

SUPREME COURT
OF THE
UNITED STATES OF AMERICA
CASE NO. _____

LISTON WATSON

PETITIONER

V.

PETITION FOR WRIT OF CERTIORARI

UNITED STATES OF AMERICA

DEFENDANT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT IN COURT OF APPEALS
CASE NUMBER 23-3171**

Respectfully submitted,

s/ Jeffrey C. Rager
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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the right to effective assistance of counsel attaches during a 28 U.S.C. §2255 proceeding when counsel is communicating a plea agreement to the defendant that would resolve the underlying federal conviction.

LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONER/APPELLANT/DEFENDANT – LISTON WATSON

RESPONDENT/APPELLEE/PLAINTIFF – UNITED STATES OF AMERICA

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APPENDIX B: Opinion of the Court of Appeal for the Sixth Circuit affirming, United States of America v. Watson, Case No. 23-3171 entered on October 16, 2024, at Docket Entry 47-1.

TABLE OF AUTHORITIES CITED

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OPINIONS BELOW

The Defendant's Appeal to the Sixth Circuit was taken from a Judgment entered against him in his criminal case whereby the District Court imposed a sentence of 240 months on February 24, 2023. The Judgment of the District Court is attached hereto in Appendix A. A timely appeal was taken from the Judgment and Sentence to the Sixth Circuit Court of Appeals. On October 16, 2024, the Sixth Circuit Court of Appeals affirmed the District Court's sentence. Said Opinion is attached hereto in Appendix B.

STATEMENT OF JURISDICTION

The basis of the subject matter jurisdiction of the United States District Court for the Southern District of Ohio was 18 U.S.C. §2113(a) and 18 U.S.C. §924 for which the Defendant, Liston Watson, was initially indicted. A Final Judgment and Sentence was rendered by the District Court on February 24, 2023. The Defendant filed his Notice of Appeal on the same date the judgment was entered. The basis for the jurisdiction of the Court of Appeals was Fed. R. App. P. 3 and 28 U.S.C. §1291. The jurisdiction of Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and SCR 10 and 13(3). The United States of America is a party and the Solicitor General of the United States has been served with this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to U.S. Constitution: "...nor be deprived of life, liberty, or property, without due process of law"
2. Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Mr. Watson presents a straightforward question for the Court, even though his case has a long and winding history. Mr. Watson was indicted for five counts of Bank Robbery and five counts for using, carrying, and or brandishing pursuant to 18 U.S.C §924(c). Indictment D.E. 14, ID#27-31. He entered into a written plea agreement pursuant to Criminal Rule 11(c)(1)(C) in April of 2016, which is otherwise known as a binding plea agreement. Plea Agreement D.E. 31. However, Mr. Watson requested to withdraw his plea on June 24, 2016. Pro Se Motion to Withdraw Plea. D.E. 34, ID#111. The basis of this motion was ineffective assistance of counsel and that in paragraph 9 of the plea agreement he preserved the right to withdraw the plea. Motion D.E. 34. This Motion was denied, but new counsel was appointed for Mr. Watson. Order D.E. 37 ID# 118. After a new attorney was appointed, a subsequent Motion to Withdraw his Plea was filed on October 20, 2016. As stated in the Motion, the plea agreement had Mr. Watson pleading guilty to Counts 1, 2, 5, and 6. Counts 1 and 5 were for bank robbery and 2 and 6 were for the gun charges related to Counts 1 and 5. However, an incorrect statutory penalty of up to 20 years was written in the plea agreement when actually 18 U.S.C §2113 carried a maximum sentence of 25 years. Therefore, Mr. Watson did not enter his plea knowingly and voluntarily. Motion to Withdraw Guilty Plea D.E. 51, ID#185-90. After the United States responded to the Motion to withdraw his plea, the Court entered an order denying the motion. Order D.E. 53, ID#200-5. It was initially agreed that the Court and

counsel would inquire further with Mr. Watson about whether he was fully aware of the plea agreement with the correction of 25 years. *Id.* at ID#203. After this, the Court held a sentencing hearing and sentenced him to 360 months for the gun convictions, plus 1 day for the bank robberies to be served concurrently on December 12, 2016. Judgment D.E. 59, ID#234. Mr. Watson appealed the case to the Sixth Circuit.

On November 28, 2017, the Court of Appeals issued an Opinion affirming the District Court's denial of his Motion to Withdraw his Guilty Pleas and determined that the argument concerning the additional 1-day sentence for the bank robbery was abandoned because his appellate attorney argued inadequately and in only a skeletal fashion. Opinion D.E. 74, ID#320.

Not surprisingly, Mr. Watson filed a Motion to Vacate his Sentence pursuant 28 U.S.C. §2255. Motion to Vacate D.E. 78 and 78-1, ID# 326. However, a supplemental memorandum prepared by counsel was attached to the Motion. D.E. 78-1. Mr. Watson asserted several grounds in his motion. The Magistrate Court held an evidentiary hearing on the matter on March 6, 2020. Transcript D.E. 110 ID#478. Although there were other issues raised concerning his acceptance of the plea, Mr. Watson main argument was the breach of the binding plea agreement by the Court. *Id.* at ID#550.

Ten days after the evidentiary hearing, Mr. Watson filed a Motion for Miscellaneous Relief pro se. In his Motion, he requested to supplement the hearing

with a Stipulation and Agreement that was tendered to him by the United States before the §2255 evidentiary hearing was to be held. Motion to Amend Evidentiary Hearing D.E. 106 ID#467. This was motion was not considered by the District Court because it was a *pro se* filing during a time when Mr. Watson had counsel and it was ordered stricken from the record. The order also stated that a refiled motion must be filed by his counsel until and unless Mr. Watson discharges the attorney and proceeds *pro se*. Order D.E. 107 ID#469-70. Two days after this order was entered and likely before it was received by Mr. Watson, Mr. Watson filed a more detailed Motion for Miscellaneous Relief (on the motion it states that it was received on March 16, 2020). Motion D.E. 108, ID#471-73. He specifically requested that the stipulation and agreement he attached be accepted before the Court ruled on the pending §2255 motion. Attached to the Motion was the Stipulation and Agreement which stated that the United States and Mr. Watson had agreed to vacate the sentence imposed on December 12, 2016, and agreed that the Court should enter the following sentencing in its place:

- A) A 180 months of imprisonment total, imposed as follows:
 - i. 60 months each on Counts One and Five, to be served concurrently to each other;
 - ii. 60 months on Count Two to be served consecutive to Counts One and Five; and
 - iii. 60 months on Count Six to be served consecutive to Count Two.
- B) All other aspects of the Court original sentence shall remain in effect.

Stipulation & Agreement D.E. 108 ID#473-474.

However, the lower court again struck this from the record as a *pro se* filing from a defendant who had an attorney. Order D.E. 109 ID# 476. Thereafter, the Magistrate Court issued its Report and Recommendation recommending the denial Mr. Watson's §2255 Motion and that he be denied a certificate of appealability and that any appeal would be objectively frivolous. Report and Recommendation D.E. 115 ID# 653.

Before the Report and Recommendation of the Magistrate Court was submitted, Mr. Watson advised he wanted to accept the offer of 15 years. Unfortunately, he was then told by his Counsel that the offer had expired on March 3, 2020. He further affirmatively stated that it was his desire to accept this offer.

On June 10, 2020, the District Court adopted the Report and Recommendation of the Magistrate Court, and it also denied the certificate of appealability. Order D.E. 125 ID#718 and Judgment D.E. 126 ID#719. Mr. Watson thereafter filed a Motion to Oppose Order Striking First and Second Pro Se Motions and attached an affidavit. Motion to Oppose Order Striking First and Second Pro Se Motion D.E. 127 ID#720. In his Motion, he disputed the Order of the Magistrate Court (D.E. 119). He was not transported back to Court by the BOP until January 9, 2020, and did not arrive in Ohio until February 7, 2020. The Stipulation & Agreement was not offered until February 29, 2020, and the only reason it was not accepted on that same day was a request concerning 18 U.S.C. §3582. Mr. Watson was not made aware that the offer would be withdrawn if he continued forward with the §2255 hearing until three

weeks after the hearing on March 27, 2020. He stated he received a letter from his Counsel on that date telling him that offer was withdrawn or expired three days after it was presented to him.

The Report and Recommendation of the Magistrate Court was adopted by the Court, including the denial of a certificate of appealability. Decision and Order D.E. 135, ID#842-6. Mr. Watson filed a second Motion to Amend after this, but it too was denied. Eventually, Mr. Watson's case made its way to the Sixth Circuit Court of Appeals in Case Number 20-3922. The Court of Appeals appointed an attorney to prosecute his appeal and the matter was fully briefed by the parties. Oral Argument was heard by the Court on March 9, 2022. The United States confessed error in that the District Court's judgment was flawed. See Order in Appeal Case Number 20-3922 and D.E. 48-1, ID# 143-44. The case was remanded to the District Court with instructions for the Court to grant his pending §2255 motion and permit Mr. Watson to withdraw his plea of guilty. *Id.*

POSTURE OF CASE AFTER REMAND

After the remand to the District Court, the District Court appointed a new attorney for Mr. Watson. Eventually a motion to withdraw his plea of guilty was filed on August 15, 2022. Motion to Withdraw Plea of Guilty D.E. 170 ID#1071. However, this was after the parties had jumped the gun and had a hearing that was apparently for Mr. Watson to enter a new plea. On August 9, 2022, the parties

appeared before the District Court based upon a new plea agreement that was entered into the record of the District Court. Plea Agreement D.E. 168 ID#1060. Unfortunately, there was confusion over the proper procedure for going forward, such as whether Mr. Watson was withdrawing his plea or whether he was maintaining his earlier plea and just being resentenced under a new plea agreement. Transcript of Change of Plea, D.E 195 at ID#1349-50. However, to compound the confusion, the Plea Agreement tendered to the Court did not adequately reflect what the parties agreed. The parties anticipated a total sentence of 15 to 20 years on the entire case, but this was not in the plea agreement. The District Court eventually continued the hearing to allow the parties to enter into a new plea agreement that adequately reflected their agreement. Transcript of Change of Plea, D.E 195 at ID#1354-5.

The next change of plea hearing took place on August 17, 2022. At this hearing, Mr. Watson was given a chance to speak for himself. Mr. Watson was upset with getting yet another plea agreement that changed the recommended sentence once again. When he was present in Court on August 9, 2024, it was his understanding that the gun charges would carry 14 years and the Court would decide the remainder of the sentencing but the agreed upon lowest part of the range would be 14 years. However, before the hearing on August 17, 2022, he reviewed the new plea agreement and this time the range started at 15 years. Transcript of Change of Plea 2, D.E 180 at ID#1185-6 and Plea Agreement at D.E.171. Mr. Watson said this

was the fourth plea agreement in his case and it seemed every time he received a new one, the sentence had changed to his detriment. Transcript of Change of Plea 2, D.E 180 at ID#1186.

Mr. Watson once again tried to inform the Court that he had been presented with a plea agreement from the United States that was set at 15 years, which was attached to his *pro se* pleading at Docket Entry 108 ID#473. Mr. Watson stated that this prior plea agreement was never honored.

The United States addressed this prior offer and confirmed that yes, the United States had offered 15 years total prior to his hearing on his §2255 motion but advised the Court that it was rejected by Mr. Watson. Transcript of Change of Plea 2, D.E 180 at ID#1188.

The Court then inquired whether the agreement was signed by the United States. In response, Mr. Watson said it was not signed and “this is why I wanted to get into this issue of this plea, Your Honor.” Transcript of Change of Plea 2, D.E 180 at ID#1190-1. Mr. Watson then fully informed the Court as to the circumstances of his acceptance of the plea. He reiterated that he first received the offer on February 29, 2020 (before the prior §2255 hearing) from his former attorney. He told his attorney right then that it was good deal and he was willing to accept it. However, he did have one request to see if the United States was willing to remove the restriction on filing for a later modification of his sentence pursuant to 18 U.S.C §3582 (for such things like a motion for compassionate release). His attorney advised him that he should be

able to take care of this request and that he would call the prosecutor on the following Monday. Mr. Watson was advised to call his attorney the following Tuesday. Unfortunately, the jail where he was housed went on lockdown and he could not call until that Thursday. By the time he was allowed to call, his former attorney was in trial and Mr. Watson did not hear back from him until the §2255 hearing scheduled for March 6, 2020. Right after the §2255 hearing, he once again said that he wished to accept the plea. He was advised by his counsel to sign the agreement and send it to him. Transcript of Change of Plea 2, D.E 180 at ID#1191. Thereafter, in late March of 2020, Mr. Watson received a letter from his attorney stating that apparently the offer was only open for acceptance until March 2nd or 3rd, 2020. However, Mr. Watson was not made aware that there was expiration date for the offer. Transcript of Change of Plea 2, D.E 180 at ID#1191-2. Essentially, Mr. Watson was offered a plea, but never had the opportunity to accept it.

Thereafter, Mr. Watson requested to file three motions (one of which would have been to hold a Laffler hearing) with the Court, but he was advised that he could not do so because the Court had appointed him an attorney. Transcript of Change of Plea 2, D.E 180 at ID#1194. However, Mr. Watson responded that of one of his motions was a request to substitute his counsel with another one. Id. at 1195. Then, the Court explained to Mr. Watson how it viewed his case. The court advised that it sounded like the government had a slam dunk against him if he went to trial. Id. The former judge on this case very rightly sentenced him to 30 years, but he was lucky

that the former judge “screwed up” because not only was Mr. Watson before the Court with a second chance but also had a much better deal than the 30 years. Id. The Court then gave him a choice, either take the plea that was before him or to go to trial. Id. at 1196. Mr. Watson took the plea agreement, and his sentencing hearing was scheduled. Id.

Mr. Watson also once again tried to set forth his issue concerning the plea agreement that he was offered right before he was set to have his §2255 hearing. He tried to get his issue with the plea that he had wanted to accept and his issue with his present trial counsel before the Court. Motion to Supplement Sentencing Memorandum D.E. 179 ID#1171. Mr. Watson had requested that his current counsel file a motion for a Laffler Hearing to resolve whether he had accepted the plea agreement that was presented to him February 29, 2020. See Id. His trial attorney had refused to file the motion for Laffler hearing because it would upset the prosecutor in his case. Id. The United States’ response to Mr. Watson’s Motion was that it should once again be ignored by the Court. U.S. Response to Motion to file Supplemental Sentencing Memorandum D.E. 181 ID#1230.

The Court held Mr. Watson’s sentencing hearing on February 15, 2023. The Court imposed of sentence of 20 years because it was amazed at Mr. Watson actually received the benefit of the newest plea agreement, which knocked off a 1/3 of his original sentence. Id. at 1330. Again, Mr. Watson stated that circumstances behind

his so-called rejection of a this very beneficial plea, including telling his lawyer to file for a Laffler hearing. *Id.* at 1335.

This is only a nutshell explanation of the procedural history of this case. However, for purposes of the question presented to this Court, the main facts are that when Mr. Watson returned to district Court for his §2255 hearing, he was presented with an offer from the United States, through his counsel, to resolve the underlying case. It his Mr. Watson's contention that when the offer was presented to him, he was not made aware of a deadline to accept to reject the offer.

In his most recent appeal, he argued that his attorney who represented him after remand from the Sixth Circuit Court of Appeals committed ineffective assistance of counsel by failing to request a Laffler hearing concerning the plea agreement that was offered by the Court. The Sixth Circuit Opinion rejected this argument in part because it held “[t]here is no reasonable probability that the district court would have granted Watson a hearing because he cannot raise an ineffective-assistance claim against his § 2255 counsel, as he had no right to counsel in that proceeding.” *See* Opinion attached in Appendix B at p. 3 (citing to *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

REASONS FOR GRANTING THE WRIT

Mr. Watson's case presents an important question that has an impact on the Federal Criminal Justice System that should be settled by this Court. Although generally, the right to effective assistance of counsel during 28 U.S.C. §2255 proceedings does not

apply, Mr. Watson’s question of whether this general prohibition should nonetheless be applied to counsel during §2255 proceedings when counsel is presenting an plea offer that would resolve the entire case.

In *Missouri v. Frye*, 566 U.S. 134 (2012) the Supreme Court answered in the affirmative about whether the Sixth Amendment right to have effective assistance of counsel extends to plea negotiations, consideration of acceptance of an offer and whether such offers have lapsed. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012). Since the vast, vast majority of both federal and state criminal cases are resolved through the plea-bargaining process, the Sixth Amendment right to effective assistance of counsel attaches to such a critical stage of the criminal justice process. *See Id.* at 145. “When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.” *Id.* As *Frye* instructed, the companion case of *Laffler v. Cooper* addressed the proper remedies to apply when there is ineffective assistance involving a plea agreement. *See Frye* at 138.

Stemming from *Laffler v Cooper*, 566 U.S. 156 (2012) these remedies have become known as a Laffler Hearing when the District Court holds a hearing so that the defendant can show that but for his counsel’s ineffective assistance, the original plea would have been accepted by the Defendant. The remedies are different depending on the nature of the plea, such as whether there was an agreement to dismiss charges with a higher mandatory minimum penalty in the plea, then the proper remedy would be for the Court to order that the United States reoffer the plea agreement if the offer was rejected due to ineffective assistance of counsel. *Laffler v Cooper*, 566 U.S. 156, 170-1 (2012).

In *Frye*, the Supreme Court stated that, as a general rule, defense counsel must communicate any conditions concerning a plea agreement including any expiration dates of the offer. Failure of counsel to do so is ineffective. *See Frye* at 145. It is obvious from the record that the February 29th offer was the best offer for Mr. Watson because it cut his sentence in half from the 360 months (plus 1 day) he received before the sentence was set aside.

One of the many reasons that this Court relied on in *Pennsylvania v. Finley*, 481 U.S. 551 (1987) is that post-conviction proceedings, such as a request for release under 28 U.S.C. §2255, is not part of the underlying criminal proceedings, but is civil in nature. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-7 (1987). In the case at bar and even though the plea offer was offered during post-conviction proceedings, it was clearly an offer to resolve the underlying criminal action. When this happens, then this main support for the *Finley* rule is eroded as applied to the Mr. Watson's case. Secondly, when this Court extended effective assistance of counsel to plea negotiations because the vast majority of criminal cases are resolved through the plea-bargaining process, which is critical to the criminal justice process, then just because the offer came during such proceedings does not negate the right for indigent individuals (also one with impediment of being imprisoned) to be afforded effective assistance of counsel.

When facts such as Mr. Watson's are presented, then his case is the type that is deserving of a limited qualification to the rule that there is no constitutional right of effective assistance of counsel during post-conviction proceedings as was done in *Martinez v. Ryan*, 566 U.S. 1 (1991).

CONCLUSION

From a practitioner's standpoint, when an attorney representing a client during collateral proceedings is presented with an offer for his client that would cut in half the original sentence, the duty to effectively advise the client concerning the plea agreement and deadline to accept it really does intrinsically attach regardless of when the offer is made. Mr. Watson asks this Court to so extend his right to effective assistance to his situation. Therefore, Mr. Watson respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

s/ Jeffrey C. Rager
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CERTIFICATE OF SERVICE

I, Jeffrey C. Rager, attorney for the petitioner, Liston Watson, hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, One 1st Street NE Washington, DC 20543; and that a true copy of the foregoing Petition was served by mail with first-class postage prepaid, upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; Mary Beth Young, United States Attorney's Office for the Southern District of Ohio, Marconi Blvd., Suite 200, Columbus, Ohio 43130; Liston Watson Inmate No. 60501-060, FCI Victorville #2, P.O. Box 3850, Adelanto, CA 92301, by first class mail, on this the 18th day of December, 2024.

s/ Jeffrey C. Rager

Jeffrey C. Rager

APPENDIX A

APPENDIX A: Judgment of the District Court, United States v. Watson, Case No. 1:15-CR-00113 entered on February 24, 2023, at District Court Docket Entry 1235.

UNITED STATES DISTRICT COURT

Southern District of Ohio

UNITED STATES OF AMERICA

v.

Listen Watson

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:15cr113

USM Number: 73392-061

Tim McKenna
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1, 2, 5, and 6

pleaded no contest/contested to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|-------------------------|---|---------------|-------|
| 18 U.S.C. 2113(a) & (d) | Armed bank robbery | 12/11/2012 | 1 |
| 18 U.S.C. 924(c)(1)(A) | Using, carrying, and brandishing a firearm during and in (B) relation to a crime of violence | 12/11/2012 | 2 |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

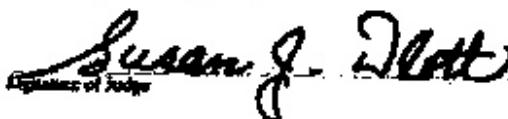
The defendant has been found not guilty on count(s) _____

Count(s) 3, 4, 7, 8, 9, and 10 is is dismissed on the motion of the United States.

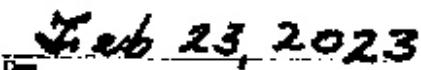
It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/15/2023

Date of Imposition of Judgment


Susan J. Dlott
Signature of Judge

Susan J. Dlott—United States District Judge
Name and Title of Judge


Feb 23, 2023
Date

DEFENDANT: Uiston Watson
CASE NUMBER: 1:15cr113

ADDITIONAL COUNTS OF CONVICTION

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|---|----------------------|--------------|
| 18 U.S.C. 2113(a) & (d) | Armed bank robbery | 6/26/2015 | 5 |
| 18 U.S.C. 924(c)(1)(A) | Using, carrying, and brandishing a firearm during and | 6/26/2016 | 6 |
| (ii) | In relation to a crime of violence | | |

DEFENDANT: Linton Watson
CASE NUMBER: 1:15cr113

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 84 months on Counts 2 and 6, to be served consecutively to each other (168 months). He was also sentenced to 72 months on Counts 1 and 5, to be served concurrently with each other, but consecutively to the sentences imposed for Counts 2 and 6, for a total sentence of 240 months.

The court makes the following recommendations to the Bureau of Prisons:
Defendant shall be designated to the FMC at Lexington, KY. If this facility is not available then the closest appropriate facility to Cincinnati, OH. Participate in the BOP's Culinary Apprenticeship program, or any apprenticeship programs that are available. Receive counseling and treatment services to address his gambling addiction. Defendant shall be eligible for any educational or vocational programming for which he has an interest.

The defendant is surrendered to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:
 at _____ a.m. p.m. on _____
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on _____
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
 _____, with a certified copy of this judgment.

UNITED STATES MARSHAL,

By _____ DEPUTY UNITED STATES MARSHAL,

DEFENDANT: Linton Watson
CASE NUMBER: 1:15-cr-113

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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:
5 years on each count, to be served concurrently with each other, for a total of 5 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution. (check if applicable)
5. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Linton Watson
CASE NUMBER: 1:15cr113

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation office, and you must report to the probation office as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as munitions or lasers).
11. You must not enter or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

AO 245B (Rev. 9/17) Judgment in a Criminal Case
Sheet 10 - Supervised Release

DEFENDANT: Linton Watson
CASE NUMBER: 1:15-cr-113

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SPECIAL CONDITIONS OF SUPERVISION

- 1.) Mr. Watson shall attend mental health treatment for compulsive gambling and/or Gambler's Anonymous meetings as directed by the probation officer. Further, he shall refrain from participating in activities associated with gambling, including visiting casinos, Internet sites, or other gambling venues.
- 2.) Mr. Watson shall provide all personal financial information as requested by the probation officer.
- 3.) Mr. Watson shall not incur any new credit charges or open lines of credit without approval of the probation department.
- 4.) Mr. Watson shall maintain full-time employment. If he is not employed full-time, he shall participate in a workforce development program until he obtains employment, as directed by the probation officer.

DEFENDANT: Liston Watson
CASE NUMBER: 1:16-cr-113

Attachment — Page 7 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Exhibit 4.

TOTALS Assessment Participation Fees AVAA Assessment* IVTA Assessment**
\$ 0.00 \$ 19,000.00 \$ 0.00 \$ 0.00 \$ 0.00

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 243C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following victims in the amount listed below:

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3644(d)(1), all non-federal victims must be paid before the United States is paid.

| <u>Name of Person</u> | <u>Total Loss***</u> | <u>Restitution Ordered</u> | <u>Priority or Fines/Forfeitures</u> |
|--|----------------------|----------------------------|--------------------------------------|
| Fifth Third Bank 3656 Springdale Road Cincinnati, OH 45261 | \$3,500.00 | \$3,500.00 | |
| Fifth Third Bank 120 East Kemper Road Cincinnati, OH 45248 | \$16,300.00 | \$16,300.00 | |

TOTALS \$ 19,800.00 \$ 19,800.00

- Restitution amount ordered pursuant to plea agreement: \$ 5
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(d). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows: 1,788.63 has already been paid.

¹⁰ Amy, Vicki, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, 132 Stat. 3261 (2018); Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 132 Stat. 225 (2015).

⁴⁷ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-21.

** Fines imposed for the total amount of losses are required under Chapters 109A, 110, 115A, and 113A of Title III for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Linton Watson
CASE NUMBER: 1:15cr113

Judgment Page 8 of 8

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A **Initial sum payment of \$ _____ due immediately, balance due**

not later than _____, or
 in accordance with C. D. E, or F below; or

B **Payment to begin immediately (may be combined with C. D, or F below); or**

C **Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g. months or years), to commence _____ (e.g. 30 or 60 days) after the date of this judgment; or**

D **Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g. months or years), to commence _____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or**

E **Payment during the term of supervised release will commence within _____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or**

F **Special instructions regarding the payment of criminal monetary penalties:**
While incarcerated, if Mr. Watson is working in a non-UNICOR or grade 5 UNICOR job, he shall pay \$25.00 per quarter toward his restitution obligation. If working in a grade 1-4 UNICOR job, he shall pay 50% of his monthly pay toward his restitution obligation. Any change in this schedule shall be made only by order of this Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Bureau of Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number):

Total Amount

Joint and Several
AmountCorresponding Payee,
if appropriate

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
Smith and Wesson 9mm semi-automatic handgun; Charter Arms .38 caliber revolver; and Smith and Wesson .380 caliber semi-automatic handgun.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX B

APPENDIX B: Opinion of the Court of Appeal for the Sixth Circuit affirming, United States of America v. Watson, Case No. 23-3171 entered on October 16, 2024, at Docket Entry 47-1.

NOT RECOMMENDED FOR PUBLICATION

No. 23-3171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Oct 16, 2024

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
v.)
) STATES DISTRICT COURT FOR
LISTON WATSON,)
) THE SOUTHERN DISTRICT OF
) OHIO
Defendant-Appellant.)
)

O R D E R

Before: BATCHELDER, GIBBONS, and GRIFFIN, Circuit Judges.

Liston Watson appeals the district court's judgment of conviction and sentence. He moves for permission to cite certain documents that he filed pro se in the district court but that were stricken because he was represented by counsel. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we grant Watson's motion and affirm the district court's judgment.

In 2016, Watson pleaded guilty to two counts of bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). As part of a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agreed on a sentence of 360 months. The district court sentenced Watson to 360 months and one day in prison. We affirmed the district court's judgment. *United States v. Watson*, 716 F. App'x 499 (6th Cir. 2017).

In 2019, Watson moved for relief under 28 U.S.C. § 2255. The district court denied the motion and declined to issue a certificate of appealability. After we granted Watson a certificate of appealability as to some of his claims, the government moved to vacate the denial of his § 2255

motion and remand the case, conceding that the district court erred by sentencing Watson above the agreed-upon term. We granted the government's motion and remanded, instructing the district court to grant Watson's § 2255 motion and permit him to withdraw his guilty plea in accordance with his plea agreement.

On remand, Watson withdrew his guilty plea, then pleaded guilty to the same four offenses in a new binding plea agreement. That agreement called for a prison sentence of 180 to 240 months, which included consecutive 84-month terms for the firearm offenses. The district court determined that, based on his total offense level of 28 and criminal history category of I, Watson's guidelines range for the bank robbery offenses was 78 to 97 months in prison. The district court sentenced Watson to 240 months in prison, consisting of concurrent 72-month terms for the bank robberies and consecutive 84-month terms for the firearm offenses.

On appeal, Watson argues that his counsel on remand rendered ineffective assistance by failing to seek a hearing under *Lafler v. Cooper*, 566 U.S. 156 (2012), object to the district court's guidelines calculations, and argue that the government breached the plea agreement. Generally, a defendant may not raise an ineffective-assistance claim on direct appeal. *See United States v. Ferguson*, 669 F.3d 756, 762 (6th Cir. 2012). But we may choose to hear such a claim on direct appeal if, as here, we find that the parties have adequately developed the record. *See id.* To prevail on an ineffective-assistance claim, a defendant must establish that counsel's performance was deficient, and that the deficiency resulted in prejudice, meaning that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Shimel v. Warren*, 838 F.3d 685, 696 (6th Cir. 2016).

Watson first argues that his counsel on remand was ineffective by not seeking a *Lafler* hearing to determine whether his former counsel rendered ineffective assistance during his § 2255 proceedings, resulting in Watson's failing to accept a more favorable plea offer. *See Lafler*, 566 U.S. at 170-71 (explaining that, where a defendant alleges that he declined to accept a more favorable plea offer due to ineffective assistance, a court may conduct a hearing to determine whether the defendant would have accepted the offer absent counsel's error). Watson contends

that, while his § 2255 proceedings were pending in the district court prior to our remand, the prosecutor offered a stipulation under which the parties would agree that the district court should vacate Watson's sentence and impose a 180-month sentence. According to Watson, his § 2255 counsel did not advise him that the offer was set to expire a few days later. Thus, Watson sought minor changes to the agreement rather than immediately accepting it, and the deadline passed before he learned of the expiration date. The government acknowledges that it made the offer but claims that Watson rejected it.

Watson has not established prejudice from counsel's alleged error. There is no reasonable probability that the district court would have granted Watson a hearing because he cannot raise an ineffective-assistance claim against his § 2255 counsel, as he had no right to counsel in that proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (explaining that the right to counsel extends only to the first appeal of right); *Nichols v. United States*, 563 F.3d 240, 248 (6th Cir. 2009) (en banc) (explaining that, where there is no right to counsel, there can be no deprivation of effective assistance). And, to the extent that Watson argues that his counsel on remand should have raised the previous plea offer as a general sentencing consideration, he has not shown a reasonable probability that doing so would have affected his sentence, given that the district court heard the parties' arguments about the issue before imposing the 240-month sentence, and the court explained that it could not justify any sentence below 240 months.

Watson next argues that his counsel on remand was ineffective by failing to raise certain objections to the district court's guidelines calculations. He specifically contends that counsel should have argued that the district court erred by (1) treating the three additional bank robbery charges in the indictment as pseudo counts under USSG § 1B1.2(c) because he did not admit each element of those offenses in his plea agreement, (2) considering the three dismissed bank robbery charges as relevant conduct, and (3) enhancing the offense level for his two bank robbery convictions under USSG § 2B3.1(b)(2)(C) based on his brandishing a firearm because he was also convicted of a related § 924(c) offense.

Watson has not shown prejudice from counsel's alleged errors. Under § 1B1.2(c), a written plea agreement "containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)." In the plea agreement, the parties agreed that Watson "committed the five bank robberies listed in the indictment." Thus, the district court properly treated the dismissed robberies as pseudo counts in its guidelines calculation, and there was no viable basis for counsel to object. *See USSG § 1B1.2 cmt. n.3* (explaining that, if a defendant is convicted of one count of robbery but admits to two additional counts of robbery in a plea agreement, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery). There was also no viable basis for counsel to argue that the district court improperly considered the dismissed counts as relevant conduct because the court considered the counts only as stipulated conduct under § 1B1.2(c), not relevant conduct under USSG § 1B1.3.

As for Watson's claim that counsel should have objected when the district court enhanced his robbery convictions by five levels under § 2B3.1(b)(2)(C), he has not shown prejudice from the alleged error. The district court should not have applied the five-level increase to Watson's two robbery convictions because he was convicted of a related § 924(c) offense. *See USSG § 2K2.4 cmt. n.4* (stating that, if a court imposes sentence for a § 924(c) offense in conjunction with a sentence for an underlying offense, the court should not apply a specific offense characteristic for brandishing a firearm when determining the sentence for the underlying offense); *United States v. Stewart*, 628 F.3d 246, 258 (6th Cir. 2010). As a result, the offense level for the two robbery convictions should have been 22 rather than 27. The court properly applied the five-level enhancement to the three pseudo counts, however, because Watson was not convicted of a related § 924(c) offense. *See USSG § 2K2.4 cmt. n.4* (explaining that, if a defendant is convicted of two armed bank robberies but only one related § 924(c) offense, a weapon enhancement applies to the other bank robbery). Thus, the district court's error had no effect on Watson's guidelines range because the highest offense level for the five robbery counts remained 27 and there was no change to the four-level increase under USSG § 3D1.4 because the

two robbery convictions still counted as one-half unit, meaning that there were four total units from the five robbery counts. *See USSG § 3D1.4* (counting as one unit the group with the highest offense level and each equally serious group, counting as one-half unit any group that is five to eight levels lower than the highest group, and providing for a four-level increase for three-and-one-half to five units).

Watson next argues that his counsel on remand was ineffective by not arguing that the government breached the plea agreement by referencing the three dismissed robbery charges at his latest sentencing hearing. Watson specifically contends that referencing the charges violated a provision in the plea agreement stating that the government “will not further prosecute [him] for conduct prior to the date of this Plea Agreement that was part of the same course of criminal conduct described in the Indictment and that was known by the [government] at the time of the execution of this Plea Agreement.”

Watson has not shown prejudice from counsel’s alleged error. The prosecutor’s reference to the dismissed robbery charges did not violate the plea agreement because the reference did not constitute prosecuting Watson for the dismissed charges. And the plea agreement did not otherwise prohibit the prosecutor from relying on the charges, particularly because Watson agreed that the district court was obligated to calculate the guidelines range, which included considering his stipulated offenses, *see USSG § 1B1.2(c)*. Thus, there is no reasonable probability that an objection by counsel would have succeeded.

Accordingly, we **GRANT** Watson’s motion to cite stricken documents and **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens
Kelly L. Stephens, Clerk