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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff,

v.

JAMES PARKER, et al., Defendants.

No. 10-CR-757-PHX-ROS

DEFENDANT'S RESPONSE TO NOTICE OF DEFENDANTS' REJECTION OF GOVERNMENT'S PLEA PROPOSAL AND COURT ORDER DATED APRIL 25, 2012

I.

INTRODUCTION

Defendant James Parker, in response to the Government's Notice of Defendants' Rejection of Government's Plea Proposal of April 25, 2012, objects to the Government's efforts to engage the Court in plea bargaining at this stage of litigation, and to the Government's publishing its version of the alleged confidential proceedings. This now-necessary response does not waive Defendant's objection to the nature of the proceedings, or the court's participation.

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II.

THE CONSTITUTIONAL IMPLICATIONS OF THE APRIL 25, 2012 FILINGS

Nowhere in the Fifth Amendment, or the Sixth Amendment, or, for that matter, the entire United States Constitution, is there a hint that a citizen's right to counsel or right of due process is tempered by the right of the Government to enlist the support of defense counsel and the court in the service of obtaining a speedy guilty plea.

The Supreme Court has recently, in a sharply divided 5-to-4 opinion, acknowledged that the jury system itself is no longer the predominate method of serving convictions in this Republic. The admission of guilt is tantamount to the entire federal process 97% of the time. *Missouri v. Frye*, No. 10-444, slip op. at 7, 566 U.S. ___ (Mar. 21, 2012). In acknowledgment of that statistic, the U.S. Supreme Court has ordered that the federal courts, including this Court, and the members of the various federal bars, have a greater duty than was provided in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The guarantee of fair due process must include the plea bargaining period that now dominates the American judicial system. *Frye*, slip op. at 8. In *Frye*, however, the Supreme Court acknowledged that defining a defense attorney's duty and responsibilities during plea bargaining was unnecessary in the case before it. The attorney's failure to disclose was egregious—he did not inform his client of the government's formal plea offer. The Supreme Court held, "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* at 9.

The undersigned counsel, while not completely in agreement with the *Frye* majority opinion, or the dissent for that matter, is bound to follow it, and counsel does agree that this one single violation of due process—counsel's failure to disclose a plea offer to his client—was an

abomination excused neither by the successful majority nor the loud dissenters.[1] The undersigned attorney did in this case what has been his practice during his entire 35-year career, that is, he informed his client of the Government's discussion of a possible plea offer (although, as is discussed below, this offer never came to fruition as a formal plea offer), and discussed with Defendant the benefits of accepting such a plea. This is all that was required of defense counsel, under *Frye*, its antecedents, or any bar rule.

Nowhere in *Frye* or *Lafler* is there the slightest hint, much less a mandate, that plea negotiations are no longer contained affairs, that the fundamental protections of the attorney-client privilege no longer apply to plea discussions, or that Federal Rule of Criminal Procedure 11's prohibition on the court's involvement in plea negotiations no longer applies. Unfortunately, the Government's Notice of Defendants' Rejection of Government's (possible) Plea Proposal of April 25, 2012, and this Court's Order of the same date, seem to find in the Supreme Court's *Frye* and *Lafler* opinions an excuse to do away with both Rule 11 and attorney-

[1] The Supreme Court's companion opinion that was released the same day, *Lafler v. Cooper*, No. 10-209, 566 U.S. ___ (Mar. 21, 2012), was more nuanced. Defense counsel was simply incompetent. The Court reiterated that counsel must exercise a minimal level of competency in all stages of the proceeding, not just the theoretical trial that in real life seldom takes place. *See id.*, slip op. at 3 (citing *Frye* for the rule that "Defendants have a Sixth Amendment right to

From the nature of the Government's proffer and the Court's response, counsel cannot determine if the Government is claiming counsel failed to disclose the proffer, or that counsel is incompetent. If counsel failed to disclose to their clients an informal offer, the law is unclear. Regardless, counsel will, if the government wishes, without waiving client's constitutional objections to the entire proceeding, which seeks to establish new constitutional guidelines, stipulate, that under full disclosure requirements of the Federal Bar, the Ninth Circuit, Texas Bar, and Arizona Bar, failure to have forwarded a substantial informal "offer" would be inappropriate. If counsel has acted incompetently, the Court must remove counsel after making an appropriate record to allow Defendant to exercise his Sixth Amendment rights. If neither occurred, counsel is due an apology, and sanctions would be appropriate against the Government. Counsel cannot speculate as to any other grounds for sanctions. The unique government proposal, which will not likely be endorsed by the Ninth Circuit, creates a new, ridiculous—and unconstitutional—intrusion into the Fifth and Sixth Amendments and a potential pre-trial inquisition of all defense counsel.

client privilege protections. The severity of the conduct mandates a response. Failure to do so would vitiate the Defendant's Sixth Amendment right to counsel and his Fifth amendment right to remain silent unless, or until, he chooses otherwise.

III.

THE GOVERNMENT'S NOTICE OF DEFENDANT'S REJECTION OF GOVERNMENT PLEA PROPOSAL

The Government's tender of a possible plea bargain and this Court's response to it turns both the rulings of the majority and the reasoning of the dissenters in *Frye* upside-down.

The Government's now public tender, boiled down to a few words, was this: "We will *consider* offering a 36-month maximum sentence for Mr. Parker and one year maximum for Mrs. Parker,[2] *if* the Defendants jointly accept in advance of the offer actually being made." As stated, Defendant's attorney conveyed to Defendant that such a contingent plea offer might be forthcoming from the Government, and attorney and client discussed the benefits of accepting such an offer. At this stage of the litigation, no one has the right to know whether or not this conversation took place. No one outside of the parties has the right to know Defendants' responses, if any. The Government has thus violated the fiduciary nature of the plea-bargaining "arrangement." The Government did not request or receive permission to do so. The government did not send an advance copy to the defendant for consideration or objection before filing it.

What has been set forth herein thus far should not have been required of defense counsel to disclose; all discussions between attorney and client are privileged from disclosure and the Court must not participate in plea negotiations, as is discussed further below.

[2] The Government has no case against Mrs. Parker at all, as it effectively concedes in the Special Agent's Report. In 35 years of trial practice, the undersigned counsel has never seen a tax case go forward when the special agent recommends against it. The indictment against Mrs. Parker was issued to force Mr. Parker's hand, and if unsuccessful, to prevent Mrs. Parker from testifying for her husband.

In its April 25, 2012 Notice, the Government commits a violation of Defendant's right to due process, and improperly seeks to penetrate the attorney-client privilege and to pull the Court into plea negotiations from which the Court is expressly forbidden. The Government does so under guise of a mandate from the U.S. Supreme Court: "In light of the recent United States Supreme court decisions in [*Lafler* and *Frye*], this pleading is filed by the government to place on the record the nature of the joint plea proposal recently rejected by the defendants in this matter." (Gov't's Notice of 04/25/12, at 1.) It divulges details regarding a possible plea offer conveyed to Defendant's attorney, and the contents of the attorney's confidential telephone communication with the Government on April 18, 2012. It then "defers to the court as to whether any further record is needed regarding the fact that the above joint offer was communicated to, and rejected by, defendants James and Jacqueline Parker." (*Id.* at 3.)

Further, the Government misstates the facts. Did Mr. Parker reject the entire proposal? Did Mrs. Parker? Was a reasonable counter proposal made? Did anyone refuse the plea because they are innocent? Repeatedly referring to the contingent, possible plea offer as a "joint plea proposal" (*id.* at 1, 2), "proposed consolidated plea offer" (*id.* at 2), "proposed plea arrangement" (*id.*), and "joint offer" (*id.* at 3), the Government admits by footnote that there was no formal "plea proposal" provided to counsel. In fact, the undersigned attorney repeatedly asked the Government to make an offer, but no formal plea proposal or offer has ever been made. The Government admits as much. It explains in a footnote that "formal Tax Division approval, which is a layered process" had not been sought at the time the pre-proposal was conveyed to counsel, and that the Government would not seek formal approval until "[D]efendants indicated they wanted the proposed joint plea." (*Id.* at 2, n.1.)

In contrast to the contingent, preliminary, potential offer the Government made here, in *Frye*, "the offer was a formal one with a fixed expiration date." *Frye*, slip op. at 9. The Supreme Court found this fact significant enough to expressly limit its holding to "formal" offers, stating that "[a]ny exceptions to" the general rule it announced—that defense counsel must communicate formal offers to the accused—"need not be explored" in the *Frye* opinion, given that the plea offer there was a formal one. *Id.*

The Ninth Circuit "construes a plea agreement as a contract between the prosecutor and the defendant." *United States v. Gonzalez-Melchor*, 648 F.3d 959, 963 (9th Cir. 2011). *Accord United States v. Manzo*, Nos. 10–35848, 10–35849, 10–35871, ___ F.3d ___, 2012 WL 1130270 (9th Cir. Apr. 5, 2012). Application of contract principles here demonstrates that there was no plea offer, much less a plea agreement. *See United States v. Devine*, No. 11–001, 2011 WL 4548304, at *5 (E.D. Pa. Sept. 30, 2011) (applying contract principles to determination whether there was a plea agreement, and concluding "that there was never a point in time when the parties actually reached an articulable agreement" because there was no specific plea offer and there was no manifestation of mutual knowledge and assent). Thus, even if one were to reasonably glean from the Supreme Court's *Frye* and *Lafler* decisions that the government from here forward should convey plea offers to the district courts—something that simply cannot be found in the opinions—such a new procedure would not apply here, as there never has been a plea offer.

Thus, the Government's Notice is improper in both form and substance. No "notice" to the Court was required, or even allowed, by recent Supreme Court mandate or otherwise. Nothing in *Frye* indicates that government counsel is now required or even allowed to inform the court when it has made a plea proposal, let alone a possible or potential plea agreement, so that

the court can, at that moment, seek to ensure that defense counsel is effectively communicating with his or her client or that the client is making a wise or foolish decision if he joins the 3% of accused Americans who put their prayers in the American presumption of innocense, and trust their fates to the judgment of their fellow citizens. Such notice surely is not required when there has been no formal plea proposal or offer in any event. The Supreme Court cases cannot, and must not, be read as mandating penetration of the attorney-client privilege and eschewing Rule 11. The Government has improperly shared confidential negotiations.

The decision-maker as to the proposed possible plea, whether it be a member of either Mr. Parker's defense team or Mrs. Parker's defense team, or Mr. Parker personally or Mrs. Parker personally, has not been identified by the Government's attorneys. One reason? They don't know how. Since they proposed only a joint agreement, acceptance would have to be by both Defendants. And they are not entitled to know. And, on advice of counsel, Defendant Parker will not share that information at this time.

IV.

COURT ORDER DATED APRIL 25, 2012

This Court has no jurisdiction to be involved in the plea bargain process. Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part: "(c) PLEA AGREEMENT PROCEDURE. (1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions*." Fed. R. Crim. P. 11(c)(1) (emphasis added). The Court of Appeals for the Ninth Circuit has had occasion to consider this explicit language, and has repeatedly emphasized the importance of the court having no involvement whatsoever in the plea bargaining process.

> We have explained previously that judicial participation in plea negotiations is prohibited, first, because it "inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty;" second, because it threatens the integrity of the judicial process; and finally, because it may affect the judge's impartiality after negotiations are completed.

Gonzalez-Melchor, 648 F.3d at 964 (*quoting United States v. Bruce*, 976 F.2d 552, 556-58 (9th Cir. 1992)). *Accord United States v. Cano-Varela*, 497 F.3d 1122 (10th Cir. 2007). *See United States v. Anderson*, 993 F.2d 1435, 1439 (9th Cir. 1993) (holding that the trial court's "prospective refusal to accept a plea to fewer than the full thirty counts, and direction to the prosecutor not to offer any such deal in the future," and its "ex ante rejection of any 'deals,'" caused the judge to be "a participant in the plea negotiation process" even though the court's comments "did not directly address Anderson's decision whether to plead guilty"; the court's comments were coercive because "they effectively threw the weight of the court behind the prosecution," which was an abuse of discretion and violation of Rule 11).

The *Bruce* court has described Rule 11's prohibition on the court's involvement in plea discussions as a "bright-line rule." *Bruce*, 976 F.3d at 556. Explaining the purpose for the bright-line rule on points especially pertinent to the present controversy, the *Bruce* court stated, "Rule 11 bars judicial participation in plea discussions in order to preserve the judge's impartiality *after* the negotiations are completed." *Id.* at 557. Once the judge becomes at all involved in plea negotiations, his or her objectivity is at risk.

> Judicial involvement detracts from a judge's objectivity in three ways. First, "[s]uch involvement makes it difficult for a judge to objectively assess the voluntariness of the plea" eventually entered by the defendant. Next, judicial participation in plea discussions that ultimately fail inherently risks the loss of a judge's impartiality during trial, not only because he becomes aware of the defendant's possible interest in pleading guilty, but also because he *may view unfavorably the defendant's rejection of the proposed agreement*. Further, involvement in plea negotiations diminishes the judge's objectivity in post-trial matters such as sentencing and motions for a judgment of acquittal.

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Id. at 557-58 (citations omitted and emphasis added). As the *Bruce* court pointed out, the court "may view unfavorably the defendant's rejection of the proposed agreement"—which is exactly what appears to have happened in the present case. Indeed, even if none of the rationales for the Rule 11 prohibition applies in a particular case, the judge nevertheless is "required to follow the mandate—perhaps in part prophylactic—of Rule 11." *Id.* at 558. *See also Cano-Varela*, 497 F.3d 1122 (holding that the district court, which became involved in plea discussions, committed reversible plain error, and that on remand the defendant's case was to be reassigned to a different district judge).

The Court's response to the Government's Notice was a same-day ruling that "should a plea deal be reached at a later date, sanctions will be imposed due to the parties' delay, excepting extraordinary circumstances." (Order of 04/25/12.) This is the whole of the Court's Order. The only additional information one can glean from the filing is that it is responsive to the Government's Notice—which the Court acknowledges having "received and reviewed"—and the Court's observation that "the plea deadline has now passed." (*Id.*) The Court made this ruling without time for a response by Defendants.

Defendant takes issue with the Court's April 25, 2012 Order, and seeks clarification thereof, for several reasons. First, the Court appears to have allied itself with the Government *sua sponte* by promising sanctions. As the *Bruce* court observed, once the court becomes aware of a plea offer proposed and rejected, the court cannot help but develop an opinion as to the proposal's validity. By the Government filing its Notice, and the Court ruling in response that sanctions might be in order, the prohibition on judicial participation in plea negotiations has been violated.

Second, the Court's April 25, 2012 Order is unconstitutionally vague. Which of the parties, and/or which lawyer or team of lawyers is at risk of sanction—Mr. Parker's or Mrs. Parker's (which is clearly suggested, since the Court's instantaneous ruling follows the Government's improper proffer without having allowed any response) or perhaps the Government's counsel, or the clients themselves? "[S]anctions will be imposed" does not indicate with any specificity who might be sanctioned, especially where "the parties' delay" is the sole indication of any wrongdoing, and "should a plea deal be reached at a later date" is the sole trigger for imposition of sanctions.

Third, the threat of sanctions either against the parties or their lawyers, in the event that Defendants were to accept an offer from the Government, creates an unconstitutional conflict of interest between Defendants and their attorneys. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005) (observing in analogous context that attorney's right to seek appellate review may not be foreclosed by the fact that the underlying suit has settled; a contrary result would create a personal conflict for the attorney). The lawyers must either recommend for or against an offer, and they must do so jointly, regardless of whether they feel their two clients have different positions, or face the promised sanctions. What a quandary. Should the lawyers recommend refusal of a deal they believe is in the best interest of their clients, and risk sanctions, or should they instruct their clients to accept an agreement, which could also lead to sanctions? Can every lawyer on every team be expected to make recommendations without bias that might inadvertently help the lawyers more than their clients?

Fourth, as discussed above, the Government's Notice and the Court's subsequent Order have created an impermissible intrusion into the sanctity of the attorney-client relationship. These filings appear to seek to discover whether or not counsel recommended the potential,

contingent plea offer (which the Government seems to suggest counsel accepted, even though there is no evidence of acceptance and counsel could not have accepted, in any event, what was so contingent as to not constitute an offer) in the hope it would be formally made? If counsel did recommend contingent acceptance of the contingent offer, was the recommendation competent or incompetent? Were both of the Defendants properly informed? None of these inquiries are proper here. The only time such questions can be relevant is during a § 2255 proceeding at which the defendant has made at least a partial waiver by exploring with subsequent counsel whether prior counsel was deficient. The requests for 2255 hearings are frequent and common. The granting of these hearings—extremely rare. The grant of a new trial after such a new hearing—so rare as to be unique. As discussed above, there is nothing in the Supreme Court's *Frye* opinion—which dealt with whether the attorney conveyed a *formal* plea offer to his client (here, the *informal*, proposed, contingent, possible offer *was* conveyed to Defendants)—that suggests, much less requires, action by the Government such as what has occurred here.

V.

CONCLUSION

The Frye decision was intended to help the accussed, to balance the scales of justice more greately in the accussed's favor. The Government wants this court to construe it as a burden harming the Defendant, and in fact, by publishing their proffer they have harmed the Defendant.

Defendant's attorney requests that this Court make its dictates known so that counsel and their clients can obey them, or assert privileges. Defendant requests that this Court strike the Government's proffer from the record and take such steps as are necessary, if possible, to restore Defendant's Fifth and Sixth Amendment rights, and if not possible, dismiss this case with prejudice.

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2 Respectfully submitted on May 4, 2012.
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CERTIFICATE OF SERVICE

On May 4, 2012 I, Ashley Blair Arnett, attorney for the Defendant, James Parker, filed the Defendant's Response to Court Order *via* ECF. Based on my training and experience with electronic filing in the federal courts, it is my understanding that a copy of this request will be electronically served upon opposing counsel, Peter Sexton and Walter Perkel, and co-counsel, Joy Bertrand, upon its submission to the Court.

Respectfully submitted this 4th day of May, 2012.

s/Ashley Blair Arnett
Ashley Blair Arnett
Attorney for Defendant