No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERON GASKIN,

Petitioner,

v.

UNITED STATE OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, by and through counsel, Elizabeth L. Jacobs, asks leave to file the attached petition for certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Michigan during the 28 USC 2255 proceeding, during which he was appointed counsel pursuant to 18 USC 3006A. Appointed counsel continued to represent him in the Sixth Circuit Court of Appeals.

Petitioner's affidavit is not attached because he was appointed counsel in this case in the courts below.

Elizabeth L. Jacobs
Counsel of Record

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERON GASKIN,

Petitioner,

v.

UNITED STATE OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING INCLUDE BEING ACCURATELY ADVISED BY COUNSEL OF THE POTENTIAL FOR CONSECUTIVE SENTENCING IF HE IS CONVICTED AFTER TRIAL?

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Criminal Case No. 11-cr-20178
Civil Case No. 16-cv-11138
United States of America, Plaintiff-Respondent v Jeron Gaskin, Defendant-Petitioner
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13-1824
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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS

The opinion of the Sixth Circuit Court of Appeals was not selected for full text publication and is reproduced in Appendix A. *Gaskin v United States*, 2019 FED App. 0397N (6th Cir.)

The opinion of the United States District Court was not selected for publication and is reproduced in Appendix B. *United States v Gaskin*, 2018 U.S. Dist. Lexis 133739; 2018 WL 3756618.

The opinion on direct appeal of the Sixth Circuit Court of Appeals was not selected for publication and is reproduced in Appendix C. *United States v Gaskin*, 587 Fed Appx. 290 (6th Cir.2014).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on August 1, 2019. This Court has jurisdiction pursuant to 28 USC 1254(1) to review the circuit court's decision on a writ of certiorari. No petition for rehearing was filed.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides

> 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

This case presents an important question of federal law concerning whether counsel must accurately advise the defendant of the potential for consecutive sentencing before the defendant decides to forego a favorable guilty plea offer and proceed to trial.

Petitioner was convicted after a jury trial of conspiracy to possess and distribute a controlled substance contrary to 21USC secs. 841(a)(1) and 846 and two counts of possession with intent to deliver a controlled substance contrary to 21 USC secs. 2 and 841(a)(1). On June 6, 2013, he was sentenced to 20 years on Count 1, a consecutive ten years on Count 2, and a concurrent sentence of 20 years on Count 3 for a grand total of 30 years. (App H; 58a) On direct appeal, Jeron Gaskin's convictions were affirmed. (App C; 13a).

Petitioner, in pro per, filed a motion to vacate his sentence pursuant to 28 USC 2255. After counsel was appointed, an evidentiary hearing was held on the issue of ineffective assistance of counsel during the plea bargaining phase of the criminal proceeding.

Post Conviction Hearing

Evidence at the hearing showed that Petitioner was first arraigned on a one-count complaint. Three weeks later, he was arraigned on a two-count indictment which alleged violations of the federal criminal drug laws. He signed an Acknowledgment of the Indictment which informed him that each count carried a sentence of not more than twenty years. (APP D; 28a). During the arraignment the court stated:

> THE COURT: . . . As to Count 1, the maximum penalty is up to 20 years in prison. . . And that is the same penalty on Count 2. Not that they are necessarily concurrent penalties, but it is the same maximum penalty under the statute. Do you understand that?
>
> THE DEFENDANT: Yes, ma'am.

(APP D; 33a).

A month later, Petitioner was arraigned on a three-count superseding indictment. He

signed an Acknowledgment of the Indictment which informed him that Count 1 carried a penalty of up to five years in prison, Count 2 carried a penalty of up to 20 years in prison, and Count 3 carried a penalty of up to 20 years in prison. (APP E; 36a). At the arraignment, the Court stated:

> THE COURT: . . . And if you are convicted or plead guilty of the charges in the first superseding indictment, you could be sentenced as follows: On Count 1, up to five years in prison, ... On Count 2, up to 20 years in prison . . . . And Count 3, up to 20 years in prison . . . .

(APP E; 39a-40a). Defendant acknowledged that he was aware of the added charges.

Eight months later, Petitioner was arraigned on the multi-count second superseding indictment. He signed an Acknowledgment of the Indictment which informed him that Count 1 carried a penalty of up to 20 years in prison, Count 2 carried a penalty of up to 20 years in prison, and Count 3 carried a penalty of up to 20 years in prison. (APP F; 42a). At the arraignment, the Court stated:

> THE COURT: Mr. Gaskin do you understand that if you were convicted or pled guilty to Count 1, which charges conspiracy with intent to distribute controlled substances, and Count 2 and 3, each of which charge possession with intent to distribute a controlled substance, as to each of those charges, if you were convicted, you could get up to 20 years imprisonment and/or a fine of 1 million dollars. Do you understand that?
>
> THE DEFENDANT: Yes.

(APP F; 45a-46a).

During the hearing, two identical letters dated August 23, 2012 and August 31, 2012, were offered into evidence concerning the plea offer. In the letters, Thomas Randolph, the trial counsel, informed Petitioner that the plea offer included a sentence of 17.5 years, but not that he faced consecutive sentencing or 60 years in prison. (APP K; 91a-92a, 101a).

A little more than two weeks after receiving the letters, on September 19, 2012, Mr. Gaskin was brought to court. The trial court granted the government's motion to adjourn the trial because of ongoing plea negotiations with the other defendants. Mr. Gaskin testified that on this

date Mr. Randolph told him to reject the plea offer of 17.5 years because the difference between 20 years and 17.5 years was minimal. (APP L; 118a). Based on this advice, Petitioner exercised his right to a trial. (APP L: 135a-136a). No record was made of the plea offer nor of its rejection. Petitioner further testified that had he known about consecutive sentencing he would not have gone to trial. (APP L; 119a). He was never told by counsel, or anyone else, that if he pled guilty he would get three points deducted from his guideline score. (APP L; 116a-117a).

At the 2255 hearing, evidence from a post verdict hearing was also offered. Petitioner had informed his attorney that he wanted him to withdraw from another pending case. A hearing was held on the motion to withdraw. The government had no objection but expressed concern over counsel remaining on the drug case for the sentence because although there was a verdict, the sentence would be very much in dispute.

> MR. CHASTEEN: . . . So, there is quite a bit of work still to do since there was not a plea agreement and sentencing could be anywhere from, you know, whatever the Court decides is the low end, up to potentially 60 years because he was convicted on all three counts. And the government does intend to ask for a very considerable sentence.
>
> . . .
>
> MR. RANDOLPH: Mr. Chasteen has articulated himself. I have, Your Honor, and my client understands.
>
> THE COURT: All right. You want to speak.
>
> THE DEFENDANT: Yes, I didn't understand about the 60 years part. I didn't understand what he just meant by that.
>
> THE COURT: Well, I have no idea what sentence will be imposed. I haven't seen the presentence report. I haven't seen the arguments you'll make, your attorney will make, so I have no idea.
>
> THE DEFENDANT: I do want to let you know that, you know, I was told that my cases was getting ran concurrent. I never – this is my first time hearing something –
>
> THE COURT: . . . Have him come up to the podium.
>
> THE DEFENDANT: Your honor, I said this was my first time hearing, after the case was done, that my cases was trying to get ran

> consecutive. I never knew nothing what consecutive mean. Was never told before trial by my prosecutors or my lawyers or nobody that it was a possibility it could get ran consecutive.
>
> Every time I asked my lawyer, I was told this was one charge and that my cases was all getting ran under a 20-year max and my pleas was 17 years. So, I couldn't – 17 years and 20 year max, that's why I went to trial, sir. And now I'm hearing 60 years and I'm really confused in this courtroom, sir. I never heard of this.

(APP G; 54a-56a).

After the 2255 hearing, the district court denied the motion to vacate. (App B; 7a-12a). Although, it refused to find that the attorney's performance was deficient, it was persuaded that counsel lacked experience representing defendants in federal court and warned both co-counsel and Mr. Randolph:

> . . . this case should serve as a strong warning . . . about the importance of fully preparing to represent a client, being forthright about potential conflicts of interest, abstaining from accepting questionable payments of attorney's fees and creating a complete written record of action taken during a case.

(APP B; 9a-10a).

On August 1, 2019, the Sixth Circuit Court of Appeals affirmed the district court holding that 25 years to life was sufficient advice by counsel. (App A; 1a-6a).

Other facts will be referred to in the body of the argument and are incorporated into this statement by reference.

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING INCLUDES BEING ACCURATELY INFORMED BY COUNSEL OF THE POTENTIAL FOR CONSECUTIVE SENTENCING IF HE IS CONVICTED AFTER TRIAL.

A. Preservation

This issue was raised in 28 USC 2255 proceeding. The Sixth Circuit does not entertain issues of ineffective assistance of trial counsel on direct appeal, so the issue was properly raised on the collateral appeal. *United States v Graham,* 484 F3d 413, 421- 422 (6th Cir. 2007).

B. Discussion

This Court has recognized the centrality of plea bargaining in the criminal justice system.

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," (*internal citation omitted*), it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992).

Missouri v Frye, 566 US 134, 143-144 (2012). Because of its importance, this Court extended the right to the effective assistance of counsel to the plea negotiations. *McCann v Richardson,* 397 US 759, 771 (1970)(defendant is entitled to the effective assistance of competent counsel before deciding to plead guilty).

Left undecided however was what must be deemed a part of competent counsel's advice to the accused during plea bargaining. This Court should grant the writ because the issue of

whether the accused, before deciding to forego the advantages of a plea bargain, must be informed by counsel of the potential for consecutive sentencing after multiple convictions at trial, is an important federal question that has not been decide by this Court. SCR 10(c). Further there is a split among the Circuits on whether the record must conclusively show that a defendant was accurately informed of the sentencing consequences during plea bargaining before he decides to reject a favorable plea offer.

The test for ineffective assistance of counsel is found in *Strickland v Washington*, 466 US 668 (l984). To prove a Sixth Amendment violation, a defendant must show a deficient performance by counsel and must also show that he was prejudiced by that deficient performance. The same test applies to ineffective assistance of counsel during guilty plea proceedings. *Hill v Lockhart*, 474 US 52, 56-58 (1985). But on the prejudice prong, defendant must show that but for the deficient performance, there was a reasonable probability that he would have accepted the plea offer. *Id.*, at 59.

On the first prong of *Strickland*, a deficient performance is shown if counsel made errors so serious that representation fell below an objective standard of reasonableness. *Id.*, at 688. This is shown in the plea bargaining stage if defendant's decision to plead guilty or to reject a plea offer is not based on reasonably competent advice. *McMann v Richardson*, 397 US at 770. Erroneous advice on what the prosecution must prove at trial would constitute a deficient performance. *Lafler v Cooper,* 566 US 156 (2012)(misadvice on the intent element of the offense causing defendant to believe that he wouldn't get convicted at trial). Erroneous advice also includes what the sentencing consequences are upon pleading guilty. *Hill,* 474 US at 56-58 (failure to advise the defendant on parole eligibility). Even where the penalty is neither direct nor criminal in nature, the consequences of a guilty plea must be disclosed to the defendant by counsel. *Padilla v Kentucky,* 559 US 356 (2010)(immigration consequences). The *Padilla* Court also rejected the distinction between express misdvice and misadvice by omission because

"there is no relevant difference." *Id.,* at 370; *Strickland,* 466 US at 690.

On the deficient performance pong of *Strickland,* a reviewing court must defer to counsel's reasonable strategic choices but only to the extent that they are based on a reasonable investigation. *Strickland, supra* at 694. Reasonable investigation presumes knowledge of statutory penalties and familiarity with the United States Sentencing Guidelines. *United States v Day*, 969 F2d 39, 43 (3d Cir. 1992). Further, representation is deficient where counsel offers a "plainly incorrect' estimate of the likely sentence due to ignorance of applicable law of which he should have been aware." *United States v Aguiar*, 894 F3d 351, 357 (DC Cir. 2018) quoting from *United States v Booze*, 293 F3d 516, 518-519 (DC Cir. 2002).

In *Booze,* counsel's erroneous advice about a likely sentence upon conviction at trial resulted in the defendant rejecting a plea offer involving a sentence two-thirds lower than the sentence that was imposed after trial. Similarly, in *United States v Gaviria*, 116 F3d 1498, 1512-1513 (DC Cir. 1997), counsel, contrary to precedent, advised his client that if he pled he would be sentenced as a career offender and would face a sentence range of 360 months to life imprisonment. Gaviria rejected the plea offer and went to trial. But based on a recent case, he could not be sentenced as a career offender and was really only facing a range of 15-22 years in prison if he pled. The Court noted that,

> Familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation.

Quoting from *Day*, 969 F2d at 43.

In *Aguiar,* the Court noted that the prosecutor's sentencing analysis was not made part of the record at the status hearing. Nor did the record show the advice counsel gave Aguiar about sentencing after a § 924 (c) conviction. This should have included that he was specifically advised of the mandatory minimum and consecutive sentencing consequences of rejecting the

plea offer, including life imprisonment upon conviction of two § 924 (c) counts. The Court stated that "[w]hat Aguiar needed to know before he decided whether or not to accept the plea offer was the worst-case scenario if he rejected the plea and went to trial." The reviewing court held that the district court erred in rejecting the ineffective assistance of counsel claim without holding a hearing. It relied on the fact that there was no conclusive showing on the record that Aguiar was advised that a consequence of rejecting the plea offer was mandatory life imprisonment or at least a longer mandatory minimum sentence.

The Third Circuit requires counsel to give a defendant sufficient information to make a reasonably informed decision whether to accept a plea offer. *United States v Day*, 969 at 43. The Fifth Circuit holds that the precise advice of counsel concerning the guideline range is essential for the accused in deciding whether to accept a plea offer. *United States v Herrera*, 412 F3d 577, 581 (5th Cir. 2005). The Ninth Circuit requires counsel to give the defendant the tools he needs to make an intelligent decision. *Turner v Calderon*, 281 F3d 851, 881 (9th Cir. 2002). The Tenth Circuit will find a deficient performance if counsel failed to understand the basic structure and mechanics of the sentencing guidelines. Without this knowledge counsel is incapable of helping the defendant to make a reasonably informed decision. *United States v Washington*, 619 F3d 1252, 1260 (10th Cir. 2010).

The DC Circuit in *Aguiar* set the burden of proof as that of a **conclusive showing** that the defendant was informed of the consequences of rejecting a plea bargain and choosing to proceed to trial. In that case, Aguiar faced a mandatory life sentence upon conviction.

In the case at bar, trial counsel's failure to tell Mr. Gaskin that he was subject to consecutive sentencing was the deficient performance. This is shown by a preponderance of the evidence because no where in the record does Thomas Randolph, the trial attorney, state that he told Mr. Gaskin that he was subject to consecutive sentencing, nor did he tell him that the likelihood was greater after trial than if he accepted the plea bargain. Neither in two identical

letters to Mr. Gaskin, nor in two post sentence affidavits (APP I; 64a-65a, APP J; 66a-67a), nor in sworn testimony did Randolph ever claim that he advised his client about the very real potential for consecutive sentencing after trial.

Jeron Gaskin testified that he chose to go to trial based on the advice and recommendation given to him by his trial attorney. Mr. Randolph told him that the plea offer was 17.5 years and that all he faced, if convicted after a trial, was twenty years. He also never advised him of the potential for consecutive sentencing. (APP L; 118a -119a; 135a -136a).

Mr. Randolph's experience concerning sentencing even in state court was very limited. He denied knowing that there is a presumption of concurrency in state court sentences. (APP K; 82a). But, the more experienced Mr. Chapman, who represented the co-defendant but also met with Mr. Gaskin, agreed that concurrent sentences were the presumption in state court, but not in federal court. (App K; 77a-78a). Mr. Gaskin's only previous experience as a defendant occurred in state court. (APP L; Pg 108a). So he would not have learned about consecutive sentencing from his experience there.

Mr. Gaskin also only had the benefit of an eighth grade education. (APP L; 107a).

Randolph admitted that he does not hold himself out as a criminal defense attorney. This was also fairly obvious from his website. (APP K; 81a-82a) He also admitted that he didn't know what a panel attorney was and that he had never attended a seminar on federal sentencing practice. (APP K; 81a-83a). Out of the 23 cases in which Mr. Randolph was listed as the attorney in federal court, only three were criminal. (APP K; 79a-80a). Chronologically, the third case was Mr. Gaskin's. Mr. Randolph's limited prior criminal experience supports Petitioner's claim that his attorney did not know that he faced consecutive sentencing.

Mr. Randolph testified that he had little recollection about what he did in this case. He had no recollection of sending the defendant any letters. He had no recollection of Petitioner standing up during the hearing on the motion to withdraw and questioning the government's

comment that he was facing 60 years in prison. (APP G; 54a-55a). Nor does he recall Mr. Gaskin confronting him about that "sixty years" comment. (App K; 84a-87a). He admitted that he never wrote a letter telling Mr. Gaskin about concurrent and consecutive sentencing. (App K; 101a).

In his 2013 affidavit, Randolph listed the advice he gave to the defendant concerning the sentencing consequences of pleading guilty or going to trial, but he never mentioned the potential for consecutive sentencing. (APP K; 88a-90a, APP I; 64a-65a). Likewise in his letters to Mr. Gaskin, transmitting the government's 17.5 year plea offer, he never mentioned consecutive sentencing if Petitioner did not plead guilty and was convicted after trial. The letters only mention that the advantage of pleading guilty is that "you have some idea of what you will receive." (APP K; 91a-92a).

Mr. Randolph testified that after the co-defendant agreed to testify against Mr. Gaskin, he thought it was in Petitioner's best interests to plead guilty. (APP K; 91a). And clearly he wanted him to plead guilty as demonstrated by the letters he sent to him. The surest way to get Mr. Gaskin, or any defendant, to plead guilty would be to advise them of the potential for consecutive sentencing after conviction at trial.

A reasonably competent attorney would know that the way to make the plea offer attractive was to tell him that he could get 60 years in prison after trial. If Mr. Randolph knew about consecutive sentencing, he would have written it in his letters or in his two affidavits. Mr. Randolph claims he told the petitioner that a 20-year sentence is better than life. (APP K; 99a). This is an interesting phrase since a "life" sentence is not authorized under the statute for the crime with which the Petitioner was charged. Nor was Gaskin ever offered 20 years, he was offered 17.5 years. So it is unclear why Mr. Randolph would have even made this comment, unless he believed the maximum possible sentence was twenty years. Further, the three judges Mr. Gaskin had appeared before and the three documents he retained in his cell informed him that the longest sentence was 20 years, not life.

The government's cross examination of trial counsel did little to clarify matters. It brought out that Mr. Randolph received a Rule 11 and different worksheets, some of which listed possible sentences greater than 240 months. (APP K; 93a-100a). The only problem with this evidence is that its shows the government's interaction with counsel, but does not enlighten us on Mr. Randolph's interaction with Mr. Gaskin. Mr. Randolph also had no evidence that he transmitted the Rule 11s or the worksheets to Mr. Gaskin nor did he have a memory of doing so. (APP K; 101a-103a).

After he received the worksheets with numbers running above 240 months, he only told Mr. Gaskin that he could receive a sentence of 20 years to life and that 15-20 years is better than a life sentence. He never told him that there was consecutive sentencing. (APP K; 98a-100a). Because Mr. Randolph had no idea that consecutive sentencing was part of sentencing practice in federal court, he had no clue why the worksheets contained numbers in excess of 240 months.

Further evidence that Mr. Randolph did not know about consecutive sentencing, is found in his 2017 Affidavit, where he states in averment #5:

> During discussions with Mr. Gaskin to persuade him to accept the Rule 11 agreement, I told him that 15-20 years is better than life, Mr. Gaskin again refused, intimating that (paraphrasing) 20 years is like a life sentence to him.

(APP K; 88a, APP J; 66a-67a). He does not contend in the affidavit that he advised him of the potential for consecutive sentencing after trial.

In that 2017 affidavit, which was signed in anticipation of the hearing conducted in the district court and four years after the events in question, the most Mr. Randolph would say was that he did not recall telling Mr. Gaskin that "the charges against him would result in concurrent, rather than consecutive sentencing, if he were found guilty on multiple charges." This statement is the smoking gun. In truth, nowhere in this whole record, is there an averment or testimony in which Mr. Randolph affirmatively states that he told Mr. Gaskin that he was facing consecutive

sentencing. (APP J; 66a).

Earlier, in 2013, a scant six months after the trial, Mr. Randolph, at Petitioner's repeated requests, signed the first affidavit. In that affidavit, he detailed his discussions with Mr. Gaskin concerning possible sentences. At the hearing, he testified that the affidavit was an accurate representation of what he advised Petitioner. Nowhere in this affidavit does he mention concurrent or consecutive sentencing. (APP K; 88a-90a)(APP I; 64a-65a).

Mr. Gaskin testified that he believed that the longest prison term he could receive on any count was twenty years. (APP L; 109a-112a, 114a-115a). His belief is supported by the three "Acknowledgment of the Indictment" forms and the three transcripts of the arraignments. (APP D; 28a , APP E; 36a, APP F; 42a). At each arraignment, Mr. Gaskin was assured, by a person in a black robe, that he was facing twenty years in prison. Magistrate Morgan came the closest to mentioning the possibility of non-concurrent sentencing. But her comment, "not that the sentences are necessarily concurrent," is confusing rather than elucidating. And Mr. Gaskin didn't understand it. (APP L; 134a). Her advice was followed by two more magistrates who never even mentioned concurrent or consecutive sentencing.

Mr. Gaskin kept the copies of the acknowledgment forms in his possession in his jail cell. They assured him that he was facing a maximum of twenty years. These forms do not mention either concurrent or consecutive sentencing, so they do not support the district court's conclusion that Petitioner knew he was facing consecutive sentencing.

Petitioner finds support for his position in the December 17, 2012 transcript. In arguing against releasing Mr. Randolph from his duty to represent Petitioner, the government referred to the fact that there was much left to do on the drug case because Mr. Gaskin was facing potentially 60 years in prison. At this mention of 60 years, Mr. Gaskin's physical reaction to "60 years" must have caught the eye of the Judge and the Judge allowed him to speak. And here Petitioner credibly tells the judge that he didn't understand about the 60 years part and that this

was his first time hearing this. When asked to comment, counsel took the equivalent of the Fifth Amendment. (APP G; 54a-56a).

After that court date, Mr. Randolph assured Petitioner that he would "fix it," so Petitioner let him stay on the case for the sentence. (APP L; 124a). After receiving this thirty-year sentence, Mr. Randolph, during phone conversations, continued to reassure Mr. Gaskin that he would help him with changing the sentence. (APP L; 125a). Mr. Gaskin continued to believe that counsel would "fix it" because Randolph sent him the documents for obtaining an attorney on the appeal in which "ineffective assistance of counsel" was listed as an issue. (APP L; 120a-127a).

Mr. Gaskin continued calling both Mr. Chapman and Mr. Randolph for help. This testimony was corroborated by phone records which were admitted into evidence at the hearing. (APP L; 128a-130a). He wrote letters to Mr. Randolph asking for him to sign an affidavit. This testimony was corroborated by two letters admitted into evidence at the hearing. (APP L; 128a-130a).

The government tried to show through the testimony of his first attorney, a panel attorney, that Mr. Gaskin must have known about consecutive sentencing. However, Ms. Stout testified that she had no independent recollection about their conversations or of telling him about consecutive sentencing. (APP K; 70a-72a, 73a). Further, the relationship between Stout and Gaskin broke down. Ms. Stout concluded that he did not trust her advice. (APP K; 72a, 76a).

Ms. Stout had a copy of one letter written to Mr. Gaskin in which she transmitted a copy of a Rule 11 containing a guideline range of 87-108 months. She had no proof that any letter sent him mentioned consecutive sentencing. (APP K; 76a).

Ms. Stout testified that it was her normal practice to discuss worst case scenarios with defendants. (APP K; 75a). But an attorney's standard practice to explain worst case scenarios, is

not determinative of the issue.

> . . . where the defendant swore that his attorney never explained the significance of the government's plea offer to him, his attorney had no indication in her file that she had properly advised him of the offer and could not recall having done so (though it was her customary practice to do so), and there was a substantial disparity between the penalty offered by the government and the penalty called for by the indictment, the defendant showed a reasonable probability that he would have pleaded guilty had he received proper advice.

Griffin v United States, 330 F3d 733, 737-738 (6th Cir. 2003). Any inference as to Mr. Gaskin's knowledge of sentencing consequences based on her advice and testimony would be purely speculative.

Moreover, Petitioner did not decide to go to trial based on Stout's advice.

Petitioner's rejection of the plea offer was based on the advice of Mr. Randolph. The advice was incompetent because Randolph lacked basic knowledge of the sentencing practices in federal court. Incompetent advice as to sentencing consequences constitutes a deficient performance. *Padilla, supra* at 365. So the deficient performance prong of *Strickland* was demonstrated. But the district court found Randolph believable because he was consistent. The problem is that he was consistent in failing to advise Mr. Gaskin about consecutive sentencing.

Randolph's lack of research into possible penalties means that a court does not have to defer to a strategic choice made on this issue. *Strickland, supra*. The district court, in fact, found that trial counsel did not understand "the importance of fully preparing to represent a client." (APP B; 9a-10a). It inferred that defense counsel knew his client faced consecutive sentencing because he told him that he could receive a sentence of more than 240 months. The district court gave no further explanation.

The Court also found that Randolph lacked experience in representing defendants in federal court. (APP B; 9a-10a). Lack of experience and lack of preparedness are hardly the hallmarks of counsel guaranteed by the Sixth Amendment.

Here, the erroneous advice was the failure to inform Mr. Gaskin that his sentences could run consecutively. The Sixth Circuit found that Randolph never testified that he told Petitioner that he faced up to 60 years in prison. Despite this failure, the Sixth Circuit found that the attorney's advice was sufficient. It found no error in the failure to tell petitioner that he was facing 60 years if the court chose to impose consecutive sentences. (App A; 4a).

The district court had no guide to refer to as to the specificity of information an attorney must impart to a client faced with making a decision to accept or reject a plea offer. Petitioner does not suggest that counsel must accurately predict the outcome of a plea, trial, or sentence. That would be absurd and one Circuit has already held that an inaccurate prediction of a sentence does not constitute a constitutionally deficient performance. *Washington*, 619 F3d at 1258-1259. But Petitioner does suggest that the information that is known with reasonable certainty must be imparted to a defendant who is trying to decide between accepting a plea bargain or proceeding to trial. The statutory maximum and minimum, any mandatory minimum sentence, and the potential for consecutive sentencing are all facts that are readily available to counsel, along with immigration and parole consequences. Counsel should also be required to explain the guidelines to the defendant including the scoring of variables relevant to his case.

This Court has yet to decide whether a defendant who chooses to forego a favorable plea bargain and proceed to trial must first be advised of the potential for consecutive sentencing after convictions at trial. Both the Third Circuit and the District of Columbia Circuit require defense counsel to be familiar with sentencing guidelines and the applicable law and to offer advice to the defendant that allows him to make an intelligent decision. The District Columbia Circuit requires a conclusive showing that the defendant was advised of the sentencing consequences. It refers to advice on the "worst case scenario."

The instant decision by the Sixth Circuit relieves counsel of the duty to accurately inform the defendant of the worst case scenario, of the sentencing consequences that may occur after

conviction at trial. It does not even require that counsel be familiar with guideline sentencing. Petitioner acknowledges that the Sixth Circuit has recognized that "in a system dominated by sentencing guidelines, we do not see how sentence exposure can be fully explained without completely exploring the ranges of penalties under likely guideline scoring scenarios . . .. " *Smith v United States*, 348 F3d 454, 553 (6th Cir.2003). But in this case, the panel of the Sixth Circuit did not feel bound by that statement.

In a justice system where 95% of the cases[1] are resolved through a plea, the Sixth Amendment protection must require more of defense counsel. It must require counsel to provide the defendant with sufficient and accurate information to make an intelligent decision on whether to plead guilty or not. This must also include the potential for consecutive sentencing after multiple convictions.

Accordingly, the Court should grant this petition for a writ of certiorari because if this opinion is allowed to stand, it will erode the accused's right to the effective assistance of counsel during plea negotiations and sentencing proceedings and will leave him to the "mercies of incompetent counsel." *Padilla*, 559 US at 374.

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1 *Padilla*, 559 US at 372.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: October 21, 2019

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERON GASKIN,

Petitioner,

v.

UNITED STATE OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Elizabeth L. Jacobs certifies that on October 21, 2019, as required by Supreme Court Rule 29, she served the enclosed

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
PETITION FOR A WRIT OF CERTIORARI
APPENDICES A-L

on counsel for the Respondent United States of America in the above proceeding by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first class postage prepaid for delivery within three calendar days. The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Also served in the same manner was:

Mark Chasteen
United States Attorney's Office
211 W. Fort St., Suite 2001
Detroit, MI 48226

Elizabeth L. Jacobs
Counsel of Record

I declare under the penalty of perjury that the foregoing is true and correct.
Executed on October 21, 2019.