MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Eastern District of Michigan
Name *(under which you were convicted)*: Farid Fata, M.D.	Docket or Case No.: 2:13-cr-20600
Place of Confinement: FCI Williamsburg	Prisoner No.: 48860-039
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)* FARID FATA

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

   U.S. District Court for the Eastern District of Michigan; Southern Division

   (b) Criminal docket or case number (if you know): 2:13-cr-20600

2. (a) Date of the judgment of conviction (if you know): 7/14/2015

   (b) Date of sentencing: 7/10/2015

3. Length of sentence: 540 months

4. Nature of crime (all counts):

   18 U.S.C. § 1347; 18 U.S.C. § 371; 18 U.S.C. § 1425(a); 18 U.S.C. § 1956

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☑ (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

   Pled guilty to Counts 3-6, 9-17, 20, 22-23

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☐

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the Sixth Circuit

(b) Docket or case number (if you know): 15-1935

(c) Result: Affirmed

(d) Date of result (if you know): 5/25/2016

(e) Citation to the case (if you know): United States v. Fata, 650 Fed. Appx. 260 (6th Cir. 2016)

(f) Grounds raised:

1) The Court erred in its application of a role enhancement; 2) the Court erred in allowing victim impact statements from persons whose status as victims had not been determined.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): 16-8786

(2) Result: Petition Denied

(3) Date of result (if you know): 5/22/2017

(4) Citation to the case (if you know): Fata v. United States, 137 S.Ct. 2175 (2017)

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: COUNSEL WAS INEFFECTIVE FOR ADVISING FATA TO PLEAD GUILTY

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Memorandum of Law in Support of 2255 Motion.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:
Christopher Andreoff, Mark Kriger

(c) At the trial:

(d) At sentencing:
Christopher Andreoff, Mark Kriger

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is timely under 28 U.S.C. § 2255(f)(1).

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

The Court should grant Fata § 2255 relief.

or any other relief to which movant may be entitled.

/s/ Jeremy Gordon
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____.
(month, date, year)

Executed (signed) on _____ (date)

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 2:13-cr-20600
FARID FATA, M.D.,	)	
Defendant/Movant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Farid Fata, M.D. ("Fata"), by and through the undersigned counsel, respectfully submits this Memorandum of Law in Support of Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. In support thereof, Fata offers the following:

I. INTRODUCTION

Dr. Farid Fata had every intention of taking his case to trial. However, due to an accumulation of pretrial ineffective assistance of counsel, Fata entered an involuntary and unintelligent guilty plea. But for counsel's ineffectiveness, Fata would have unquestionably proceeded to trial.

Based on this memorandum of law and authorities, and the attached declarations and exhibits, Fata will show that he is entitled to § 2255 relief. Accordingly, the Court should vacate Fata's guilty pleas so that he may proceed to trial with the effective assistance of counsel.

II. PROCEDURAL HISTORY

On August 14, 2013, a federal grand jury in the Eastern District of Michigan issued a one-count Indictment which charged Fata with Health Care Fraud, in violation of 18 U.S.C. § 1347. (Docket Entry "DE" 20). The indictment also contained forfeiture provisions under 18 U.S.C. § 982. (DE 20 at 6). A First Superseding Indictment was filed on September 18, 2013, which included 12 counts of Health Care Fraud, one count of Conspiracy to Pay and Receive Kickbacks, and one count of Unlawful Procurement of Naturalization. (DE 36).

Three more Superseding Indictment would follow, with the Fourth Superseding Indictment filed on January 15, 2014. The Fourth Superseding Indictment included a total of 23 counts, including: Health Care Fraud, in violation of 18 U.S.C. § 1347

(Counts 1-19); one count of Conspiracy to Pay and Receive Kickbacks, in violation of 18 U.S.C. § 371 (Count 20); one count of Unlawful Procurement of Naturalization, in violation of 18 U.S.C. § 1425(a) (Count 21); and two counts of Money Laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts 22-23). (DE 66). The 19 counts of Health Care Fraud were summarized by the Fourth Superseding Indictment as follows:

Count	Patient	Insurer	On or About Service Date	Description of Item Billed	Approx. Billed Amount
1	W.D.	Medicare	5/23/13	Azacitidine (chemotherapy)	$700
2	W.D.	Medicare	7/18/13	Azacitidine (chemotherapy)	$700
3	W.D.	Medicare	6/26/13	Pegfilgrastim (growth factor)	$5000
4	W.V.	Medicare	5/23/12	Ferumoxytol (iron)	$1020
5	W.V.	Medicare	5/29/12	Ferumoxytol (iron)	$1020
6	W.V.	Medicare	5/20/13	Ferumoxytol (iron)	$1020
7	R.S.	BCBSM	11/3/11	Zoledronic Acid (cancer drug)	$1120
8	R.S.	Medicare	11/15/12	Zoledronic Acid (cancer drug)	$1120
9	M.F.	HAP	7/1/13	Bortezomib (chemotherapy)	$2100
10	J.M.	Medicare	12/21/12	Bortezomib (chemotherapy)	$2100

11	J.M.	Medicare	4/26/13	Bortezomib (chemotherapy)	$2100
12	T.H.	BCBSM	7/18/13	Rituximab (monoclonal antibody)	$8100
13	T.H.	BCBSM	6/4/13	Octagam (immunoglobulin)	$7420
14	D.M.	BCBSM	7/22/13	Rituximab (monoclonal antibody)	$7200
15	M.H.	Medicare	7/9/13	Rituximab (monoclonal antibody)	$6300
16	M.H.	Medicare	11/28/11	Ferumoxytol (iron)	$1020
17	M.C.	BCBSM	7/11/13	PET Scan	$4573
18	W.W.	Aetna	2/8/13	Decitabine (chemotherapy)	$3750
19	W.W.	Aetna	3/8/13	Decitabine (chemotherapy)	$3750

(DE 66 at 10-11).

Fata retained attorneys Christopher A. Andreoff and Mark J. Kriger to represent him in the proceedings. On May 20, 2014, attorney Andreoff filed a motion to be appointed as counsel for Fata. (DE 95). Mr. Andreoff stated that Fata had retained counsel on or about August 6, 2013, and had exhausted his retainer on May 15, 2014. Per Mr. Andreoff, Fata had no additional funds to pay counsel and requested the Court appoint him to continue representing Fata under the Criminal Justice Act. *Id*. Mr. Andreoff noted that co-counsel, Mr. Kriger, was not joining in the

motion for appointment. The Court held a motion hearing on June 3, 2014 which addressed counsel's motion for appointment. On June 10, 2014, Mr. Andreoff withdrew his motion for appointment. (DE 99).

On September 16, 2014, Fata appeared before the Court for arraignment on the Fourth Superseding Indictment and a change of plea hearing. Fata entered guilty pleas to Counts 3–6, 9–17, 20, and 22–23, without a plea agreement. After accepting Fata's guilty pleas, the Court ordered preparation of a Presentence Investigation Report ("PSR") and set the case for sentencing.

Utilizing the 2014 Guidelines Manual, the PSR found Fata's total offense level to be 43 which corresponded to an advisory Guideline range of life imprisonment. (PSR ¶ 132). However, because the statutory maximum sentence for all counts ran consecutively was 175 years, the PSR found Fata's Sentencing Guideline range to be 2,100 months imprisonment pursuant to U.S.S.G. § 5G1.2(d). (PSR ¶ 132).

Sentencing began on July 6, 2015, and lasted to July 10, 2015. The first day of sentencing was composed of the

Government's presentation of its expert witness, Dr. Dan Longo. (DE 156, pp. 10-163). Day two of sentencing was dedicated entirely to victim impact statements and testimony. (DE 168). On the third day of sentencing, the Government presented testimony from its second expert witness, Dr. David Steensma. (DE 169, pp. 12-212). Day four was dedicated to argument related to the PSR objections. (DE 170). Finally, on the fifth day of sentencing the Court heard allocution from the parties and imposed its sentence.

Written judgment of conviction was entered on July 14, 2015. (DE 158). The Court sentenced Fata as follows:

> Counts 3ssss: 120 months; Counts 4ssss-6ssss and 9ssss-17ssss: 120 months, to run concurrently to each other but consecutively to all other counts; Count 20ssss: 60 months to run consecutively to all other counts; Count 22ssss: 240 months to run consecutively to all other counts; Count 23ssss: 60 months to run concurrently to all other counts. The total period of incarceration ordered is 540 months.

(DE 158).

Fata appealed to the U.S. Court of Appeals for the Sixth Circuit on August 5, 2015. (DE 165). On appeal, Fata argued that 1) the Court erred in its application of "role in the offense" enhancements; 2) the Court erred in allowing victim impact

statements from persons whose status as actual victims has not been determined; and 3) the Court erred in accepting Fata's pleas of guilty to money laundering charges in the absence of a sufficient factual basis. On May 25, 2016, the Sixth Circuit affirmed Fata's sentence. *United States v. Fata*, 650 Fed. Appx. 260 (6th Cir. 2016). Fata subsequently filed a petition for writ of *certiorari* with the United States Supreme Court which was denied on May 22, 2017. *Fata v. United States*, 137 S.Ct. 2175 (2017).

III. TIMELINESS

Fata's judgment of conviction became final on May 22, 2017, the date the Supreme Court denied *certiorari*. Thus, under 28 U.S.C. § 2255(f)(1), this motion is timely if filed on or before May 22, 2018.

IV. STANDARD OF REVIEW

Claims of ineffective assistance of counsel are governed by the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, Fata must show that his counsel's performance was both objectively

unreasonable and prejudicial. *Id*. at 687-88. Fata can satisfy the first prong by demonstrating that his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. The second prong can be satisfied by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

In evaluating a claim that a guilty plea was unknowing or involuntary due to ineffective assistance of counsel, the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

V. ARGUMENT

(a) Counsel Was Ineffective For Advising Fata To Plead Guilty

Up to his change of plea hearing, Fata steadfastly adhered to his innocence. Fata now argues that his guilty pleas were the direct result of ineffective assistance of counsel, thus rendering his pleas involuntary. Fata alleges that attorney Andreoff provided affirmative misadvice and misrepresentations as to Fata's guilty plea, thus rendering ineffective assistance of counsel. Further,

Fata alleges that counsel misled him to plead guilty under the improper guise that Fata would receive a significant reduction for cooperating with the United States.

But for counsel's ineffectiveness, Fata avers that he would have proceeded to trial rather than pleading guilty. Moreover, Fata submits that had he proceeded to trial, there would have been at least a reasonable probability of a favorable outcome or mistrial.

Fata's statutory maximum sentence for the counts he pled guilty to was 2,100 months, or 175 years. There was no plea agreement in place that could have capped Fata's sentencing exposure at anything less. Additionally, even a precursory review of the Guidelines prior to Fata's guilty plea would have led a reasonable attorney to speculate that Fata's Guidelines range would have been a minimum of 30 years to life.

Had Fata been convicted of all counts at trial, his sentencing exposure would have undoubtedly been higher. However, it would have been a distinction without a difference. Fata was 49 at the time of his rearraignment. Whether Fata pled guilty or was

convicted at trial, it was all but assured that Fata would receive an effective life sentence. Indeed, Fata pled guilty and received a 45-year term of imprisonment. If Fata were to survive to his 2052 release date, he would be in his late-eighties.

As noted above, Fata had every intention of seeing his case through trial. Fata retained two attorneys–Mr. Andreoff and Mr. Kriger–to prepare and represent Fata at trial. However, in a sudden about-face, Fata entered his guilty pleas on September 16, 2014. Fata avers that he did so based on two distinct misrepresentations by his lead counsel, Mr. Andreoff.

Despite Fata's persistence in his innocence, attorney Andreoff advised Fata 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. Counsel's advice was apparently based on the assumption that if Fata pled guilty and accepted responsibility, he would receive a sentence that would not equate to Fata spending the rest of his natural life in prison.

On the other hand, Andreoff's co-counsel, Mr. Kriger, advised Fata of the opposite. Mr. Kriger was aware of Fata's insistence to proceed to trial and adherence to his innocence. (Decl. of Kriger ¶¶ 3-4). Further, Mr. Kriger correctly calculated that a sentence by way of guilty plea or conviction would most likely result in an effective life sentence for Fata. (Decl. of Kriger ¶ 3). Knowing these issues, Mr. Kriger believed Fata's best strategy would be to proceed to trial as Fata had nothing to lose by doing so, and nothing to gain by pleading guilty. (Decl. of Kriger ¶ 3). Mr. Kriger believed there was a slight possibility of mistrial or if Fata were convicted, a possibility of prevailing on appeal. (Decl. of Kriger ¶ 3). In fact, attorney Kriger requested Fata sign a waiver acknowledging that Fata was entering his guilty pleas against Mr. Kriger's advice. (Decl. of Kriger ¶ 5).

Mr. Andreoff was ineffective for advising Fata to plead guilty where it was all but assured Fata would receive a sentence tantamount to life in prison. But for this misadvice, Fata would have proceeded to trial instead. (Decl. of Fata at 5).

In addition to the above, Fata's guilty plea was entered unknowingly due to counsel's misrepresentations that Fata would receive a reduction under U.S.S.G. § 5K1.1 if he pled guilty and cooperated with the Government. Of course, no 5K1.1 motion was filed. In fact, the Government rejected Fata's cooperation entirely, contradicting counsel's assurances to Fata.

In *Brady v. United States*, the Supreme Court discussed the standard as to the voluntariness of guilty pleas:

> (A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g.) bribes.

Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added).

In the instant case, Fata was assured by counsel that the Government would provide a proffer session after he entered his guilty plea. In the series of emails attached as Exhibit A, defense

counsel notes that the offer of cooperation "played a significant role" in Fata's guilty plea. (Exhibit A at 2).

Defense counsel's misrepresentations regarding the possibility of a reduction for cooperation was ineffective assistance of counsel, and caused Fata to enter an involuntary and unknowing guilty plea. As noted by defense counsel's email, the promise of cooperation was a significant factor in Fata's decision to plead guilty in addition to the grounds presented above. But for counsel's ineffectiveness, Fata avers that he would not have entered a guilty plea and proceeded to trial instead. (Decl. of Fata at 5).

In *Lee v. United States*, the Supreme Court examined the prejudice inquiry established in *Hill v. Lockhart* that "the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. Untied States*, 137 S.Ct. 1958, 1965 (2017) (quoting *Hill*, 474 U.S. at 59). In doing so, the Court held:

> The dissent contends that a defendant must also show that he would have been better off going to trial. That is true

> when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error–for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession. *Premo v. Moore*, 562 U.S. 115, 118, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011); cf., e.g., *Hill*, 474 U.S. at 59, 106 S.Ct. 366 (discussing failure to investigate potentially exculpatory evidence.)
>
> Not all errors, however, are that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. See *id.,* at 60, 106 S.Ct. 366 ("the claimed error of counsel is erroneous advice as to eligibility for parole"). Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial.

Lee, 137 S.Ct. at 1965.

Here, as in *Lee*, Fata's ineffective assistance of counsel claim does not turn on the prospects of success at trial. Given the high probability of an effective life sentence regardless of how he proceeded, Fata had nothing to gain by pleading guilty and nothing to lose by proceeding to trial. As the Court noted in *Lee:*

> A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after

> trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendant obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.
>
> But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. *When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive*.

Lee, at 1966 (emphasis added).

The consequences of Fata's guilty plea and proceeding to trial were similarly dire. Either option had high potential for resulting in an effective life sentence. However, it was Mr. Andreoff's misadvice and misrepresentations that led Fata to enter his guilty pleas. Under *Lee*, Fata need not show that he would have succeeded had he proceeded to trial. Nonetheless, Fata maintains that he had a viable defense based upon the reports from Dr. Jack Goldberg, M.D., which Fata will submit under seal of Court. (*See* Sealed Exhibit B).

But for counsel's ineffectiveness, Fata would have proceeded to trial even if the chance of success was slim. Accordingly, Fata is entitled to § 2255 relief.

VI. EVIDENTIARY HEARING

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). Fata respectfully submits that an evidentiary hearing is required to resolve Fata's claims of ineffective assistance of counsel.

VII. CONCLUSION

Based on the foregoing, Fata respectfully requests the Court schedule this matter for an evidentiary hearing and grant § 2255 relief accordingly.

Respectfully submitted,

/s/ Jeremy Gordon
Jeremy Gordon
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Counsel for Farid Fata, M.D.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 2:13-cr-20600
FARID FATA, M.D.,	)	
Defendant/Movant.	)	

DECLARATION OF FARID FATA, M.D.

I, Farid Fata, M.D., declare under the penalty of perjury that the following is true and correct to the best of my knowledge, information and belief.

I am the defendant in the above styled cause. I was represented in the above criminal case by attorneys Christopher Andreoff and Mark Kriger. Mr. Andreoff served as lead counsel. From the beginning of my relationship with Mr. Andreoff, he attempted on a regular basis to convince me that it would be in my best interest to plead guilty.

Mr. Andreoff advised that he would be able to secure a sentence of 20 years as opposed to the life sentence the

government was seeking. However, I continuously refused. I maintained my innocence and requested to proceed to trial. I had expressed dissatisfaction with Mr. Andreoff to my family, who then started seeking other attorney to replace Mr. Andreoff. My dissatisfaction with Mr. Andreoff led my family to retain Mr. Kriger one month after retaining Mr. Andreoff.

I told both Mr. Andreoff and Mr. Kriger that I maintained my innocence and refused to accept a plea agreement. After I had rejected Mr. Andreoff's request to negotiate a guilty plea, my family met with attorney Jim Thomas to discuss taking my case to trial. Unfortunately, my family could not afford to retain Mr. Thomas because the government had seized all of my assets.

After the fourth superseding indictment, Mr. Andreoff continuously repeated that I would lose at trial, and that Mr. Andreoff believed my case was too complex to defend and introduced the idea of cooperating with the government. As a doctor with no criminal history, being unfamiliar with the concept of "cooperation," I followed Mr. Andreoff's recommendation to cooperate.

Numerous times Mr. Andreoff repeated that I would lose at trial and receive a life sentence. He stated on multiple occasions that trial would be lengthy, complicated and expensive. Mr. Andreoff advised me that my perspectives, absent a guilty plea, were hopeless. However, I maintained that the record factually reflects that I had the support of a medical expert, Dr. Jack Goldberg, M.D., clinical professor of medicine at the University of Pennsylvania, who would testify at trial with a reasonable defense and expectation of at least a chance of mistrial.

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. Mr. Kriger acknowledged that regardless of trial or a guilty plea, I would facing an equivalent life sentence either way. Given I had nothing to lose by proceeding to trial, Mr. Kriger advised that I do so.

In a meeting with Mr. Andreoff and Mr. Kriger in September 2014, Mr. Andreoff acknowledged again that whether I pled guilty or went to trial, I was likely to receive a sentence that for all

intents and purposes would be a life sentence. Mr. Andreoff asked again to explore a plea deal before trial, and asked whether the government would consider my cooperation. My attorney arranged a for a meeting with three government attorneys. Both Mr. Kriger and Mr. Andreoff "took notes" on the meeting. After the meeting, both of my attorneys advised me that the government would sit down with me, in good faith, to debrief me after I pled guilty. Mr. 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. However, I advised both of my attorneys that I would plead guilty for reasons not related to guilt. It was primarily related to the cooperation incentive as presented to me. It was only after my guilty plea that I discovered the government

had no intention of debriefing me. I pled guilty for this reason, only to later discover it was all for naught.

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 he agreed that I had built a strong defense against. His reasons for advising me to plead to the kickbacks were that, as he stated to me, there could be no cooperation against Sam Kassab (the owner of Guardian Angel Hospice) if I was not convicted of the crime.

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.

After entering my guilty pleas, when I finally realized that there would be no cooperation agreement with the government, I

expressed to my attorneys that I desired to withdraw my guilty pleas and continued to assert my innocence. Mr. Andreoff called a meeting where he went on for hours in an effort to convince me that the judge would likely deny such a motion and I would lose any "leniency" gained from pleading guilty. He advised me not to file a motion in that regard. It became clear, though, that I had been mentally beaten and worn by the entirety of the experience.

In sum, I expressed to my attorneys that I would only enter my guilty pleas based on Mr. Andreoff's advice, and that my guilty pleas were not the result of my actually being guilty. From day one to the present, I have steadfastly maintained my innocence. And I maintain that I only agreed to plead guilty in this case due to Mr. Andreoff's false promises and misadvice. But for this, there is no question that I would have proceeded to trial instead.

Signed under penalty of perjury pursuant to 28 U.S.C. § 1746.

Farid Fata M.D.

Farid Fata, M.D. May 10, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 2:13-cr-20600
FARID FATA, M.D.,	)	
Defendant/Movant.	)	

DECLARATION OF MARK J. KRIGER

I, Mark J. Kriger, Esq., declare under the penalty of perjury that the following is true and correct to the best of my knowledge, information and belief.

1. In late of August of 2013, Dr. Farid Fata retained me to represent him in the above referenced cause. I served as co-counsel with attorney Christopher Andreoff, who was retained to represent him on the day of his arrest.

2. According to the discovery, former employees, including both doctors and nurses made statements that Dr. Fata had provided unnecessary treatments to his patients. In addition, physicians who began treating Dr. Fata's patients after his arrest also agreed

that Dr. Fata provided unnecessary medical treatments to many of his patients. According to the physicians and the medical literature, many of these treatments had debilitating side effects. In addition, Mr. Andreoff and I provided medical records to several potential expert witnesses who also came to the conclusion that Dr. Fata had rendered unnecessary treatments and could not support Dr. Fata's theory of defense that his treatments constituted legitimate medical practice.

Based on the above, Mr. Andreoff and I concluded that the evidence was extremely strong. Mr. Andreoff felt that there was virtually no chance of an acquittal and that he would be found guilty if he proceeded to trial. Therefore, Mr. Andreoff believed that it was in Dr. Fata's best interest to plead guilty. Mr. Andreoff felt that by pleading guilty the judge would not be exposed to much of the damaging evidence that would be presented at a trial, including the former employees, the physicians who had worked for Dr. Fata, and physicians who had took over the care of Dr. Fata's patients after his arrest. Because Mr. Andreoff was of the belief that there was virtually no chance of succeeding at a trial, the only chance for

Dr. Fata to receive leniency would be for him to accept responsibility for his conduct and plead guilty.

3. Although I agreed with Mr. Andreoff that the case would be extremely difficult to win, I recommended to Dr. Fata that he proceed to trial because it was my belief that even if he accepted responsibility and pled guilty, he would likely receive a sentence that would for all practical purposes amount to life in prison. While I agreed with Mr. Andreoff that Dr. Fata would likely be convicted, I felt there was always the possibility, however slight, that the jury might be unable to agree on a verdict, or that if convicted, he might prevail on appeal, and perhaps negotiate a more favorable plea agreement that would result in sentence that was not for all practical purposes a life sentence.

4. Approximately two months before Dr. Fata pled guilty, however, the government took the deposition of one of Dr. Fata's patients and shortly after the deposition, we discussed the possibility of negotiating a plea agreement and Dr. Fata authorized us to approach the government about resolving the case pursuant to a Rule 11 plea agreement. Our efforts to negotiate a Rule 11 plea

agreement, however, were unsuccessful. Up until that time, Dr. Fata expressed to me that he wanted to go to trial and contest the charges and repeatedly maintained his innocence.

5. Although 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.

6. After Dr. Fata had entered his guilty pleas, he inquired about withdrawing his plea. Both Mr. Andreoff explained to him that we believed that if he moved to withdraw his plea, the motion would be denied. We also told him that if the Court denied the motion to withdraw the plea, any hope for leniency would be lost because it would appear to the judge that he was not accepting responsibility for his conduct which was the precise reason he pled guilty. Both Mr. Andreoff and I recommended that he not file a motion to withdraw his plea and he followed our advice.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 21ST day of May, 2018.

Mark J. Kriger, Esq.

EXHIBIT A

Subject:	Re:
From:	mark kriger (mkriger@sbcglobal.net)
To:	Catherine.Dick@usdoj.gov;
Cc:	John.Neal@usdoj.gov; Wayne.Pratt@usdoj.gov; Sarah.Cohen@usdoj.gov; candreoff@jafferaitt.com;
Date:	Tuesday, November 25, 2014 2:00 PM

Thanks. Have a good thanksgving. M

On Tuesday, November 25, 2014 1:28 PM, "Dick, Catherine" <Catherine.Dick@usdoj.gov> wrote:

I'll get back to you with times on Monday.

Sent from my iPhone

On Nov 25, 2014, at 12:00 PM, "mark kriger" <mkriger@sbcglobal.net<mailto:mkriger@sbcglobal.net>> wrote:

Hi Cassie. We would like to discuss this further. It can wait 'till after the holidays. What would be a good time to talk next week? Both us would like to be in involved in the call. Mark and Chris.

On Tuesday, November 25, 2014 11:44 AM, "Dick, Catherine" <Catherine.Dick@usdoj.gov<mailto:Catherine.Dick@usdoj.gov>> wrote:

Mark,

We told you from the beginning that we would never foreclose the possibility of a proffer and we haven't. I certainly did not promise a debrief, much less on any particular areas and no one else (John or others) made any promises. We did promise to keep an open mind and we have.

We're willing to have an attorney proffer on national security issues. I asked what kind of health care fraud information you had and if it rose to the level of what Dr. Fata did (in essence, poisoning people) and it did not. We are not going to proffer Dr. Fata about lesser health care fraud crimes than he committed. This decision is collective, not mine alone.

Your client pleaded straight up without cooperation and no promise was ever made regarding cooperation. If that was why he decided to plead, that was a consideration discussed between you and him. You certainly never conveyed that to us as the primary motivator and we would have told you (again and as we did many times) that we were making no compromises or promises. There was no plea offer, no plea agreement and no promise of cooperation, which

you know is many steps beyond a proffer.

We're doing our best to move forward with what we can do, which is to have the attorney proffer on national security issues. I am out of the office as is everyone else on the team right now.

If you want to have further discussion, I can call you later today or we can discuss next week after the holiday.

Cassie

Sent from my iPhone

On Nov 25, 2014, at 11:31 AM, "mark kriger"
<mkriger@sbcglobal.net<mailto:mkriger@sbcglobal.net>
<mailto:mkriger@sbcglobal.net<mailto:mkriger@sbcglobal.net>>> wrote:

Hi Cassie.

Your phone call yesterday wherein you stated you were not interested in Dr. Fata's cooperation unless it involved "poisoners" took us by surprise, and not in a good way.

You will recall that when we met with you, Wayne, John, and Sarah to discuss the possibility that Dr. Fata would plead guilty to several counts without a Rule 11 agreement, we began to outline with some specificity his proposed cooperation. John Neal interrupted and said that the details of the cooperation would be addressed after the plea. While you certainly did not make any promises about whether that cooperation would result in a 5K1.1 motion, as we recall, and as our notes of the meeting reflect, you stated that you would certainly debrief him and "would keep an open mind." At no time during the meeting, did you indicate that you would not be interested in his cooperation in the area of health care fraud.

We, of course, passed that information along to Dr. Fata, and in our view that representation (that you would debrief him in the areas of both national security and health care fraud and "keep an open mind as to the value of his information) played a significant role, if not the primary role, in his decision to plead guilty. In preparation of the proffer, Dr. Fata has spent a great deal of time preparing notes on his possible cooperation.

As you know, since the plea, we have on several occasions raised the issue of when the proffer would take place. We did so because Dr. Fata has repeatedly asked us when the proffer will take place. In response, we told him that he need not worry, there is plenty of time, and that the government will debrief him as promised, and fairly evaluate what he has to say.

Quite frankly, after your call yesterday, we feel that you have pulled the rug out from under us, and put both of us in a very difficult situation. On the one hand, we would like to ask you to honor your representation, conduct the promised proffer with Dr. Fata, and "keep an open mind" as promised. On the other hand, however, given your message, we question whether

any such proffer session would be anything but an exercise in futility at least in the area of health care fraud.

While we try to come up with a way out of this quandry, I would be interested in hearing your thoughts on the matter.

Mark and Chris

Subject: Dr. Fata and a Proffer Session

From: Christopher Andreoff (candreoff@jaffelaw.com)

To: Sarah.Cohen@usdoj.gov; Catherine.Dick@usdoj.gov; John.Neal@usdoj.gov;

Cc: candreoff@jaffelaw.com; mkriger@sbcglobal.net;

Date: Saturday, November 1, 2014 6:21 PM

It has been nearly seven weeks since the client's plea and no meeting has been set to debrief Dr. Fata under a Proffer or Kastigar letter. Mark and I were hoping that the debriefing could take place in the very near future. The client is very anxious to meet with you to discuss the possibility of cooperation. Could you give ussome update when this will occur.

Christopher A. Andreoff

Jaffe Raitt Heuer & Weiss, P.C.

27777 Franklin, Suite 2500

Southfield, MI 48034

Phone: 248-351-3000

Direct Dial: 248-727-1380

Fax: 248-351-3082

Candreoff@jaffelaw.com