No. _____

In the Supreme Court of the United States

ROBERT BRANDON BILUS,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Eleventh Circuit entered a decision that misapplies the precedent of this Court and as a result, violates the Sixth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Robert Brandon Bilus respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on August 11, 2021, affirming the judgment of the United States District Court for Northern District of Florida, Gainesville Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at Bilus v. United States, 2021 WL 3523922 (11th Cir. 2021). It is attached as **Appendix A**.

The judgment of the United States District Court for the Northern District of Florida, Gainesville Division, is unpublished and is attached at **Appendix D**.

JURISDICTION

The court of appeals entered its order on August 11, 2021. The Petitioner requested an extension of time with this Court, which was granted until December 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the United States Constitution which provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Robert Bilus, was serving a sentence imposed by the United States District Court for the Northern District of Florida when he filed a Motion to Vacate Judgment and Sentence pursuant to Title 28, United States Code, Section 2255, which provides the district court with the authority to vacate convictions in certain circumstances. The district court ultimately entered a judgment against Mr. Bilus, and in favor of the United States. Mr. Bilus filed a timely notice of appeal thereafter. The Eleventh Circuit exercised jurisdiction over Mr. Bilus's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts.

This case concerns a violation of the most basic and fundamental constitutional rights defined by the United States Constitution: the right to effective assistance of counsel and the right to knowingly and voluntarily choose to proceed to trial rather than enter a guilty plea. The Eleventh Circuit, in denying Mr. Bilus relief, violated those rights when it found that Mr. Bilus could not establish prejudice under this Court's binding case of Strickland v. Washington because Mr. Bilus raised a new argument on appeal that had not been previously raised. However, the argument raised on

appeal had been presented to the magistrate judge at the evidentiary hearing on Mr. Bilus's motion.

The opinion issued by the Eleventh Circuit in the instant case reveals an issue that will continue to occur, resulting in additional constitutional violations, unless this Court remedies the issue swiftly. We respectfully submit that accepting the instant case and resolving this issue will provide clarity for future defendants, and reinstate public confidence in the federal judiciary.

B. Factual Background.

Mr. Bilus was charged and convicted of receiving and attempting to receive child pornography, and later sentenced to a term of 168-months imprisonment. After the appellate court affirmed the judgment and sentence imposed, Mr. Bilus filed his motion under 28 U.S.C. § 2255. At the evidentiary hearing for said motion, two witnesses testified: Mr. Bilus and Attorney John Stokes. Mr. Bilus was the first witness to testify at the evidentiary hearing. He testified that he was currently in custody as a result of two separate cases - one federal and one state. However both of these cases arose from the same set of facts. (Doc. 215 at 8). Mr. Bilus was represented by the same attorney, John Stokes, on both of his cases. Initially, Mr. Bilus was only charged in state court. His state court case was pending for approximately two years before he was charged in the instant case. (Doc. 215

at 9). When Mr. Stokes was first retained, Mr. Bilus talked to him about his goals of his representation. Mr. Stokes advised him that there was a very strong Fourth Amendment suppression issue, that worked in both the state and federal case. In light of the strength of the suppression issue, the discussed strategy was to pursue that first with the hope of getting the case dismissed. (Doc. 215 at 10). Mr. Bilus filed a motion to suppress in the instant case and after a hearing was held, the motion was denied. After its denial, Mr. Bilus testified that he spoke with Mr. Stokes about what options were available to him moving forward.

Mr. Bilus testified that their conversation about options was limited to two options, both of which would allow Mr. Bilus to preserve the suppression issue for appeal. Mr. Bilus testified at that point, the most important thing to him (as a result of Mr. Stokes' advice) was to preserve the suppression issues and argue his case to the Eleventh Circuit. (Doc. 215 at 11). Mr. Bilus testified that it was his understanding, based on Mr. Stokes' representation to him, that the only way to preserve the motion to suppress issues was to go to trial.

Mr. Stokes also advised Mr. Bilus that proceeding to trial was not a big deal because there was little to lose by going to trial. Specifically, Mr. Stokes advised Mr. Bilus that if he was found guilty at trial, he would be subject to the same incarcerative sentence regardless. (Doc. 215 at 12). Mr. Bilus

testified that he expressed an interest in pleading guilty to Mr. Stokes. When this option was discussed, Mr. Stokes advised him that if he pled guilty, the government would argue for a sentence of 14 years and they would argue for a sentence of 10 years. Then, it would be up to the sentencing judge to decide a sentence between the argued-for ranges. Mr. Stokes advised Mr. Bilus that if he chose that option, to plead guilty, he could not appeal the motion to suppress issue. Mr. Stokes unequivocally told Mr. Bilus that the only way to preserve the motion to suppress issue was to go to trial and then handle the issue on appeal if he was found guilty. (Doc. 215 at 13). Mr. Bilus testified that he was not the type of defendant who was adamant on going to trial. He was open to entering a guilty plea if that meant a lower sentence because at the end of the day, his goal was to get the lowest amount of time possible. However, Mr. Stokes allowed him to believe that going to trial would result in a sentence similar to the sentence he would receive if he entered a plea. Again, Mr. Stokes continued to say that Mr. Bilus had nothing to lose by going to trial. When asked why he decided to go to trial, Mr. Bilus testified, "in the end, I felt like I was forced to go to trial to preserve the issues, and he made it seem like my sentence would be the same or close to it either way, so that there wasn't much to lose." (Doc. 215 at 14).

Mr. Bilus testified that he made the decision to go to trial, rather than enter a plea, because of his conversations and advice he received from Mr.

Stokes. In making that decision, he also spoke to Mr. Stokes about what the government was required to prove at trial and whether they had any chance of getting an acquittal. Mr. Stokes advised Mr. Bilus that the government could not prove that the Appellant viewed certain files because they could not show that Mr. Bilus had opened and viewed them. (Doc. 215 at 19). As a result, Mr. Stokes felt they had a good chance. Mr. Bilus testified that if he had known he could pursue a conditional guilty plea and preserve his right to appeal the motion to suppress, he would not have gone to trial.

Following Mr. Bilus's testimony, Attorney John Stokes testified for the government. Mr. Stokes first testified about his background as an attorney and the fact that he has conducted six jury trials in federal court throughout his thirty years of practice. (Doc. 215 at 40). Beyond the six jury trials, Mr. Stokes testified that he has obviously resolved more federal cases in pleas. Mr. Stokes first testified about the phone call that he received from the government. At the time, he was only representing Mr. Bilus on his State case. Mr. Stokes testified that when the government called him, no plea offer was ever made and the call was an inquiry about the status of the state case. (Doc. 215 at 44). Mr. Stokes admitted that the only reason the federal government would be making such a call was if they were looking into the case for federal reasons. (Doc. 215 at 59).

Mr. Stokes next testified about the conversations he had with Mr. Bilus about his case. First, he testified about out the discussions he had with Mr. Bilus regarding the benefits of filing a motion to suppress. Mr. Stokes was also asked whether he spoke with Mr. Bilus about potential punishments in his case. Mr. Stokes responded that he did not have any specific recollection of having those conversations with Mr. Bilus, but he obviously had a recollection about what he does in every case. Mr. Stokes testified that he always discusses, with every client state or federal, what the maximum punishments are, what his assessment of the facts and risks are, and whether they should go the route of trying to secure a plea offer or to trial. (Doc. 215 at 47). Mr. Stokes confirmed that there was never a plea offer made by the government. Instead, Mr. Stokes testified that the conversation he had with the government was that Mr. Bilus could plead straight up, he would get the two level adjustment for acceptance of responsibility and both parties could present their respective arguments to Judge Paul. (Doc. 215 at 50). After the motion to suppress was denied. Mr. Stokes was asked if he had a discussion regarding a possible plea or a conditional plea with Mr. Bilus. Mr. Stokes testified that he did not recall having that discussion because **he did not think** there was much use of one (i.e., a conditional plea) at that point. (Doc. 215 at 51). The government next asked Mr. Stokes whether there was a

discussion with Mr. Bilus about preserving the suppression issue without going to trial.

> Q: So was there ever a discussion with Mr. Bilus that the only way to preserve the suppression issue was to go to trial?
>
> A: I'm hesitating and trying to think in that, since it was -- the motion was denied, really our option at that point, since there was no plea offer, was to go to trial and preserve the issues.

(Doc. 215 at 51: 18-24). When Mr. Stokes was asked point blank about whether he discussed preserving the appellate issues and asking for a conditional plea with Mr. Bilus, Mr. Stokes responded, "I don't remember having a discussion about a condition plea specifically, no." (Doc. 215 at 52:7-8).

> Q: So is it possible that he did not understand that he didn't have to go to trial to preserve the suppression issue?
>
> A: I don't believe that's possible because we had extensive discussions about why would you plead now, especially in light of the facts of the case that we're free to argue – and you and I fought this case very fervently at trial, Mr. Williams, and anyone that doubts it should look at your closing argument and your remark about the job that we did on behalf of Mr. Bilus. That all said, no, it was very clear that we were going to trial, I'll say it again, we were going to trial in both cases. There was no question.

(Doc. 215 at 52:9-19). Mr. Stokes was then asked, in a different way, whether he thought that Mr. Bilus understood that he could plead guilty and still preserve the suppression issues for appeal.

> Mr. Bilus is an extremely intelligent person. There's no doubt in my mind he understood he could have pled to it. I would have probably done everything that a lawyer could do to persuade a client not to at that point given the fats we had to deal with at trial. Because we had a suppression hearing, a motion that had been denied, I saw little to no benefit in pleading to preserve an issue.

(Doc. 215 at 53:9-15). Mr. Stokes then confirmed that he still, even though he personally believed Mr. Bilus knew about his options, could not recall ever discussing a conditional plea with Mr. Bilus. (Doc. 215 at 54).

> I don't have a recollection of discussing the conditional plea because, based on the tone and tenor of how we were discussing whether to go to trial or not, that wouldn't have been a logical discussion to have. It would have been, well, I'll just go ahead and plead anyway despite losing the suppression motion. It made no sense to me at that point.

(Doc. 215 at 54:15-21).

Following the presentation of evidence, both parties presented evidence and discussed the issues with the court. Mr. Bilus originally scored a Level 33 – making the high end of the guidelines 168 months at the time of his sentencing. The court discussed that if Mr. Bilus had not gone to trial, had entered a plea and received the three level adjustment for acceptance of responsibility, his base offense level would have decreased to a Level 30, which would have established a **maximum** guideline sentence of 121 months (approximately 10 years). (Doc. 215 at 85). The magistrate judge considered at the evidentiary hearing the argument that but for counsel's advice, Mr.

Bilus would not have gone to trial and instead would have entered a conditional guilty plea. (Doc. 215 at 83-84).

C. Procedural History.

On March 8, 2017, Mr. Bilus filed a Motion to Vacate his Judgment and Sentence pursuant to 28 U.S.C. § 2255 with the district court, wherein he argued four grounds for relief. The district court ultimately found that an evidentiary hearing was necessary and was ultimately held on January 9, 2020. (Doc. 193).

On January 23, 2020, Honorable Magistrate Judge Gary R. Jones issued a Report and Recommendation (hereafter referred to as "the Report") that Mr. Bilus's motion be denied. (Doc. 195). As relevant to the instant petition, the district court addressed Mr. Bilus's claim that counsel was deficient for failing to research the applicable law prior to trial and advising Mr. Bilus that there was a good chance of success at trial because the government was required to prove that Mr. Bilus actually viewed the child pornography found on his computer. (Doc. 195 at 47). The district court agreed that if counsel provided that advice, it would have been erroneous. (Doc. 195 at 48). However, the district court found that Mr. Bilus was not entitled to relief because he couldn't prove prejudice.

> While Stokes did not testify that viewing the child pornography was an element of the offense Stokes suggested that the fact the computer was located in residence with other occupants having

> access to it in conjunction with the lack of evidence that Bilus actually looked at the child pornography, was a viable theory of defense at trial. But even assuming counsel was deficient with respect to his advice about the Government's burden, Bilus's claim on this ground fails because Bilus received the same sentence he claims he would have agreed to under the alleged plea offer from the Government. Consequently, Bilus cannot demonstrate prejudice.

(Doc. 195 at 49).

Mr. Bilus filed objections to the Report on February 6, 2020. (Doc. 196). On March 30, 2020, the Honorable Judge Allen C. Winsor adopted the Report and denied Mr. Bilus relief. (Doc. 198, 199). Thereafter, Mr. Bilus filed a timely notice of appeal with the district court and sought a certificate of appealability with the Eleventh Circuit Court of Appeal. On December 10, 2020, the Honorable Judge Britt C. Grant granted Mr. Bilus's COA motion on the following issues only:

1. Whether trial counsel was ineffective for failing to alert the district court to a proposed amendment to U.S.S.G. § 5G1.3; and
2. Whether trial counsel was ineffective for: (a) failing to pursue a conditional guilty plea; and (b) misadvising Bilus as to the elements of 18 U.S.C. § 2252A(a)(2).

After the parties submitted their briefs, the panel ultimately affirmed the district court's denial on August 11, 2021. In affirming the findings made as to the claim concerning counsel's advice about the elements of the offense, the panel found

> [e]ven assuming arguendo that counsel performed deficiently under Strickland, Bilus's claim fails. Bilus's prejudice allegations in the district court differed from his allegations on appeal. In his § 2255 motion, Bilus argued that he was prejudiced because "[a]s a result of trial counsel's misadvice, [he] rejected the government's plea offer." The district court concluded that Bilus could not establish prejudice because there was no plea offer, and even assuming there was an alleged offer, he received the same sentence of 14 years' imprisonment that he claimed was made in the plea offer. In his reply brief, Bilus concedes that, although he believed there was a plea offer, "as admitted during the evidentiary hearing, there was never an alleged plea offer from the government." Nevertheless, he maintains that he can establish prejudice because, had he entered a conditional guilty plea, he would have received a guidelines reduction for acceptance of responsibility, resulting in a lower guideline range and a lesser sentence. Bilus failed to assert the latter prejudice argument properly in the district court. Having discovered that there was in fact no plea offer ever made (which was the basis of his prejudice allegation below), Bilus cannot shift gears on appeal to assert a new basis for establishing prejudice in order to sustain his ineffective- assistance-of-counsel claim. See Johnson v. Alabama, 256 F.3d 1156, 1176 (11th Cir. 2001) ("The petitioner bears the burden of proof on the 'performance' prong as well as the 'prejudice' prong of a Strickland claim, and both prongs must be proved to prevail."); Johnson v. United States, 340 F.3d 1219, 1228 n.8 (11th Cir. 2003) (holding that § 2255 movant's argument raised for the first time on appeal was waived). In any event, as discussed previously, Bilus's assertion that he would have received a two-point reduction for acceptance of responsibility if he had pleaded guilty and therefore necessarily a lesser sentence is based on pure speculation.[13] At best, the likelihood of a different result is merely conceivable, which is insufficient to establish prejudice. See Harrington, 562 U.S. at 112 (explaining that, for purposes of Strickland prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable"). Accordingly, the district court did not err in denying relief on this claim.

Pet. App. A15-A17.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Opinion Gives Insufficient Deference to the Critical Aspect of Plea Bargaining.

Plea bargaining is a critical stage at which the Sixth Amendment's guarantee of effective assistance of counsel is implicated. Padilla v. Kentucky, 559 U.S. 356, 373 (2010). "Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012), quoting Lafler, at 132 S. Ct. at 1388. As this Court has explained, "horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." Id. (emphasis in original; internal brackets and citations omitted). "In order that these benefits can be realized…criminal defendants require effective counsel during negotiations. Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." Id. at 1407-08 (internal punctuation and citations omitted).

Maintenance of plea bargaining's adversarial component is essential to preserving the Sixth Amendment's promise of guaranteed effective assistance at critical stages. Indeed, "the adversarial process protected by

the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. … But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." United States v. Cronic, 466 U.S. 648, 656-57 (1984) (internal citations omitted). As the Court has observed, "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed gladiators." Id. at 657 (citation omitted).

The importance of the adversarial process is demonstrated by Lafler v. Cooper, 132 S. Ct. 1376 (2012), where defendant rejected a favorable plea agreement after heeding the uninformed advice of counsel. Id. at 1384. At trial, he was convicted and sentenced to a significantly more severe term of imprisonment than the one proposed in the rejected plea agreement. Id. Opposing habeas relief, Michigan argued that the defendant could not show prejudice since "the purpose of the Sixth Amendment is to ensure the reliability of a conviction following a trial," and that, because the evidence had been weighed by a jury and determined to indicate his guilt beyond a reasonable doubt, the reliability of his conviction could not be doubted. Id. at 1388. This Court summarized that argument as an assertion that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining," Id., and rejected it. As this Court explained, "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth

Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." 132 S. Ct. at 1388. In other words, no matter how much evidence prosecutors marshal against a defendant, he still may be prejudiced by ineffective assistance of counsel at the plea bargaining stage, by giving up valuable rights and benefits he otherwise would have retained but for counsel's deficient performance.

Lafler teaches the importance of protecting the process. There, defendant demonstrated prejudice by showing that "as a result of not accepting the plea and being convicted at trial, [defendant] received a minimum sentence three and a half times greater than he would have received under the plea." Lafler, 132 S. Ct. at 1391. As a result of not accepting this plea, defendant lost a valuable benefit and suffered prejudice – prejudice not remedied by the reliability of the subsequent trial and evidence that convicted him. Id. at 1388 ("the question is not the fairness or reliability of the trial but the fairness and regularity of the **processes** that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." (emphasis added)).

One way that the importance of the plea process is ensured and maintained, is a defendant's ability to challenge counsel's ineffectiveness surrounding their representation during that process. Claims

of ineffective assistance of counsel require the petitioner to show both that his attorneys' performance was deficient and that their deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). Defendants are entitled to the effective assistance of competent counsel during plea negotiations and, consequently, the Strickland test applies to claims of ineffective assistance with regard to plea offers. In Hill v. Lockhart, the Court applied the Strickland test to claims of ineffective assistance of counsel in pleading guilty to a crime. Hill v. Lockhart, 474 U.S. 52, 58 (1985). To succeed on the second prong of the Strickland test on a claim relating to an attorney's advice about pleading guilty, a petitioner "must show a reasonable probability that, but for counsel's errors, he would … have pleaded guilty and would [not] have insisted on going to trial." Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995). A defendant fails to show prejudice where he fails to offer evidence that he would have accepted a plea if not for his counsel's ineffective assistance. Glover v. United States, 522 Fed. Appx. 720, 723 (11th Cir. 2013).

Here, the Eleventh Circuit's opinion gives insufficient deference to the critical aspect of plea bargaining, as outlined extensively throughout this Court's history. The opinion recognizes that Mr. Bilus received ineffective assistance of counsel and as a result of that, Mr. Bilus could not knowingly decide whether he should proceed to trial or enter a conditional guilty plea.

However, regardless of the clear violation of Mr. Bilus's rights, the opinion undermines the adversarial process by accepting the district court's findings that ignore arguments and evidence previously presented on the issue.

II. The Eleventh Circuit's Opinion Squarely Contravenes this Court's Precedent, as well as the Sixth Amendment to the United States Constitution.

The Eleventh Circuit Court of Appeal's decision violates this Court's axiomatic holding in Strickland and Lockhart: that a defendant is entitled to the effective assistance of counsel during all critical stages, including plea negotiations. The Eleventh Circuit's opinion disregards those two accepted decisions when it found that regardless of there being a Sixth Amendment violation, Mr. Bilus was not entitled to relief.

Pursuant to the Eleventh Circuit's opinion, Mr. Bilus was not entitled to relief because (1) he raised an issue that differed from the allegations he made to the district court; and (2) any argument or finding that Mr. Bilus would have received a two-point reduction for acceptance of responsibility if he had pleaded guilty was based on pure speculation. Pet. App. A16. In making these findings, the Eleventh Circuit's opinion directly conflicts with this Court's opinions.

First, Mr. Bilus did not raise a new argument on appeal. In Mr. Bilus's originally filed 2255 petition, he alleged that

> [t]rial counsel advised the Petitioner that in order for the government to prove the charges against him the government was required to prove that the Petitioner actually viewed the pornography found on his computer. The Petitioner agreed to go to trial because he did not think the government had any evidence that he viewed the pornography, based on trial counsel's advice, not because he ever insisted he was innocent. Had the Petitioner been properly advised of all aforementioned things, he would have entered a plea and forfeited his right to go to trial.

(Doc. 177 at 7). Mr. Bilus's claim, from the outset, was that he was unable to enter a **guilty plea** – whether that was a negotiated plea or a conditional plea to the court. Thereafter, during the evidentiary hearing on said issue, when counsel testified that there was no plea agreement, the entire arguments presented thereafter were about whether Mr. Bilus would have entered a conditional plea absent counsel's deficient performance and this argument was accepted by the magistrate judge presiding over the case. The magistrate judge went so far as to calculate what the applicable guideline range would have been, had Mr. Bilus entered a plea of guilty rather than go to trial.

> I think Mr. Bilus scored at Level 33. The maximum – not maximum, but the guideline, high end of the guideline sentence was 168 months. So we talk about a two-level downward adjustment for acceptance of responsibility. It would typically be a three level -- a two level, and then typically the Government has to file a motion, but –
>
> …
>
> So it's a three level, so that would have moved the sentence to a Level 30, which would have been a maximum guideline sentence of 121 months.
>
> …

> Which is about 10 years. And your client's position is, in terms of the best judgment Mr. Stokes gave your client -- and I think your client admitted he understood that, you know, his lawyer doesn't have a crystal ball, he can just tell the client what he thinks would be the sentence -- Mr. Stokes was pretty much telling your client he was looking at, if he was found guilty at trial or a plea, the best-case scenario about 10 years, worst-case scenario about 14 years, somewhere in that range.

(Doc. 215 at 84-85). It was understood by all parties that there was no "plea agreement" and all issues surrounding Mr. Bilus's decision to go to trial involved his rejection of pleading guilty **in general**. Thus, the finding that this was raised for the first time on appeal is just a further violation of Mr. Bilus's rights.

Additionally, the finding that Mr. Bilus would have received a lower sentence if he had pled guilty, rather than go to trial, is speculative is contrary to the very principals that established the opinions in Frye and Lockhart. As explained in Frye, our nation has become a system of pleas, not a system of trials. One of the reasons behind this shift in the system is because proceeding to trial has known and obvious risks, that are not present when a defendant accepts responsibility and pleads guilty. During the evidentiary hearing at the district court, trial counsel testified that Mr. Bilus **would have** gotten the two points for acceptance of responsibility, if he had pled guilty, and as a result, there would have been "some benefit" to that instead of going to trial. (Doc. 215 at 54). There was no dispute or speculation

that Mr. Bilus would have received the two-level (if not three-level) reduction for accepting responsibility if he had pled guilty. As a result, there was nothing speculative about the argument that had he pled guilty, his guideline range would have been significantly lower and his maximum under that range would have been less than any sentence in the guideline range used at his sentencing. Thus, there is nothing speculative about the relief he would have received, but for counsel's actions.

Mr. Bilus's case is the perfect example of when a defendant is entitled to relief under Strickland because he was denied the most basic right as a result of counsel's deficient performance. The Eleventh Circuit's opinion overlooks (1) the critical aspect of plea bargaining; and (2) this Court's decisions and principles underlying the decisions in Strickland, Lockhart and Frye.

III. This Court Should Exercise its Discretion and Grant Instant Petition

In accordance with 28 U.S.C. § 604(a)(2), each year the Administrative Office of the United States Courts is required to provide a report of statistical information on the caseload of the federal courts for the 12-month period ending March 31. In a study conducted by Pew Research Center in 2019, it was determined that the number of individuals who go to trial is extremely small. "Nearly 80,000 people were defendants in federal criminal cases in

fiscal 2018, but just 2% of them went to trial. The overwhelming majority (90%) pleaded guilty instead, while the remaining 8% had their cases dismissed, according to a Pew Research Center analysis of data collected by the federal judiciary." See, https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

In 2018, only 320 of 79,704 total federal defendants (fewer than 1%) went to trial and won their cases. Meaning, for purposes of the instant petition, Mr. Bilus could have fallen amongst the majority of defendants who decide to enter a plea because of the benefits, but for counsel's deficient actions. The only way to ensure that Mr. Bilus and other future defendants who may fall before the same panel receive the same constitutional guarantees as all other defendants is for this Court to exercise its discretion and grant the instant petition.

CONCLUSION

For the reasons stated above, Robert Bilus, respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Bilus, Petitioner

Date: December 9, 2021

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