No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CODY LEE HERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION OF DEFENDANT-PETITIONER CODY LEE HERMAN

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Cody Lee Herman, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner encloses his affidavit of indigence in support of this motion.

Dated: February 8, 2021

/s/ Matthew M. Robinson
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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether Petitioner's Right to the Effective Assistance of Counsel Was Violated During the Pretrial and Plea Stages of this Case Requiring That Petitioner's Conviction and Sentence Be Vacated.

B. Whether Petitioner's Right to the Effective Assistance of Counsel During Sentencing Was Violated When Counsel Failed to Provide Argument Supporting the Request for a 15-year Sentence.

C. Whether the Appellate Court Improperly Failed to Construe Petitioner's Pro Se Objections Liberally in Violation of this Court's Dictate in Erickson v. Pardus, 551 U.S. 89, 94 (2007)

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IV. OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky entered a final appealable order on June 1, 2020, dismissing Petitioner's motion under 28 U.S.C. § 2255 and denying certificate of appealability. See, United States v. Herman, 15-cr-00065-KKC (ED Ky 2020). The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's dismissal and declined to issue certificate of appealability Herman v. United States, No. 20-5618 (6th Cir. Nov. 12, 2020). Neither decision is reported, but both are attached.

V. STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as Petitioner was charged with crimes under the United States Code, including with production, distribution, and possession of child pornography, in violation of 18 U.S.C. §§ 2251(a), 2252(a)(2), and 2252(a)(4)(B). The district court re-obtained jurisdiction when Petitioner filed a motion under 28 U.S.C. § 2255 within a year of the date his conviction became final. R. 59 § 2255 Motion; PageID#279-291; R. 59-1 Memorandum of Law; PageID#292-302; See 28 U.S.C. § 2255(f)(1). On June 1, 2020, the district court entered an order and judgment denying Petitioner's § 2255 motion and declining to issue certificate of appealability. R. 104 Opinion and Order; PageID#505-532. Petitioner filed a timely notice of appeal from that order on June 11, 2020. R. 106 Notice of Appeal; PageID#534 See Fed. R. App. P. 4(a)(1)(A). Accordingly, this Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered a final decision on November 12, 2020 and Petitioner is filing this petition within 90 days from that decision. See, Herman v. United States, No. 20-5618 (6th Cir. Nov. 12, 2020), attached.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

U.S. Const. Amend. V.

> 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 accusations; 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 defence.

U.S. Const. Amend. VI.

VII. STATEMENT OF THE CASE

On July 24, 2015, a grand jury sitting in the United States District Court for the Eastern District of Kentucky handed down a three count Indictment charging Petitioner with the following offenses:

Count One:	production of child pornography, in violation of 18 U.S.C. 2251(a)
Count Two:	distribution of child pornography in violation of 18 U.S.C. 2252(a)(2)
Count Three:	possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B)

R. 9 Indictment; PageID#23-27. Petitioner faced penalties of 15 to 30 years imprisonment on Count One; 5 to 20 years imprisonment on Count Two; and not more than 10 years imprisonment on Count Three.

Petitioner's competence to stand trial was at issue due to trauma Petitioner suffered as a child and while serving in the military in Iraq. On November 17, 2015, Petitioner's counsel moved for a

competency evaluation to address Petitioner's competence to stand trial as well as to address whether he possessed the mental ability to understand the nature and wrongfulness of his alleged conduct at the time of the charged offenses. Doc 17, Motion; PageID#60. Thirteen days later the district court ordered a competency evaluation to be completed and that Petitioner is returned to the court for a hearing in "a reasonable period of time not to exceed forty-five (45) days" Id; PageID#69-70. The competency hearing was set to occur on January 27, 2016, which required a continuance of the trial scheduled for of December 7, 2015. Id. The order stated that the time between November 17, 2015 and the conclusion of the hearing on the competency motion was excluded from the speedy trial calculations under of 18 U.S.C. § 3161(h)(1)(D). Id. The court did not specifically find "good cause" for the exclusion of the time period. Id.

Petitioner was transferred to the Federal Medical Center in Lexington, Kentucky, for evaluation on December 7, 2015. R. 21 Order; PageID#71-72; R.21-1 Letter from Warden; PageID#73. The Warden requested additional time to complete the competency exam. On December 17, 2015, the district court granted the Warden's request and ordered that the competency exam be completed by February 19, 2016, with the corresponding written report to be filed by March 18, 2016. R. 21 Order; PageID#71-72. The order did not state that this time period would be excluded from the speedy trial calculations under of 18 U.S.C. § 3161(h)(1)(D) or that "good cause" existed for the exclusion of the time period. Id.

Petitioner's counsel moved to withdraw and the court granted that motion on December 29, 2015. R. 24 Motion; PageID#78-79; R. 26 Order; PageID#81-82. In that order, the district court continued the date of the competency hearing to March 30, 2016. Id. On March 18, 2016, the competency examination was completed and a psychiatric report was filed with the district court

under seal. R. 26 Order; PageID#83-84; R. 27; Psychiatric Report. The district court ordered the competency hearing to occur as scheduled on March 30, 2016. R. 26 Order; PageID#83.

On March 22, 2016, the district court, *sua sponte,* issued an order continuing the competency hearing until April 5, 2016. R. 28 Order; PageID#105. The order did not state a reason for the continuance. Id. On April 4, 2016, the court again rescheduled the competency hearing so that it would occur on April 7, 2016. R. 29 Order; PageID#106. The order did not state a reason for the continuance and was based on the court's own motion. Id. Again, the order did not exclude this time period from the speedy trial calculations under of 18 U.S.C. § 3161(h)(1)(D) and failed to mention of "good cause" for the exclusion of the time period. Id.

More than two months later than originally scheduled, a competency hearing was held on April 7, 2016. R. 30 Minute Entry; PageID#107. Petitioner was represented at that hearing by new CJA counsel, H. Wayne Roberts. Id. Petitioner stipulated to his competence to proceed with the case as well as his competency at the time of the alleged offenses. Id. The matter was then scheduled to proceed to trial on May 16, 2016, more than five months after the original trial date. Id.

The court found "the time between and including November 17, 2015, the date of the motion for competency evaluation (DE #17), and up to and including April 7, 2016, the date of the competency hearing, is a reasonable period of delay that is EXCLUDABLE pursuant to 18 U.S.C. §§ 3161(h)(1)(A) and (D) of the Speedy Trial Act." Id. The order did not state that "good cause" existed for the exclusion of the time period. Id.

On May 4, 2016, Petitioner moved to be re-arraigned on Count One of the indictment. R. 33 Order; PageID#111. The district court granted that motion and set aside the trial date of May 16, 2016. Id. On May 17, 2016, Petitioner was rearraigned and entered a plea of guilty pursuant to a plea

agreement to Count 1. R. 36; Plea Agreement; PageID#114-120. R. 52 Transcript Plea Hearing; PageID#231-253. The plea agreement included stipulations resulting on a total offense level 41, but permitted Petitioner to seek a reduction under § 3B1.2 based on his "mitigating role" in the offense. R. 36 Plea Agreement; PageID#115-116. Paragraph 3 of the plea agreement listed the facts making up to offense. R. 36 Plea Agreement; PageID#115

During the change of plea hearing, the government did not read into the record all of the stipulations contained in the plea agreement, but revealed stipulations resulting in a total offense level 37. PageID#114-120. R. 52 Transcript Plea Hearing; PageID#242. Additionally, neither the government nor the court read into the record the facts of the offense or asked if Petitioner admitted to those facts. Instead, the court asked Petitioner if he had read paragraph 3 of the plea agreement and whether he admitted to those facts. R. 52 Transcript; PageID#244-245.

Prior to sentencing, defense counsel filed a sentencing memorandum requesting a sentence at the statutory minimum–15 years imprisonment. R. 38 Sentencing Memorandum; PageID#126-129. Although the plea agreement contemplated the possibility of a mitigating role reduction, the memorandum failed to include an argument requesting a downward adjustment under § 3B1.2. Id. Sentencing took place on August 18, 2016. R. 43 Sentencing Transcript; PageID#143-164. The presentence investigation report (PSR) included the calculations agreed to in the plea agreement, plus an additional two-level enhancement because the offense involved the distribution of child pornography. R. 55 Sixth Circuit Order; PageID#261.

Although the guideline range was higher than contemplated in the plea agreement, no objections were made to the PSR and the court adopted the factual findings and guideline range calculations contained therein. R. 43 Sentencing Transcript; PageID#145.

Based on an offense level 43 and a Criminal History Category I, the guideline range was life imprisonment. Id. Defense counsel requested that the court sentence Petitioner to 180 months' imprisonment. Id; PageID#149. The court sentenced Petitioner to 300 months' imprisonment. R. 44 Judgment; PageID#164-171.

Petitioner filed a notice of appeal and proceeded to the Sixth Circuit Court of Appeals. R. 45 Notice of Appeal; PageID#172. Although Petitioner's attorney had previously argued for a minimum punishment of 15 years imprisonment at sentencing, and despite the plainly deficient Rule 11 colloquy and potentially invalid plea of guilty, appellate counsel filed an Anders brief and moved to withdraw as counsel citing no arguable grounds for appeal existed. See Order, United States v. Herman, No. 16-6386 (6th Cir. July 20, 2017). Not surprisingly, the appellate court affirmed the district court judgment. Id.

Petitioner, proceeding pro se, filed a motion to vacate pursuant to 28 U.S.C. § 2255 and memorandum of law in support. R. 59 § 2255 Motion; PageID#279-291; R. 59-1 Memorandum of Law; PageID#292-302. Petitioner argued that his right to the effective assistance of counsel was violated during plea, sentencing, and direct appeal. It was argued that attorney Gore provided ineffective assistance when Gore unreasonably waited five months to request that Petitioner receive a psychological evaluation. Petitioner asserted that his attorney knew that Petitioner was suffering PTSD, but waited five months to file a motion requesting a competency examination. Petitioner further asserted that his attorney unreasonably moved to withdraw as counsel without cause. Id; PageID#284.

Petitioner argued that replacement counsel provided ineffective assistance during the plea stages because counsel was unavailable for consultation and because counsel failed to notify the

Court that the government had threatened to charge Petitioner's wife with a crime and leave his children parentless unless Petitioner entered a guilty plea.

Petitioner argued that his right to the effective assistance of counsel was violated at sentencing when counsel failed to provide meritorious arguments in support the request for a 15 year sentence, including the fact the offense represented aberrant behavior and Petitioner's diminished mental capacity resulting from PTSD stemming from his war-time overseas military service.

Petitioner argued that his right to the effective assistance of counsel was violated on appeal when counsel filed an Anders brief and argued that Petitioner's appeal was without merit. R. 59 § 2255 Motion; PageID#285-86.

A federal Magistrate Judge issued a Report and Recommendation ("Report) on March 29, 2019, recommending that Petitioner's § 2255 motion be denied. R. 77 Report; PageID#377-416. The Report concluded that Petitioner received effective assistance of counsel during the plea stages and that Petitioner cannot show prejudice. The Report failed to conduct the analysis for ineffective assistance of counsel during plea required under Missouri v. Frye, 132 S. Ct. 1789, 182 L. Ed. 2d 379, 389 (2012), see also, Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). The Report concluded that a speedy trial violation occurred, but that Petitioner could not demonstrate prejudice from counsel's failure to move to dismiss the indictment. Id; PageID#392-398. The Report further concluded that Petitioner's Sixth Amendment right to a speedy trial was likewise not violated. Id; PageID#398-401. The Report concluded that Petitioner's right to the effective assistance of counsel was not violated at sentencing. Id; PageID#402-411.

Petitioner, still proceeding pro se, filed objections to the Report of the Magistrate Judge. R. 85 Objections; PageID#432-440. He also filed motions seeking to amend the § 2255 motion based

on new evidence R. 94 Amendment to § 2255 Motion; PageID#463-469. Petitioner's arguments and objections were not artfully made, but it was clear from these filings that Petitioner was objecting to the Report's findings that each of Petitioner's claims should be denied. The district court entered an order and judgment denying Petitioner's § 2255 motion on June 1, 2020. R. 104 Opinion and Order; PageID#505-532.

Petitioner filed a timely notice of appeal from that order on June 11, 2020. R. 106 Notice of Appeal; PageID#534. In the Sixth Circuit Court of Appeals, Petitioner argued that the record shows that the guilty plea was the product of unreasonable advice and performance of defense counsel coupled with an incomplete plea colloquy and vague or incomplete admissions from Petitioner during the change of plea hearing. Thus, Petitioner's right to the effective assistance of counsel was not violated. Accordingly, the district court should have granted Petitioner's § 2255 motion and vacated his conviction. At minimum, the district court's decision was debatable among reasonable jurists such that certificate of appealability should be granted. Petitioner also argued that his right to the effective assistance of counsel at sentencing was violated when counsel failed to provide argument in support of the request of a downward variance. Had counsel correctly moved for a downward variance based on the combination of Petitioner's diminished mental capacity and the aberrant nature of the offense, it is likely that his sentence would have been lower. Because Petitioner's right to the effective assistance of counsel was violated at sentencing Petitioner argued that his sentence should have been vacated. At minimum, the decision to deny relief on this basis was debatable and worthy of further review such that certificate of appealability should issue.

On November 12, 2020, the Sixth Circuit declined to issue certificate of appealability and dismissed the appeal. See, Herman v. United States, App. No. 20-5618, attached. Petitioner now

seeks writ of certiorari so that these matters of exceptional constitutional importance can be heard and corrected by this Honorable Court.

VIII. STATEMENT OF FACTS

The following facts are taken directly from the district court order denying Petitioner's § 2255 motion:

> This case began when a Federal Bureau of Investigation Child Exploitation Task Force Under Cover Officer (UC) posted an online advertisement on a website known to be frequented by individuals having a sexual interest in children. Defendant Herman responded to the advertisement. His response indicated that he was in the beginning stages of abusing his daughter, who was six years old at the time of the offense. The UC and Defendant maintained a conversation on Kik, an instant messaging application for mobile devices. The statements made and images shared by the Defendant during the conversation led the UC to believe that the Defendant's daughter was in immediate danger. On June 23, 2015, law enforcement executed a search warrant at Defendant's residence. Officers seized Defendant's cellphone and discovered images of child pornography that he had taken of his daughter inside his home. (See DE 77 at 1-3.)
>
> Defendant was indicted on one count of production of child pornography, in violation of 18 U.S.C. § 2251(a); one count of distribution of child pornography, in violation of § 2252(a)(2); and one count of possession of child pornography, in violation of § 2252(a)(4)(B). (DE 9.)
>
> Defendant pleaded guilty to production of child pornography and was sentenced to 300 months imprisonment, 30 years of supervised release, and a $100 special assessment. (DE 36 and 44.) All remaining counts were dismissed.

IX. REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of

judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In the instant case, Petitioner made two arguments demonstrating, at minimum, a substantial showing of the denial of his constitutional rights. Specifically, that his right to effective assistance of counsel was violated during the plea and sentencing stages of this case. Because of these violations of the Fifth and Sixth Amendments to the United States Constitution, Petitioner's conviction and sentence should have been vacated. Those arguments are briefed below. In refusing to issue certificate of appealability on these claims, the Sixth Circuit incorrectly applied Supreme Court precedent by failing to apply the pro se review standards to Petitioner's claims and sanctioned the district court's decision to dismiss Petitioner's § 2255 motion despite the obvious and apparent violations of Petitioner's right to the assistance of counsel and right to due process. Therefore, Petitioner asks that this Honorable Court exercise its authority under Supreme Court Rule 10 and grant certiorari with respect to the following claims.

A. Petitioner's Right to the Effective Assistance of Counsel Was Violated During the Pretrial and Plea Stages of this Case Requiring That Petitioner's Conviction And Sentence Be Vacated.

The Sixth Amendment to the United States Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. U.S. Const., amend. VI. The High Court has stated, "[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Further, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his

"counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2055, 2063 (1984). In order for a defendant to prevail on an ineffective assistance of counsel claim, he must demonstrate that the representation he received (1) "fell below an objective standard of reasonableness" and (2) "a reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different." Strickland, 466 U.S. at 688, 694.

A court reviewing a claim of ineffective assistance must determine whether a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceedings would have been different or whether the result was fundamentally unfair or unreliable. Id., *citing* Lockhart v. Fretwell, 113 S.Ct. 838 (1993). Ultimately, the Strickland test requires courts to focus upon whether counsel's performance was sufficient to ensure the fundamental fairness of the proceeding. Id. However, the prejudice that must be shown need not be anything more than something as small as one additional day in jail. *See* Glover v. United States, 531 U.S. 198 (2001).

The Supreme Court addressed the importance of effective representation during plea negotiations, stating, "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."Missouri v. Frye, 132 S. Ct. 1789, 182 L. Ed. 2d 379, 389 (2012), see also, Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

Because the United States' criminal justice system "is for the most part a system of pleas, not a system of trials," Lafler, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Frye, 182 L. Ed. 2d at 389. Plea

bargaining "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). "In today's criminal justice system, therefore, the negotiation of the plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." Frye, 182 L. Ed. 2d at 390. Therefore, the Sixth Amendment guarantees a defendant the effective assistance of counsel during the plea bargaining stage of a case. Lafler, 566 U. S. at 165; Frye, 566 U.S. 134, 140-41; Hill v. Lockhart, 474 U. S. at 58-59; see also, Webb v. Mitchell, 586 F.3d 383, 393 (6th Cir. 2009).

When advising a defendant concerning the decision to enter a plea agreement or go to trial, it is unreasonable for a lawyer to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea. United States v. Gordon, 156 F.3d 376, 379-81 (2d Cir. 1998) (*per curiam*). Although the decision to plead guilty rests with the defendant, not his lawyer, "the attorney has a clear obligation to fully inform her client of the available options." Smith v. United States, 348 F.3d 545, 552 (6th Cir. 2003). Defense counsel carries the "paramount" duty to ensure that the client's decision to waive his constitutional right to trial is as informed as possible. Miller v. Straub, 299 F.3d 570, 580 (6th Cir. 2002).

In order to ensure that the client's decision to accept a guilty plea is as informed as possible, an attorney must have conducted a reasonable investigation so that a defendant may be informed of potential defenses and alternatives to entering a guilty plea. See, Strickland, 466 U.S. at 691 ("counsel bears a duty to make a 'reasonable' investigation of the law and facts in his client's case"). Indeed, a defendant's right to effective assistance of counsel during plea negotiations confers a duty on counsel to conduct an adequate pre-trial investigation. McCoy v. Newsome, 953 F.2d 1252, 1262 (11th Cir. 1992). "[W]hen a lawyer fails to conduct a substantial investigation into any of his client's

plausible lines of defense, the lawyer has failed to render effective assistance of counsel." Id. at 1262-63.

Additionally, the ABA Standards Relating to the Administration of Criminal Justice provide:

> (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
>
> (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
>
> (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.
>
> (d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

Standard 4-4.1.

Further:

> (b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully

> informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.
> * * *
>
> (e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions.
>
> (f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client's decisions regarding a plea.

"Pre-trial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984). See Hooper v. Garrgaghty, 845 F.2d 471 (4th Cir. 1988). For example, in Washington v. Murray, 4 F.3d 1285 (4th Cir. 1993), the Fourth Circuit held that counsel was ineffective for failing to investigate a defense based upon forensic evidence. Since counsel failed to inquire into possible problem with the government's forensic evidence, "counsel was completely in the dark about the import of the evidence, and therefore, could not have made a strategic choice against using it." Id. at 1288.

Here, counsel failed investigate, and thus, failed to give reasonable advice regarding the entering of a plea. As noted in Petitioner's § 2255 motion, following the completion of the competency evaluation and the withdrawal of his attorney, new CJA counsel was unavailable to Petitioner in the days prior to the change of plea hearing. In his pleadings, Petitioner recalls that he met with counsel on one occasion for 10 minutes prior to entering the guilty plea. R. 59-1 Memorandum; PageID#297. The meeting occurred the same day Petitioner entered a plea of guilty, on May 17, 2016. Counsel knew that Petitioner was suffering from PSTD and was in distress at the

time he met with Petitioner concerning a guilty plea. Counsel advised Petitioner that if he did not enter the guilty plea, the government would bring charges against his wife and leave his children without a primary caretaker. R. 59-1 Memorandum; PageID#297. Counsel then gave Petitioner ten minutes to decide whether or not to enter the plea agreement. Faced with the threat that his wife would be prosecuted and given 10 minutes to make a decision, Petitioner believed he had no choice but to enter the plea agreement. Id.

In addition to the threats with respect to the prosecution of Petitioner's wife, counsel failed to advise Petitioner that a speedy trial violation had occurred and counsel failed to move to dismiss the indictment on that basis. R. 59-1 Memorandum; PageID#297-298. Further, counsel did not investigate the search of Petitioner's residence to determine if that evidence should be suppressed. The search warrant was never made part of the record because the search was not challenged. R. 94 Amendment to § 2255 Motion; PageID#463-469. Similarly, counsel failed to investigate whether the statements Petitioner made to the authorities were made in violation of his Fifth Amendment rights or whether Petitioner had been informed of those rights and whether he had waived those rights.[1]

The record shows that Petitioner was unaware that a search warrant existed and that defense

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[1]Statements made during a custodial interrogation must be suppressed unless an individual's waiver of his Miranda rights is knowing and voluntary. See Patterson v. Illinois, 487 U.S. 285, 292, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988); North Carolina v. Butler, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1979) ("The question is … whether the defendant in fact knowingly and voluntarily waived the right delineated in the Miranda case."); A "heavy burden" rests on the government to prove that a defendant waived his privilege against self-incrimination. Miranda, 384 U.S. at 475.

counsel never investigated the legality of the search or the admissibility of the statements he made to the authorities. The record further suggests that defense counsel failed to consider the possibility of filing a motion to suppress and thus, failed to provide any advice to Petitioner with respect to that line of defense. R. 59-1 Memorandum; PageID#297-298. Believing that no possible defense existed and that his wife would be prosecuted if he did not enter the plea agreement, counsel gave Petitioner ten minutes to make his decision. Id. Afterward, Petitioner was hastily brought before the court to enter a guilty plea. Id.

Notably, the record from the change of plea hearing does not refute Petitioner's recollection of events listed in his § 2255 motion. Although Petitioner answered affirmatively when asked if he understood the charges and whether he understood the plea agreement, Petitioner was not advised of all of the facts and stipulations listed in the plea agreement. For example, during the change of plea hearing the government read into the record Guidelines' stipulations resulting in a total offense level 37. PageID#114-120. R. 52 Transcript Plea Hearing; PageID#242. However, the plea agreement included stipulations resulting in a total offense level 41, and permitted Petitioner to seek reduction under § 3B1.2 based on his "mitigating role" in the offense. R. 36 Plea Agreement; PageID#115-116. Thus, Petitioner was not advised of the Guidelines' stipulations contained in the plea agreement.

Further, neither the government nor the court read into the record the facts the government would prove at trial beyond a reasonable doubt and Petitioner was not asked by the court to expressly admitt to the facts making up the offense. Paragraph 3 of the plea agreement lists the facts making up to offense. R. 36 Plea Agreement; PageID#115. The plea agreement states that Petitioner was admitting to those facts. But the facts were never stated on the record and Petitioner did not expressly

admit to those facts. Instead, the court asked Petitioner if he had read paragraph 3 and whether he admitted to the facts listed in paragraph 3. R. 52 Transcript; PageID#244-245. This was insufficient for a court to determine whether Petitioner had admitted to the facts of the crime.

Counsel's failure to investigate and provide complete advice led Petitioner to enter a plea agreement that Petitioner otherwise would have never entered. As noted above, alternatives existed to entering the guilty plea that were never discussed or pursued because counsel failed to investigate. As noted, a speedy trial violation had occurred in this case. R. 104 Order; PageID#517-519. Counsel could have filed a motion to dismiss the indictment based on the violation and the motion and the indictment would have been dismissed. Yet, counsel failed to inform Petitioner of this line of defense.

The district court found that Petitioner's right to the effective assistance of counsel was not violated because the court would have dismissed the indictment without prejudice and the government would have been permitted to seek a new indictment. R. 104 PageID#508-525. This is not the appropriate analysis for determining if counsel's unreasonable advice amounted to ineffective assistance of counsel during the plea stages requiring that Petitioner's convictions be vacated. See Lafler, *supra*, Frye, *supra*. Importantly, whether a defendant would likely be convicted at trial is not relevant to determining whether counsel's unreasonable advice prejudiced the defendant. Lee v. United States, 137 S.Ct. at 1966-67(2017) (in accepting a plea a defendant has "more to consider than simply the likelihood of success at trial"). Instead, when a defendant claims that his counsel's failure to investigate led to inaccurate advice that caused him to accept a plea, prejudice is shown if "the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163; Hill v. Lockhart, 474 U. S. at 59 ("reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial").

In Miller v. United States, 2014 U.S.App. LEXIS 6305 (6th Cir. 2014)(unpublished), the defendant had argued in his § 2255 motion that his attorney was ineffective during plea negotiations for understating the penalty the defendant would receive if he were convicted at trial. The defendant in Miller asserted that had he known he was subject to an enhanced sentenced, he would have decided to accept the government's plea agreement. Id *21-22. The Sixth Circuit vacated the district court's denial of the § 2255 motion and remanded for an evidentiary hearing to determine whether the defendant received ineffective assistance of counsel during plea negotiations. Id; see also, United States v. Reed, 719 F.3d 369 (5th Cir. 2013)(remanding for an evidentiary hearing to explore whether counsel was ineffective during plea negotiations). Here, had counsel conducted a reasonable investigation, it would have been easily determined that Petitioner's right to a speedy trial had been violated. Had counsel advised Petitioner that he could seek dismissal of the indictment on this basis, Petitioner would have never entered the plea agreement. Miller, Lafler, Frye, Supra. The district court squarely failed to address this issue looking only to see whether Petitioner's plea of guilty was knowing and voluntary. Thus, the district court's decision to deny § 2255 relief should be vacated.

In sum, the record shows that Petitioner's guilty plea was the product of unreasonable advice and performance of defense counsel coupled with an incomplete plea colloquy and vague or incomplete admissions from Petitioner during the change of plea hearing. Thus, the district court erred when it found that Petitioner's right to the effective assistance of counsel was not violated. Accordingly, the district court should have granted Petitioner's § 2255 motion and vacated his conviction. At minimum, the district court's decision was debatable among reasonable jurists such that certificate of appealability should be granted. Buck, supra.

B. Petitioner Received Ineffective Assistance of Counsel During Sentencing.

A defendant has a constitutional right to effective representation at his sentencing hearing. United States v. Johnson, 935 F.2d 47,49 (4th Cir. 1991). Counsel has been found to be ineffective for failure to argue sentencing issues that may have resulted in different sentences. In United States v. Ford, 918 F.2d 1343 (8th Cir. 1990), the court found that counsel's failure to argue for acceptance of responsibility, in light of commentary which could have provided the defendant with the reduction, denied the defendant a fair sentencing. Id. at 1350. In United States v. Headley, 923 F.2d 1079 (3rd Cir. 1991), the court found ineffective assistance where counsel failed to argue for a reduction for a minor role in the offense, given the court's willingness to consider such an adjustment. Id. at 1084.

In United States v. Breckenridge, 93 F.3d 132 (4th Cir. 1996), the Fourth Circuit held that counsel's failure to object to a sentencing adjustment, when there was an argument which could be made against the adjustment, amounted to ineffective assistance, requiring a hearing on whether or not the defendant was prejudiced as to this lack of objection. Id. at 138; see also, United States v. Headley, 923 F.2d 1079, 1083-84 (3d Cir.1991) (counsel's failure to seek potentially fruitful downward adjustment under section 3B1.2 fell outside "prevailing professional norms" and therefore was ineffective); United States v Soto, 132 F.3d 56, 59 (D.C. Cir. 1997)(counsel's failure to request a downward sentencing adjustment based on minor participation rendered counsel's performance constitutionally ineffective).

Here, counsel failed to address compelling § 3553(a) factors that called for a sentence of no higher that 15 years imprisonment. As a result, the sentence of 25 years imprisonment is far greater than necessary to achieve the goals of sentencing. The Supreme Court has made clear that the

imposition of sentence greater than necessary to meet the four purposes of sentencing is reversible, even if within guideline range. See, Gall v. United States, 128 S.Ct. 586, 597 n.6 (2007), Rita v. United States, 127 S.Ct. 2456, 2463-65 (2007); Spears v. United States, 129 S.Ct. 840 (2009),; Kimbrough v. United States, 128 S.Ct. 558, 570 (2007). In determining the sentence minimally sufficient to comply with the Section 3553(a)(2) purposes of sentencing, the court must consider several factors listed in Section 3553(a). Those factors include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed–
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the advisory guideline range;
>
> (5) any pertinent policy statements issued by the Sentencing Commission;
>
> (6) the need to avoid unwarranted sentence disparities; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2011). See, Rita v. United States, 127 S.Ct. 2456, 2463-65 (2007). Imposition of sentence greater than necessary to meet the four purposes of sentencing under § 3553(a)(2) is reversible, even if within guideline range. See, Gall, 128 S.Ct. at 597-99, Rita v. United States, 127

S.Ct. 2456, 2463-65 (2007); Spears v. United States, 129 S.Ct. 840 (2009), Gall v. United States, 128 S.Ct. 586, 597 n.6 (2007); Kimbrough v. United States, 128 S.Ct. 558, 570 (2007).

Further, a sentence below the correctly calculated guideline range is appropriate "if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." see, United States v. Rivera-Rodriguez, 318 F.3d 268, 275 (1st Cir. 2003); United States v. Castano-Vasquez, 266 F.3d 228, 235 (3rd Cir. 2001); Factors a court can consider in determining the appropriate sentence include the defendant's "(A) mental and emotional condition; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." USSG § 5K2.20, comment. (n. 2). These factors are not exhaustive. Castano-Vasquez, 266 F.3d at 235; United States v. DeRusse, 859 F3d. 1232 (10th Cir. 2017)(district court's discretionary consideration of the aberrant nature of defendant's conduct, for purposes of an 18 U.S.C.. § 3553 downward variance, properly focused on the extent to which the criminal conduct was out of character, rather than on factors applicable to a USSG § 5K2.20 departure).

In United States v. Booe, 252 F.Supp. 2d 584 (ED Tenn. 2003), the defendant was suffering severe depression when, without preparation or planning, she committed armed bank robbery. The defendant had a spotless criminal record, and the court found that her mental and emotional condition played a significant role in her actions. Id. The court determined that a substantial variance of nine levels was warranted. Id. In United States v. DeRusse, 859 F3d. 1232, 1235 (10th Cir. 2017), the Tenth Circuit upheld a downward variance based on the following findings:

> because there is absolutely no history or indication in Mr. DeRusse's background that he

> has ever been involved in anything of this nature or anything even remotely related to it prior to this time." (Id. at 85-86.) The court also found that Defendant "was suffering from a mental illness at the time, which does not justify what he has done, but it's a factor to take into account and, obviously, since he has been seeing mental health treatment providers and has been on medication, there have been absolutely no issues."

In the instant case, defense counsel filed a sentencing memorandum requesting a sentence at the statutory minimum–15 years imprisonment. R. 38 Memorandum; PageID#126-129. Although the plea agreement contemplated the possibility of a mitigating role reduction, counsel failed to make any argument requests an adjustment under § 3B1.2. Id. The presentence investigation report (PSR) included the Guidelines' calculations agreed to in the plea agreement, plus an additional two-level enhancement because the offense involved distribution. R. 55 Sixth Circuit Order; PageID#261. Based on an offense level 43 and a Criminal History Category I, the guideline range was life imprisonment. R. 43 Sentencing; PageID#145. Although the guideline range was higher than contemplated in the plea agreement, no objections were made to the PSR and the court adopted the factual findings and guideline range calculations contained therein. R. 43 Sentencing; PageID#145.

Defense counsel requested a sentence of 15 years imprisonment, citing the abuse Petitioner suffered as a child and the fact he suffered from PTSD related to his military service in the Middle East. Id; PageID#149. However, counsel failed to notify the court of additional mitigating factors under 18 U.S.C. § 3553(a) in support of a 15 year term of imprisonment. For example, counsel failed to present a legitimate argument that the offense was plainly outside the character and history of Petitioner and constituted aberrant behavior. By all accounts, Petitioner had a spotless criminal record, had been consistently employed, and was a decorated war veteran prior to engaging in the instant offense. Furthermore, he was suffering from depression stemming from PTSD at the time of the act. The act was a single act of limited duration that was committed without significant planning.

Further, Petitioner made no attempt to avoid detection. Under these circumstances, the offense represented a marked deviation by the defendant from an otherwise law-abiding life. Therefore, like the defendant in DeRusse, a variance under § 3553(a) was warranted, yet counsel failed to make this argument in support of the request for a 15 year term of imprisonment. Furthermore, and closely related, counsel failed to provide evidence of Petitioner's PTSD which triggered the aberrant behavior of Petitioner in committing his illegal and harmful acts. Therefore, a variance under § 3553(a) was warranted as a result of Petitioner's diminished metal capacity. Counsel failed to provide these arguments at sentencing.

Had counsel correctly moved for a downward variance based on the combination of Petitioner's diminished mental capacity and the aberrant nature of the offense, it is likely that his sentence would have been lower. Accordingly, the district court erred when it found that Petitioner's right to the effective assistance of counsel was not violated at sentencing. At minimum, the decision to deny relief on this basis was debatable and worthy of further review such that certificate of appealability should issue.

C. The Appellate Court Failed to Construe Petitioner's Pro Se Objections Liberally in Violation of this Court's Dictate in Erickson v. Pardus, 551 U.S. 89, 94 (2007)

In Erickson v. Pardus, 551 U.S. 89, 94 (2007), this Court recognized that inmates seeking habeas relief are often not represented by counsel. In such situations, "A document filed pro se is to be liberally construed, and a pro se complaint, however in artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. See also, Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice.")

A petitioner is "deemed to have waived an objection to a magistrate judge's report if [he]

do[es] not present [his] claims to the district court." United States v. Benton, 523 F.3d 424, 428 (4th Cir. 2008). In order "to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." United States v. Midgette, 478 F.3d 616, 622 (4th Cir. 2007). Even so, when confronted with the objection of a pro se litigant, an appellate court must also be mindful of the requirement to construe pro se filings liberally. See Erickson, 551 U.S. at 94; Martin v. Duffy, 858 F.3d 239, 245-246 (4th Cir. 2017)(deciding equal protection issue even though pro se litigant did not object to specific findings in the Magistrate Report); Martin v. Overton, 391 F.3d 710 (6th Cir. 2004)("pleadings of pro se petitioners are held to less stringent standards than those prepared by attorneys, and are liberally construed"); Aron v. United States, 291 F.3d 708 (11th Cir. 2002)("the court should construe a habeas petition filed by a pro se litigant more liberally than one filed by an attorney").

In the instant case, Petitioner proceeding, pro se, filed objections to the Report of the Magistrate Judge. R. 85 Objections; PageID#432-440. He also filed motions seeking to amend the § 2255 motion based on new evidence R. 94 Amendment to § 2255 Motion; PageID#463-469. Petitioner's arguments and objections were not artfully made, but it was clear from these filings that Petitioner was objecting to the Report's findings that each of Petitioner's claims should be denied. The district court entered an order and judgment denying Petitioner's § 2255 motion on June 1, 2020. R. 104 Opinion and Order; PageID#505-532. Despite the standards of review approved by this Court with respect to pro se litigants, the district court and the Sixth Circuit incorrectly found that Petitioner waived his arguments because he had not made specific objections to each and every point he disagreed with in the Magistrate Judge's Report.

This treatment of Petitioner's objections violated this Court's requirement that pro se litigant's objections and arguments should be construed liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007). It is unreasonable and inequitable for the district court and the court of appeals to require a pro se inmate to make objections and arguments with the same precision as an attorney. Duffy, 858 F.3d 239 (deciding equal protection issue even though pro se litigant did not object to specific findings in the Magistrate Report); Overton, 391 F.3d 710 ("pleadings of pro se petitioners are held to less stringent standards than those prepared by attorneys, and are liberally construed"); Aron, 291 F.3d 708 ("the court should construe a habeas petition filed by a pro se litigant more liberally than one filed by an attorney").

Petitioner's pro se objections to the Magistrate Judge's report sufficiently alerted the district court that he believed the magistrate judge erred in recommending dismissal of each of his claims. Accordingly, certiorari should be granted so that the Sixth Circuit Court of Appeals is not permitted to ignore Supreme Court precedent requiring that it liberally construe Petitioner's pro se arguments and objections and thereby deny Petitioner the right to seek habeas corpus relief.

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on February 8, 2021 a true and accurate copy of the foregoing was sent via U.S. Mail with sufficient postage affixed to the Office of the Assistant United States Attorney for the Eastern District of Kentucky, 260 W. Vine Street, Suite 300, Lexington, KY 40507-1612 and the Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
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