud, and Count Two was for access device fraud, the use of an unauthorized access device, a credit card, in violation of 18 USC §1029(a)(2) and §3147(1).

On January 25, 2007, pursuant to a Plea Agreement, Thompson appeared at a change of plea hearing in order to plead guilty.

The Presentence Report calculated the base offense level at 7. The loss was calculated at more than 200k, but less than 400k, increasing the offense level by 12 levels. Two levels were

added for the abuse of a position of trust. Pursuant to USSG §3C1.3, there was an increase of three levels as the defendant committed Count Two of the indictment while on pretrial release, pertaining to Count One of the Indictment, causing a total offense level of 24. Criminal history points were four, resulting in a Criminal History Category of III. The corresponding sentencing range was 63-78 months.

On September 21, 2007, Thompson was sentenced to 72 months on Count One, 6 months on Count Two, to be served consecutively. Restitution was calculated at $236,164.18. Supervised release of 5 years on Count One and 3 years on Count Two, to be served concurrently was also ordered.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

As an initial matter, Thompson notes that she has not previously brought this claim forward because, generally an appellate court does not consider ineffective assistance of counsel claims on direct appeal. See Massaro v. United States, 538 US 500, 504 (2003)("In light of the way our system has developed, in most cases a motion brought under [28 USC] §2255 is preferable to direct appeal for deciding claims of ineffective assistance.").

The Sixth Amendment to the U.S. Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. The High Court has stated, "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." See Kimmelman v. Morrison, 477 US 365, 374 (1986);

see also U.S. Const. Amend. VI. Furthermore, the Court has recognized that "the right to counsel is the right to **effective assistance** of counsel". See McMann v. Richardson, 397 US 759, 771 (1970) [emphasis added].

Strickland v. Washington, 466 US 668, 688, 694 (1984), has held that the two prongs to prevailing on an ineffective assistance of counsel claim include (1) that the representation received "fell below an objective standard of reasonableness", and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceedings would have been different". See also Lockhart v. Fretwell, 113 S. Ct. 838 (1993). However, the prejudice that must be shown need not be anything more than something as small as one additional day in jail. See Glover v. United States, 531 US 198 (2001).

"It is the client's right to expect that his lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation of the client's interests". See Frazer v. United States, 18 F. 3d 778, 785 (9th Cir., 1984).

In the context of a guilty plea, counsel must give objectively reasonable advice before the presumption of effectiveness will be applied. See Hill v. Lockhart, 474 US 52 (1985). Ineffective assistance of counsel at the plea stage of a proceeding will render the plea involuntary and hence invalid.

There is some question amongst the circuits concerning the reach of the federal bank fraud statute, and a question

which should have been of concern to competent and effective defense counsel.

United States v. Staples, 435 F. 3d 860, 866-867 (8th Cir., 2006), has indicated that, "Several circuits have held that the bank fraud statute does not extend to situations where the defendant has no intent to expose the bank to an actual or potential loss, see United States v. Thomas, 315 F. 3d 190, 200 (3rd Cir., 2002); United States v. Laljie, 184 F. 3d 180, 189 (2d Cir., 1999); United States v. Rodriguez, 140 F. 3d 163, 167 (2d Cir., 1998); or does not place the bank at risk of civil liability. United States v. Odiodio, 244 F. 3d 398, 401 (5th Cir., 2001); United States v. Davis, 989 F. 2d 244, 246-247 (7th Cir., 1993). For example, a 'scheme to pass bad checks', and a 'pigeon drop' scheme, in which the victim is induced to withdraw money from a bank and entrust it to the defendant, have been held insufficient to establish bank fraud. Laljie, 184 F. 3d at 190. The reasoning of these courts is typified by the statement of the Seventh Circuit that the purpose of the bank fraud statute 'is not to protect people to write checks to con artists but to protect the federal government's interest as an insurer of financial institutions.' Davis, 989 F. 3d at 247; see also Thomas, 315 F. 3d at 199 ("Money is taken from banks every day for countless foolish purposes, but in such instances, banks are not exposed to liability nor is their integrity compromised.")." Staples concluded, "we granted that the government must prove the defendant 'deliberately made false representations to the bank,' because '[o]therwise there would be no scheme or artifice to

defraud.'" Id.; see also United States v. Ponec, 163 F. 3d 486, 489 (8th Cir., 1998).

United States v. Thomas, 315 F. 3d 190, 202 (3rd Cir., 2002), has held, "Even a scheme which does not expose a bank to a loss must be so intended. '[A] scheme to pass bad checks [to merchants] is not bank fraud,' because, even though the bank might honor the checks and be civilly liable, the defendant did not anticipate that the bank, rather than the merchant, would bear the loss. United States v. Jacobs, 117 F. 3d 82, 93 (2d Cir., 1997)."

A guilty plea must be made knowingly, voluntarily, and intelligently. See Boykin v. Alabama, 395 US 238 (1969); see also United States v. Hernandez-Fraire, 208 F. 3d 945 (11th Cir., 2000).

A motion to vacate is available for a case in which petitioner argues that conduct for which he was convicted never rose to the level of a federal offense. See Howard v. United States, 135 f. 3d 506 (7th Cir., 1998).

Of the circuits which have rejected the requirement of an intent to harm or create a risk of loss to a financial institution, and have upheld convictions in the absence of any such intent, see United States v. McNeil, 320 F. 3d 1034, 1038 (9th Cir., 2003); United States v. De La Mata, 266 F. 3d 1275, 1298 (11th Cir., 2001); United States v. Kenrick, 221 F. 3d 19, 27 (1st Cir., 2000)(en banc); United States v. Sapp, 53 F. 3d 1100, 1103 (10th Cir., 1995); some of these courts have required the government at least prove the defendant intended to deceive the bank,

see Kenrick, 221 F. 3d at 29; De La Mata, 266 F. 3d at 1298.

Only one circuit has gone so far as to say that there is a violation of §1344(2) if the defendant merely intends to defraud **someone**, and then causes a bank, as an unwitting intstrumentality, to transfer funds pursuant to a fraudulent scheme. See United States v. Everett, 270 F. 3d 986, 991 (6th Cir., 2001). Staples, 435 F. 3d at 867.

In the instant case, it was only through employment at Custom Wood Products or Jordan Traditions that Thompson was able to secure the funds that later formed the basis for the charges. Therefore, any "intended" victim would have been her employer, and there was some lingering debate as to whether or not she had permission from Jerrold Hewitt, who she attested at sentencing had promised to marry her and "this would all go away" (TR 27, August 1, 2007 sentencing hearing).

As the result, Thompson's Sixth Amendment right to effective assistance of counsel were violated, causing her plea to be involuntary and unknowing, if she were advised to plead guilty to a charge that is not even defined as a federal charge by most of the courts of appeals in the federal scheme. Thompson submits that this matter should be remanded for rehearings consistentwith the findings of this court and the constitutional principles of fair play and substantial justice.

II. BRADY VIOLATION AND ABUSE OF CHARGING AUTHORITY

As previously presented, the charge of bank fraud may have been an abuse of charging authority. There is also the issue of the $52,699 that was administratively forfeited, but which

was used to increase Thompson's sentence by two levels. According to AUSA Bourgeois, the amount was "part of a Treasury Enforcement Fund. It's, for lack of a better word, it's gone." (TR 31, August 1, 2007, sentencing). This amount of money and property included a 2006 Acura, valued at $28,600, and a 2006 Honda, valued at $6,099.00. While Thompson agreed in the Plea Agreement to "not contest any administrative forfeiture action that the United States Secret Service has commenced in this matter" (TR 23, January 25, 2007, plea hearing), she did not understand such an agreement to deprive her of credit for it for sentencing purposes as to loss findings or restitution ordered. Thompson would have been subject to only a 10 level increase for losses of $120,000 up to $200,000 rather than the 12 level increase at which she was sentenced. $52,699, which is simply "gone", and more importantly, which does not even go to the victims of a so-called federal crime, does not comport with constitutional or lawful authority when the federal government acts to subrogate the claims of a victim it promises to help, not use some kind of administrative action to instead harm. Such "action" would also appear to violate Brady, when the prosecution represents that such funds and property are simply "gone".

Thompson's sentence should be reduced accordingly as to its length and as to the amount of restitution, otherwise, this would be a violation of her right to due process. Sentences that are "greater than necessary" exaggerate the "seriousness of the offense", do not "promote respect for the law", and do not "provide just punishment for the offense". See 18 USC

§3553(a)(2)(A).

III. UNREASONABLE AND UNLAWFUL SENTENCE

The Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." See United States v. Gaudin, 515 US 506, 509-510 (1975); In re Winship, 397 US at 363-364. Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. See Apprendi v. New Jersey, 530 US 466 (2000). In Blakely v. Washington, 542 US 296 (2004), the Supreme Court held that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

Twelve levels added to the base offense level for a loss more than $200,000 is erroneous, given the administrative forfeiture of $52,699 as previously discussed. Therefore, the total offense level should be no more than 22, with a corresponding calculation of 51-63 months for a category III. The two levels for abuse of trust, given the fact that Thompson was also denied a reduction for acceptance of responsibility, should be removed as this over penalizes her for the same alleged conduct. There is the possibility that she had been promised marriage and that she was told to obtain cash. In any event, she agreed to plead guilty thereby saving the government the

expense of a trial and time involved to take a case to trial.

Even defendants who take the case to trial are sometimes eligible for a reduction for acceptance of responsibility. See United States v.McKittrick, 142 F. 3d 1170 (9th Cir., 1998); United States v. Ellis, 168 F. 3d 558 (1st Cir., 1999); United States v. Corona-Garcia, 210 F. 3d 973 (9th Cir., 2000); United States v. Guerrero-Cortez, 110 F. 3d 647 (8th Cir.), cert. den. 522 US 1017 (1998).

Another two-level reduction would have resulted in a total offense level of 20. At a category III, the sentencing range would be 41-51 months.

In addition, Thompson's criminal history was overstated by two points, which caused it to be increased from a category II to a category III. At the total offense level at which Thompson was sentenced, level 24, a category II would have been a sentencing range of 57-71 months rather than 63-78 months at a category III. At a level 20, category II, the sentencing range would be 37-46 months.

On May 1, 2007, the United States Sentencing Commission sent to the United States Congress proposed changes to modify two areas of Chapter Four "Criminal History Rules" (Chapter 4A1.1 and 2) in the Sentencing Guidelines, specifically--Amendment 709--which included the counting of multiple prior sentences and the use of misdemeanor and petty offenses in determining a defendant's criminal history score and when they are counted. Offenses listed at §4A1.2(c)(1) would be counted only if the sentence was for a term of probation of **more than**

one year **or** a term of imprisonment of at least thirty days. Therefore, the offense from March 20, 1997, with a 6 month sentence of probation (PSR, ¶38), and the offense from October 23, 1997, upon which the conviction was set aside on November 15, 2000 (PSR, ¶39), should not have been counted towards Thompson's criminal history category score. Even if she were not eligible for retroactive application of the change in how criminal history categories are calculated, she would still be eligible for a reduction due to the conviction having been set aside on November 15, 2000, for the second referenced offense. Because she had a score of 4 points, the reduction by 1 point to 3 points changes her criminal history category to II, causing her to be entitled to a reduction for this reason. In essence, her sentence was miscalculated.

The issue of whether or not the alleged conduct in which Thompson engaged was even a federal crime would also be applicable to the legitimacy of any sentence imposed under it Thus, the issue would need to be addressed here as well.

In summary, at a minimum, Thompson's criminal history was miscalculated to her detriment, and at best, she is not guilty of a federal crime. Therefore, her sentence is unreasonable and illegal. She is entitled to relief.

CONCLUSION

Thompson is entitled to an evidentiary hearing on these matters. In order to be granted an evidentiary hearing, a habeas corpus petition must allege sufficient facts, which if true, would support the conclusions of law advanced. See Townsend v.

Sain, 372 US 293, 312 (1963). A petitioner for habeas corpus requires a hearing unless the motion, the files and the records of the case conclusively show that the prisoner is entitled to no relief. See Chandler v. United States, 218 F. 3d 1305, 1330 (11th Cir., 2000).

In the instant case, Thompson would submit that she has set forth sufficient facts in her petition that would entitle her to relief. Therefore, at a minimum, the court should consider an evidentiary hearing in this matter.

Thompson also respectfully moves this court to vacate, set aside or correct her convictions and sentencing in this case. Thompson further requests the court to grant her any other relief to which she may be entitled in this matter.

Respectfully submitted,

Date: _____

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