No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD OLIVE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. What do *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), require of a defendant to demonstrate prejudice resulting from counsel's failure to properly advise the defendant of a pretrial plea offer?

2. Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that he was prejudiced as a result of his counsel's failure to properly advise him regarding the Government's pretrial plea offer.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, RICHARD OLIVE, requests the Court to issue a writ of certiorari to review the judgment/order of the Sixth Circuit Court of Appeals entered in this case on July 2, 2020. (A-3).[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Sixth Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

In 2012, the Petitioner was charged with mail fraud (counts 1-3), wire fraud (counts 4-7), and money laundering (counts 8-9). The case proceeded to a jury trial in 2013, and at the conclusion of the trial, the jury returned a verdict finding the Petitioner guilty as charged. The district court (the Honorable Kevin Sharp) sentenced the Petitioner to 372 months' imprisonment. On direct appeal, the Sixth Circuit Court of Appeals affirmed the convictions and sentence. *See United States v. Olive*, 804 F.3d 747 (6th Cir. 2015).

Thereafter, the Petitioner timely filed a motion pursuant to § 2255. (A-11). The Petitioner raised two claims in the § 2255 motion – one of which is relevant to the instant petition: defense counsel rendered ineffective assistance of counsel by failing to properly advise him regarding the Government's pre-trial plea offer. On June 6, 2018, the district court ordered an evidentiary hearing on this § 2255 claim. An evidentiary hearing was held on June 24, 2019. At the conclusion of the evidentiary hearing, the district court orally denied the first § 2255 claim, and the district court subsequently entered a written order incorporating its oral findings and denying a certificate of appealability. (A-8).

The Petitioner thereafter filed an application for a certificate of appealability in the Sixth Circuit Court of Appeals. On July 2, 2020, a single circuit judge denied a certificate of appealability on the Petitioner's § 2255 claim. (A-3). The circuit judge agreed that the Petitioner's trial counsel "acted unreasonably in failing to inform Olive that he faced the possibility of consecutive sentences" (A-4), but the circuit court

concluded that the Petitioner "has failed to make a substantial showing of prejudice." (A-4).

2. Statement of the facts (i.e., the testimony from the June 24, 2019, evidentiary hearing).

David Komisar. Mr. Komisar, a criminal defense attorney in Nashville, testified that he has practiced "fairly frequently" in the Middle District of Tennessee since 1991 and he said that he has been a member of the Criminal Justice Act panel since 1993. (A-109). Mr. Komisar stated that during his career, he has been involved in approximately fifty cases where the Government and the defense reached a plea agreement for a particular sentence (i.e., a "type C" plea agreement), and Mr. Komisar said he has never had a federal judge reject one of his "type C" plea agreements. (A-110). Mr. Komisar testified that Judge Kevin Sharp was only on the federal bench for a short period of time, but he said he previously had a "type C" plea agreement accepted by Judge Sharp. (A-111). Mr. Komisar stated that historically in the Middle District of Tennessee, district court judges accepted "type C" plea agreements. (A-111) ("[H]istorically a court would look at it, well, if the government and the defendant have come to this agreement, there's – there's not a whole lot for me to – to quibble with."). Mr. Komisar testified that in cases involving "type C" plea agreements, a judge learns far less about the underlying facts of the case as compared to cases that proceed to trial:

> [P]robation, when they knew that it was a C plea, it would be – the presentence report wouldn't be quite as thorough as it would be.
>
> And quite frankly, it would be designed to – to correspond with

> that C plea agreement. Because, again, everybody's in agreement to it. Facts that would be contained in a presentence report post trial and incorporated into a presentence report will look a whole lot different than a presentence report where you're only dealing with a couple of counts of conviction pursuant to the plea. It will be quite different.

(A-112-113). Mr. Komisar added that for cases that proceed to trial, the additional facts that appear in a post-trial presentence investigation report are usually to the defendant's detriment. (A-113). Mr. Komisar stated that during the time that Judge Sharp was on the bench, it would be "very rare" for a judge in the Middle District of Tennessee to reject a "type C" plea agreement":

> [I]t would be a very rare – very rare circumstance in which a C plea would be rejected. It would almost take a manifest injustice for it to take effect.

(A-114).

Nathan Kyle Bailey. Mr. Bailey, the Petitioner's son-in-law, stated in 2012, he and the Petitioner discussed the plea offer that had been extended by the Government. (A-122). Mr. Bailey testified that during that time, the Petitioner was "very much distraught" and "[a]n emotional wreck" when trying to decide whether to accept the Government's plea offer. (A-123-124).

Susan Olive. Mrs. Olive, the Petitioner's wife, testified that during the time her husband was considering whether to accept the Government's plea offer, she heard her husband's attorney (James Edward Nesland) tell her husband that the maximum sentence he could receive if he proceeded to trial and lost was 20 years. (A-130-135. Mrs. Olive stated that her husband's decision to either accept or reject the

Government's plea offer was "very difficult." (A-136).

The Petitioner. The Petitioner stated that in October of 2012, the Government extended a 9-year plea offer to him. (A-160). The Petitioner testified when his attorney (James Edward Nesland) told him about the plea offer, Mr. Nesland said that the Government indicated that he "could face 30 years in prison" – but he said that Mr. Nesland then told him "I believe that she's [i.e., the prosecutor] wrong" and that he would "update the sentencing memorandum." (A-161). The Petitioner stated that Mr. Nesland conducted his update and then provided him with a new sentencing memorandum, and the Petitioner said that Mr. Nesland affirmatively told him that the Government's 30-year guideline calculation "was wrong." (A-162). The Petitioner testified that he ultimately decided to reject the Government's plea offer based on Mr. Nesland's advice that the Government's 30-year sentencing guideline calculation was wrong. (A-166). The Petitioner stated that he and his wife spent approximately one week discussing whether he should accept the Government's 9-year plea offer or proceed to trial, and the Petitioner said that the last email he received from Mr. Nesland said:

> 17 to 20 years. He's telling me right here in writing.

(A-182). The actual October 23, 2012, email that the Petitioner received from Mr. Nesland was introduced as Plaintiff's Exhibit 1(e) during the June 24, 2019, evidentiary hearing, and the email states:

> You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, *will*

result in a sentence in the range of 17 to 20 years.

(Emphasis added). The Petitioner said that after weighing the benefit of the plea offer and the risk of going to trial and losing and possibly getting up to 20 years in prison, he decided to reject the plea offer and pursue a trial. (A-182). The Petitioner testified that he understood Mr. Nesland's email to mean that the "worst case scenario" in his case was that if he went to trial and lost, he maximum sentence he could receive was 20 years in prison. (A-183).

The Petitioner stated that in 2012, he was 47 years old, and he said that the farthest he advanced in school was high school. (A-187-188). The Petitioner testified that had Mr. Nesland correctly told him that his maximum exposure was either 31 years' imprisonment or 160 years' imprisonment, he would accepted the Government's 9-year plea offer:

> Q. And just so – I think you may have implied this, but just so you state it, if you had known what the judge has been asking you, that Mr. Nesland was wrong and Mr. Nesland's advice to you was not accurate, and you – you could receive 30 years, a maximum of 160 years, and those sentences by law had to be consecutive, would you have accepted the plea of nine years?
>
> A. Yes, I would. I never knew that there could be a consecutive sentence. There was never a discussion of 160 years. There was never a discussion of spending my life in prison. There was never a discussion of me receiving 30 years, because when the 30 years came up in the plea, Mr. Nesland told me, "Richard, she's wrong."

(A-188). The Petitioner further stated:

> My breakoff was 20 years.
>
> So I guess, Your Honor, that leads me back to your question. I would have had to admit that I had intent to break the law because I am not going to trial – the – the exposure of spending my the rest of my life

in prison, I'm not going to trial for that because that was never presented to me that that was a possibility.

The judge at my sentencing said, "I don't believe you deserve to die in prison." I never knew that was an option. I didn't know there was an option for me to pass away in prison.

(A-191-192). At the conclusion of his testimony, the Petitioner added:

Q. How old were you – you say you were 47 –

A. Forty-seven.

Q. – in October of 2012?

If you got a – received a nine-year sentence relative to the plea, you would have been – what? – 56, minus good time, when you got out?

A. Right.

Q. If you went to trial and you were found guilty and you received the 20 years that you discussed with Mr. Nesland, you would be how old?

A. Well, are you talking about with good time taken off?

Q. Yeah.

A. Hmm? I mean , because I was 47, so that's 67, but with good time I would have been 62 years old.

Q. So you – you would have had some life left?

A. Absolutely.

Q. If you were correctly informed about your exposure and you – that you could get a 30-year sentence, how old would you be when you were released on that sentence?

A. If I – I'm sorry? I didn't understand your question.

Q. Well, you – you're serving a sentence now?

A. Right.

Q. Thirty – over 30 years, correct?

A. Thirty-one years.

Q. And you will be how old?

A. Seventy-nine.

Q. And did – did that cal – if you had been informed about that calculation, you said you relied on the time.

A. I would have accepted the plea.

(A-227-228).

Joseph Scott Key. Mr. Key, a criminal defense lawyer and an adjunct professor of law at Mercer University College of Law, testified that when a lawyer advises a defendant about a plea offer, it is critical that the lawyer ensure that the defendant understands the maximum exposure he faces should he reject the plea and proceed to trial. (A-238). Mr. Key stated the following about things that defendants consider when considering whether to accept a plea offer:

> Very often, even if there is a – only a minuscule chance that the client will be acquitted, clients calculate those odds and they calculate those odds on the basis of all sorts of things: Children's age, their potential age, and what type of – or quality of life or how many years they may have when they get released.
>
> So, very often, even in a case where there's a low possibility of an acquittal, clients will factor that among the range of possible years they would face in the event of a loss at trial.
>
> I think clients always want to know what is the worst that could possibly happen to them and the best that could possibly happen to them, and they – they calculate those things in ways that I wouldn't, but it's their right to calculate those odds that way.

(A-238-239). Mr. Key opined that defendants facing a longer possible prison exposure are more likely to accept a plea offer rather than risk losing at trial. (A-239). Mr. Key testified that it would *not* be within the acceptable standard of care for an attorney to

tell a client a maximum exposure number that is less than the actual maximum that applies in the case. (A-240). Mr. Key stated that it is common – when a defendant is first charged in a criminal case – for the defendant to believe that he is innocent and/or to be ignorant of the fact that he may be guilty. (A-240).

James Edward Nesland. Mr. Nesland, the Petitioner's trial attorney, testified that during his pretrial discussions with the Petitioner, he informed the Petitioner of the United States Sentencing Guidelines and he told the Petitioner that the judge was not bound by the sentencing guidelines – "[b]ut that it was more often the case that the Court stayed within the sentencing guidelines." (A-250). Mr. Nesland stated that the Petitioner "didn't want to do a plea." (A-252). Mr. Nesland testified that he informed the Petitioner that he believed that the Government had "overwhelming evidence" (A-254), but he said that the Petitioner indicated "I think we can win." (A-263). Mr. Nesland stated that the Petitioner's belief that he could win was based on the Petitioner's confidence in his own testimony at trial (A-268-269), but Mr. Nesland conceded that he did not have a "prep" session relating to the Petitioner's testimony until January of 2013 – *after* the October 2012 9-year plea offer had expired. (A-267).

On cross-examination, Mr. Nesland conceded that he *never* advised the Petitioner that he could receive 31 years' imprisonment or 160 years' imprisonment and therefore he does not know whether the Petitioner would have accepted the Government's 9-year plea offer had he been correctly advised regarding the maximum exposure:

> Q. And Number 6, paragraph 6, it is true, as you said in this

declaration, that you did not advise Mr. Olive that he could receive 31 or 160 years?

A. I certainly did not.

Q. And it's also true that you did not advise Mr. Olive that the sentences could be run consecutively?

A. No, I did not.

Q. And it's also true that the government's plea offer or your consultant did not make such a determination?

A. Nobody made that determination. I think maybe the probation office did later. But nobody did –

Q. So, therefore –

A. The government was at 40.

Q. So isn't it also true, then, that you don't know what Mr. Olive's decision about a plea offer would have been if you had told him that you're looking at a nine-year offer versus a 160-year exposure? Is that fair to say?

A. Absolutely not [i.e., he does not know what Mr. Olive's decision about the plea offer would have been had he been correctly advised]. *I don't know what he would have thought.*

(A-273-274).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

The first question presented in this case is as follows:

> What do *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), require of a defendant to demonstrate prejudice resulting from counsel's failure to properly advise the defendant of a pretrial plea offer?

The Petitioner requests the Court to grant his certiorari petition and thereafter consider this important question. As explained by the Fourth Circuit Court of Appeals, guidance is needed from this Court because "[w]hat exactly *Frye* and *Lafler* require of a petitioner to demonstrate prejudice is not clear at this time." *Merzbacher v. Shearin*, 706 F.3d 356, 366 (4th Cir. 2013).

In his § 2255 motion, the Petitioner alleged that defense counsel rendered ineffective assistance of counsel by failing to properly advise him regarding the Government's pre-trial plea offer. As a result, the Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the Constitution.

The record establishes that on October 15, 2012, the Government extended a plea offer of 9 years' imprisonment. The plea offer expired on October 24, 2012. As demonstrated by the testimony presented during the June 24, 2019, evidentiary hearing, after the plea offer was extended, defense counsel and the Petitioner discussed the plea offer and the "pros" and "cons" of accepting the plea offer versus proceeding to trial. Both the Petitioner and defense counsel agreed that defense counsel told the Petitioner that the Government opined that if the Petitioner proceeded to trial and lost,

his sentencing range would be 292-365 months' imprisonment. However, the record is unrefuted that defense counsel told the Petitioner that the Government's calculation was incorrect and that the actual sentencing range would be 17-20 years' imprisonment. Most notably, in an October 23, 2012, email sent from defense counsel to the Petitioner (A-27) – which was the last written communication that defense counsel had with the Petitioner before the plea offer expired – defense counsel stated the following to the Petitioner:

> You know from the sentencing memorandum I provided to you and our discussions that the applicable sentencing guidelines, if followed, *will result* in a sentence in the range of 17 to 20 years.

(Emphasis added). Based on defense counsel's representation that application of sentencing guidelines in this case "will result" in a sentence in the range of 17 to 20 years, the Petitioner rejected the Government's 9-year plea offer (because, in the Petitioner's mind – and given the Petitioner's age – he was willing to take the chance of winning at trial and accept the risk of losing and adding only an additional 8 to 11 years over the Government's plea offer).

Contrary to defense counsel's advise, following the trial, the application of the sentencing guidelines in this case resulted in a sentencing range of *160 years' imprisonment* – the statutory maximum for each count (i.e., total offense level of 41 and a category 2 criminal history). The district court ultimately imposed a sentence of 372 months' imprisonment (31 years' imprisonment).

As explained by the Petitioner during the June 24, 2019, evidentiary hearing, had defense counsel properly advised him that the sentence he faced if convicted at

trial was 31 years' imprisonment (or 160 years' imprisonment), the Petitioner would have accepted the Government's 9-year plea offer. Defense counsel was therefore ineffective for informing the Petitioner that the sentence he faced if convicted at trial was 17-20 years' imprisonment.

In *Lafler*, 566 U.S. at 163-164 , the Court stated that a defendant must establish the following to demonstrate prejudice relating to a claim that counsel rendered deficient performance by misadvising a defendant regarding a plea offer:

> In contrast to *Hill* [*v. Lockhart*, 474 U.S. 52 (1985)], here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability 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), that the court would have accepted its terms, and 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.

The Petitioner satisfies all of the *Lafler* requirements. The written documentation in this case demonstrates that the Government's plea offer remained open until October 24, 2012. As explained above, had defense counsel properly advised the Petitioner that the sentence he faced if convicted at trial was 31 years' imprisonment (or 160 years' imprisonment), the Petitioner would have accepted the Government's 9-year plea offer. The Petitioner also met his burden of establishing that there is a reasonable probability that the district court would have accepted the terms of the Government's 9-year plea offer. Finally, the 9-year plea offer was much less severe than the 31-year sentence that was imposed by the district court at the conclusion of the trial.

In support of his argument, the Petitioner relies on *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998). In that case, the defense attorney informed Gordon that he was facing a maximum sentence of 120 months if convicted after trial. Based on his attorney's representation, Gordon rejected an eighty-four-month plea deal and was subsequently convicted after trial. *See Gordon*, 156 F.3d at 377. Under the sentencing guidelines, however, Gordon was actually facing a sentencing range of 262 to 327 months, and was sentenced to 210 months in prison. *See id.* at 377-378. After sentencing, Gordon filed a § 2255 motion arguing that his attorney was ineffective for telling him that his maximum exposure was 120 months. *See id.* at 378. The district court granted Gordon's petition, ruling that Gordon's counsel "had provided ineffective assistance in failing to properly advise Gordon of his potential sentencing exposure," and finding that Gordon would have accepted the plea but for defense counsel's "inaccurate advice." *Id.* On appeal, the Government argued that Gordon's counsel was not ineffective because he had also informed Gordon that there was a possibility of getting consecutive 120-month sentences for each count in the indictment. *See id.* at 380. The Second Circuit Court of Appeals rejected this argument, relying on the district court's finding that " '[a]lthough [defense counsel] does mention in his letter that there is a possibility that Gordon could be sentenced to ten years for each count under the indictment consecutively, his conclusion is clear that Gordon faced a maximum incarceration of 120 months." *Id.* (quotations omitted). The Second Circuit explained that

> the decision whether to plead guilty or contest a criminal charge is

> ordinarily the most important single decision in a criminal case and counsel may and must give the client the benefit of counsel's professional advice on this crucial decision. Finally, *it follows that knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.*

Id. (emphasis added) (citations omitted). In affirming the district court's finding of ineffectiveness, the Second Circuit ruled that, "[b]y grossly underestimating Gordon's sentencing exposure in a letter to his client, [counsel] breached his duty as a defense lawyer in a criminal case 'to advise his client fully on whether a particular plea to a charge appears desirable.'" *Id.* (quoting *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996).

Gordon's holding is instructive in the instant case. To the extent the attorney in *Gordon* was deemed ineffective for "grossly underestimating" Gordon's sentencing exposure by 17.25 years (i.e., the difference between the 120-month maximum relayed by counsel and the guidelines maximum of 327 months), defense counsel's 140-year underestimation of the Petitioner's sentencing exposure (i.e., the difference between the 17-20 range relayed to the Petitioner and the Petitioner's actual maximum exposure of 160 years) was far more egregious. As explained by the Second Circuit in *Gordon*, defense counsel was ineffective for failing to provide accurate sentencing advice to the Petitioner because "[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *Gordon*, 156 F.3d at 380.

In denying the Petitioner's *Lafler* claim, the district court concluded that (1) Judge Sharp (i.e., the judge who was presiding over the Petitioner's case at the time

of the plea offer) would not have accepted the Government's 9-year plea offer and (2) the Petitioner would not have accepted the plea offer had he been properly advised by defense counsel regarding the maximum exposure he faced if convicted at trial. Both of these points are addressed in turn below.

First, regarding whether Judge Sharp would have accepted the Government's 9-year plea offer, the *only evidence* presented during the June 24, 2019, evidentiary hearing was that it would have been "very rare" for a judge in the Middle District of Tennessee to reject a "type C" plea agreement. During the evidentiary hearing, the Petitioner presented the testimony of David Komisar – an attorney who has handled approximately fifty "type C" plea agreements in the Middle District of Tennessee and at least one such case in front of Judge Sharp during the short time that he was on the bench. Mr. Komisar testified that he has never had a "type C" plea agreement rejected by a judge, and he said that historically in the Middle District of Tennessee, district court judges accepted "type C" plea agreements. (A-111). In fact, Mr. Komisar specifically stated that during the time that Judge Sharp was on the bench, it would be "very rare" for a judge in the Middle District of Tennessee to reject a "type C" plea agreement":

> [I]t would be a very rare – very rare circumstance in which a C plea would be rejected. It would almost take a manifest injustice for it to take effect.

(A-114).[2] Notably, *the Government did not present any testimony during the evidentiary*

[2] In its response to the Petitioner's § 2255 motion, the Government cited to

hearing to refute Mr. Komisar's testimony.[3] Based on Mr. Komisar's unrebutted

---

United States v. George, case number 3:15-cr-69 – a case where Judge Sharp rejected a plea agreement between the parties. (A-36). But as explained by undersigned counsel during the evidentiary hearing, Mr. George's case was substantially different from the Petitioner's case – as prior to the fraud case for which Judge Sharp rejected the plea, *Mr. George had been previously convicted of fraud in both state court and in federal court* (and prior to the instant case, the Petitioner had *never* been convicted of fraud). (A-284).

[3] *See Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir. 1988) ("We find it much more significant that the State can point to no evidence that indicates that the state trial court would not have approved the two-year plea arrangement. We believe that, if the State wishes to suggest that the trial court would not have approved this plea arrangement, the State, and not Turner, bears the burden of persuasion. The prosecution may, therefore, argue that a prisoner, who has established a reasonable probability that, but for his counsel's ineffective assistance, he would have accepted a plea arrangement offered by the prosecution, was, nevertheless, not prejudiced because the trial court would not have approved the plea arrangement. To prevail on such an argument, however, the prosecution must offer clear and convincing evidence that the trial court would not have approved the plea arrangement. Here, Turner has established a reasonable probability that he would have accepted the State's two-year plea offer were it not for his counsel's ineffective assistance. *The State, on the other*

testimony, it is at least "debatable" whether the Petitioner met his burden of establishing that Judge Sharp would have accepted the Government's 9-year plea offer.[4]

---

hand, has offered no evidence that the state trial court was not prepared to approve the contemplated plea arrangement.") (emphasis added). *See also Johnson v. Genovese*, No. 3:14-cv-2305, 2018 WL 1566826 at *18 n.6 (M.D. Tenn. Mar. 30, 2018) ("In *Faison v. United States*, the court held that where petitioner had shown that he would have accepted the plea offer, and there was no evidence suggesting that the court would have been unwilling to enter that offer, the petitioner had sufficiently established prejudice under *Lafler*. 650 Fed. Appx. 881, 887 (6th Cir. 2016). This ruling seems to leave open the possibility that a petitioner can demonstrate a reasonable probability that the court would have entered the plea agreement without providing any affirmative evidence.").

[4] Additional evidence attached to the Petitioner's § 2255 reply further supports the Petitioner's argument. After Judge Sharp retired, he was interviewed by Nashville Post and he gave the following answer to one of the questions posed to him:

> On making changes from within the justice system: At the district court level, it's really, really tough to do. I was on the bench for six years; I can count about five times an important case came through. The rest of the time, you're kind of cranking it out. A lot of it is theater on the criminal side. We're going to go through the motions, *you're going to plead guilty, and I'm going to sentence you and you've already worked out a deal.*

(A-75) (emphasis added). Judge Sharp's answer in the article certainly suggests that it would be rare for Judge Sharp to reject a "deal" that was "already worked out."

Second, regarding whether the Petitioner would have accepted the 9-year plea offer had he been properly advised by defense counsel regarding the maximum exposure he faced if convicted at trial, not only does the evidentiary hearing testimony of the Petitioner, his wife, and his son-in-law support the Petitioner's claim, but the testimony of defense counsel supports the Petitioner's claim. During the evidentiary hearing, defense counsel conceded that he *never* advised the Petitioner that he could receive 31 years' imprisonment or 160 years' imprisonment and therefore he does not know whether the Petitioner would have accepted the Government's 9-year plea offer had he been correctly advised regarding the maximum exposure:

> Q. And Number 6, paragraph 6, it is true, as you said in this declaration, that you did not advise Mr. Olive that he could receive 31 or 160 years?
>
> A. I certainly did not.
>
> Q. And it's also true that you did not advise Mr. Olive that the sentences could be run consecutively?
>
> A. No, I did not.
>
> Q. And it's also true that the government's plea offer or your

---

Moreover, the 9-year plea offer in this case required the Petitioner to enter a guilty plea to two counts – count one and count eight). Ultimately, Judge Sharp sentenced the Petitioner to 8 year's imprisonment for these two counts (3 years for count one and 5 years for count eight, with the sentences to be served consecutively), meaning that the sentence that Judge Sharp imposed for these two counts was *less* than the Government's plea offer – which further supports the Petitioner's argument that Judge Sharp would have accepted the 9-year plea offer.

consultant did not make such a determination?

A. Nobody made that determination. I think maybe the probation office did later. But nobody did –

Q. So, therefore –

A. The government was at 40.

Q. So isn't it also true, then, that you don't know what Mr. Olive's decision about a plea offer would have been if you had told him that you're looking at a nine-year offer versus a 160-year exposure? Is that fair to say?

A. Absolutely not [i.e., he does not know what Mr. Olive's decision about the plea offer would have been had he been correctly advised]. *I don't know what he would have thought.*

(A-273-274). Undersigned counsel appreciates defense counsel's candor. Had defense counsel responded "it is my opinion that Mr. Olive would not have accepted a plea offer regardless of his maximum exposure," then arguably the district court's conclusion would be supported by the record – but the fact that defense counsel admitted that he *does not know* whether the Petitioner would have accepted the plea offer had he been properly advised about his maximum exposure supports the Petitioner's *Lafler* claim. And as explained by criminal defense expert Joseph Scott Key, a defendant facing a longer possible prison exposure is more likely to accept a plea offer rather than risk losing at trial. (A-239). This is especially true given the Petitioner's explanation regarding his thought process at the time he was contemplating the plea offer (i.e., even with a maximum sentence of 20 years, the Petitioner would be released in his mid-60s – which would allow him to still spend several years of his life with his family outside of prison walls – but a sentence of 31 years' imprisonment, when considering

life expectancy tables, means that the Petitioner will, in essence, spend the rest of his life in prison).[5] At the very least, the testimony in the record creates a "debatable" issue as to whether the Petitioner would have accepted the Government's 9-year plea offer had he been correctly advised by defense counsel.

Notably, in the Sixth Circuit's order denying the request for a certificate of appealability, the circuit judge *agreed* that the Petitioner's trial counsel "acted unreasonably in failing to inform Olive that he faced the possibility of consecutive sentences." (A-4).[6] However, the circuit judge concluded that the Petitioner failed to make a substantial showing of prejudice:

> Olive has failed to make a substantial showing of prejudice. The district court determined that Olive's testimony that he would have accepted any plea offer from the government had he known his actual sentence exposure lacked credibility. First, Olive rejected the 9-year plea offer despite counsel explicitly informing him that he would be convicted if he went to trial based on the government's evidence. Moreover, counsel testified that Olive never expressed a willingness to take a plea deal, and that, after the plea offer had expired, Olive refused to let him contact the government about an additional plea agreement. Finally, during the evidentiary hearing, Olive continued to assert his innocence on the

---

[5] Obviously a sentence of 160 years' imprisonment would have meant that the Petitioner had a literal life sentence.

[6] "Once the defendant has satisfied the first prong of *Strickland* [*v. Washington,* 466 U.S. 668 (1984),] by establishing that counsel's performance was constitutionally defective, the threshold showing of prejudice required to satisfy the second prong *is comparatively low . . . .*" *Sawaf v. United States*, 570 Fed. Appx. 544, 547 (6th Cir. 2014) (emphasis added).

> ground that he had never intended to commit fraud or create a loss. Because this court gives deference to a district court's credibility determination, reasonable jurists could not disagree with the district court's determination that Olive failed to demonstrate that, but for counsel's deficient performance, he would have pleaded guilty.

(A-4-5) (citation omitted). Each of the circuit judge's reasons is addressed in turn below.

First, the fact that the Petitioner "rejected the 9-year plea offer despite counsel explicitly informing him that he would be convicted if he went to trial based on the government's evidence" does *not* establish that the Petitioner would have rejected the offer had he been properly advised that the actual maximum sentence was *160 years' imprisonment*. The Petitioner's rejection of the plea offer is merely a reflection of a risk-reward analysis that was conducted based on incorrect facts. Upon being informed that the maximum sentence was 17-20 years' imprisonment, the Petitioner – given his age and life expectancy – was willing to take a chance and reject a 9-year offer. It is not a stretch to assume the risk-reward analysis would have been much different had the Petitioner been correctly informed about his maximum exposure – an exposure that was literally the rest of his life in prison. In *Gordon*, 156 F.3d at 381, the Second Circuit recognized that a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer. If the "substantial disparity" holding in *Gordon* is applied to the facts of this case, then it is clear that the Petitioner has established prejudice.

Second, for these same reasons, the circuit judge's conclusion that the Petitioner "never expressed a willingness to take a plea deal" should also be rejected. The Petitioner was basing his decision to reject the plea offer on counsel's incorrect advice that the maximum exposure was 17-20 years' imprisonment. Because the Petitioner relied on this erroneous information, he suffered prejudice and his ability to make an intelligent decision regarding a plea offer was severely undermined." *See United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) ("[T]he advice that he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer.").

Finally, the circuit court's assertion that the Petitioner "continued to assert his innocence on the ground that he had never intended to commit fraud or create a loss" should also be rejected. As explained by the court in *Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003):

> Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. *See North Carolina v. Alford*, 400 U.S. 25, 33 (1970) ("reasons other than the fact that he is guilty may induce a defendant to so plead, . . . and he must be permitted to judge for himself in this respect") (quoting *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 276 (Iowa 1879)). 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. It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea. It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. Finally, Griffin could have possibly entered an *Alford* plea even while protesting his innocence. *See id. These declarations of innocence are therefore not dispositive on the question of whether Griffin*

would have accepted the government's plea offer.

(Emphasis added).

As explained above, the Fourth Circuit has acknowledged that "[w]hat exactly *Frye* and *Lafler* require of a petitioner to demonstrate prejudice is not clear at this time." *Merzbacher*, 706 F.3d at 366. Some courts require a petitioner to offer "objective evidence" that establishes a reasonable probability of acceptance. *See, e.g.*, *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991). Is a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment sufficient? What about a substantial disparity between the maximum exposure erroneously provided by defense counsel compared to the actual maximum exposure? And are declarations of innocence dispositive? As stated by the Fourth Circuit:

> The Supreme Court has not yet resolved what, if anything, a petitioner must show in addition to his own credible post hoc testimony and a sentence disparity to satisfy the *Strickland* prejudice prong. *Cf. Frye*, 566 U.S. at 150-151.

Merzbacher, 706 F.3d at 366. Undersigned counsel submits that the instant case is the appropriate case for the Court to consider and resolve these unanswered questions. Accordingly, the Petitioner respectfully requests the Court to grant the instant petition.

Alternatively, the Petitioner contends that the Sixth Circuit erred by denying him a certificate of appealability on his claim that he was prejudiced as a result of counsel's failure to properly advise him regarding the Government's pre-trial plea offer. To be entitled to a certificate of appealability, the Petitioner needed to show only "that

jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion; in light of the Second Circuit's holding in *Gordon*, the district court's resolution of this claim is – at the very least – "debatable amongst jurists of reason" (and thus the Sixth Circuit should have granted a certificate of appealability for this claim). The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Sixth Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER