

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA

CRIMINAL NO. 04-20075-01

VERSUS

JUDGE MELANÇON

GREGORY JAMES CATON

MAGISTRATE JUDGE HILL

PREHEARING MEMORANDUM ON BEHALF OF GREGORY JAMES CATON

MAY IT PLEASE THE COURT:

By way of a Minute Entry received by undersigned counsel this afternoon, counsel were ordered to be prepared to discuss the remedy in cases where counsel is ineffective at sentencing.

Ineffectiveness issues have most often been addressed in appellate opinions. To address your Honor's directive, undersigned counsel used Westlaw and made the following natural language inquiry: *What is the remedy for ineffective assistance of counsel at sentencing?* The first document yielded by that search was *United States v. White*, 371 F.2d 378 (W.D. New York 2005). In *White*, White proceeded to trial and was convicted by the jury. Prior to being sentenced, White moved to vacate and set aside the jury verdict, and for other relief, based upon alleged ineffective assistance of counsel that occurred during plea negotiations prior to trial. After appointing new counsel and holding a hearing, the court found that White had received ineffective assistance of counsel. Procedurally, the United States contended that the ineffectiveness should not be resolved at that time.

In addressing that position, the court said:

Were I to adopt the Government's position and ignore the obvious error and require White to pursue the matter on appeal, it seems likely the Second Circuit would be compelled to remand the case to this Court for a hearing to determine the factual issues surrounding the advice given to White and to determine whether the second prong of *Strickland* has been met. That has all now been accomplished. The error is clear and it should be remedied now. [at page 383]

After addressing that issue, the court went on to determine the appropriate remedy and said:

Ineffective assistance of counsel can take many forms and perhaps because of that, courts have broad discretion in fashioning the appropriate remedy to protect a defendant whose Sixth Amendment rights have been violated by virtue of receiving ineffective assistance of counsel. *See, e.g., United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1988) (district court would have “considerable discretion in fashioning a remedy” where Sixth Amendment violation occurred)(quoting *United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992)); *Riggs v. Fairman*, 399 F.3d 1179, 1184 (9th Cir. 2005) (“Once a determination has been made that habeas relief is warranted, the district court has considerable discretion in fashioning a remedy “tailored to the injury suffered from the constitutional violation”)(quoting *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)); *Gilmore v. Bertrand*, 301 F.3d 581, 582 (7th Cir. 2002)(“habeas corpus is an equitable remedy, and courts have ‘broad discretion in conditioning a judgment granting habeas relief’”) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987))(internal citation omitted); *United States v. Price*, 237 F.Supp.2d 1, 6 (D.D.C. 2002)(district court has considerable discretion in fashioning remedy at sentencing for ineffective assistance of counsel during pretrial plea bargaining). [at p. 384]

Although undersigned counsel believes that the evidence in this matter will show that Mr. Caton is entitled to relief on his request for an out of time appeal, the prudent procedure would be for the court to determine the ineffectiveness issues regarding counsel’s alleged failure to raise and argue the constitutionality of the United States Sentencing Guidelines, while Mr. Caton is before the court. Thereafter, if it is found that a Sixth Amendment violation occurred, then the court has considerable discretion in fashioning a remedy to address the violation. In this matter, the appropriate remedy would be to place the matter before Judge Melançon for resentencing. To proceed otherwise would,

in all probability, result in Mr. Caton returning to this court, following his appeal, for resolution of the ineffectiveness issue.

RESPECTFULLY SUBMITTED,

REBECCA L. HUDSMITH
FEDERAL PUBLIC DEFENDER FOR THE
MIDDLE & WESTERN DISTRICTS OF LOUISIANA

BY: _____

S/ WAYNE J. BLANCHARD, LA BAR #3113
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above PREHEARING MEMORANDUM ON BEHALF OF GREGORY JAMES CATON has been served on the Honorable C. Michael Hill, United States Magistrate Judge, 800 Lafayette Street, Suite 3400, Lafayette, Louisiana 70501, Ms. Cristina Walker, Assistant United States Attorney, 800 Lafayette Street, Suite 2200, Lafayette, Louisiana 70501-6832 and Mr. Gregory James Caton, c/o Lafayette Parish Correctional Center, P. O. Box 2537, Lafayette, Louisiana 70502 by first class United States mail with proper postage affixed.

Lafayette, Louisiana, November 16, 2005.

S/ WAYNE J. BLANCHARD