

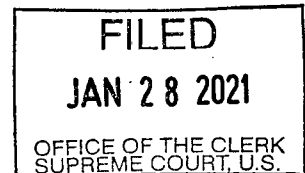
No. 20-1187

IN THE
SUPREME COURT OF THE UNITED STATES

LEON CARMICHAEL, SR.,
Petitioner,

- versus -

UNITED STATES OF AMERICA,
Respondent.



ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Question One: What additional objective and contemporaneous evidence is required to satisfy the prejudice test this Court articulated in *Missouri v. Frye* and *Laffer v. Cooper*, where a defendant, such as Carmichael, has proved (1) he was not told about pre-trial plea offer of 10-to-20 years; (2) he was not advised about his guidelines sentencing exposure; (3) he testified he would have accepted the pre-trial plea offer if his lawyers had properly advised him; (4) he repeatedly asked his lawyers to seek a pre-trial plea settlement; (5) he knew his attorneys were unprepared for trial and he had no viable defense; and (6) he received a sentence decades longer than the government's pre-trial plea offer?

Question Two: Did the Eleventh Circuit commit reversible error when it denied Carmichael's ineffective assistance of counsel claim without considering the totality of the evidence, "to include", where he was offered a post-trial plea offer that could have possibly limited his sentence to 20 years (but no guarantee of 20 years) that his lawyers advised him not to accept, however, Carmichael rejected his lawyer's advice and hired another lawyer to try to accept that plea offer, but the Eleventh Circuit misinterpreted this evidence and used purported hearing testimony as dispositive that does not exist in the record at all?

II. LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The caption of this case contains the name of all the parties.

* * *

III. RELATED CASES

- United States v. Carmichael, 2:03-cr-00259-001-MHT-WE-1, U.S. District Court for the Middle District of Alabama. Judgment entered Mar. 28, 2007. (Criminal Judgment).
- United States v. Carmichael, No. 07-11400-JV, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 29, 2009 (Direct Appeal)
- Carmichael v. United States, 558 U.S. 1128, 130 S.Ct. 1093 (Jan. 11, 2010)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Leon Carmichael, Sr. respectfully prays that this Court issue a writ of certiorari to review the judgment below.¹

VII. CITATIONS OF OPINIONS BELOW

- The July 22, 2020 opinion of the United States court of appeals affirming the denial of Carmichael's section 2255 motion appears at Appendix "A" to the petition and is reported at 966 F. 3d 1250 (11th Cir. 2020)
- The August 22, 2017 opinion of the United States district court denying Carmichael's section 2255 motion appears at Appendix "B" to the petition and is unpublished.
- The August 30, 2016 opinion of the United States court of appeals reversing the initial denial of Carmichael's section 2255 motion appears at Appendix "C" to the petition and is reported at 659 F. App'x 1013 (11th Cir. 2016)(unpublished).
- The June 5, 2014 opinion of the United States district court denying Carmichael's section 2255 motions appears at Appendix "D" to the petition and is unpublished.

1. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L. Ed. 2d 652 (1972) (This Court holds pro se pleadings "to less stringent standards than formal pleadings drafted by lawyer.")

- The April 22, 2014 opinion of the United States magistrate judge recommending the denial of Carmichael's section 2255 motion appears at Appendix "E" to the petition and is unpublished.
- The September 29, 2020 Order of the United States court of appeals denying rehearing appears at Appendix "F" to the petition and is unpublished.

* * *

VII. JURISDICTION STATEMENT

The judgment of the United States of Appeals for the Eleventh Circuit was entered on July 22, 2020. A timely petition for rehearing was denied by the United States Court of Appeals on September 29, 2020 and a copy of the order denying rehearing appears at Appendix "F."

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

* * *

VIII. CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature and cause of the accusation;... and to have the assistance of counsel for his defense."

28 U.S.C. § 2255 states in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence

was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct sentence."

* * *

IX. STATEMENT OF THE CASE

A. Carmichael's Underlying Conviction and Direct Appeal

The question presented for review involves a claim of ineffective assistance of counsel during the plea negotiation process. Leon Carmichael, Sr. is a federal prison serving a 480-month prison sentence. He was charged on August 17, 2004 in a third superseding indictment with a marijuana-distribution conspiracy and a money laundering conspiracy. On June 17, 2005 a jury convicted him of both charges. He appealed.

On May 29, 2009, the Eleventh Circuit affirmed Carmichael's convictions and sentence. *United States v. Carmichael*, 560 F.3d 1270 (11th Cir. 2009). His petition for rehearing was later denied. See, *United States v. Carmichael*, 347 F. App'x 556 (11th Cir. 2009). This Court denied his petition for writ of certiorari on January 11, 2010. See *Carmichael v. United States*, 558 U.S. 1128, 130 S.Ct. 1093 (2010).

B. Carmichael's Section 2255 Motion and the Eleventh Circuit's Remand Order.

On December 30, 2010, Carmichael moved under 28 U.S.C. § 2255 to vacate his convictions and sentence. He alleged, inter alia, that his attorneys provided him with constitutionally ineffective assistance during the plea negotiation stage. (Appendix "B" D.Ct. Order at 8). Carmichael asserted that, when he was deciding whether to plea guilty or risk a conviction at trial, his attorneys failed to: (1) explain the weight and extent of the Government's evidence; (2) advise him of the applicable guideline sentence if he was convicted; (3) follow his instructions to pursue plea negotiations; and (4) convey the Government's pre-trial plea offer. (Id. at 9-10).

On April 22, 2014, the magistrate judge entered a 104-page report recommending that Carmichael's section 2255 motion be denied without an evidentiary hearing. (Appendix "E"). About two months later, the district court adopted the magistrate judge's report and denied Carmichael's section 2255 motion. (Appendix "D"). However, on August 30, 2016, the Eleventh Circuit reversed the district court's denial of Carmichael's section 2255 motion. See Carmichael v. United States, 659 F. App'x 1013 (11th Cir. 2016). The Eleventh Circuit held that Carmichael had sufficiently pleaded deficient performance and prejudice to entitle him to an evidentiary hearing on his claim of ineffective assistance of counsel during the negotiation process. Id. at 1020-23.

C. The Evidentiary Hearing and Testimony

On February 21, 2017, the district court conducted an evidentiary hearing. (D.Ct. Order at 4). Carmichael testified on his own behalf and called two witnesses: his former attorneys Susan James and Marion Chartoff. (Id.). The government called three witnesses: AUSA Stephen Feaga, AUSA Louis Franklin, and AUSA A. Clark Morris. (Id.). The following summary of evidence is based on

that testimony.

Shortly after being charged in a third superseding indictment, Carmichael asked his lead attorney Stephen Glassroth to negotiate a plea settlement (D.Ct. Order at 10). Glassroth advised him that they should wait until discovery is completed to pursue a plea deal. However, before he could negotiate a plea deal, Glassroth withdrew from Carmichael's case. (Id.).

Colorado defense attorney Lisa Monet Wayne was then elevated to lead counsel. Carmichael also hired attorneys Susan James and Ronald Brunson to work with Wayne and Marion Chartoff. (D.Ct. Order at 6). The newly-informed defense team, however, was "a disaster," "dysfunctional" — "a rudderless ship" under Wayne's leadership. (Id.). Wayne did not focus on the case at all. (Id. at 8). She did not talk to the lawyers about trial strategies, evidentiary issues, or delegate assignments to other team members. (Id. at 7) Wayne and James refused to work together, and each complained to Chartoff about the other. (Id.).

This lack of cohesion and dysfunction lead to important omissions. For example, none of Carmichael's lawyers explained to him the implications of the Sentencing Guidelines before the trial (Id. at 9). Nor did the attorneys ask that the probation office prepare a preliminary assessment of the likely Guidelines range that would apply upon conviction. (Id.).

As they drew near, Carmichael expressed concern about the defense lack of preparation (Id. at 8). He asked Wayne to try to settle the case. (Id. at 10). She promised Carmichael that she would pursue a settlement when she came to Alabama for his upcoming criminal trial. (Id.). But Wayne did not arrive in Alabama until the weekend of trial. (Id.). She never pursued a plea settlement. (Id.).

AUSA Stephen Feaga, however, later attempted to negotiate an eleventh-hour plea deal. (Id. at 11). He and James discussed the possibility that Carmichael could receive a 20-year prison sentence if he merely pleaded guilty and provided "truthful information" to the Government. (Id. at 11-12). Feaga further

stated that the deal would offer Carmichael the chance to work "super cooperation" and forfeit his entertainment venue - "the Carmichael Center." (Id.). James never conveyed to Carmichael AUSA Feaga's informal plea offer. (Id. at 28).

Carmichael proceeded to trial. A jury found him guilty of both the marijuana-distribution and money laundering conspiracy. (Id. at 2). A few days later, Carmichael agreed to forfeit the Carmichael Center, his automobile, and 385 acres of land. (Id.).

Later that day, Carmichael and Susan James met with AUSA Feaga and AUSA Louis Franklin. (Id. at 13). James asked whether a plea agreement calling for a five-year sentence was still a possibility. (Id.). Feaga responded that "ten years or less is not going to happen." (Id.). Although no specific plea deal was offered during the meeting, Feaga did explain to Carmichael "what he needed to do if he wanted to enter into some kind of agreement with the limited states." (Id.).

James continued to talk with Feaga about the possibility of limiting Carmichael's sentence. She eventually arranged an one-on-one meeting between Feaga and Carmichael at the Elmore County Jail. (Id. at 15). Feaga wanted to discuss the possibility of Carmichael receiving a 20-year sentence recommendation if he cooperated with the government and waived his appellate rights. (Id.). But before the meeting took place, James advised Carmichael to reject the 20-year sentence - recommendation offer. (Id.). She explained that a 20-year sentence "was not a good deal and [that] she did not believe the judge would sentence him to over 20 years in any event." (Id.). So based upon James's advice, Carmichael did not timely accept Feaga's post-trial offer.

Shortly after the meeting with Feaga, Carmichael sought a second opinion from his attorney Marion Charoff and appellate attorney Jim Jenkins. (Id. at 16). Jenkins advised Carmichael to reject the 20-year post-trial offer. However, Charoff advised him to accept Feaga's proposal. (Id.). She told Carmichael that Jenkins might be

offer. The district court then consider whether this deficient performance prejudiced Carmichael. The district court concluded that it did not. The district court acknowledged that Carmichael's 40-year sentence was decades longer than the one offered. The district court further admitted that there was nothing in the record showing the plea offer would have been withdrawn or the sentencing court would have rejected it. Nevertheless, the district court found that Carmichael failed to prove that his attorneys' deficient conduct prejudiced him since he did not show he would have accepted the plea offer. Thus, the district court concluded Carmichael was not entitled to any relief.

D. The District Court's August 22, 2017 decision

conflicted by the large fee he was charging to handle the appeal. (Id.). Upon receiving that advice, Carmichael asked Charloff if she knew a lawyer who could negotiate with the Government. Charloff recommended Michael Ufferman. (Id.). Later Ufferman traveled to Alabama to speak with Feaga, but by then the Government had withdrawn the 20-year, post-trial offer. (Id.).

potential total sentence and the application of the sentencing guidelines; (2) seek a negotiated plea (as Carmichael requested); and (3) relay to him the plea offers that Feaga and James discussed." The Eleventh Circuit agreed. See *Carmichael v. United States*, 966 F.3d 1250, (11th Cir. 2020)(Appendix "A"). The Eleventh Circuit held that, although Carmichael's attorneys' performance was deficient, Carmichael could not show prejudice. *Id.*

First, the Eleventh Circuit concluded that Carmichael failed to show he could have satisfied the terms of the ten-year pre-trial plea deal. The court noted that Carmichael did not offer evidence showing he could have provided "super cooperation" as required by the terms of the deal. The court further noted that Carmichael's refusal to proffer after he was convicted contradicted his testimony that he would have accepted the ten-year pre-trial deal.

Second, the Eleventh Circuit held that, regarding the 20-year, noncooperation, pretrial deal, Carmichael's failure to show prejudice was stark. The court pointed out that, beside his own "conclusory and self-serving" post-conviction testimony, Carmichael did not offer any evidence indicating he would have accepted a 20-year sentence. Thus, the Eleventh Circuit concluded the district court did not error when it denied Carmichael's relief.

* * *

X. REASONS FOR GRANTING THE WRIT

A. The Court should grant certiorari to clarify what evidence is required to satisfy Frye and Lafler's three-part prejudice test.

This Court has held that a defense counsel has a duty under the Sixth Amendment to communicate plea offers to his client and to provide accurate advice on whether to accept

a plea offer. See *Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L. Ed. 2d 398 (2012). *Frye* and *Lafler* requires courts to decide whether a defense counsel's violation of this duty was the decisive factor in his client's decision to plea guilty or to proceed to trial. This Court has articulated a three-part test: A defendant must show a reasonable probability:

"(1) that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

Lafler, 566 U.S., at 164; *Frye*, 566 U.S. at 149-50.

What *Frye* and *Lafler* precisely require for a defendant to demonstrate prejudice is not exactly clear under current decisional law. The law is "murky" as to what quantum of evidence must be produced to satisfy *Lafler* and *Frye*'s prejudice test. *Anaya v. Lumpkin*, 976 F.3d 545 (5th Cir. 2020); *Merzbacher v. Shearin*, 706 F.3d 356, 366 (4th Cir. 2013) (noting circuit split). This Court has yet to resolve what, if anything, a defendant must show in addition to his own credible post hoc testimony to satisfy *Lafler* and *Frye*'s prejudice test. Carmichael's case presents the ideal opportunity to provide additional guidance in this area.

B. The Eleventh Circuit failed to consider the totality of the evidence.

The Eleventh Circuit's determination that Appellant Leon Carmichael was not prejudiced by his counsel's deficient performance was dependent on its view that Carmichael's post-trial conduct presents "strong indications" he would not have accepted the pre-trial offer. Slip Op. 28 (see Addendum). This was error in at least two respects. First, the Eleventh Circuit misapprehended

the record on Carmichael's post-trial conduct. Second, the Eleventh Circuit failed to examine the totality of the circumstances. With a proper understanding of both, the evidence shows Carmichael was prejudiced by never being given the chance to accept the government's pre-trial plea offer.

Carmichael, as the Eleventh Circuit recognized, was the victim of "[a]stounding" ineffective assistance of counsel. Slip Op. 13. His attorneys failed to advise him of his sentencing guidelines range, even though, as the district court acknowledged, awareness of one's guidelines range is "essential to a meaningful discussion about whether to enter a plea." (D.Ct. Order at 25). They failed to pursue plea deals even though Carmichael directed them to do so.

And they failed to advise him of a critical pre-trial plea offer, in which the government would recommend a twenty-year sentence with a chance to work it down to ten years.

All of this, the district court found — and the government does not dispute — constituted deficient performance. Ultimately,

the consequence for Carmichael was a forty-year prison sentence.

The sole question before the Eleventh Circuit was whether,

if Carmichael had been advised of his likely sentencing

guidelines range of thirty-years-to-life, there is a "probability

sufficient to undermine confidence" in the outcome, that he

would have accepted the pre-trial deal of ten-to-twenty years.

Slip Op. 17-18 (citation omitted). The evidence makes clear the

answer is yes. Carmichael's guidelines range — information his

attorneys never shared — was decades longer than the government's

pre-trial offer, which again his attorneys did not convey.

Meanwhile, Carmichael did know his defense team was "dysfunctional,"

"a team in name only," and completely unprepared for trial.

ID. 5-6. And he repeatedly attempted to have his counsel

negotiate a plea. All of this reinforces he would have accepted

the pre-trial deal if he had known about the deal and his

sentencing exposure.

The record also contains another, pointed demonstration of Carmichael's willingness to accept the pre-trial offer if only he had received competent counsel, though the Eleventh Circuit misapprehended these facts: Carmichael's conduct once he finally had some inkling he was likely facing a serious sentence. In a second and final post-trial meeting with prosecutor Feaga, Feaga raised the possibility of a twenty-year sentence and noted this would be shorter than what he risked without a plea. Feaga also made clear a ten-year option "was gone." What Carmichael did with that information is telling: He consulted his attorneys, rejected the advice of his senior lawyers to turn down the offer, and instead attempted to negotiate that plea. This contemporaneous evidence showing what Carmichael actually did when he had even a notion of his sentencing vulnerability is strong evidence he would have accepted the even more favorable pre-trial deal.

The Eleventh Circuit's opinion mischaracterizes the record on Carmichael's post-trial conduct, including findings by the district court. The opinion states Carmichael, even after Feaga "apprised" him of the "serious sentence he was facing," "rejected" a twenty-year plea offer, had "second thoughts" but "stayed the course," and only months later had "third thoughts." Slip Op. 28-29. But neither the district court's findings nor the record support this. Rather than reject such an offer, the district court found — and the evidence showed — that Carmichael attempted to circumvent his senior lawyers' advice and hired a new attorney to negotiate a plea. The Eleventh Circuit's opinion also fails — as the district court did — to analyze the totality of the circumstances in determining whether Carmichael might have accepted the plea offer. The Eleventh Circuit recognized the district court's

The remaining question is whether Carmichael was prejudiced by these failures. As relevant here, the question is whether, under the "totality of the circumstances," Strickland v. Washington, 466 U.S. 668 (1984), there was a reasonable probability that Carmichael would have accepted the government's

offer. Slip Op. 14, which is antithetical to a "totality" analysis. Yet the Eleventh Circuit proceeded to do the same. Id. at 14 n. 7. The improper bifurcation cleared off evidence showing Carmichael's willingness to plead, such as his knowledge of the futility of his trial, and erroneously amplified the Eleventh Circuit's (already erroneous) understanding of Carmichael's post-trial conduct. Id. at 28-30. With the errors in the opinion unwound, the record is clear that Carmichael proved at least a "reasonable probability" he would have accepted the pre-trial plea offer. To prevail on his claim for ineffective assistance of counsel, Carmichael must establish that his counsel was ineffective and that this ineffective assistance prejudiced him. Slip Op. 16. As the Eleventh Circuit recognized, the evidence proved his counsel was remarkably ineffective, on three fronts. First, counsel "failed to advise Carmichael how the guidelines would apply in his case" and he had "no idea what his guideline score would be." Id. at 12-13 (citation omitted). Second, counsel was ineffective because they "failed to attempt to negotiate a plea agreement despite Carmichael specially directing them to do so." Id. at 13. Third, counsel failed to "communicate" the government's pre-trial plea offer for a twenty-year sentence recommendation, with the possibility to work it down to ten years if Carmichael could provide "super cooperation." Id. at 14 and n. 7. Carmichael's counsel was "dysfunctional," a "disaster," and a "team in name only." Id. at 5-6.

pre-trial plea offer, but for his counsel's errors, *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Only a "probability sufficient to undermine confidence in the outcome" is required, not "more likely than not." *Strickland*, 466 U.S. at 693-94.

The totality of the evidence establishes a reasonable probability that Carmichael would have accepted the government's pre-trial plea offer. The total picture here shows Carmichael's willingness to plead. Of course, Carmichael testified that he would have accepted the government's offer, but the evidence goes much further, contrary to the Eleventh Circuit's opinion. Slip Op. 28.

At the most basic level, Carmichael repeatedly asked his lawyers to seek a plea deal, which makes sense only if he were open to one. D. Ct. Order 25-26; Appellant's Br. 21. Indeed, Carmichael's attorney, Susan James, testified she thought he would accept a five-year deal, even though she had never explained to him that his Guidelines range would likely be thirty-years-to-life (or higher). See Hearing 67. Because Carmichael was open to a five-year deal with no information as to the severity of the Guidelines range, there is every reason to believe he would consider a longer sentence when informed of his crushing sentencing vulnerability. Similarly, after trial, he voluntarily forfeited substantial property, again showing his willingness to settle his case. D. Ct. Order 13.

Moreover, Carmichael was well aware his defense was in complete disarray, such that his chance of acquittal was essentially non-existent. His "case proceeded to trial with a team of lawyers who were unprepared, did not coordinate with one another, and had no cohesive theory of defense." D. Ct. Order 8; Hearing 23 (Carmichael's attorney testified he was "worried and upset" because he could "see what was going on"). "Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). That is especially true where, as explained below, Carmichael could not "understand"

the "consequences" of a pleading decision because he had not been properly informed — and his attorneys never properly informed him. *Id.* at 1967 n.3.

Most important, the difference between his Guidelines range (thirty-years-to-life) and the government's pre-trial offer (ten-to-twenty-years) is strong evidence of the likelihood he would accept that offer. "A great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines and the sentence exposure represented by defendant's attorney provides sufficient objective evidence to establish a reasonable probability that the outcome of the proceedings would differ." *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998). And that makes sense, because the Guidelines are "the starting point for every sentencing calculation in the federal system." *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018). The Guidelines have a "central role in sentencing"; rarely do courts depart from the Guidelines range without a government motion. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-46 (2016).

Thus, knowledge that his Guidelines range was decades longer than a potential plea offer would be "essential" to Carmichael's decision whether to accept such a deal. D. Ct. Order 25. "To conclude that this information would have had no impact on his decision-making process would undercut the very point that effective assistance during plea bargaining 'includes the right to be informed by counsel as to the range of penalties under the applicable guidelines.'" *Sawaf v. United States*, 570 F. App'x 544, 548-49 (6th Cir. 2014).

Despite its importance, Carmichael's counsel "never" explained anything about his Guidelines range at all. D. Ct. Order 24-25. If they had, the huge disparity alone is sufficient reason to believe Carmichael's was likely to take a favorable government offer.

On top of that, when Carmichael did learn his sentence would likely exceed twenty years, he tried to negotiate a plea deal less favorable than the pre-trial offer — thus proving the commonsense point that knowledge of his sentencing vulnerability was essential to his determination of whether to plead. As the Eleventh Circuit notes, prosecutor Feaga met with Carmichael in a second and final post-trial meeting to talk about Carmichael pleading and giving up his appeal rights. Slip Op. 9-10. In that conversation (with no counsel present), Feaga informed Carmichael that his likely sentence was much higher than twenty years, and he suggested Carmichael accept a deal that he might be able to "work" down to twenty years. D. Ct. Order 15, 29. Carmichael's senior attorneys (James and Jenkins), before and after this meeting, told him not to take such a deal. Id. at 15-16, 29. But Carmichael rejected their advice and, with assistance of junior attorney Chartoff — who advised him after the meeting to take the deal — he tried to pursue the plea with the government. Id. at 15-16. Thus, the contemporaneous evidence shows that once Carmichael was even minimally aware of his situation, he was willing to plead — and to a deal less favorable than the pre-trial offer.

In other words, upon having the slightest notice that his sentencing range was likely to exceed twenty years — and recall, his attorneys had still not advised him about his Guidelines range — Carmichael rejected his own senior attorneys' advice and tried to negotiate a plea deal that was less favorable than the government's pre-trial offer. The disparity in Guidelines range alone is strong evidence that Carmichael would have accepted the pre-trial offer, *Gordon*, 156 F. 3d at 381, but Carmichael's contemporaneous actions are further strong evidence he would have done so.

The Eleventh Circuit's opinion mischaracterizes Carmichael's one-on-one meeting with prosecutor Feaga and key facts thereafter. The Eleventh Circuit's opinion states that Carmichael "decided to reject" the twenty-year proposal, then "may have had

second thoughts" and met with his attorneys, two of whom "confirmed" Carmichael's decision, and then after "waiting over two months" had "third thoughts," and "only then did he ask" his junior lawyer, who had previously advised him "to accept" the plea, to help him to accept it. Slip Op. 28-29. In important respects, this is not what the district court found or what the testimony shows.

As to his attorneys' advice, the record shows that, "before the meeting" with Feaga took place, James advised Carmichael not to take "a twenty-year sentence"—still without explaining his Guidelines range. D. Ct. Order 15 (emphasis added). As the district court found, "given Carmichael's age and her own experience with the sentencing judge," James expected Carmichael to get a better sentence from the judge, which of course would retain Carmichael's right to appeal his conviction and sentence in contrast to a deal with the government and would not have depended on satisfying the government with sufficient cooperation. D. Ct. Order 29.

Moreover, Feaga's testimony refutes any notion Carmichael was unwilling to plead. Feaga testified Carmichael began the meeting by "wanting to revisit the ten-year" pre-trial deal he had since learned about, with Feaga responding he "can certainly let folks know you're interested in pursuing it," and even if that offer was gone, he could "tell them that you want to cooperate now." Hearing 173-75. The Eleventh Circuit's opinion, however, considered only Carmichael's statement he would "take his chances on appeal." Slip Op. 28, see Hearing 176. But there is no finding by the district court in that regard; the government did not rely on that statement in its appeal brief; and that lone statement, in context, is not indicative of a refusal to plead. Carmichael had just learned (from a prosecuting attorney) that his likely sentence was decades longer than his own attorneys had ever explained; he had also been advised, ahead of time, not to accept a twenty-year deal; and he was alone, uncounseled.

The statement is also far outweighed if not rendered meaningless by what Carmichael did after the meeting: He pursued the deal. And while the district court noted Carmichael did "not timely accept" Feaga's offer, Slip Op. 31, the Court's further characterization as Carmichael having "rejected" the offer, *id.* at 28, is unsupported. Instead, as the district court stated, with the information in hand from that meeting, Carmichael consulted his lawyers; James and Jenkins "advised against it." D.Ct. Order 24. Carmichael proceeded to ask junior attorney Chartoff her view, and when she "suggested that Carmichael consider the twenty-year offer," he followed that advice: "Carmichael asked her if she knew a lawyer who negotiate with the Government," and they hired a lawyer to negotiate a deal despite the advice of Carmichael's senior attorneys and his pending appeal. D.Ct. Order 16.

Finally, while the Eleventh Circuit suggested that two months transpired between Carmichael consulting Chartoff and making any "effort to accept or discuss the offer," Slip Op. 29, no evidence supports this. To the contrary, as the district court recounted, "upon receiving" Chartoff's advice, Carmichael pursued representation for negotiating a plea. D.Ct. Order 16 (emphasis added). Nothing suggests Carmichael waited any time at all after the meeting with Feaga to speak with his counsel, including Chartoff, nor to take steps to negotiate the plea. (1) Notably, Carmichael was attempting to hire a new attorney while incarcerated and without his other attorneys knowing, which likely explains why it took two months. Hearing 127. The Eleventh Circuit's misapprehension of these facts likewise misinformed its unsupported view that Carmichael was willing to plead only when he purportedly had belated "second" or "third thoughts." *Id.*

In short, for purposes of understanding whether there is a reasonable probability Carmichael would have accepted the pre-trial offer, the salient point from his post-trial conduct is this: When minimally advised of the disparity between a

possible plea deal and his likely sentence, Carmichael tried to negotiate a plea that was significantly worse than the pre-trial offer he was never informed about, and he tried to do so against the advice of his senior attorneys. This is more than sufficient to "undermine confidence" in the outcome. Slip Op. 17.

One of Carmichael's principal arguments was that the district court failed to examine the "totality" of the circumstances. Slip Op. 31; Unfortunately, the Eleventh Circuit's opinion repeats this error. This isolated analysis led the court to ignore the paucity of relevant evidence discussed above and to mistake largely irrelevant evidence as dispositive.

As an initial matter, the Eleventh Circuit recognized that "the correct characterization" is that the pre-trial offer was a single offer and recognized that the district court erred in treating the government's pre-trial offer as two separate offers. Slip Op. 14 n.7. The Eleventh Circuit nevertheless treated it as two separate offers, thereby failing to take into account the totality of the circumstances. Slip Op. 14 n.7. The question is not whether Carmichael would have accepted a ten-year deal or a twenty-year deal in isolation; it is whether he would have accepted the deal the government actually proposed, a twenty-year deal with the chance to reduce it as low as ten years. And that distinction matters, as Carmichael is more likely to have accepted the offer precisely because it provided not only a cap at twenty years but also a chance at reducing the sentence to ten years with "super cooperation." Whether Carmichael would ultimately have been able to work his sentence down to ten years is not as probative as the fact that the possibility of such further reduction even if it is just down to 18 or 15 years makes Carmichael more likely to have accepted the government's offer.

The Eleventh Circuit's opinion illustrates the problem with bifurcating the analysis. In discussing the purportedly standalone ten-year offer, the opinion states there are many unknowns as

to whether Carmichael could have provided "super cooperation," and that Carmichael failed to present evidence he could have provided such cooperation. Id. at 26-27, 32. So the Eleventh Circuit held there was insufficient evidence that Carmichael would or could have accepted a ten-year deal. Contrary to the Eleventh Circuit's opinion, there was evidence Carmichael could have provided "super cooperation." (2) The Eleventh Circuit's points only to Carmichael's testimony about a police lieutenant, Slip Dp. 21, but there was also, inter alia, Feaga's testimony that his office was interested in learning the source of Carmichael's drug supply, Hearing 175; the fact that Carmichael was charged as an organizer/leader; and the government's repeated efforts to obtain a deal, showing the government believed he had important information. But even if this was largely unknown, it does not detract from the point that the chance at a ten-year sentence makes the ten-to-twenty-year plea offer more attractive, a point that is lost when analyzing the offers separately.

The Eleventh Circuit's also heavily relied on its view that Carmichael supposedly "did not want to 'proffer'" without a "guaranteed sentence," "based on what the panel calls a 'crystal clear' finding by the district court that Carmichael purportedly 'rejected' a 'twenty-year' 'offer' supposedly raised by prosecutor Franklin immediately after trial. Id. at 22-23, 30 n. 14. But all of this is wrong. At that meeting, Franklin and Feaga merely explained "what Carmichael needed to do if he wanted to enter into some kind of agreement." Hearing 203-04. Whether characterized as an "offer" or not, discussions of "sense" of deal—without the government offering even a starting point in terms of the length of sentence the "offer" might include—is not an "offer" preclusive of Carmichael's willingness to plead. The testimony itself makes clear that neither Franklin nor anyone else at that meeting made any mention of a specific plea offer. Hearing 180-81; 203-04. (3) Likewise, Carmichael could

not have "refused to proffer... pre-trial," either, Slip Op. II, as he was never made aware of any plea negotiations before trial. Franklin and Feaga did not testify otherwise, nor did the district court so find. And while the district court's opinion references "twenty years," id. 24, there is no record support for that, and the district court's ultimate finding was simply that "Carmichael rejected the Government's offer to enter into an agreement limiting his sentence." Id.; Gov't Br. 14, 20-21. The Eleventh Circuit's mis- understanding of a "rejection" of a specific twenty-year deal at that meeting runs throughout its analysis. (4) The Eleventh Circuit's opinion states that Carmichael's counsel conceded the district court's findings. Slip Op. 32 n. 15. That is incorrect — counsel represented only that the "vast majority" were "fine." Oral Argument 6:58. To the extent the district court "found" there was a specific offer made at the post-verdict meeting with Franklin, it clearly erred. Slip Op. 22-23, 30 n. 14.

And even assuming this counterfactual that Carmichael "rejected" a specific twenty-year offer, the episode is still meaningless. During that meeting, he had no idea what his sentencing risk was, due to his counsel's deficient performance, so Carmichael could not make an informed decision even if the government had made a specific offer. This episode thus cannot speak to what Carmichael would have done, pre-trial, had he known of his Guidelines range and known of a twenty-year offer with a chance at ten years — which was decades better than his Guidelines range. When even minimally informed, Carmichael tried to accept an offer Feaga had specifically made clear was dependant on a proffer and cooperation. Having

175.

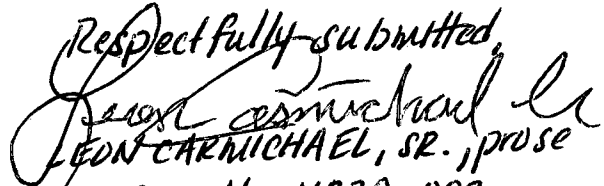
As Carmichael argued, he could not make an "informed decision" whether to accept a plea without knowing his Guidelines. Appellant's Br. 42. "An attorney who underestimates his clients

sentencing exposure . . . does not provide his client with the information needed to make an informed decision about accepting a plea offer or going to trial." *Byrd v. United States*, No. 5:11-CR-404, 2017 WL 3605333, at *4 (N.D. Ala. Aug. 22, 2017) (citing *United States v. Herrera*, 412 F.3d 577, 581 (5th Cir. 2005)). Indeed, the Eleventh Circuit explication of the "basic" mechanics of plea bargaining, Slip Op. 27, proves the point: Carmichael's attorneys never advised him about this "basic" process. Carmichael was, essentially, without counsel during the "critical" plea bargaining stage, *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (citation omitted), as his attorneys explained nothing about the process to him, see D.Ct. Order 25. *Osley v. United States*, 751 F.3d 1214 (11th Cir. 2014), which the Eleventh Circuit cites (Slip Op. 22), is inapposite. *Osley* found no prejudice because that defendant turned down a plea "knowing" he "risked at least doubling his time in prison if convicted." 751 F.3d at 1224 (emphasis added). But the inverse happened here: Carmichael had no idea he was risking a far greater sentence without pleading, and in fact, he did not know as much even after trial. (5) The Eleventh Circuit indicates Carmichael's assertions of innocence "partially undercut" his claims, Slip Op. 27 n.12, but the district court did not rely on this, and with good reason. "Defendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government." *Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003).

Respectfully, had the Eleventh Circuit appropriately analyzed the totality of the evidence, its reasons for affirmance would not suffice. The significant evidence of his willingness to plead establishes at least a "reasonable probability" he would have done so.

XI. CONCLUSION

The petition for a writ of certiorari should be granted.

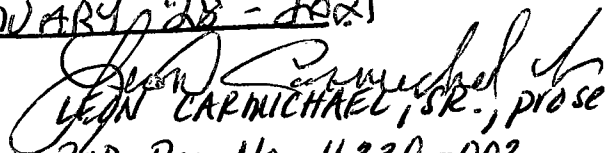
Respectfully submitted,

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* * *

XII. CERTIFICATE OF SERVICE

I, Leon Carmichael, Sr., hereby certify under the penalty of perjury, 28 U.S.C. § 1746, that a true and correct copy of the foregoing "Petition for Writ of Certiorari" was deposited in the prison's legal mailing system addressed to: Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. I further attest that first-class postage has been prepaid.

Executed on this JANUARY 28 - 2021


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