No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH ARTHUR VINSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Fourth Circuit*

(CA4 No. 20-6402)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

The lower courts are divided about what a competent criminal defense attorney must do when, as happened here, the prosecution offers a plea bargain. Some courts say that a lawyer need only transmit the offer. Other courts—consistent with the plurality opinion in *Von Moltke v. Gillies*, 332 U.S. 708 (1948)—hold that trial counsel must not only transmit the offer, but also provide a recommendation about whether the plea offer is a good one.

Despite both the split of authority and trial counsel's own admission that he did not provide a recommendation about the proposed plea agreement, the Fourth Circuit denied a certificate of appealability from the denial of § 2255 relief. Accordingly, the question presented is as follows:

1. Did the Court of Appeals err in denying a certificate of appealability over trial counsel's potential ineffectiveness in the plead-vs-trial decision?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the Western District of North Carolina:

United States v. Vinson, 1:12-cr-00020-MR-DSC-5 (jmt. entered June 29, 2015) (criminal conviction).

Vinson v. United States, 1:18-cv-00179-MR (jmt. entered March 11, 2020) (§ 2255 denial).

U.S. Court of Appeals for the Fourth Circuit:

United States v. Vinson, 15-4384 (jmt. entered March 24, 2017) (jmt. affirming conviction).

United States v. Vinson, 20-6402 (jmt. entered June 1, 2021) (jmt. denying certificate of appealability).

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TABLE OF AUTHORITIES

Cases

Statutes

Keith Arthur Vinson respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication. It is reprinted in the Appendix. [App. 1-3].

The district court did not select its opinion for publication. It is reprinted in the Appendix. [App. 4-54].

JURISDICTION

The district court had jurisdiction over the underlying federal criminal charge. 18 U.S.C. § 3231. It also had jurisdiction to consider whether to grant post-conviction relief. 28 U.S.C. § 2255.

The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to consider whether to grant a certificate of appealability over the denial of post-conviction relief. 28 U.S.C. § 2253(c).

This Court has jurisdiction to review the judgment of the Fourth Circuit. 28 U.S.C. § 1254(1). *See also* 28 U.S.C. § 2253(c). Judgment was entered on June 1, 2021. No petition for rehearing was filed. Due to the COVID-19 pandemic, this Court extended the deadline for this Petition to 150 days. 594 U.S. __ (Order of July 19, 2021).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

I. Mr. Vinson's Criminal Conviction

A. The Trial

In 2012, a grand jury in the Western District of North Carolina indicted Mr. Vinson, and others, with several charges involving a failed real-estate development scheme. After all his co-defendants pleaded guilty, the grand jury returned a Second Superseding Indictment against Mr. Vinson alone. It charged him with bank fraud conspiracy, conspiracy to defraud the United States, aiding and abetting the misapplication of bank funds, aiding and abetting wire fraud affecting a financial institution, money laundering conspiracy, and money laundering.

Pursuant to Mr. Vinson's plea of not guilty, the case proceeded to a jury trial. During the trial, the Government called twenty-six witnesses, including several of Mr. Vinson's co-defendants to testify against him, and introduced hundreds of documents as exhibits. Mr. Vinson did not call any witnesses. The jury convicted him on all counts.

The district court determined that the applicable Guideline was 262-327 months, but it varied downward and imposed a sentence of 216 months (with 120 months concurrent on the money laundering).

B. The Direct Appeal

The same lawyer who represented Mr. Vinson at trial also represented him on his direct appeal. Forgoing any evidentiary issues from the week-and-a-half long trial, trial counsel raised three issues: sufficiency of the evidence, the propriety of the willful blindness charge, and substantive unreasonableness of the sentence. *See United States v. Vinson*, 852 F.3d 333, 337 (4th Cir. 2017) ("*Vinson I*"). The Fourth Circuit affirmed.

With respect to sufficiency of the evidence, the Fourth Circuit noted the exceptional difficulty that trial counsel had assumed: "Challenging the sufficiency of trial evidence presents a heavy burden for an appellant, as reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *Id.* at 350 (alteration and quotation omitted). Far from being insufficient, the Fourth Circuit found the evidence "wholly sufficient to convict Vinson." *Id.* at 352.

As for the decision to charge willful blindness, the Fourth Circuit found no error. On the one hand, the prosecution produced direct evidence of scienter:

> [There was] ample evidence that Vinson knowingly and intentionally engaged in fraudulent activities—including evidence that Vinson himself paid kickbacks to straw borrowers, signed contracts and closing documents that misrepresented the purpose and material terms of loan transactions, and engaged in a pattern of writing checks for thousands (and even hundreds of thousands) more dollars than were in the relevant bank accounts. Indeed, email and other communications with his cohorts corroborated Vinson's guilty knowledge.

Vinson I, 852 F.3d. at 357. But the charge was ultimately appropriate because at least some evidence suggested deliberate ignorance, too. Among other things, "there was evidence that Vinson requested the assistance of others to obtain bank funding Vinson needed but knew he could not obtain on his own, and that Vinson's coconspirators then kept him abreast of details of their various schemes, even though Vinson did not always respond to their communications." *Id.*

The Fourth Circuit also affirmed the reasonableness of the lengthy sentence. *Id.* at 358.

II. Mr. Vinson's § 2255 Motion

Mr. Vinson timely filed a *pro se* § 2255 motion to set aside his conviction. As is relevant here, he raised a claim that trial counsel was ineffective at the plea bargaining-stage. Specifically, Mr. Vinson alleged that trial counsel had not explained the evidence and the law to him, resulting in the disastrous decision to go to trial rather than accept the Government's offer to plead to one count of money laundering that had a statutory maximum of only 120 months.

The district court appointed counsel for Mr. Vinson and scheduled an evidentiary hearing on the claim of plea-bargaining ineffectiveness.

C. Evidence at the § 2255 Motion Hearing

A summary of the evidence from that hearing follows:

a. Richard Fennell

Richard Fennell, an attorney who represented Mr. Vinson on state criminal charges and civil proceedings all collateral to the federal charges, testified that, before trial, Mr. Vinson had conveyed his understanding of the Government's plea offer. As Mr. Vinson understood it, the offer was for him to serve "ten years active."[1] When the two discussed whether Mr. Vinson was going to reject the offer, Mr. Vinson indicated that he was going to reject it because "he did not believe that his exposure was much greater than ten years active." Further, Mr. Vinson seemed "confident" about the odds of winning an outright acquittal.

Even when the spoke after the trial was underway, Mr. Vinson seemed "still shockingly upbeat" despite "three or four days" of presentation from the Government.

Within the first ten to 30 days after the trial—after Mr. Vinson had been convicted on all counts—Mr. Fennell met with Mr. Vinson at the jail. Based upon Mr. Vinson's questions about the Sentencing Guidelines and his visible surprise at Mr. Fennell's answers, Mr. Fennell believed that Mr. Vinson did not previously understand his Guideline sentencing exposure if convicted.

[1] At the motion hearing, the Government advised that the plea offer was a plea to "a single money laundering cap," which has a ten-year statutory cap pursuant to 18 U.S.C. § 1957(b)(1).

b. Clark Fischer

Clark Fischer, Mr. Vinson's trial counsel and counsel on direct appeal, testified that the Government provided a "reverse proffer," whereby the Government outlined its key pieces of evidence for Mr. Fischer. Only Mr. Fischer was at that meeting with the Government.

From his appointment through the end of trial, that is, August 2012 to October 29, 2013, Mr. Fischer estimated that he met with Mr. Vinson for a total of 16-25 hours. At no point during their time together did Mr. Fischer ever show Mr. Vinson sample jury instructions related to Mr. Vinson's charges. Mr. Fischer did, however, recall providing "the same sort of overview of the federal sentencing guidelines that [he] give[s] every federal client." That overview of the sentencing guidelines did not include a pre-trial written work-up of how the Guidelines might apply to Mr. Vinson's case, like the one Mr. Fischer prepared post-trial. Nor did the overview include a detailed oral explanation of the potential Guideline provisions. According to Mr. Fischer's testimony, "I told him about the guidelines and that they're advisory, the amount of loss, and that you start out at this level and then there's a range under the guidelines that the court can or can choose not to follow. I don't think I would have gone over, well, 2B1.1(C) adds two points for such and such." As Mr. Fischer recalled at the hearing, he would have said that Mr. Vinson "could easily get more than

20" years, but that he "wouldn't have been more specific than that."[2] Mr. Fischer did, however, concede that it was possible that he mentioned 11.5 years as a Guidelines sentence at some point.

In his meetings with Mr. Vinson, Mr. Fischer testified that they discussed "in general what the government was claiming that he did." During those meetings, Mr. Vinson asked "many or some number of times" whether Mr. Fischer believed that Mr. Vinson had "committed a crime." Mr. Fischer told Mr. Vinson that he did not believe that Mr. Vinson had committed a crime, although Mr. Fischer claimed that he qualified his assurance with a disclaimer that he would not serve on the jury.

At the hearing, Mr. Fischer testified that the prospects of winning at trial were unexpectedly worse than he had hoped for. Not only was the testimony of one of the conspirators (on October 10) "bad," but the individuals selected for the jury did not fit the profile of what he had thought would make a good jury.

The dour assessment that Mr. Fischer offered at the hearing was, however, quite inconsistent with Mr. Fischer's email to Mr. Vinson dated October 13, 2013, toward the end of trial. [App. 55-56]. In that email, Mr. Fischer told Mr.

[2] At a 2014 hearing before the preparation of the initial presentence investigation report, Mr. Vinson told the magistrate that Mr. Fischer had said before trial that "he was looking at twelve and a half to 14 if [he] was convicted of everything." At that hearing, Mr. Fischer did not specifically dispute that statement.

Vinson that there was "no direct evidence of your participation in any conspiracy or plan to defraud any bank or the U.S. The only evidence at all of your active involvement in the 'lot loan program' was Buck [Cashion]'s testimony about a very vague conversation." [App. 55]. He likewise was not impressed with the evidence that the Government had offered for the other counts. Thus, far from being a loser of a case, Mr. Fischer opined that forgoing any evidence during the defense case-in-chief would "make things fairly simple for our jury which is certainly quite confused, and confusion should lead to reasonable doubt if they follow the law." [App. 56].

In terms of plea offers extended prior to trial, Mr. Fischer reported that the Government initially made a soft offer of a plea that would cap Mr. Vinson's exposure at five years. While Mr. Fischer claims to have relayed the offer to Mr. Vinson, Mr. Fischer says that he merely "laid out [the plea] as an option for him," but Mr. Fischer did not recall making any "specific recommendation" as to whether Mr. Vinson ought to take the offer.

At some point during the representation, Mr. Fischer recalled Mr. Vinson indicating that he would entertain a plea agreement but that he wanted to cap his sentence at one year, an option that was never on the table.

In any event, shortly before trial, after everyone else had pleaded out, the Government made a "firm offer" of a non-cooperation plea with a ten-year statutory cap for a count of money laundering. When Mr. Fischer and Mr. Vinson met to discuss it, Mr. Fischer told Mr. Vinson that "if he chose to go to trial and

it didn't work out that every day after that ten years was something he was going to very strongly regret for the rest of his life." But Mr. Fischer refused to offer an estimate as to the odds of conviction for Mr. Vinson:

> Q … Before everybody else pled out did you tell Mr. Vinson what his odds of winning at trial were?
>
> A. I would never in a million years have done that…. My … answer, if he had asked that, would have been: This ain't Vegas; I can't give you odds.
>
> […]
>
> Q. And you never tried to dissuade him from going to trial; right?
>
> A. I told him that was his option. I presented his various options to him as various plea opportunities came up along the way….
>
> Q. But you never told him something like, if we try this case a hundred times you're going to lose 99 of them?
>
> A. I certainly did not use that language.

While Mr. Vinson ultimately rejected the plea offer, Mr. Fischer conceded that Mr. Vinson—who supposedly "had little interest in even thinking about a plea,"—"probably would" have told him to see whether the Government would reduce the cap to something similar to what the other defendants received.

Mr. Fischer testified that Mr. Vinson supposedly indicated right after jury selection that the jury was likely to convict him—in contrast to Mr. Fennell's recollection of a shockingly upbeat Mr. Vinson and in contrast to Mr. Fischer's email opining that Mr. Vinson "should" be acquitted. Nonetheless, Mr. Fischer

did not take any steps to explore options for a plea (straight-up or otherwise) before the evidence began.

As of the time of the § 2255 hearing, Mr. Fischer still did not believe that Mr. Vinson was guilty of any crime:

> Q. So as you understood the law and the evidence, the evidence, in your opinion, was not sufficient to sustain a conviction; right?
>
> A. Again, if I had been on the jury, that's how I would have voted.

c. Keith Vinson

Keith Vinson testified that in his meetings with Mr. Fischer as the case progressed, Mr. Vinson would always ask whether any of the new evidence indicated that he had committed a crime. Each time, Mr. Vinson recalls Mr. Fischer telling him no. But Mr. Fischer did once hedge that no one could ever be sure what a jury will do.

With respect to the plea that would have capped his exposure at 10 years, Mr. Vinson testified that Mr. Fischer orally relayed the offer without commentary. When Mr. Vinson asked why he would take the offer when Mr. Fischer had told him that he would face 11.5 years if convicted, Mr. Fischer replied that the day after the 10th year could be the longest day of his life. Otherwise, he did not provide any advice about whether Mr. Vinson should or should not accept the offer. When Mr. Vinson asked whether Mr. Fischer could ask the

Government to improve their offer, Mr. Fischer indicated that he would not because the offer was the final one.

From Mr. Vinson's perspective, the difference between 10 years and 11.5 years was not great, particularly given Mr. Fischer's repeated assurances that Mr. Fischer had seen no evidence that Mr. Vinson had committed a crime. Accordingly, Mr. Vinson was prepared to proceed to trial.

As of the date that Mr. Vinson rejected the plea, Mr. Fischer had never shown Mr. Vinson the Sentencing Guidelines manual, nor even the grid at the back of the manual. The first time that Mr. Vinson recalled ever hearing about how the loss amounts could factor into a sentence was in January 2014, when Mr. Fennell explained the Guidelines to him.

As of the date of the rejection of the plea, Mr. Fischer also had not informed Mr. Vinson about the concept of willful blindness or how the acts of one co-conspirator can be imputed to another.

Mr. Fischer also did not explain that a sentence for 10 years would result in less time actually served due to good-time credit.

Mr. Vinson testified that if he had been told how the Guidelines worked and about how a conspiracy can be established, he would have taken the 10-year plea. But he went to trial because trial counsel had told him that he had committed no crime and believed that the sentence following a trial would be around 11.5 years. Had Mr. Fischer told Mr. Vinson that Mr. Vinson was going

to be convicted at trial and could face a Guideline sentence of up to 300 months, Mr. Vinson would have taken the Government's plea "without question."

d. Kaitlyn Vinson

Mr. Vinson's daughter testified via a declaration because she was outside the subpoena range of the district court. Ms. Vinson recalled that her father told her that he believed that he had a good chance of winning at trial and that, even if he did not, he thought that the sentence would be only a little higher than the 10-years called for under the plea. Based upon her interactions with him, she had no reason to believe that he thought a 216-month sentence was a possibility if he went to trial.

D. Denial of § 2255 Relief

Via a written order, the district court denied Mr. Vinson's motion. [App. 4-54]. With respect to the performance-of-counsel inquiry, the district court found that "Fischer's advice to the Petitioner about strength of the Government's case against him was well within the range of competent representation." [App. 43]. Despite finding Mr. Fischer a credible witness—who had testified at the motion hearing that "if I was on the jury, I would say – at least on a criminal jury I would say no [you did not commit a crime]—the district court, without explanation, held that Mr. Fischer "never advised the Petitioner that he had committed no crime…." On the other hand, the district court found Mr. Vinson not credible, in part, because "[e]ven after his trial, having heard the voluminous evidence of his guilt as well as the Court's instructions to the jury

describing exactly what the Government needed to prove with respect to every count, the Petitioner continued to insist [at his sentencing allocution] that he had committed no crime." [App. 45]. The district court did not, however, explain how that fact was material given that Mr. Fischer likewise *still* does not believe Mr. Vinson to be a guilty man.

The district court also found that Mr. Fischer told Mr. Vinson before trial that Mr. Vinson "could receive a sentence of more than twenty years in prison if convicted at trial." [App. 46]. The district court did not, however, determine whether Mr. Fischer said—or even if he did, whether Mr. Vinson understood—a Guideline sentence in excess of 20 years would be a low probability or high probability outcome if convicted at trial. *See* [App. 46-47].

In terms of the prejudice inquiry, the district court found that Mr. Vinson "has not shown that he would have pleaded guilty had Fischer advised him differently." [App. 47]. In so finding, the district court did not explain why the supposedly headstrong Mr. Vinson followed Mr. Fischer's advice to remain silent at his trial, *see* [App. 56] and/or what possible purpose would have been served by going to trial if a conviction and heavy sentence were pre-ordained.

The district court declined to issue a COA. [App. 53].

E. The Fourth Circuit's Decision

In a brief per curium decision without substantive analysis, the Fourth Circuit denied Mr. Vinson a certificate of appealability. [App. 2]. It did, however,

appoint Mr. Vinson counsel under the Criminal Justice Act, to file the instant Petition. *See* [App. 2].

REASONS FOR GRANTING THE PETITION

Before an appeal on the merits from a denial of post-conviction relief under 28 U.S.C. § 2255, the criminal defendant must obtain a certificate of appealability ("COA"), either from the district court or from the appellate court. 28 U.S.C. § 2253(c)(1). A criminal defendant is entitled to a COA if the criminal defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As this Court has explained, that standard for issuing a COA is very low, requiring only that "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, a showing that an appeal would be successful is not required because "[t]he holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

To prevail on a claim of ineffectiveness, a criminal defendant must make a two-part showing: (1) "a reasonable probability that, but for counsel's unprofessional errors, [(2)] the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). That test for

prejudice is less rigid than a more-probable-than-not test. *Id.* at 697 ("[A] strict outcome-determinative test… imposes a heavier burden on defendants than the tests laid down today.").

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (citations omitted). Thus, counsel can be constitutionally ineffective if counsel offers too rosy an assessment of the weakness of the Government's case or of the difference in potential sentencing exposure between a plea and a guilty verdict. *See, e.g.*, *Lafler*, 566 U.S. at 163 ("[A]ll parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial."); *United States v. Rashad*, 331 F.3d 908, 909 (D.C. Cir. 2003) (holding that defendant was entitled to an evidentiary hearing on his ineffectiveness claim that "his trial counsel assured him that the evidence against him could not support a conviction and that he faced a maximum sentence of 10 to 15 years in prison" but was instead sentenced to 235 months); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) ("We do not believe Toro received competent assistance. At the time counsel advised Toro to proceed to trial, his investigation should have indicated to him that the evidence against Toro was very strong. There were few, if any, viable defenses…. It was incredibly naive for counsel to get so caught up in Toro's case that he was unable to evaluate it objectively.").

When evaluating potential failure to satisfy "the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement," this Court has held that "there is no relevant difference between an act of commission and an act of omission in this context." *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010) (quotation and citation omitted).

I. Reasonable Jurists Could Debate Whether Trial Counsel Provided Deficient Performance.

The presence of a split of authority establishes that reasonable jurists could debate an issue, thereby making a COA appropriate. *See Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012) ("We grant this motion to expand the COA because, given the split in authority, we hold that 'reasonable jurists could debate' [the issue]…."). A split of authority exists here.

In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a plurality of this Court discussed the critical importance of a lawyer's advice to a criminal defendant, particularly where, as here, a conspiracy is alleged:

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer *his informed opinion* as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope, and that is particularly true of conspiracies under the Espionage Act. And especially misleading to a layman are the overt act allegations of a conspiracy.

332 U.S. at 721-22 (citations omitted) (emphasis added) (plurality opinion).

Since *Von Moltke*, several lower courts have, in published authority, affirmatively held that a criminal defendant is entitled to actual advice from trial counsel about whether to proceed to trial. *See, e.g.*, *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) ("If it is ineffective assistance to fail to inform a client of a plea bargain, it is equally ineffective to fail to advise a client to enter a plea bargain when it is clearly in the client's best interest. (citation omitted)); *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996) ("Counsel cannot plead a client guilty, or not guilty, against the client's will. But counsel may and *must* give the client *the benefit of counsel's professional advice on this crucial decision.*" (quotation omitted) (original emphasis)); *United States v. Carter*, 130 F.3d 1432, 1442 (10th Cir. 1997) ("[E]ffective assistance of counsel includes counsel's informed opinion as to what pleas should be entered." (citation omitted)); *Walker v. Caldwell*, 476 F.2d 213, 224 (5th Cir. 1973) ("[C]ounsel [must] actually and substantially *assist* his client in deciding whether to plead guilty." (original emphasis)).

Yet other lower courts—including the Fourth Circuit—have taken the opposite view in published authority, holding that a defendant is not entitled to actual advice from counsel about a potential plea. *See, e.g.*, *Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir. 1991) ("Jones contends that his counsel acted in what he calls a 'professionally unreasonable' manner by neither recommending that he accept the plea bargain nor attempting to persuade him to do so.... We cannot agree."); *Chapdelaine v. State*, 32 A.3d 937, 944 (R.I. 2011) (holding that

even though trial counsel did not "impart his professional and experienced advice" when conveying the offer, trial counsel's performance was not deficient).

Here, although published authority from the Fourth Circuit does not require counsel to make a recommendation to a client about whether to accept a plea agreement, published authority from other jurisdictions does. That split ought to have been enough to overcome the low showing required for a COA. *See Slack*, 529 U.S. at 484 (holding that the standard for a COA is only whether "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."). On merits review, perhaps Mr. Vinson could convince the Fourth Circuit *en banc* to change sides in that split—or convince this Court to reject the Fourth Circuit's view. But without a COA, Mr. Vinson never had a merits appeal to which he was statutorily entitled.[3]

II. Reasonable Jurists Could Debate Whether Mr. Vinson Showed Prejudice.

As indicated above, the test for prejudice from ineffective assistance is whether a "reasonable probability" exists that the result would have been different. *Williams v. Taylor*, 529 U.S. 362, 406 (2000) (quoting *Strickland*, 466

[3] Furthermore, counsel's transmission of the proposed plea agreement was accompanied with assertions that counsel himself would not vote to convict Mr. Vinson. That false hope was not reasonable. *See Vinson I*, 852 F.3d at 357 (holding that the Government presented "ample evidence that Vinson knowingly and intentionally engaged in fraudulent activities").

U.S. 668). That standard is thus lower than "a preponderance of the evidence." *Id.* (holding that applying a preponderance standard would be error).

Despite this Court's precedents, the district court's opinion applied the preponderance standard on the prejudice issue, concluding that prejudice was lacking because Mr. Vinson "has not shown that he would have pleaded guilty had Fischer advised him differently." [App. 47]. It should have asked whether a reasonable probability existed that Mr. Vinson would have accepted the Government's plea if trial counsel had advised him to do so.

Furthermore, even apart from having applied the wrong test, the district court's opinion appears incomplete in at least two respects.

First, it did not explain what Mr. Vinson thought he would have gained from a trial. *See, e.g., Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) ("[D]efendants obviously weigh their prospects at trial in deciding whether to accept a plea. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." (citation omitted)).

Second, it did not explain why Mr. Vinson would have rejected a recommendation to take a plea when Mr. Vinson actually followed trial counsel's advice to not take the stand. Such a course of conduct is good evidence of prejudice. *See Williams v. State*, 605 A.2d 103, 110 (Md. 1992) (holding that a defendant's

decision to follow trial counsel's advice about not testifying was sufficient evidence to show that the defendant would have followed counsel's advice about a plea).

A reasonable jurist could conclude that Mr. Vinson established prejudice. He should, therefore, have received a COA so that he could litigate that issue on the merits at the Fourth Circuit.

CONCLUSION

For the forgoing reasons, Mr. Vinson requests that this Court grant this Petition, reverse the judgment below that denied him a COA, and remand so that Mr. Vinson can appeal on the merits to the Fourth Circuit his claim trial counsel was ineffective in the plead-versus-trial decision.

Dated: October 28, 2021

Respectfully submitted,

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