No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHICO JERMELL CARRAWAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari To
the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a defendant alleges with supporting evidence that he pleaded guilty based on an unkept promise of counsel concerning sentencing, is he entitled to an evidentiary hearing under 28 U.S.C. § 2255(b), on an ineffective-assistance-of-counsel claim, to prove prejudice, even though the defendant acknowledged an accurate sentencing exposure in his plea agreement and at the Rule 11 hearing?

RELATED PROCEEDINGS

United States District Court for the Middle District of Pennsylvania: United States of America v. Chico Jermell Carraway (No. 1:14-CR-00167-001). Criminal judgment entered on April 17, 2017.

United States Court of Appeals for the Third Circuit: United States of America v. Chico Jermell Carraway (No. 17-2011). Order granting voluntary dismissal of direct appeal entered on September 29, 2017.

United States District Court for the Middle District of Pennsylvania: United States of America v. Chico Jermell Carraway (No. 1:14-CR-00167-001). Order entered on February 6, 2020, denying Carraway's § 2255 motion. (App. to Pet. Cert., 4a–5a.)

United States Court of Appeals for the Third Circuit: United States of America v. Chico Jermell Carraway (No. 20-1467). Judgment entered on April 14, 2022, affirming the district court's order upon review on certificate of appealability. (App. to Pet. Cert., 1a–3a.)

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INTRODUCTION

It is undeniable that guilty pleas form a central component of our criminal-justice system. Accordingly, to ensure that defendants receive effective assistance of counsel under the Sixth Amendment, counsel have certain responsibilities in the plea context. For counsel who represent federal defendants, they must be familiar with the Sentencing Guidelines as well as statutory minimums and maximums.

When counsel fails in understanding the latter and makes sentencing assurances that are plainly not permitted by statute, which, in kind, induce a plea agreement, federal defendants are permitted, absent express waiver, to file a motion under 28 U.S.C. § 2255. Indeed, § 2255 safeguards a person's freedom from detention in violation of constitutional guarantees, including the Sixth Amendment guarantee of effective assistance of counsel. Section 2255 further provides for evidentiary hearings, to test claims of ineffective assistance of counsel: "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). That provision sets a low bar for a hearing.

Instantly, just as trial was to begin, Petitioner, Chico Jermell Carraway, and the government struck an agreement. Carraway would plead guilty to the following: Count I – distribution and possession with intent to distribute controlled substances; and, Count II – possession of a firearm during and in relation to drug trafficking. The statutory provisions associated with those Counts mandated a total, minimum 10-year sentence. And ultimately, the district court sentenced Carraway to 160 months imprisonment, above the 10-year minimum. According to Carraway, however, based on what his court-appointed attorney, Christopher A. Ferro, promised, he was never supposed to be sentenced to more than nine years imprisonment.

In a motion filed under 28 U.S.C. § 2255, Carraway claimed that Attorney Ferro failed to provide effective assistance of counsel, as guaranteed by the Sixth Amendment. Carraway alleged that Attorney Ferro assured him a nine-year prison sentence if he pleaded guilty to Counts I and II, and, but for that assurance that was plainly wrong, he (Carraway) would not have done so.

To support his claim, Carraway identified two witnesses who provided affidavits. Carraway attached both affidavits to his § 2255 motion. Therein, the witnesses swore that Attorney Ferro similarly told them in the courtroom that Carraway, who was reluctant to plead guilty, would receive a nine-year prison sentence upon pleading guilty to Counts I and II. But that is not all.

Post-plea, even though the sentence was plainly illegal under the statutes that governed Carraway's guilty plea, Attorney Ferro advocated for a nine-year sentence. In that regard, Attorney Ferro specifically asked the district court to impose a nine-year prison term in both a sentencing memorandum and at the sentencing hearing.

Unfortunately, even though Carraway's claim was not conclusively foreclosed by the case files and records, the district court never held an evidentiary hearing on Carraway's claim. Despite appointing counsel for Carraway upon its initial belief that an evidentiary hearing was required, the district court denied Carraway's § 2255 motion without one. The court relied on Carraway's acknowledgements in the plea agreement and at the Rule 11 change-of-plea hearing about his sentencing exposure. The court also made presumptions about the advice given to Carraway based on personal familiarity with Attorney Ferro.

On appeal, upon the issuance of a certificate of appealability, the Third Circuit affirmed. The Third Circuit's decision, like the district court's, turned on Carraway's sentencing acknowledgements in the plea agreement and during the change-of-plea hearing. According to the Third Circuit, those acknowledgments foreclosed Carraway's ability to demonstrate prejudice under the second prong of the ineffective-assistance test; hence, an evidentiary hearing was not required.

Carraway files this petition because the Third Circuit's decision conflicts with relevant decisions of this Court: *Machibroda v. United States*, 368 U.S. 487 (1962); *Fontaine v. United States*, 411 U.S. 213 (1973) (*per curiam*); and, *Blackledge v. Allison*, 431 U.S. 63 (1977). As discussed below, the Third Circuit's decision impermissibly treats a defendant's plea acknowledgements as invariably insurmountable and further erects a *per se* rule: when a defendant acknowledges his sentencing exposure in a plea agreement or at a Rule 11 hearing, there is no possibility that the defendant's acknowledgments were the product of misrepresentation, misadvice, or unkept promises by counsel and, thus, the prejudice prong of the *Strickland* / *Hill* test can never be satisfied. The decision also ignores Carraway's specific and supported allegations in his § 2255 motion. And, given that nearly 98% of federal defendants plead guilty, the Third Circuit's decision addresses an issue of federal importance.

The Court should grant this petition for a writ of certiorari. At minimum, the Court should grant the petition, summarily reverse, and remand for an evidentiary hearing.

OPINIONS BELOW

The Third Circuit's decision affirming the district court's denial of Carraway's motion under 28 U.S.C. § 2255 is unpublished. (App. to Pet. Cert., 1a–3a.) The district court's memorandum in support of its order denying Carraway's § 2255 motion without an evidentiary hearing is also unpublished. (App. to Pet. Cert. 6a–11a).

JURISDICTION

The Third Circuit issued its opinion and entered judgment on April 14, 2022. (App. to Pet. Cert., 1a–3a.) This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the 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 defence.

U.S. Const. amend. VI (emphasis added).

* * *

Section 2255(b) of United States Code, Title 28 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255(b) (emphasis added).

STATEMENT OF THE CASE

A. Carraway Is Indicted And Appointed Counsel

On July 9, 2014, a grand jury indicted Carraway for: Count I – distribution and possession with intent to distribute cocaine hydrochloride, cocaine base, and heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(i), (ii), and (iii); Count II – possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and, Count III – felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (App. to Pet. Cert., 201a–203a.) Carraway faced a mandatory-minimum sentence of five years imprisonment on Count I and a mandatory-consecutive sentence of five years' imprisonment on Count II. 21 U.S.C. § 841(b)(1)(B); 18 U.S.C. § 924(c)(1)(A)(i).

The district court eventually appointed Attorney Ferro to represent Carraway. Several months into Attorney Ferro's representation, Carraway moved to dismiss Attorney Ferro as counsel. According to Carraway, Attorney Ferro failed to meet with him to discuss strategy.

During a hearing on Carraway's motion, Attorney Ferro represented to the district court that Carraway rejected a plea agreement offered by the government. (App. to Pet. Cert., 192a–193a.) When the district court asked Attorney Ferro for Carraway's "maximum exposure" under that agreement, Attorney Ferro commented that Carraway was likely a career offender under the Sentencing Guidelines; thus, his Guidelines likely would have exceeded 30 years. (App. to Pet. Cert., 193a.) Attorney Ferro additionally commented that the plea offer was for "significantly" less than the career-offender Guidelines range. (*Id.*) But precisely how much less is unknown.

B. Carraway Pleads Guilty To Counts I And II Of The Indictment

On November 16, 2015, Carraway's trial was scheduled to begin. But "at the eleventh hour there were discussions between . . . Carraway and the government that resulted in a plea agreement." (App. to Pet. Cert., 146a.) Under its terms, Carraway agreed to plead guilty to

Counts I and II of the indictment. (App. to Pet. Cert., 166a–167a.) The plea agreement further identified the maximum term of imprisonment for both Counts and the mandatory-minimum sentences to be imposed. (App. to Pet. Cert., 166a–167a, 168a.)

On the same date that Carraway entered the negotiated plea agreement, the district court held a change-of-plea hearing under Federal Rule of Criminal Procedure 11. During the hearing, Carraway again acknowledged the maximum and mandatory-minimum penalties on each Count. (App. to Pet. Cert., 151a–152a, 153a, 154a.) At the end of the hearing, the district court determined that Carraway knowingly, voluntarily, and intelligently entered the plea agreement. (App. to Pet. Cert., 162a–163a.) Accordingly, the district court accepted Carraway's guilty plea to Counts I and II of the indictment. (*See id.*)

C. Post-Plea, Attorney Ferro Advocates For An Illegal Nine-Year Sentence

Ahead of sentencing, Carraway, through Attorney Ferro, timely submitted a sentencing memorandum. Attorney Ferro advocated for a nine-year sentence of imprisonment:

> For all the foregoing reasons, the defense submits that the minimally sufficient sentence, to satisfy all of the goals of sentencing, would be, on Count [I], a period of four years confinement with the statutorily mandated consecutive term o[f] five years incarceration on Count [II].

(App. to Pet. Cert., 143a.) (emphasis added.) Then, during the sentencing hearing, Attorney Ferro repeated the sentencing request:

> [W]e're asking the court, as we did in our sentencing memorandum, to impose a sentence of four years on Count [I], with the mandatory minimum consecutive sentence of five years on Count [II]. That will be a total term of incarceration of nine years[.]

(App. to Pet. Cert., 124a–125a) (emphasis added.)

Neither the district court nor the government corrected Attorney Ferro. And the district court ultimately sentenced Carraway to a total of 160 months imprisonment (100 months on Count I plus 60 months on Count II). (App. to Pet. Cert., 112a, 133a.)

D. Carraway Files But Withdraws His Direct Appeal

After sentencing, Carraway timely filed a notice of appeal. Carraway, however, moved for voluntary dismissal under Federal Rule of Appellate Procedure 42(b). On September 29, 2017, the Third Circuit granted Carraway's motion, and he did not file a petition for certiorari.

E. Carraway Moves For Relief Under 28 U.S.C. § 2255

On December 4, 2018, Carraway filed a *pro se* motion under 28 U.S.C. § 2255. (App. to Pet. Cert., 38a–109a.) Carraway's primary argument was that Attorney Ferro failed to provide effective assistance of counsel during plea negotiations by assuring him of a nine-year sentence, even though that was not permitted by law. But for Attorney Ferro's ineffective assistance, Carraway would not have pleaded guilty.

With the permission of the district court, which had jurisdiction under 28 U.S.C. §§ 1331 and 2255, Carraway filed an amended § 2255 motion. (App. to Pet. Cert., 25a–37a.) Carraway averred that Attorney Ferro provided constitutionally ineffective assistance of counsel, in that he "mislead [Carraway] into pleading guilty by telling him that he would receive a sentence that the law did not permit." (App. to Pet. Cert., 31a; *see also*, *id.*, 28a.)

In response to Carraway's amended § 2255 motion, the district court entered an order appointing counsel. (App. to Pet. Cert., 23a–24a.) According to the district

court, Carraway's "motion rais[ed] factual issues that . . . likely require[d] a hearing." (App. to Pet. Cert., 23a.) Through court-appointed counsel, Carraway filed a second-amended § 2255 motion. (App. to Pet. Cert., 14a–22a.)

Carraway contended that an evidentiary hearing was necessary on his sole claim for relief: that Attorney Ferro provided constitutionally ineffective assistance of counsel, causing him to plead guilty under the false belief that he (Carraway) would receive a nine-year sentence, which was not permitted by law. Carraway claimed that Attorney Ferro assured him that he would receive that specific sentence under the plea agreement. But had he been correctly advised by Attorney Ferro, Carraway would not have pleaded guilty. In support of his claim, Carraway attached an affidavit from his mother, Pricilla Carraway, and brother, Tito Carraway. (App. to Pet. Cert., 21a–22a.)

Carraway's family members averred that they were at the courthouse when Carraway's trial was scheduled to begin. (*Id.*) Consistent with what Attorney Ferro advocated for at sentencing, they claimed that Attorney Ferro told them Carraway would be sentenced to nine years if he pleaded guilty. (*Id.*) Attorney Ferro also told them that Carraway was reluctant to take a plea deal; thus, he asked them to talk with Carraway about it. (*Id.*) In kind, when Carraway was brought into the courtroom, they encouraged Carraway to take the plea deal. (*Id.*)

Without holding an evidentiary hearing, the district court denied Carraway's § 2255 motion and declined to issue a certificate of appealability. (App. to Pet. Cert., 6a–11a.) According to the district court, a "review of the transcript of the change of plea proceedings . . . confirm[ed] that Carraway's claim [wa]s clearly frivolous and d[id] not warrant a hearing." (App. to Pet. Cert., 9a.) The district court explained that it "was made plain" during the Rule 11 hearing "that Carraway was facing a 10 year sentence at minimum." (App. to Pet. Cert. 10a.) In the district court's view, that was the "dispositive" factor. (*See* App. to Pet. Cert., 11a.)

The district court did not reference Attorney Ferro's requests for a nine-year sentence, which the law did not authorize. Despite that, the district court also expressed that it "defie[d] credulity that Carraway's experienced and

able counsel would have 'assured' him he was only going to receive a 9 year sentence." (App. to Pet. Cert., 10a.) Likewise, the district court opined that: "Attorney Ferro ha[d] practiced before th[e] court for many years, and [it] harbored grave doubts that he would ever make such an assurance given the extant facts." (App. to Pet. Cert., 11a.)

F. The Third Circuit Grants A Certificate Of Appealability And Affirms The District Court's Order

The Third Circuit granted Carraway a certificate of appealability. The certificate was limited to reviewing whether the district court erred in denying his § 2255 motion without an evidentiary hearing. (App. to Pet. Cert., 12a.) The Third Circuit had jurisdiction under 28 U.S.C. §§ 1291, 2253(a), (c), and 2255(d).

On April 14, 2022, the Third Circuit affirmed. The court held that no evidentiary hearing was required because Carraway's ineffective-assistance claim, taken as true, failed to demonstrate prejudice. (App. to Pet. Cert., 3a.) "Carraway's alleged promise of a nine-year sentence could not have affected [his] decision to plead guilty" because, in light of the terms of the plea agreement and the acknowledgements made during the Rule 11 hearing, he "knew" that the sentence "would be [10] years or more." (*Id.*) This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees defendants effective assistance of counsel at "critical stages of a criminal proceeding, including when he enters a guilty plea." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017). "To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." *Lee*, 137 S. Ct. at 1964 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984)).

When a defendant pleads guilty, to prove prejudice, he must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). When counsel's error affects a defendant's understanding of the consequences of pleading guilty, a defendant does not have to show that he would have been better off going to trial. *Lee*, 137 S. Ct. at 1965. The defendant must only show that he would not have entered the plea and gone to trial.

In the district court, Carraway pursued a Sixth Amendment claim, alleging ineffective assistance of counsel by Attorney Ferro. According to Carraway, Attorney Ferro promised a nine-year sentence of imprisonment if he pleaded guilty to Counts I and II of the indictment. That sentence, though, was plainly forbidden by law. Carraway further alleged that Attorney Ferro made the promise on the same date that he (Carraway) pleaded guilty, which was at the start of trial. As well, Carraway alleged that Attorney Ferro made the same representations to two family members, who provided affidavits. And, post-plea, the record unequivocally reflected that Attorney Ferro continued to advocate for the same illegal nine-year sentence that he allegedly promised Carraway that he would receive in exchange for his guilty plea. But for Attorney Ferro's unkept promise, Carraway allegedly would not have pleaded guilty and insisted on going to trial.

Unfortunately, even though the district court at one point believed a hearing was needed, App. to Pet. Cert., 23a, no hearing was held on Carraway's claim. Thus, his allegations were never tested, and the district court denied Carraway's § 2255 motion.

On appeal, the Third Circuit affirmed, holding that Carrway's acknowledgements in the plea agreement and at the Rule 11 hearing foreclosed the possibility of Carraway demonstrating prejudice – that he would not have entered the guilty plea and gone to trial.

This Court should review the Third Circuit's decision because it conflicts with relevant decisions of this Court and addresses an important federal issue. SUP. CT. R. 10(c). The instant case further affords a solid vehicle for the important issue to be reviewed. At minimum, this case is prime for summary reversal.

1. The Court should review the Third Circuit's decision, which conflicts with relevant decisions of this Court.

a. In *Machibroda v. United States*, 368 U.S. 487 (1962), the petitioner pleaded guilty to two informations. At sentencing, the district court addressed the petitioner's counsel but did not address the petitioner. *Machibroda*, 368 U.S. at 488. The court imposed a 25-year sentence of imprisonment on one information and a consecutive 15-year sentence on the second. *Id.* The government, moreover, never requested a sentence reduction for the petitioner. And the petitioner did not complain about that at sentencing or shortly thereafter. *Id.* at 488, 493.

Two years later, the petitioner moved for relief under 28 U.S.C. § 2255. *Id.* The petitioner claimed with specificity (and in an affidavit) that his plea was involuntarily entered upon promises by the prosecutor about the total sentence. *Id.* at 488, 489. The prosecutor allegedly promised the petitioner, outside of counsel's presence, a total prison sentence of up to 20 years if he pleaded guilty to both informations. *Id.* at 489–90. The petitioner also alleged that he wrote two letters to the district court and to the Attorney General concerning the prosecutor's alleged promises. *Id.* at 490.

In opposition, the government attached to its brief an affidavit from the prosecutor. *Id.* at 491. The prosecutor adamantly denied making any promises regarding sentencing. *Id.*

The district court denied the § 2255 motion without an evidentiary hearing. *Id.* at 489. Based on a combination of factual inferences, including that the court never received the letters referenced in the motion and that the petitioner never complained about the sentence at an

earlier point, the court determined that the petitioner's allegations were false. *Id.* at 492–93, 494. The Sixth Circuit affirmed in a two-paragraph *per curiam* decision. *Id.* at 489.

On certiorari, this Court vacated the Sixth Circuit's judgment and remanded for an evidentiary hearing. *Id.* at 496. The Court acknowledged that a "guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A[nd a] conviction based upon such a plea is open to collateral attack." *Id.* at 493. Relying upon the plain language of 28 U.S.C. § 2255, as to when evidentiary hearings are required, the Court then held that the case was not one "where the issues raised . . . were conclusively determined either by the motion itself or by the 'files and records' in the trial court." *Id.* at 494.

According to the Court, the "factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could . . . cast no real light." *Id.* at 494–95. "Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." *Id.* at 495. Thus, "the specific and detailed factual assertions . . . while improbable, c[ould not] at th[at] juncture be said to [have] be[en] incredible." *Id.* at 496. Meaning that "the function of 28 U.S.C. § 2255 . . . [could only be served] by affording the [petitioner a] hearing which [§ 2255] require[d]." *Id.*

b. In ***Fontaine v. United States***, 411 U.S. 213 (1973) (*per curiam*), before the district court accepted the petitioner's guilty plea, it held a hearing under Federal Rule of Criminal Procedure 11. At the Rule 11 hearing, the district court addressed the petitioner who "acknowledged in substance that his plea was given voluntarily and knowingly, that he understood the nature of the charge and the consequences of the plea, and that he was in fact guilty." *Fontaine*, 411 U.S. at 213–14. The district court then accepted the plea and, thereafter, sentenced the petitioner to 20 years imprisonment.

Two years later, the petitioner moved for relief under 28 U.S.C. § 2255. The petitioner alleged that his plea was "induced by a combination of fear, coercive police tactics, and illness, including mental illness." *Fontaine*, 411 U.S. at 214. The district court, however, denied the motion without an evidentiary hearing. The court reasoned that "since the requirements of Rule 11 [were] met, th[e] collateral attack was *per se* unavailable." *Id.* Specifically, the district court stated: "When the . . . court has so questioned the accused about pleading guilty, the petitioner cannot [later] be heard to collaterally attack the record and deny what was said in open court." The Sixth Circuit affirmed. *Id.*

On certiorari, the petitioner "urge[d] that under the plain wording of § 2255 and . . . *Machibroda* . . . he was entitled to an evidentiary hearing." *Fontaine*, 411 U.S. at 214. The Court agreed, vacating the judgment of the Sixth Circuit and remanding to the district court for an evidentiary hearing. *Id.* at 215. The Court reasoned that a hearing was required because the § 2255 motion set out "detailed factual allegations" that were not conclusively controverted by the files and records of the case, including what occurred at the Rule 11 hearing. *Id.* at 214–15. Indeed, the "objective of [Rule] 11 . . . is to flush out and resolve . . . [voluntariness] issues, but like any procedural mechanism, its exercise is . . . no[t] uniformly invulnerable to subsequent challenge calling for an opportunity to prove . . . allegations" in a § 2255 motion. *Fontaine*, 411 U.S. at 215.

c. In ***Blackledge v. Allison***, 431 U.S. 63 (1977), the respondent (habeas petitioner below) entered a guilty plea to a state charge. The mandatory-minimum sentence was 10 years imprisonment, and the maximum sentence was life. *Allison*, 431 U.S. at 65. At the plea hearing, the trial court read questions from a printed form relating to the respondent's understanding of the charge, its consequences, and the voluntariness of the plea. *Id.* One question asked whether the respondent understood that his plea could result in a sentence of 10 years to life in prison. *Id.* at 65–66. The respondent answered "yes." *Id.* at 66. He answered "no" when asked if anyone else, including

his lawyer, made any promises to influence him to plead guilty. *Id.* Based on the respondent's answers to the questions asked, the trial court accepted and entered the respondent's guilty plea. Three days later, the trial court sentenced the respondent to 17–21 years imprisonment. *Id.* at 67.

The respondent eventually filed a federal habeas corpus petition, alleging that the plea was induced by his counsel's "unkept promise" of a 10-year sentence. *Allison*, 431 U.S. at 68. The respondent further alleged that the conversation with counsel, regarding the promise, was witnessed by another person. *Id.* at 69. And, the "fact that the [trial court] said that he could get more [than 10 years], did not affect [his] belief . . . that he was only going to get a ten year sentence." *Id.*

The district court denied the habeas corpus petition on a motion to dismiss. *Id.* at 69–70. The court construed the habeas corpus petition as alleging only that counsel's sentencing prediction was inaccurate and found no basis for relief. *Id.* at 70. In kind, the district court concluded that the form read to the respondent by the trial court before accepting the respondent's plea "conclusively" showed that the respondent was "carefully examined . . . before the plea was accepted." *Id.* Thus, the plea had to stand. The district court also denied the respondent's motion for rehearing, in which he contended that the affirmations at the guilty-plea hearing were not conclusive of whether he was entitled to relief.

On appeal, the Fourth Circuit reversed. *Allison*, 431 U.S. at 70. The court held that the respondent's allegations of a broken promise was not foreclosed by his responses to the form questions at the plea hearing. The court explained, when habeas petitioners make allegations that, if proved, would entitle him to relief, "he should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of [evidence] conclusively proving their falsity." *Id.* at 70–71. The petitioner (respondent to the habeas corpus petition) subsequently obtained review in this Court on a "significant federal question presented." *Id.* at 71.

The Court ultimately affirmed the judgment of the Fourth Circuit because, when compared to the plea-hearing record (the questionnaire form), the respondent's allegations "were not in themselves so 'vague or conclusory' . . . as to warrant [summary] dismissal for that reason alone." *Allison*, 431 U.S. at 75, 78; *see id.* at 82–83. The respondent "indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication." *Id.* at 76.

In reaching its holding, the Court observed the preeminence of plea bargaining in the criminal-justice system and that the advantages of pleas "can be secured . . . only if dispositions by guilty plea are accorded a great measure of finality." *Allison*, 431 U.S. at 71. As well, the Court acknowledged that to "allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U.S.C. § 2255 or state prisoners under 28 U.S.C. §§ 2241–2254, would eliminate the chief virtues of the plea system," to include finality. *Allison*, 431 U.S. at 71. Even so, "arrayed against the interest of finality is the very purpose of the writ of habeas corpus to safeguard a person's freedom from detention in violation of constitutional guarantees." *Id.* at 72. "And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody." *Id.*

The Court then discussed *Machibroda* and *Fontaine*, above. The Court expressed that they "do not in the least reduce the force of [a] plea hearing." *Allison*, 431 U.S. at 73–74. "[T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the [trial court] accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Id.* at 74. "Solemn declarations in open court carry a strong presumption of verity," and the "subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.*

Critically, however, "the barrier of [a] plea or sentencing proceeding record, although imposing, is not invariably insurmountable." *Allison*, 431 U.S. at 74. In "administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." *Allison*, 431 U.S. at 75. On the record before the Court, summary dismissal was inappropriate. The respondent should have had the opportunity present evidence, whether through an evidentiary hearing or some other procedural mechanism. *See id.* at 81–83.[1]

d. Here, the Third Circuit's decision impermissibly treats a defendant's plea acknowledgements as invariably insurmountable when *Allison* instructs otherwise. In further conflict with *Allison*, the Third Circuit's decision erects the following *per se* rule: when a defendant acknowledges his correct sentencing exposure in a plea agreement or at a Rule 11 hearing, there is no possibility that the defendant's acknowledgments were the product of misrepresentation, misadvice, or unkept promises by counsel and, thus, the prejudice prong of the *Strickland* / *Hill* test can never be satisfied.

Such a *per se* rule is not only disavowed by *Allison*, but it also undermines the Court's past emphasis on the ineffective-assistance-of-counsel inquiry, as "demand[ing] a 'case-by-case examination' of the 'totality of the evidence.'" *Lee*, 137 S. Ct. at 1966 (quoting *Williams v.*

[1] The Court, of course, expressed doubt that the same outcome would have been reached if additional protocols were in place at the plea hearing. *See Allison*, 431 U.S. at 79. The Court further noted in dicta that certain additional protocols (like an explanation of the legitimacy of plea bargaining, the questioning of counsel, and a transcription of responses) could result in evidentiary hearings for petitioners "only in the most extraordinary circumstances." *Id.* at 80 n. 19. Even under that heightened standard, the district court should have held an evidentiary hearing on Carraway's claim.

Taylor, 529 U.S. 362, 391 (2000); *Strickland*, 466 U.S. at 695). The Third Circuit's decision, instead, categorically bars Constitutional ineffective-assistance claims, regardless of the circumstances, including where, as here, a defendant sufficiently alleges (with supporting evidence) a claim of ineffective assistance of counsel.

Carraway's allegations, like those in *Machibroda* and *Fontaine*, were sufficiently specific. Carraway clearly identified what promise Attorney Ferro allegedly made, when Attorney Ferro allegedly made it, and two witnesses who were allegedly told the same thing by Attorney Ferro. Furthermore, Carraway's allegations were far from conclusively foreclosed by the record. After the Rule 11 hearing, Attorney Ferro plainly advocated for the same (illegal) sentence that Carraway alleged he was promised before pleading guilty. It also is not unreasonable to presume that, but for the alleged unkept promise, Carraway would have elected to go to trial. Carraway's trial was set to begin on the same day that he pleaded guilty. Something must have enticed Carraway to plead guilty that day when he had previously turned down another plea agreement. (*See* App. to Pet. Cert., 192a–193a.)

Carraway's allegations, moreover, akin to those in *Machibroda*, related to occurrences outside the courtroom, between Carraway and counsel, and upon which the case filings and records could not cast light. The district court in the instant case simply was not positioned to resolve Carraway's allegations, relating to advice of counsel, by drawing upon personal knowledge or recollection. In fact, the district court appointed counsel for Carraway on his § 2255 motion because it believed that an evidentiary hearing was likely necessary. But the district court did not follow through; rather, it made assumptions based on past experiences with Attorney Ferro and Carraway's plea acknowledgments.

However improbable Carraway's allegations might have seemed to the district court, his allegations compared to the case files and records, including the change-of-plea hearing transcript, could not have been said to be incredible. Carraway could very well have a justified reason for why he made the acknowledgements that he did

upon pleading guilty. At this juncture, though, no one knows. His allegations and supporting evidence were never tested at a hearing, which 28 U.S.C. § 2255(b) required under its "reasonably low threshold" standard. *See United States v. McCoy*, 410 F.3d 124, 131, 134 (CA3 2005) (quoting *Phillips v. Woodford*, 267 F.3d 966, 973 (CA9 2001)) ("It has been recognized that '[t]he standard governing . . . requests [for evidentiary hearings] establishes a reasonably low threshold for habeas petitioners to meet'") (alterations in original).

2. The Court should also grant this petition because the Third Circuit's decision, although unpublished, addresses an important federal issue.

That the Third Circuit's decision is unpublished should be irrelevant to this Court's decision to grant certiorari. *See*, *e.g.*, *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) ("[T]he fact that the Court of Appeals' order . . . is unpublished carries no weight in [the Court's] decision to review the case"); *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of cert.) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant"). In fact, the Court's past grants of certiorari in relevant cases like *Machibroda*, *Fontaine*, and *Allison*, reflect upon the importance of issues like the one that the Third Circuit's decision addresses. *Machibroda*, in particular, arose from a two-paragraph *per curiam* decision out of the Sixth Circuit. *Machibroda v. United States*, 280 F.2d 379 (6th Cir. 1960) (*per curiam*).

It also is a "simple reality" that nearly all federal defendants plead guilty. *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *see* John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Center (June 11, 2019) 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/; Glenn R. Scmitt, J.D., M.P.P. & Lindsey Jeralds, M.A., *Fiscal Year 2021: Overview of Federal Criminal Cases*, U.S. Sentencing Commission, p. 8 (finding that, in Fiscal Year 2021, 98.3%, of federal

defendants pleaded guilty). That is why the Court has recognized that the Sixth Amendment guarantee of effective assistance of counsel extends to guilty pleas. *See Frye*, 566 U.S. at 143–45; *Hill*, 474 U.S. at 57 (1985) (establishing ineffective-assistance-of-counsel test in plea context). Therefore, a decision like the Third Circuit's, casts a wider net beyond this case.

Such decision negatively impacts and potentially relegates the importance of the Constitutional right to effective assistance of counsel for nearly all federal defendants. The decision effectively proclaims that it does not matter whether defendants truly had effective assistance of counsel. What matters is that someone – other than their own advocate – properly advised defendants of the consequences of a guilty plea. But that is not at all what the Sixth Amendment guarantees. Counsel is expected to provide competent advice to their clients. In the context of federal criminal law, that competence must extend to sentencing.

Lastly, the Third Circuit's decision implies a waiver of collateral relief for defendants like Carraway, who come forward with sufficient allegations and some proof of ineffective assistance of counsel. Sure, those defendants can file a § 2255 motion, but the instant decision provides that the motion will be dead on arrival. No evidentiary hearing will be held to test the allegations and proof to be certain that a defendant is not confined in violation of the Constitution.

3. The Court should additionally grant certiorari because this case affords a solid vehicle for the Court to address the important issue presented.

The relevant facts of the instant case presented for review are simple and undisputed. Also, although the Third Circuit requested briefing on the issue of whether Carraway's claim was timely filed, given that he voluntarily withdrew his direct appeal, the court did not address the issue. In any event, the parties agreed that the claim was timely under the circumstances. Hence, there is

no lower court ruling on, or disagreement among the parties regarding, procedural obstacles to review.

CONCLUSION

The Court should grant this petition for a writ of certiorari and either permit full merits review or summarily reverse the Third Circuit and remand for an evidentiary hearing.

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