No. _____

In The
Supreme Court of the United States

WILLIAM CASIANO,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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April 11, 2023

QUESTIONS PRESENTED

Petitioner William Casiano faced a charge that carried a 25-year minimum mandatory sentence. His attorney never told him about this minimum mandatory sentence when discussing a plea offer of 3 years. Instead, defense counsel encouraged him to go to trial, telling him he would likely only receive a sentence of 7 to 12 years if he lost. Counsel also failed to advise him of a subsequent 12-year plea offer. After a jury found him guilty, the trial court sentenced Mr. Casiano to a 45-year term of imprisonment.

Mr. Casiano brought an ineffective assistance of counsel claim. At an evidentiary hearing, his attorney admitted he did not know about the 25-year minimum mandatory prior to sentencing. Had he known about it, his advice about the plea offer would have changed, and he would have emphasized the risks of trial. Mr. Casiano testified he would have accepted the plea offers if he knew about the minimum mandatory sentence.

The postconviction court found that he failed to establish *Strickland* prejudice. A federal habeas court agreed. It declined to credit Mr. Casiano's "after-the-fact" assertions and found no reasonable probability that he would have accepted either offer. The Eleventh Circuit affirmed the denial of a certificate of appealability. This petition presents the following questions for review:

1. Does the rule in *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017), that directs courts to

credit contemporaneous evidence, and not "post hoc assertions from a defendant about how he would have pleaded," apply in cases involving the rejection of plea offers?

2. Has a habeas petitioner established a "reasonable probability" that he would have accepted a lost plea offer where his testimony is corroborated by his attorney's admission that he failed to advise him of a 25-year mandatory minimum and would have advised him differently had he known about it, where there is a large disparity between the sentence imposed and the sentence called for in the plea deal, and where the petitioner established a contemporaneous willingness to plead guilty to a lesser offense?

3. Does a habeas petitioner make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), as required for the issuance of a certificate of appealability, where he identifies factually analogous decisions that support his claim for habeas relief?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner William Casiano was the Petitioner-Appellant in the court below.

Respondents, Secretary, Florida Department of Corrections, and Attorney General, State of Florida, were the Respondents-Appellees in the Eleventh Circuit Court of Appeal.

Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- *State of Florida v. William Casiano*, Case No. 49-2013-CF-004389 (Fla. 9th Jud. Cir. 2016). Order Denying Motion for Postconviction Relief entered on March 28, 2018.

- *William Casiano v. State of Florida*, Case No. 5D18-1589 (Fla. 5th DCA 2019). Order denying postconviction relief per curiam affirmed on February 19, 2019.

- *William Casiano v. Secretary, Department of Corrections et al.*, Case No. 6:19-cv-774-PGB-LHP (M.D. Fla. 2022). Order denying petition for writ of habeas corpus entered on June 30, 2022.

- *William Casiano v. Florida Department of Corrections*, Case No. 22-12485-F (11th Cir. 2023). Order affirming denial of certificate of appealability entered on January 11, 2023.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, William Casiano, respectfully petitions the Court for a writ of certiorari to review the decision of United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's denial of a certificate of appealability.

DECISIONS BELOW

The Circuit Court of the Ninth Judicial Circuit, in and for Osceola County, Florida, entered an Order Denying Mr. Casiano's Motion for Postconviction Relief. App. 19.

Florida's Fifth District Court of Appeal issued an order per curiam affirming that decision without a written opinion. *Casiano v. State*, 264 So. 3d 177 (5th DCA 2019).

Mr. Casiano petitioned the United States District Court for the Middle District of Florida for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied his petition and ruled he was not entitled to a certificate of appealability. App. 15. The Eleventh Circuit's order denying Mr. Casiano's motion for a certificate of appealability is reproduced in the appendix. App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. Casiano's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Eleventh Circuit, which had jurisdiction to review the denial of a certificate of appealability, 28 U.S.C. § 2253(c)(2), issued its order on January 11, 2023. App. 1. This petition is timely filed within 90 days of that order. This Court has jurisdiction to review the denial of a certificate appealability. 28 U.S.C. § 1254(1); *Hohn v. United States*, 524 U.S. 236, 239 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Under 28 U.S.C. § 2253(c)(2), "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

The State of Florida charged Mr. Casiano with (1) sexual battery with a deadly weapon ("Count One") and (2) false imprisonment with a weapon ("Count Two"). App. 4. The court conducted a two-day trial, where the jury found Mr. Casiano guilty of both counts. App. 4.

At sentencing, the prosecutor and the alleged victim requested the 25-year minimum mandatory sentence required under Count One, to be followed by a 10-year term of sex offender probation. (Doc. 9-4 at

25-27).[1] That sentence was substantially higher than the sentencing score sheet, which pegged the lowest permissible sentence at 147.45 months (12.2875 years). (Doc. 9-3 at 153-155).

The mention of a minimum mandatory sentence took defense counsel by surprise. App. 22. During the sentencing, he admitted on the record that he never discussed the possibility of a 25-year mandatory minimum sentence with Mr. Casiano:

> I will tell you that in this particular case I discussed the possible consequences of this case with Casiano on a number of occasions. I neglected, I guess, to – to read the statutes fully, and I was not aware that there was a 25-year mandatory minimum in this particular case and never discussed that with him until today - - when Ms. - when the State brought it up. And I apologize for that, but that - - that's something I needed to let the Court know.

(Doc. 9-4 at 29-32). Without providing any reasoning, the trial court imposed a sentence of 45 years of imprisonment with a 25-year mandatory minimum sentence, to be followed by lifetime sexual offender probation. (Doc. 9-4 at 37).

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[1] All citations to docket entries in this section refer to documentary evidence presented to the federal district court in *William Casiano v. Secretary, Department of Corrections et al.*, Case No. 6:19-cv-774-PGB-LHP (M.D. Fla. 2022).

Mr. Casiano filed a motion to correct sentence asserting that the trial court illegally imposed a 25-year mandatory minimum sentence because the jury never factually determined whether he committed the sexual battery using a deadly weapon or with physical force. (Doc. 9-2 at 870). The state stipulated to the error, and the trial court conducted a resentencing, where it imposed the same 45-year sentence. (Doc. 9-2 at 870).

The trial court provided no explanation for sentencing Mr. Casiano to 20 years more than what the prosecutor and the alleged victim requested and 33 years greater than the lowest permissible sentence. (Doc. 9-2 at 870). Florida's Fifth District Court of Appeal affirmed the judgment on direct appeal. *Casiano v. State*, 169 So. 3d 1191 (Fla. 5th DCA 2015).

In March of 2016, Mr. Casiano filed a timely motion for postconviction relief asserting ineffective assistance of counsel. (Doc. 9-2 at 868-880). Specifically, he alleged that his defense counsel provided ineffective assistance by failing to advise him that sexual battery with a deadly weapon was punishable by a mandatory minimum prison sentence of 25 years prior to him rejecting a favorable plea offer of 3 years in prison. App. 20.

The postconviction court denied the claim without conducting an evidentiary hearing. *See* App. 19. Mr. Casiano appealed, and the state appellate court remanded the case for an evidentiary hearing, concluding that no evidence negated Mr. Casiano's

"claim that he would have taken the plea if he had known he faced a minimum mandatory sentence." *Casiano v. State*, 232 So. 3d 526 (Fla. 5th DCA 2017).

On remand, the postconviction court held an evidentiary hearing. App. 19-20. Justin Patrou, a board-certified criminal trial attorney who briefly represented Mr. Casiano, testified that it was the trial court's general practice to accept negotiated plea deals. App. 20.

The trial prosecutor, an assistant state attorney who practiced in that jurisdiction for 10 years, also took the stand. (Doc. 9-7 at 202-203). She presented many negotiated resolutions to the same trial court over a year and a half to two-year period and could not recall a single time where the trial court rejected a negotiated resolution she proposed. (Doc. 9-7 at 205-206).

The prosecutor testified that she was familiar with plea negotiations and would only "make offers that were appropriate based on the nature of the case, the nature of the defendant's background, [and] the strengths and weakness of the case if it were to go to trial." (Doc. 9-7 at 205). According to the prosecutor, Mr. Casiano's case posed unique challenges to the state because it involved a delayed disclosure, and Mr. Casiano's mother was present at the time of the incident but did not corroborate the account of the alleged victim. (Doc. 9-7 at 235-236). The case would eventually come down to consent, and whether the jury believed the alleged victim or Mr. Casiano. (Doc. 9-7 at 240-241).

The prosecutor recalled sending an email to defense counsel conveying a plea offer: Mr. Casiano could plead guilty to a lesser-included offense—sexual battery not likely to cause injury, and serve a sentence of 36 months of incarceration, to be followed by 5 years sex offender probation and a sexual offender designation. App. 21. The prosecutor stated in the email that the offer was contingent upon the alleged victim's approval, and she would not approach the alleged victim unless Mr. Casiano expressed interest in the offer. App. 21. Notwithstanding this condition, the prosecutor testified that she generally had discretion to extend plea offers even where the victim did not agree with the proposed resolution. App. 7.

The prosecutor testified at the evidentiary hearing that the offer was "provisional" and only made to gauge Mr. Casiano's interest in entering a plea. App. 23. She also confirmed that Mr. Casiano could not have simply accepted the 3-year offer. App. 23.

In addition to the email, the prosecutor recalled a 12-year prison offer she conveyed verbally to defense counsel. App. 21. In contrast to discussions related to the 3-year offer, the prosecutor classified the 12-year deal as a "firm" offer that could have been accepted by Mr. Casiano. App. 21. According to the prosecutor's notes, the alleged victim also expressed approval of a 12-year negotiated resolution. (Doc. 9-7 at 222-223).

The prosecutor testified that Mr. Casiano did not accept either the 3-year or 12-year offer. App. 21. She said that defense counsel advised her that Mr. Casiano would not be accepting the offers because he did not want to be designated as a sex offender. App. 8. He did, however, extend a counteroffer proposing a plea to a misdemeanor domestic violence charge. App. 7.

Defense counsel testified that the trial court did not always agree to negotiated resolutions, though they were accepted most of the time. (Doc. 9-7 at 244-245). He could not say whether the trial court would have accepted a negotiated resolution in this case. App. 29.

Defense counsel admitted that he received an email from the state with a provisional 3-year offer. App. 21. He discussed the 3-year plea offer with Mr. Casiano. (Doc. 9-7 at 248-250). He did not recall ever receiving or discussing a different offer with Mr. Casiano. (Doc. 9-7 at 257).

When discussing the provisional 3-year offer, defense counsel advised Mr. Casiano of what he believed his sentencing range was: a maximum sentence of life and the lowest permissible sentence between 7 and 12 years. (Doc. 9-7 at 252-253). Defense counsel gave his advice while operating under the assumption that Mr. Casiano would receive a lowest permissible sentence, telling him:

> [Y]ou know, this is a good trial. You should look at this. You should

> think about this. The - - if you lose, you're gonna get - - you know, you're probably going to get 12 years. I didn't know – I had no reason to believe at that particular time that Judge White would sentence him the way that he did finally sentence him. I didn't have any reason to believe that the victim was - - was gonna come in and asking for, you know, a longer period of time [than] the bottom of the guidelines.

(Doc. 9-7 at 258-259).

Defense counsel recalled that Mr. Casiano always maintained his innocence. (Doc. 9-7 at 266-267). Although the case came down to the issue of consent and whether the jury believed Mr. Casiano or the alleged victim, defense counsel felt confident in their chances of winning at trial. (Doc. 9-7 at 243-244). He knew the trial prosecutor had a reputation for being tough, and counsel believed that the 3-year offer reflected the weaknesses of the state's case. (Doc. 9-7 at 257, 267).

This led defense counsel to encourage Mr. Casiano to proceed with trial: "I probably encouraged him to go to trial, yes." (Doc. 9-7 at 259). Defense counsel testified that it is "absolutely important" to advise clients of minimum mandatories during plea discussions. (Doc. 9-7 at 246-247). Defense counsel admitted at the evidentiary hearing that he failed to discuss a 25-year minimum mandatory with Casiano when discussing the 3-year offer and recalled "using

terms that would encourage him to go to trial." App. 22.

Defense counsel also conceded that his advice to Mr. Casiano would have changed had he been aware of the 25-year minimum mandatory:

> I believe it would have changed my mind to some extent. I would have emphasized the 25-year min-man, and I would have emphasized, you know, there's a chance that we lose, and if we do, you have a 25-year minimum-mandatory that you're facing instead of the 12 years that - - that we were talking about at the time.
>
> There's a lot of difference. Some guys will take, say, three years or 12 years on a – in order to avoid, say, 25 years. But if they don't know that the 25 is there, . . . they may not take the 12 or three because . . . sometimes that may be what they're gonna get anyway.

(Doc. 9-7 at 254).

Defense counsel explained that most of his clients maintain their innocence, but still enter pleas because the risk of going to trial and losing is too great. (Doc. 9-7 at 256). Though no defendant wants to be labeled a sex offender, defense counsel testified that people still enter pleas in such cases to avoid the possibility of extensive prison sentences. (Doc. 9-7 at

267). Ultimately, defense counsel testified that he could not say what Mr. Casiano would have done had he been aware of the 25-year minimum mandatory during plea negotiations. (Doc. 9-7 at 270).

The evidentiary hearing concluded with the testimony of Mr. Casiano. He was 19 years old at the time, and the charges represented the first time that he had been in circuit felony court. (Doc. 9-7 at 281-82). He understood the case against him to be weak, and that it ultimately would come down to the issue of consent. (Doc. 9-7 at 283). Mr. Casiano also understood there was the possibility of losing at trial because the jury might discredit his testimony and believe the alleged victim. (Doc. 9-7 at 285, 291).

Mr. Casiano testified that defense counsel discussed a 3-year offer, but never a 12-year offer. (Doc. 9-7 at 284-285). The first time that he heard of a 12-year offer was when the trial prosecutor testified to it at the evidentiary hearing. (Doc. 9-7 at 293).

When discussing the risks of going to trial, as opposed to taking the 3-year plea offer, defense counsel told him his sentence could range from anywhere between 7-12 years (the lowest permissible sentence) and life in prison. (Doc. 9-7 at 283-285). Mr. Casiano also testified that his attorney told him he would probably get lowest permissible sentence even if he lost at trial, because this was his first major offense. (Doc. 9-7 at 283-285).

Defense counsel never advised him of the 25-year minimum mandatory until it came up at

sentencing. (Doc. 9-7 at 286-287). Mr. Casiano felt comfortable rejecting the 3-year offer because he felt confident in his ability to win at trial and believed, even if he lost, he would likely receive lowest permissible sentence of 7 years. (Doc. 9-7 at 285-286). He also knew he would have the opportunity to appeal. (Doc. 9-7 at 286).

Mr. Casiano testified that he "certainly" would have accepted either 3-year or 12-year offer had he known about the minimum mandatory of 25 years. (Doc. 9-7 at 290-292). An automatic 25-year term of incarceration would have a devastating impact on his whole family, and the risk of losing at trial was simply too great:

> At the time I was not -- at the time I was 20 when the plea was made, but sometime prior, my father had just died. I was adopted by my grandparents. I'd not been living in the home for some years. I'd left at an early age. Before he died, he asked me to move back in with my mother to take care of her because she's an older woman, and she's not in the best of health. So I moved back into the home at the age of 18. At the age of 19 is when I caught this case.
>
> Well, not having known about the minimum-mandatory of 25 years, there was no thought that I would receive any great sentence only because the advice I'd been given was that you're not likely

going to get a life sentence or anything like a life sentence. This is probably what you're going to get per your lowest permissible, which at the time was seven and some change, to be later 12. Well, had I known about a minimum-mandatory of 25, the whole dynamic of my thought process changed because now I must consider if I lose and if I know it's the possibility that I can lose which there is, there's always that possibility-- then I'm not leaving the courtroom without at least 25 years. At least. And I would be leaving at the age of 45.

So it stands to reason that while my family and loved ones are -- while I'm facing this minimum-mandatory of 25 years, I was not -- I would not have taken the risk of not only taking myself through that, but I wouldn't have taken my mother, my grandmother, my church family, and anyone else I know and love, I would not have taken them through that for the simple fact that she's all I have, and I'm all she has, really, as far as her – her children are concerned.

And so had I known about the minimum-mandatory of 25 years, it would have been in my best interest, despite whether or not I was convinced of my innocence, despite whether or not

> I felt confident, I have to not only take myself into consideration, I have to be considerate of the ones I love, and I have to be considerate of the fact, as you said earlier, I'm 20 years old, facing a minimum-mandatory of 25 years, that I would lose out on all that time of being able to establish myself as an adult or establish a family of my own or anything like that. I would have forfeited all that.

(Doc. 9-7 at 290-292).

Mr. Casiano confirmed he would have "absolutely" accepted the offers, even though he did not want to be labeled a sex offender. App 23. He once again emphasized that the risk of going to trial with a 25-year minimum mandatory would have been too great. (Doc. 9-7 at 293).

On March 28, 2018, the postconviction court entered an order denying relief. App. 19. The postconviction court accepted the testimony that defense counsel failed to advise Mr. Casiano of the 25-year minimum mandatory. App. 23-24. But the postconviction court concluded that the only firm plea offer was for 12 years and that the 3-year offer could not have been accepted. App. 23.

The postconviction court denied relief because it concluded that Mr. Casiano did not show *Strickland* prejudice. It found that he failed to establish a reasonable probability that he would have

accepted either the 3-year or 12-year offer had he been advised of the 25-year minimum mandatory. App. 24. The postconviction court based its conclusion on its belief that Mr. Casiano had an abiding conviction that he would prevail at trial and therefore found his assertion that he would accept the offer to not be credible. App. 24.

The postconviction court also concluded that Mr. Casiano did not establish a reasonable probability that a 3-year or 12-year negotiated resolution would have been accepted by the trial court. App. 24. While acknowledging that the trial court generally accepted negotiated resolutions, the postconviction court found "extrinsic evidence"—namely, the 45-year sentence imposed—demonstrated that the judge would not have accepted either of these plea deals. App. 24.

Mr. Casiano filed a motion for rehearing and argued that the postconviction court "misevaluated the reasonable probability standard" when it found: (1) he would not have accepted a 3-year or 12-year resolution; and (2) the trial court would not have accepted a negotiated resolution of 3 or 12 years. App. 27. He observed that he was "unfairly deprived of critical information when deciding to reject a favorable plea offer." App. 28. Mr. Casiano further maintained that the postconviction court improperly considered the ultimate sentence imposed by the trial court as evidence that the trial court would not have accepted a negotiated resolution. App. 29.

The postconviction court denied the motion for rehearing. App. 27. It stood by its finding that Mr. Casiano would not have accepted a negotiated resolution. App. 28. It added that it did not find credible Mr. Casiano's testimony to the contrary. App. 28. Though the testimony regarding the tendency of the presiding judge to accept negotiated resolutions went unrebutted, the postconviction court declined to credit it. App. 29. Instead, it concluded that Mr. Casiano failed to prove a reasonable probability that even the 12-year offer would have been accepted by the trial court judge. App. 29-30.

Mr. Casiano appealed the denial of postconviction relief, but the state appellate court denied the appeal without any written explanation. *Casiano v. State*, 264 So. 3d 177 (5th DCA 2019).

Mr. Casiano filed a federal habeas petition pursuant to 28 U.S.C. § 2254. App. 3. In it, he renewed his argument that trial counsel was ineffective for failing to advise him that he could be sentenced to a 25-year minimum mandatory term and for failing to convey the 12-year plea offer. App. 7.

He observed that the deficient performance of defense counsel could not be in dispute, as counsel admitted both at the sentencing hearing and the evidentiary hearing that he failed to advise Mr. Casiano of the 25-year minimum mandatory sentence when discussing whether to take a plea deal. Mr. Casiano also challenged the reasonableness of state court's application of the "reasonable probability"

standard, as well as its findings that (1) he would have accepted the state's plea offer had he been properly advised and (2) the trial court would have accepted the terms of the plea offer. App. 12.

The district court denied the petition. It found there was "no indication that defense counsel would have advised Petitioner to accept the plea," App. 13, even though counsel admitted at the hearing that (1) he encouraged Mr. Casiano to go to trial; (2) his advice would have changed if he had known about the minimum mandatory sentence; and (3) he would have emphasized the mandatory minimum. App. 22; (Doc. 9-7 at 254).

The district court additionally held there was "no indication that had Petitioner been aware of the twenty-five-year minimum mandatory term he would have foregone the trial and entered the plea," particularly since he "maintained his innocence" and did not want to "enter a plea to any offense that required him to register as a sex offender." App. 13-14. Yet Mr. Casiano had previously testified that, had he known about the draconian minimum mandatory he faced, he would have accepted the sex offender designation and taken the plea. App 23.

Instead of crediting the uncontroverted testimony of Mr. Casiano and defense counsel, the district court declined to consider such "after-the-fact statements" in determining whether he established prejudice. App. 14 (citing, *inter alia*, *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991)). Thus, it held that "the state court's denial of the claim was

not contrary to or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented at the state evidentiary hearing." App. 14-15. It also denied Mr. Casiano a certificate of appealability, finding that he had not "demonstrated that jurists of reason would find the Court's rulings debatable." App. 15.

Mr. Casiano moved the Eleventh Circuit for a certificate of appealability. He argued that he should receive a certificate because he established a reasonable probability that: (1) he would have accepted the plea deal but for defense counsel's misadvice regarding his sentencing exposure; and (2) the trial court would have accepted the terms of the plea deal. Mot. for Certificate of Appealability at 21-38.

He also pointed to other decisions in the habeas context that reached the opposite conclusion on analogous facts. Mot. For Certificate of Appealability at 21-24, 29 (citing *United States v. Knight*, 981 F. 3d 1095 (D.C. Cir. 2020); *United States v. Kearn*, 13-40057-01-DDC, 2022 WL 37648, at *13–16 (D. Kan. Jan. 4, 2022); and *Byrd v. Skipper*, 940 F.3d 248, 258 (6th Cir. 2019)). Though these other decisions were presumably written by reasonable jurists, the Eleventh Circuit denied the motion by way of a cursory, two-sentence opinion finding only that Mr. Casiano "failed to make a substantial showing of the denial of a constitutional right." App. 1. This timely petition followed.

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari to resolve a split in authority on the first question presented, which concerns the proper test to apply in ineffective assistance claims predicated on rejected plea offers. Some federal courts have applied the standard articulated in *Lee*, where this Court emphasized the primacy of "contemporaneous evidence," as opposed to "post-hoc" assertions, when determining whether a defendant would have accepted a guilty plea. *See*, *e.g.*, *Knight*, 981 F.3d at 1102.

Other federal courts have reached a different conclusion and declined to apply the *Lee* standard to cases involving rejected plea offers. *See*, *e.g.*, *Anaya v. Lumpkin*, 976 F.3d 545, 555 (5th Cir. 2020) (declining to "export the *Lee* standard—the need for contemporaneous evidence"—to rejected guilty plea offers, which are governed by the standards articulated in *Missouri v. Frye*, 566 U.S. 134, 147 (2012) and *Lafler v. Cooper*, 566 U.S. 156, 164 (2012)). This Court should resolve this dispute and hold that the testimony of postconviction defendants explaining why they would have taken a guilty plea may be relevant to ineffective assistance of counsel claims involving the rejection of favorable plea offers.

The Court should also grant certiorari review on the second question presented. Courts need clarity regarding the quantum of evidence necessary to establish *Strickland* prejudice in such cases. The "reasonable probability" standard should not turn on

the solely on subjective credibility determinations of postconviction judges. Instead, it should account for objective factors, such as the disparity between the sentence ultimately imposed and the terms of the lost plea offer, and a contemporaneous willingness of a defendant to plead guilty to a lesser charge.

Finally, the Court should review the third question presented and reiterate that the bar for obtaining a certificate of appealability should not be insurmountable. Mr. Casiano relied on factually analogous decisions from other federal habeas courts, which, at the very least, should have convinced the Eleventh Circuit to issue a certificate of appealability.

I. Review is Necessary to Clarify the Proper Standard for Ineffective Assistance of Counsel Claims Predicated on Rejected Plea Offers.

This Court has addressed ineffective assistance of counsel claims arising from the plea-bargaining context on several occasions in recent years. In *Lafler v. Cooper*, 566 U.S. 156 (2012), the Court articulated the test for prejudice to be applied in a case in which a petitioner claims that counsel's deficient performance led him to reject a favorable plea offer. Under that test, a petitioner "must show that but for the ineffective advice of counsel there is a reasonable probability that (1) the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of

intervening circumstances), (2) that the court would have accepted its terms, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164.

Subsequently, in *Lee*, the Court addressed the inverse scenario, where a postconviction defendant claimed he never would have accepted a guilty plea had he known the result would be deportation. *Lee*, 137 S. Ct. at 1962. In discussing how to evaluate whether a defendant sustained prejudice, the Court instructed that that judges "should . . . look to contemporaneous evidence to substantiate a defendant's expressed preferences," instead of "post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.*

In the wake of *Lee*, the federal circuit courts of appeal have disagreed as to whether the rule announced there applied in the context of rejected plea offers. *See generally Barlow v. Commissioner of Correction*, 273 A.3d 680, 691 (Conn. 2022) (collecting cases and concluding that its "research reveals that the federal courts have arrived at conflicting conclusions on this issue").

In *Anaya v. Lumpkin*, the Fifth Circuit rejected the state's reliance on what it described as the "*Lee* standard—the need for contemporaneous evidence." It reasoned that that "*Lee* imposed standards for overturning an *accepted* plea deal, not standards for obligating the government to offer again a plea *rejected* by the defendant." 976 F.3d at

554-55 (emphasis in original). Though lamenting that the "law is murky" on this point, the Fifth Circuit found that the test from *Lafler* and *Frye* governed, as this Court "explicitly disavowed a single 'means for demonstrating prejudice . . . during plea negotiations.'" *Id.* at 554, 555 (quoting *Frye*, 566 U.S. at 148).

In contrast, the D.C. Circuit has accepted the *Lee* standard in the context of rejected plea offers. *Knight*, 981 F.3d at 1102. In *Knight*, the D.C. Circuit looked primarily to "contemporaneous evidence" to substantiate the expressed preferences of a postconviction defendant. *Knight*, 981 F.3d at 1102. That contemporaneous evidence included a "significant disparity in sentencing exposure between the plea offer on the Superior Court charge and the charges that Knight faced in federal court." *Id.* at 1103. It also included the defendant's willingness to entertain a plea to less serious charges and the advice his attorney provided at the time of the plea bargaining. *Id.* at 1104-05.

Here, the district court rigidly applied the *Lee* standard, expressly declining to credit "after-the-fact" assertions of Mr. Casiano and flatly declaring that "Petitioner's actions prior to trial, including his profession of innocence, demonstrates that he would not have entered a plea." App. 14.

This was error. As the Fifth Circuit reasoned in *Anaya v. Lumpkin*, the proper standard for rejected pleas was articulated in *Lafler*:

> In *Lafler*, the Supreme Court didn't do its own prejudice analysis; instead, the Court relied on the Sixth Circuit's reasoning under the prejudice prong. There, the defendant relied only on his 'uncontradicted' testimony that 'had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the state's offer.' And the Sixth Circuit rejected Michigan's argument—identical to the State's argument here— that the defendant 'cannot show prejudice with his own self-serving statement.' Moreover, the Sixth Circuit explained that even if the defendant's assertion needed independent corroboration, the 'significant disparity between the prison sentence under the plea offer and exposure after trial lends credence to petitioner's claims.' The same is true here. And this rationale was affirmed by the Supreme Court.

Anaya v. Lumpkin, 976 F. 3d at 555.

The proper standard for evaluating prejudice in the context of rejected plea offers is an issue of paramount importance that has divided the lower courts. Accordingly, this Court should grant certiorari review on the first question presented.

II. The Court should Elucidate the Quantum of Evidence Necessary to Establish an Ineffective Assistance of Counsel Claim Based on Rejected Plea Offers.

The second question for review goes to the merits of Mr. Casiano's habeas petition, where he offered substantial, uncontroverted evidence that supported his claim that he would have accepted either of the two offers. The postconviction court denied relief based primarily on its finding that Mr. Casiano was not credible. In doing so, the postconviction court and the federal habeas courts below misconstrued the "reasonable probability" standard in a manner that conflicts with other federal courts. This Court should therefore grant certiorari review on the second question presented.

To "show prejudice from ineffective assistance of counsel [when] a plea offer has lapsed or been rejected because of counsel's deficient performance . . . it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147.

In evaluating whether a habeas petitioner has carried his burden, courts have looked to a variety of factors, including the disparity between the sentencing exposure and the terms of the rejected plea offer. *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003) ("a significant sentencing disparity in combination with [a] defendant's statement of his

intention [are] sufficient to support a prejudice finding" under *Strickland*); *Knight*, 981 F.3d at 1104-05.

This makes sense. As this Court stated in both *Lee* and *Hill v. Lockhart*, 474 U.S. 54, 58 (1985), the prejudice inquiry should be focused on what an individual defendant would have done but for the mistaken advice of counsel, and how that advice would have affected the defendant's decision-making. *See Lee*, 137 S. Ct. at 1966-67. There is "more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." *Id.* at 1966.

Other federal appellate courts have also discounted contemporaneous professions of innocence in evaluating whether a defendant would have taken a favorable plea offer. *See*, *e.g.*, *Byrd v. Skipper*, 940 F.3d 248, 258 (6th Cir. 2019). As the Sixth Circuit observed in *Byrd*, the habeas petitioner's "interest in proceeding to trial was rooted in misinformation gleaned from his counsel's faulty advice, making it an unreliable metric of reasonably probable outcomes." *Id.*

This logic applies with equal force in this case. Though Mr. Casiano professed his innocence during plea negotiations, he "lacked the requisite information to weigh the options in front of him, and whatever desire he exhibited before trial is not dispositive of what he would have done if he were

properly educated about the charges against him." *Id.*

It is important to remember that Mr. Casiano's attorney admitted that he never told him about the 25-year minimum mandatory sentence he faced. Defense counsel also admitted that his advice would have changed if he was aware of the minimum mandatory sentence. In fact, defense counsel admitted that he would have emphasized the minimum mandatory sentence in discussing the advisability of accepting a guilty plea. Under these circumstances, a contemporaneous profession of innocence should not override all the other compelling circumstances that corroborated Mr. Casiano's testimony that he would have accepted a guilty plea. Those circumstances included: (1) the vast disparity between the sentence imposed and the rejected plea offers of 3 and 12 years; (2) the testimony of his attorney that he would have stressed the risks of going to trial and the length of the minimum mandatory had he known about it; (3) Mr. Casiano's willingness to entertain a plea to a misdemeanor domestic violence offense; and (4) Mr. Casiano's candid testimony about the devastating impact a 25-year sentence would have had on his entire family.

The "reasonable probability" standard is objective in nature. It should not turn on entirely on the whim or caprice of the postconviction judge, who, in the face of substantial uncontroverted evidence that a defendant would have taken a favorable plea, simply states, "I don't believe you."

III. The Court should Resolve any Uncertainty regarding what Constitutes a Substantial Showing of the Denial of a Constitutional Right.

This Court should grant this petition and resolve the ambiguity as to what constitutes a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). And, because Petitioner raised issues that satisfy that threshold, the Court should remand this case to the Eleventh Circuit for the issuance of a certificate of appealability.

This Court has described the writ of habeas corpus as "the precious safeguard of personal liberty" and held that "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939); *see also Johnson v. Avery*, 393 U.S. 483, 485 (1969). However, with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress erected a series of procedural obstacles to habeas corpus relief. Chief among them is the requirement that a prisoner obtain a "certificate of appealability" as a jurisdictional prerequisite to any appeal from the denial of habeas relief. 28 U.S.C. § 2253(c)(2).

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This provision has never been construed as an insurmountable hurdle; indeed, the Court has held a prisoner need only "demonstrate that reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

As the Court explained in *Miller-El v. Cockrell*, "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 336.

Notwithstanding this admonition, the federal circuit courts of appeals have remained exceedingly reluctant to grant certificates of appealability. *See generally* Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1614 (2015) (noting that 92 percent of all certificate of appealability rulings result in denials).

This case presents a classic example of an erroneous denial of a certificate of appealability. Mr. Casiano alluded to decisions of federal habeas courts that, under factually-analogous circumstances, reached the opposite conclusion as the decision in this case.

Those cases included *Knight*, where the D.C. Circuit reversed the district court's denial of habeas relief where a defendant established that he lost a

favorable plea deal due to defense counsel's faulty advice regarding the consequences of rejecting that plea. It also included *United States v. Kearn*, 13-40057-01-DDC, 2022 WL 37648, at *13–16 (D. Kan. Jan. 4, 2022), where the District Court of Kansas relied on *Knight* and found a reasonable probability that, but for his counsel's deficient advice, the defendant would have accepted the government's plea. The *Kearn* Court rejected the sort of rationale adopted by the habeas court here: "Courts can't rationally expect defendants to theorize contemporaneously about the decisions they would make if they were receiving different advice. If courts required this kind of evidence, no defendant could show prejudice." *Id.* at *14

Mr. Casiano also cited *Byrd v. Skipper*, 940 F.3d 248 (6th Cir. 2019), where, as noted above, the Sixth Circuit declined to assign overriding significance to professions of innocence and reversed the denial of habeas relief related to a lost plea offer. If the Court needs more authority, it should also consider *Pouncy v. Macauley*, 546 F. Supp. 3d 565, 614 (E.D. Mich. 2021), where the Eastern District of Michigan found that a habeas petitioner was entitled to relief on facts that closely resemble the facts of this case.

It is important to emphasize that Mr. Casiano did not need to conclusively establish that he received ineffective assistance of counsel to receive a certificate of appealability. All he needed was to show was that "reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484. Mr. Casiano made that showing. Therefore, this Court should grant this petition and instruct the Eleventh Circuit Court of Appeals to issue a certificate of appealability as to each of the three issues raised herein.

CONCLUSION

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 11th day of April, 2023.

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