UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	Criminal No. 08-364 (RHK)
Plaintiff,	*	Civil No. 13-1110 (RHK)
vs.	*	
THOMAS JOSEPH PETTERS,	*	
Defendant.	*	**AFFIDAVIT FORM**
	*	

MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM OPINION AND ORDER" FILED DECEMBER 5, 2013, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

COMES NOW, Defendant THOMAS JOSEPH PETTERS, Pro Se, (hereinafter Movant) through his JailHouse Lawyer John Gregory Lambros, MUNZ vs. NIX, 908 F.2d 267, 268 FootNote 3 (8th Cir. 1990)(Jailhouse lawyer has standing to assert rights of inmates who need help); BEAR vs. KAUTZKY, 305 F.3d 802, 805 (8th Cir. 2002), offering this Court his "MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S 'MEMORANDUM OPINION AND ORDER' FILED DECEMBER 5, 2013, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE."

STANDARD OF REVIEW:

1. Rule 59(e) of the Federal Rules of Civil Procedure serves to allow a district court to rectify its own mistakes immediately following the entry of judgment. WHITE vs. NEW HAMSHIRE DEPT. OF EMPLOYMENT SEC., 71 L.Ed.2d 325 (1982). Moreover, the timely filing of a motion under Rule 59(e) gives this Court jurisdiction to amend the judgment for **ANY REASON**, and this Court is not limited to the grounds

contained in this motion in granting relief. VARLEY vs. TAMPAX INC., 855 F.2d 696 (10th Cir. 1988). In addition, a motion under Rule 59(e) **SUSPENDS** the finality of the judgment for purposes of appeal. VAUGHTER vs. EASTERN AIR LINES INC., 817 F.2d 685 (11th Cir. 1987).

2. HABEAS CORPUS: Motions to reconsider 28 USC §2255 ruling is available, and it is to be treated as FRCP 59(e) motion filed within 10 days of entry of challenged order. **[28 days, as amended in 2009]** See, U.S. vs. CLARK, 984 F.2d 31 (2nd Cir. 1993); EDWARDS vs. U.S., 266 F.3d 756, 757-58 (7th Cir. 2001) (§2255 case applying rule of habeas corpus procedure that filing of motion pursuant to FRCP 59(e) tolls time for filing notice of appeal). Criminal cases that have applied FRCP 59(e) include: U.S. vs. SIMS, 252 F.Supp. 2d 1255, 1260-61 (D. NM 2003); U.S. vs. THOMPSON 125 F.Supp. 2d 1297 (D. Kan. 2000); U.S. vs. HECTOR, 368 F.Supp. 2d 1060 (CD Cal. 2005).

3. PRISONER "MAILBOX RULE": HOUSTON vs. LACK, 487 US 266 (1988) (Prisoner motion is filed with clerk of court when delivered to prison mailbox and/or mailroom)

FACTS:

4. Movant PETTERS is filing a "MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION. DEFENDANT PETTERS REQUESTS THE RECUSAL OF JUDGE KYLE, PURSUANT TO 28 U.S.C. §§§ 455(a), 455(b)(5)(i), and 455(b)(5)(iii). DEFENDANT PETTERS WAS PREJUDICED." with this "MOTION TO ALTER OR AMEND JUDGMENT ... PURSUANT TO RULE 59(e). Movant PETTERS incorporates and restates his motion to disqualify the Honorable Judge Kyle here.

5. On or about May 10, 2013, Movant Petters attorney Steven J. Meshbesher filed a motion to vacate or set aside sentence pursuant to 28 U.S.C. §2255. Attorney Meshbesher raised two (2) grounds:

a. Ineffective assistance of counsel in failing to notify Movant PETTERS of the Government's plea offer; and

b. The sentence imposed being cruel and unusual insofar as it is disproportionate to the crimes of conviction.

6. The government responded and Movant's attorney responded to same.

7. This Court held an evidentiary hearing on October 23, 2013.

8. The Honorable Richard H. Kyle denied Movant PETTERS §2255 within within his "MEMORANDUM OPINION AND ORDER" dated and filed December 5, 2013.

9. Judge Kyle stated the following facts within his December 5, 2013 "MEMORANDUM OPINION AND ORDER":

a. PAGE 3: On October 5, 2008, Asst. U.S. Attorney John Marti (hereinafter "MARTI") spoke with Movant's attorney Hopeman, informing Hopeman the Government was willing to **AGREE TO A SENTENCE CAPPED AT 30-YEARS IF PETTERS WOULD PLEAD GUILTY TO SOME UNSPECIFIED CHARGES.** "This (so-called) offer was never reduced to writing, nor was there any discussion regarding the factual basis for a guilty plea. Marti later reiterated the proposed 30-year sentencing cap at a face-to-face meeting with Hopeman on December 17, 2008, approximately two weeks after Petters was indicted, and at other times before trial commenced in October 2009." "It is this alleged 'offer' that lies at the heart of the instant Motion. According to Petters, '[a]t no time during the pretrial, trial, presentencing or sentencing stages of my case did Mr. Hopeman communicate the Government's offer to me. And he contends that had he known of the offer, he would have accepted it and pleaded guilty."

b. PAGE 3: "Petters now contends that his lawyer's failure to communicate the Government's 30-year sentencing cap constituted ineffective assistance of counsel, entitling him to relief from the 50-year sentence imposed by the Court." FootNote 1, "Petters only seeks relief from his sentence; indeed, as discussed in more detail below, he must acknowledge his guilt in order to be successful here." **THIS IS NOT TRUE.** Movant did not have to admit **GUILT**, and

and the law <u>did not require him to admit guilt</u>. See, Fed. R. Crim. Procedure 11(a)(1). By pleading **<u>NOLO CONTENDERE</u>**, a defendant <u>does not admit guilt to the charged offense</u>, but the plea has the same effect at sentencing as a guilty plea. See, <u>HUDSON v. U.S.</u>, 272 U.S. 451, 457 (1926)(**Nolo Contendere Plea** authorizes ccurt to sentence defendant as if guilty.)

c. PAGE 5: The Court correctly states that:

> "The right to effective assistance of counsel extends to plea negotiations, ..., and requires counsel 'to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.' <u>MISSOURI v. FRYE</u>, **132 S.Ct. 1399, 1408-09 (2012)**(citations omitted). <u>The **FAILURE TO COMMUNICATE A FORMAL PLEA OFFER BEFORE IT EXPIRES** satisfies STRICKLAND'S 'deficient performance' prong</u>. Id. at 1409. But <u>STRICKLAND</u> also requires prejudice, and '[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed ...., [a] defendant[] must demonstrate a reasonable probability [he] would have accepted the earlier plea offer." <u>Id</u>." (emphasis added)

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<u>ANALYSIS (By Judge Kyle)</u>:

d. PAGE 5: The Court states:

> "Petters's argument rests upon three legs: (1) the Government extended him a formal plea offer; (2) defense counsel failed to communicate that offer before trial; and (3) he was prejudiced because be would have accepted the offer and pleaded guilty, thereby receiving (at most) a 30-year sentence. All three legs of Petters's argument must pass muster in order for him to be entitled to relief, yet for the reasons that follow, **<u>NONE HAS MERIT</u>**." (emphasis added)

<u>THERE WAS NO FORMAL PLEA OFFER</u>: <u>MOVANT PETTERS STATES THIS IS NOT TRUE</u>!!!

e. PAGES 5, 6, 7, 8, and 9: The Court states:

> "... The Court exphasized, therefore, that ineffective assistance may arise **ONLY WHEN <u>FORMAL</u> PLEA OFFERS HAVE <u>NOT BEEN COMMUNICATED TO DEFENDANTS</u>.** "[T]he fact of a formal offer means that **ITS TERMS AND IT PROCESSING CAN BE DOCUMENTED SO THAT WHAT TOOK PLACE IN THE NEGOTIATION PROCESS** becomes clear if some later inquiry turns on the conduct of earlier pretrial negotiations.' Id. at 1409."

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See, Page 5 and 6.

** "Here, there was <u>**NO WRITTEN OFFER FROM THE GOVERNMENT, BUT RATHER ONLY ORAL COMMUNICATIONS BETWEEN COUNSEL**</u>" (emphasis added)

"Moreover, the only 'term' of the so-called 'offer' was a 30-year sentencing cap. There was no discussion of the charges to which Petters would plead guilty, no discussion of the factual basis for such a guilty plea, and no discussion of the amount of restitution to be ordered or which of Petters assets would be subject to forfeiture - often contentious subjects in fraud cases. Simply put, there was no discussion of a myriad of issues typically part of plea agreements."

"The Supreme Court has recognized that plea agreements 'are essentially **CONTRACTS.**' <u>PUCKETT vs. U.S.</u>, 556 U.S. 129, 137 (2009)."

See, Page 6.

10. Movant states that <u>this Court is not correct in the above facts</u> it offers within the above paragraph 5. Movant offers the following facts and legal case law to support same:

a. <u>**EXHIBIT A:**</u> Movant PETTERS offers the October 28, **2008, "MEMORANDUM"** from Movant's attorney Jon Hopeman regarding his October 5, **2008 - TELEPHONE CONFERENCE WITH JOHN MARTI (**Assistant U.S. Attorney). The "MEMORANDUM" states:

** "He stated that the government was willing to <u>**AGREE TO A 30 YEAR CAP, LEAVING THE AMOUNT OF LOSS OPEN, OR STIPULATING TO THE AMOUNT OF LOSS.**</u> <u>He stated that he was not offering a 5K.</u>" (emphasis added)

b. <u>**EXHIBIT B:**</u> Movant PETTERS offers the October 28, **2008, "MEMORANDUM"** from Movant's attorney Jon Hopeman regarding his October 5, **2008 - TELEPHONE CONFERENCE WITH JOHN MARTI** (Assistant U.S. Attorney). The "MEMORANDUM" states:

"Mr. Marti reiterated his <u>**OFFER OF A 30 YEAR CAP.**</u> He stated that he wanted to meet tonight to show us the **EVIDENCE THAT HE INTENDED TO PUT ON AT THE DETENTION HEARING.**"

c. <u>**EXHIBIT C:**</u> Movant PETTERS offers the January 30, **2009, "MEMORANDUM"** from Movant's attorney Jon Hopeman regarding his **December 10, 2008**

- **CONFERENCE WITH TOM PETTERS.** The "MEMORANDUM" states on page 2, the last paragraph:

** "I also **INFORMED MR. PETTERS** in our meeting that **WE HAD RECEIVED NO PLEA OFFER FROM THE GOVERNMENT**, despite the fact that some weeks ago, after our November proffer, **JOHN MARTI TOLD ME THAT HE WOULD BE MAKING AN OFFER.**

d. **EXHIBIT D:** Movant PETTERS offers the January 30, **2009, "MEMORANDUM"** from Movant's attorney Jon Hopeman regarding his **December 17, 2008 - MEETING WITH JOHN MARTI** (Assistant U.S. Attorney). The "MEMORANDUM" states:

"I asked Mr. Marti whether there was anything wrong with Mr. Petters' proffer delivered in **LATE NOVEMBER.** He stated that there was nothing wrong with the proffer, it was just that the government already had all of the information Mr. Petters could provide."

** "I told Mr. Marti I wanted an offer from the government. **HE STATED THAT THE OFFER WAS A 30 YEAR CAP, WITH THE GUIDELINES CALCULATIONS TO REMAIN OPEN."**

"I told Mr. Marti that as a matter of personal pride, **I DID NOT BELIEVE THAT I COULD ADVISE MR. PETTERS TO PLEAD GUILTY TO A 30 YEAR CAP.** I stated that this suggested that **30 YEARS** was an appropriate sentence. I told him that my professional integrity would not allow me to do this."

11. Please note that the December 17, 2008 meeting between Attorney Hopeman and John Marti was **ONLY OFFERING THE SAME** overview of the **October 5, 2008 TELEPHONE CONFERENCE BETWEEN HOPEMAN AND MARTI.** See, **EXHIBIT A:**

a. 30 year cap.;

b. Leaving the amount of loss open;

*** c. or stipulating to the amount of loss; and

d. No offer of a 5K.

PETTERS'S ATTORNEY FAILED TO PUT THE ABOVE "PLEA AGREEMENT IN WRITING" OR "ON THE RECORD":

12. The Eleventh Circuit held that trial counsel's failure to **MEMORIALIZE ALLEGED SENTENCE REDUCTION,** either by letter, affidavit or otherwise

based on counsel's representation to defendant that judge had agreed to reduce defendant's sentence **AFTER PLEA, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.** See, BETANCOURT vs. WILLIS, 814 F.2d 1546 (11th Cir. 1987);

13. This Circuit, the Eighth Circuit Court of Appeals, addressed the issue of **FAILURE TO PUT "AGREEMENT IN WRITING".** The Court stated that trial counsel's failure to put an **ORAL AGREEMENT** that two (2) polygraph tests that defendant passed were to be admitted into evidence constituted **INEFFECTIVE ASSISTANCE OF COUNSEL.** Thus, trial counsel's failure to put **"AGREEMENT IN WRITING"** or on the record in the presence of the judge. See, HOUSTON vs. LOCKHART, 982 F.2d 1246 (8th Cir. 1993).

** 14. Movant PETTERS attorney Jon Hopeman was ineffective for not placing the **OCTOBER 5, 2008 ORAL PLEA AGREEMENT IN WRITING AND PRESENTING IT TO MOVANT PETTERS AND REQUESTING U.S. ASSISTANT ATTORNEY MARTI TO PLACE THE "PLEA AGREEMENT" IN WRITING.**

15. **WITHHOLDING INFORMATION:** Attorney Jon Hopeman withheld the oral plea offer by U.S. Assistant Attorney Marti on **October 5, 2008.** Attorney Hopeman's own **December 10, 2008 "MEMORANDUM"** as to his Conference with Movant PETTERS proves same. "I also informed Mr. Petters in our meeting that **WE HAD RECEIVED NO PLEA OFFER FROM THE GOVERNMENT,** .." See, **EXHIBIT C. PLEASE NOTE: OVER 60-DAYS PASSED FROM THE ORAL PLEA AGREEMENT OFFER UNTIL THE DECEMBER 10, 2008 MEETING WHEN PETTERS ATTORNEY STATED NO PLEA OFFERS WAS OFFERED.** See, U.S. vs. SANDERSON, 595 F.2d 1021 (5th Cir. 1979)(Trial counsel's **MISREPRESENTATION OF OF MATERIAL FACTS, WITHHOLDING INFORMATION,** and exerted pressure on defendant to induce a guilty plea, constitutes ineffective assistance and requires an evidentiary hearing to resolve claim)

16. The above clearly proves that this Court statement on page six (6) **IS NOT CORRECT:**

** > "Moreover, the **ONLY 'TERM' OF THE SO-CALLED 'OFFER' WAS A 30-YEAR SENTENCING CAP.** There was no discussion of the charges to which Petters would plead guilty, no

> discussion of the factual basis for such a guilty plea, and no discussion of the **AMOUNT OF RESTITUTION** to be ordered or which of Petters's assets would be subject to forfeiture - often contentious subjects in fraud cases." (emphasis added)

U.S. Assistant Attorney Marti's and Movant PETTERS attorney Jon Hopeman's telephone meeting on October 5, 2008 **LISTED THE "TERM OF THE OFFER": 30 years cap, leaving amount of loss open, or stipulating to the amount of loss, and no offer of 5K.** See, **EXHIBIT A.**

THE COURT STATED: "THE ALLEGED 'OFFER' WAS COMMUNICATED TO PETTERS" - See, Page 9.

17. Pages 9, 10, 11, 12, 13, 14, and 15, the Court states "Even if the Government's proposal of a 30-year sentencing cap constituted a 'formal plea offer,' the evidence conclusively establishes that counsel repeatedly informed Petters of the Government's proposal." See, Page 9.

18. Page 10, this Court states: See, **EXHIBIT E.**

> "Most compelling are the consistent, forceful assertions of **ALL OF PETTER'S ATTORNEYS THAT THEY REPEATEDLY COMMUNICATED THE PROPOSED 30-YEAR CAP TO HIM:**

** "**BETWEEN OCTOBER AND DECEMBER 2008,** even though Mr. Petters was in custody, the FBI and the IRS brought Mr. Petters to the U.S. Attorney's Office **NUMEROUS TIMES** for meetings **WITH MY PARTNER ERIC RIENSCHE AND ME [Jon Hopeman] ... I REPEATEDLY DISCUSSED THE GOVERNMENT'S PROPOSED 30-YEAR CAP OF IMPRISONMENT WITH MR. PETTERS DURING THESE MEETINGS."** (Hopeman Decl. (Doc. No. 591-1)"

** "**ON OCTOBER 27, 2008,** I met with Mr. Petters and Mr. Riensche, in a private meeting at the U.S. Attorney's Office ...**WE DISCUSSED THE GOVERNMENT'S PROPOSAL OF A 30-YEAR CAP WITH MR. PETTERS AT [that] MEETING."** (Id. at ¶22)

Movant PETTERS attorney's lied to this court. **EXHIBIT C, Page 2 "I also informed Mr. Petters in our meeting that we had received NO PLEA OFFER FROM THE GOVERNMENT,"** The above statement occurred at the **DECEMBER 10, 2008** conference with Tom Petters and his Attorney Jon Hopeman at the U.S. Attorney's office.

THE COURT STATED: "PETTERS WOULD NOT HAVE ACCEPTED" - See, Page 15.

19. Pages 15, 16, 17, and 18, the court expounds as to why Movant PETTERS would not have accepted the plea offer. Page 15 states:

> "Even assuming **ARGUENDO** the proposed 30-year sentencing cap had been a 'formal plea offer' **AND** that it was not communicated, Petters still **WOULD NOT BE ENTITLED TO RELIEF.** And this is because he cannot show "prejudice" under STRICKLAND, as he has **FAILED TO 'DEMONSTRATE A REASONABLE PROBABILITY [he] WOULD HAVE ACCEPTED THE .... OFFER' AND PLEADED GUILTY.** FRYE, 132 S.Ct. at 1409. Indeed, this final 'leg' of PETTERS's argument is perhaps the most problematic for him, because he has **REPEATEDLY ATTEMPTED TO AVOID OWNERSHIP OF THE MASSIVE FRAUD HE SPEARHEADED." (emphasis added)**

20. This court further states on Page 16:

> "Before the Court may accept a **GUILTY PLEA FROM A DEFENDANT,** it must find there exists a factual basis for the plea. **See, Fed. R. Crim. P. 11(b)(3).** Here, that would have **REQUIRED PETTERS TO ACKNOWLEDGE THAT HE ACTED WITH INTENT TO DEFRAUD AND/OR CONSPIRED WITH OTHERS TO DO SO."**

***

THIS IS NOT TRUE!!!

PLEA BARGAINING SYSTEM:

21. Under **Rule 11(a)(1)** of Federal Rules of Criminal Procedure, a defendant may plead not guilty, guilty or **NOLO CONTENDERE.** By pleading guilty, a defendant admits all elements of the charged crime. See, U.S. vs. BROCE, 488 U.S. 563, 570 (1988). **BY PLEADING "NOLO CONTENDERE", A DEFENDANT DOES NOT ADMIT GUILT TO THE CHARGED OFFENSE,** but the plea has the same effect at sentencing as a guilty plea. See, HUDSON vs. U.S., 272 U.S. 451, 457 (1926)(**NOLO CONTENDERE** plea authorizes court to sentence defendant as if guilty); OLSEN vs. CORREIRO, 189 F.3d 52, 68 (1st Cir. 1999).

22. If a defendant pleads guilty or **NOLO CONTENDERE** to either a charged offense or a lesser or related offense, the prosecutor may agree that: (1) the government will not bring, or will move to dismiss, other charges; see, Fed. R. Crim. P. 11(c)(1)(A) (2) the government will agree that a specific sentence

or a sentencing range is the appropriate disposition of the case; see, FED. R. CRIM. P. 11(c)(1)(C) or (3) the government will recommend, or agree not to oppose, the defendant's request that a particular sentence or a sentencing range is appropriate. See, Fed. R. Crim. P. 11(c)(1)(B).

23. The above overview of the "PLEA BARGAINING SYSTEM" in paragraphs 21 and 22 clearly proves that Movant PETTERS **WOULD NOT HAVE BEEN REQUIRED TO ACKNOWLEDGE HE INTENDED TO DEFRAUD AND/OR CONSPIRE WITH OTHERS TO DO SO, AS PER Fed. R. Crim. P. 11(b)(3),** as this court stated on Page 16. See, Paragraph 20.

24. The question for this court deals with the showing of prejudice that is required by the Sixth Amendment and STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984) to establish ineffective assistance of counsel. Movant believes the question is "WHETHER A FINDING OF PREJUDICE CAN BE BASED SOLELY ON MOVANT PETTERS ALLEGED SELF-SERVING CLAIM THAT HE WOULD HAVE ACCEPTED A PLEA OFFER BUT FOR COUNSEL'S DEFICIENT PERFORMANCE." JailHouse Lawyer Lambros believes this is the question this Court is asking. The Supreme Court stated in LAFLER that the simple fact of a higher sentence after trial is sufficient to **DEMONSTRATE PREJUDICE.** See, LAFLER, 132 S. Ct. at 1387 ("[P]rejudice can be shown if loss of plea opportunity led to a trial resulting in a conviction of more serious charges or the imposition of a more severe sentence.")

25. Movant PETTERS had legitimate reasons to continue to maintain his innocence and plead **NOLO CONTENDERE** in this action. Movant's attorney did not request the government to pursue a plea offer so Movant PETTERS would be allowed to plead **"NOLO CONTENDERE" and/or explain to Movant the rules governing the "PLEA BARGAINING SYSTEM"**, as outlined in paragraphs 21 and 22.

26. Movant PETTERS **WOULD OF ACCEPTED THE GOVERNMENTS PLEA!**

DISCUSSION OF ABOVE BY JAILHOUSE LAWYER LAMBROS:

27. In LAFLER v. COOPER, 132 S. Ct. 1376 (2012) and MISSOURI vs.

FRYE, 132 S. Ct. 1399 (2012), the Supreme Court extended the holding in STRICKLAND to cover ineffective assistance by defense counsel in the plea-bargaining **PHASE.** The Court stated "defense counsel have responsibilities in the plea bargaining **PROCESS,** responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires." FRYE, at 1407. (emphasis added)

28. The Court also stated, "claims of ineffective assistance of counsel in the plea-bargaining context are governed by the two-part test set forth in STRICKLAND". FRYE, at 1405. It then held as a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on **TERMS AND CONDITIONS THAT MAY BE FAVORABLE TO THE ACCUSED.** FRYE, at 1408.

29. However, while the Court could have limited itself to this narrow conclusion - that not communicating a formal plea-bargaining offer with an expiration date was ineffective assistance - the Court **EXPLICITLY WENT FARTHER THAN THIS.** Writing for the majority, Justice Kennedy stated that in order for the benefits of a plea agreement to be realized, **"criminal defendants require effective counsel DURING PLEA NEGOTIATIONS.** Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." FRYE, at 1407-08. Because "[i]n today's criminal justice system .... the **NEGOTIATION OF A PLEA BARGAIN ... IS ALMOST ALWAYS THE CRITICAL POINT FOR THE DEFENDANT."** FRYE, at 1407 (emphasis added) The Court reasoned that the "**INQUIRY**" in this case was **"HOW TO DEFINE THE DUTY AND RESPONSIBILITY OF THE DEFENSE COUSEL IN THE PLEA BARGAIN PROCESS."** FRYE, at 1408 (emphasis added)

** **

30. Justice Kennedy acknowledged that "this is a difficult question," because "[t]he art of negotiation is at least as nuanced as the art of trial advocacy" FRYE, at 1408 and that "[b]argaining is, by its nature, defined to a substantial degree by personal style." FRYE, at 1408. Therefore, the Sixth Amendment applies to **NEGOTIATION STAGE OF PLEA BARGAINS, NOT JUST THE COMMUNICATION OF OFFERS TO THE DEFENDANT.**

31. Justice Scalia, writing for the dissent, explicitly acknowledges the new step the Court has taken. He states that "counsel's plea **BARGAINING SKILLS** .... must now meet a constitutional minimum," and calls this the "constitutionalization of the plea-bargaining **PROCESS**. FRYE, at 1413 (emphasis added) He worries, however, that these new constitutional standards will be hard to define, since "**IT WILL NOT BE SO CLEAR THAT COUNSEL'S PLEA-BARGAINING SKILLS ...ARE ADEQUATE.**" FRYE, at 1413

32. Justice Kennedy shares Justice Scalia's concern as well. Kennedy worries that "[t]he alternative courses and tactics in negotiation are so individual that it may .... [not be] practicable to try to .... define detailed standards for the proper discharge of defense counsel's participation in the process." FRYE, at 1408.

33. The Court states that the FRYE case does not present the "necessity or occasion to define the duties of defense counsel in these respects," FRYE at 1408. to fully vindicate the right of effective counsel in plea-bargaining, ** these standards will have to be determined by the lower courts, on a case-by-case basis. (emphasis added)

CERTIFICATE OF APPEALABILITY:

34. Page 20 and 21: This Court stated that Movant PETTERS claims fail and to appeal a final order in a proceeding under §2255, a defendant must obtain a Certificate of Appealability. 28 U.S.C. §2253(c)(1)(B). "...., the Movant must show that the issues are 'debatable among reasonable jurists,' that different courts 'could resolve the issues differently,' or that the issues otherwise 'deserve further proceedings.' COX vs. NORRIS, 133 F.3d 565, 569 (8th Cir. 1997)." The court denied Movant a CERTIFICATE OF APPEALABILITY.

35. Movant believes the above facts and law clearly proves that the issues are "debatable amoung reasonable jurists." In fact, the above "DISCUSSION

BY JAILHOUSE LAWYER LAMBROS" that offers many meaningful quotes from the Supreme Court in MISSOURI vs. FRYE clearly states that "counsel's plea bargaining skills ... must now meet a constitutional minimum" and that the Justice Scalia worries that the new constitutional standards will be hard to define. Justice Kennedy finally states that the FRYE case **DOES NOT PRESENT** the "necessity or occasion to define the duties of defense counsel in these respects." FRYE, at 1408.

36. Movant requests that this Court issue a CERTIFICATE OF APPEALABILITY in this action, if this court does not vacate Movant's sentence, thus allowing the Eighth Circuit to evaluate the issues differently, as the issues deserve further proceeding.

37. Plea bargaining is more of an art than a science; there is no "one way" to cut the perfect deal.

CONCLUSION:

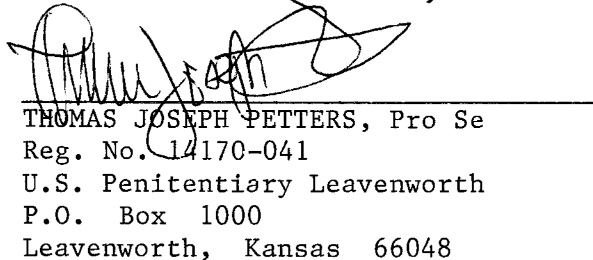
38. For all the foregoing reasons, Movant PETTERS believes this Court's December 5, 2013, "MEMORANDUM OPINION AND ORDER" resulted in clear legal error.

39. Movant request relief pursuant to his 28 U.S.C. §2255. This Rule 59(e) allows this Court jurisdiction.

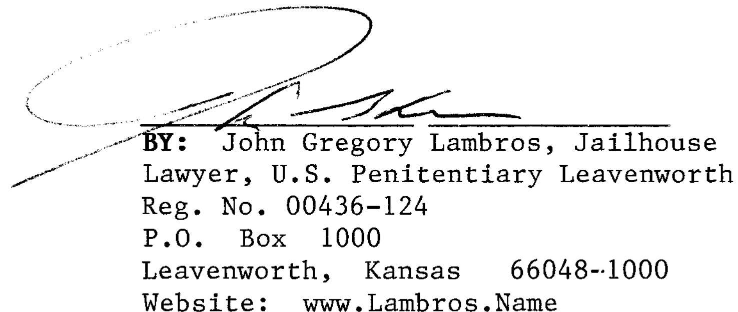
40. Movant respectfully requests this Court to alter and amend it "MEMORANDUM OPINION AND ORDER".

41. I THOMAS JOSEPH PETTERS, declare under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

EXECUTED ON: December 28, 2013



THOMAS JOSEPH PETTERS, Pro Se
Reg. No. 14170-041
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048



BY: John Gregory Lambros, Jailhouse Lawyer, U.S. Penitentiary Leavenworth
Reg. No. 00436-124
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Website: www.Lambros.Name