No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ERWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOSEPH Z. AMSEL
Counsel of Record
Law Offices of Joseph Z. Amsel, PLLC
43 West 43rd Street, Suite 265
New York, NY 10036
888-558-7425
JZAmsel@AmselLaw.com

Attorney for Petitioner

QUESTIONS PRESENTED

1. Did the Circuit Court err in affirming the district court's decision to deny, without a hearing, Petitioner's motion pursuant to 28 U.S.C. § 2255 based on ineffective assistance of counsel, despite the email from counsel to Petitioner, which corroborated Petitioner's claim that counsel advised him that at "worst" he would be sentenced to 120 months, notwithstanding the statutory maximum of 240 months, and that any potential 5K downward departure that Petitioner earned by his cooperation would be applied from the Guideline offense level commensurate with the statutory maximum?

2. By holding that the plea colloquy, during which the district court never mentioned the existence of a cooperation agreement, conclusively refuted Petitioner's claims such that a hearing was not required, did the Third Circuit split from other Circuits that require that district court allocute a defendant regarding a cooperation agreement during a plea colloquy?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were Christopher Erwin against the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Erwin prays for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit, by unpublished summary order, reproduced in the appendix at App. A, affirmed the judgment of the United States District Court for the District of New Jersey dated September 30 2019, which denied, without a hearing, Petitioner's motion to vacate his judgement of conviction pursuant to 28 U.S.C. § 2255. The rulings of the district court are reprinted starting at App. B.

JURISDICTION

This Petition for a writ of certiorari is timely filed. Although due on October 17, 2022, by order of the Honorable Justice Samuel Alito dated October 11, 2022, Petitioner's motion for an extension of time to file this Petition was extended to November 15, 2022. *See* Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides the following, in pertinent part:

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

United States Constitution, Amendment VI, provides the following, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On May 11, 2011, Petitioner Christopher Erwin was arrested and charged by complaint in the United States District Court for the District of New Jersey with conspiracy to possess and distribute oxycodone in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and in violation of 21 U.S.C. § 846. *See* App. C (Complaint). These charges arose out of a scheme that involved Petitioner obtaining non-medically necessary prescriptions for oxycodone from several doctors in exchange for cash. Petitioner would then fill the prescriptions at various pharmacies and then sell the pills for profit. Petitioner would obtain and fill prescriptions himself and through numerous "runners," whom he often transported to and from the doctors and pharmacies. *Id.*

On May 8, 2012, after conducting numerous proffer sessions with the Government, Petitioner entered into a plea agreement and a separate cooperation agreement with the Government. Under the plea agreement, given the quantity of oxycodone involved,

Petitioner's Sentencing Guideline base offense level was 38. Petitioner was then given a four-level enhancement for his leadership role in the conspiracy under U.S.S.G. § 3E1.1(a). He was also given a three-level reduction for timely acceptance of responsibility under U.S.S.G. §§ 3E1.1(a) and (b). *See* App. D at 1-9 (Plea Agreement). Thus, the agreed-upon Guideline offense level was 39. *Id.* at 9. The plea agreement also contained an appellate waiver if the court imposed a sentence that was "within or below the Guidelines range that results from a total Guidelines offense level of 39." *Id.*

On May 24, 2012, Petitioner plead guilty to a single count of oxycodone-trafficking conspiracy under 21 U.S.C. § 841(a)(1) and (b)(1)(C) and in violation of 21 U.S.C. § 846 before the District Court of New Jersey (Judge Freda L. Wolfson) pursuant to the plea agreement. *See* App. E (Plea Transcript).

During the plea colloquy, the court addressed the terms of the plea agreement. First, it requested that the Government "summarize the essential terms of the plea agreement." *Id.* at 9 (Plea Transcript). In doing so, the Government informed the court that the terms of the agreement were outlined in a letter dated March 26, 2012, and was "supplemented by another letter of the

same date." *Id.*[1] The Government further represented to the court that the "gist" of the agreement was that Petitioner would plead guilty and if he "complies with the rest of the terms of the plea agreement, the United States will not initiate any further charges against" him for the conduct underlying the drug conspiracy. *Id.* at 9-10. Finally, the Government represented that, consistent with Schedule A annexed to the plea agreement, Petitioner would have a Guideline offense level of 39, would be subject to a one million dollar fine and was required to waive his right to appeal if he was sentenced to within an offense level of 39. *Id.*

During this summarization of the plea agreement by the Government, they failed to explain what terms were contained within this supplemental letter. Indeed, the record is unclear what were the "rest of the terms of the plea agreement." Finally, the record is unclear as to whether the written cooperation agreement was actually before Petitioner during the plea colloquy or whether only the plea agreement was before him.

After the Government made these representations, the court allocuted Petitioner with respect to his understanding of the terms of the plea agreement. As with the Government's representation of the terms of the plea agreement, at no point during the court's

[1] Although separate documents, the plea agreement and the cooperation were both dated March 26, 2012 and were both were signed on May 5, 2012. *See* App. E at 1-9 **(**Plea Agreement); App. F (Cooperation Agreement).

colloquy did it reference the existence of the cooperation agreement and its conditional promise of a 5K motion should Petitioner fulfill his obligation under the cooperation agreement. During this colloquy, the following ensued:

Q. Mr. Erwin, you are being shown the plea bargain letter in this case.
Have you read the entire plea agreement?
A. Yes.
Q. Have you had an opportunity to fully discuss the agreement with your lawyer before you signed it?
A. Yes, I have.
Q. Please look at the agreement and let me know if your signature appears there
A. Yes.

THE COURT: Mr. Murphy, does your signature appear as defense counsel?
MR. MURPHY: Yes, your Honor.
THE COURT: Mr. Gribko [the Prosecutor], does a representative of your office appear as well?
MR. GRIBKO: Yes, mine and my supervisor's.
THE COURT: Thank you.
BY THE COURT:

Q. Mr. Erwin, do you feel that with the explanations and advice of your attorney that you fully understand all of the terms of the plea bargain letter?
A. Yes.
Q. That letter is supposed to set out all the bargains, benefits, things that flow to you in exchange for your willingness to plead guilty to the Information.
Do you feel that the plea bargain letter sets forth both accurately and completely all of the terms of the plea bargain as you understand it?
A. Yes.
Q. Do you have any questions at all that you wish to ask me or your attorney about what the plea bargain letter means or what any of the words or phrases in there mean?
A. No.
Q. Do you understand the terms of the plea agreement?
A. Yes.
Q. Has anyone made any other or different promises or assurances to you of any kind in an effort to induce you to enter a plea of guilty in this case?

A. No.

Later in the colloquy, the Court addressed the potential sentence. At that point, the following exchange occurred:

Q. Have you discussed the Sentencing Guidelines with your attorney?
A. Yes, I have.
Q. Has he explained to you the various considerations that go into determining what Guidelines shall be applied?
A. Yes.
Q. Has your attorney attempted to estimate for you what he thinks the Guideline range may be in your case based on the information that he currently has?
A. No, just my score, the 39 and the 20 years maximum penalty.

See App. D at 19 (Plea Transcript). The court further inquired of Petitioner if he understood "that the sentence imposed may be different from any estimate your attorney may have given you?," to which Petitioner responded "Yes." *Id.* at 21.

At the sentencing on July 25, 2013, the Government moved for a five-level downward departure under U.S.S.G. § 5K.1.1 based on Petitioner's substantial assistance in aiding in the prosecutions of the doctors from whom he obtained the prescriptions. The court granted that motion. However, the court applied the downward departure from a Guideline offense level of 39. For someone such as Petitioner who fell in Criminal History category I, offense level 39 has a range of 262-327 months. This range, however, exceeds the statutory maximum of 240 months for the crime of conviction, which is actually commensurate with an offense level of 38. *See* App. G at 9-10 (Sentencing Transcript). Thus, with

the five-level downward departure beginning from an offense level of 39, Petitioner's offense level was 34, which translates into a range of 151-188 months. By contrast, had the court applied the five-point downward departure from an offense level of 38, the reduced offense level of 33 would have translated to a range of 135-168 months. The court then imposed a sentence of 188 months' incarceration. *Id.* at 35.

Petitioner appealed that sentence, arguing that it violated the terms of his plea agreement. On direct appeal to the Third Circuit, Petitioner argued that the District Court had erred in applying the five-point downward departure that he earned through his cooperation from a Guideline offense level that exceeded the statutory maximum and, thereby, deprived him of the full value of his cooperation.

In August 2015, the Third Circuit issued a precedential decision rejecting Petitioner's claim. The court held that, to the extent that the District Court erred in applying the downward departure from a Guideline offense level that exceeded that statutory maximum, this error was waived under Petitioner's plea agreement. Thus, the court concluded, Petitioner had "breached the plea agreement by appealing, and that the appropriate remedy for his breach is specific performance of the agreement's terms: that is, the Government will be excused from its obligation to move for a downward departure" at a resentencing. *United States*

v. Erwin, 765 F.3d 219, 223 (3d. Cir. 2014). Accordingly, the court vacated Petitioner's sentence and remanded for a *de novo* resentencing before a different district judge, notwithstanding the Government's failure to file a cross-appeal. *Id.* at 235.

On April 15, 2016, Petitioner was resentenced before District Judge Peter G. Sheridan. *See* App. H at 1-19 (Transcript of Resentencing). Petitioner received a two-level reduction in his Guidelines offense level with regard to the amount of drugs involved due to an amendment to the Guidelines since his first sentencing in 2013. *Id.* at 2-3. Thus, Petitioner's total offense level was 37 and his criminal history category remained a category I. *Id.* at 3. Given the Third Circuit's decision, the Government did not move for a downward departure as it had done at Petitioner's first sentencing. *Id.* at 4, 15. Instead, the Government asked for a twelve-month sentence increase. *Id.* at 8. The District Court sentenced Petitioner to 200 months to be followed by three years of supervised release. *Id.* at 14-15; *see also*, App. I (Amended Judgement in Criminal Case). Petitioner filed a notice of appeal from this resentencing, but ultimately withdrew it.

On July 14, 2017, Petitioner filed a *pro se* motion under 28 U.S.C. § 2255 and a subsequent amended motion on April 13, 2018. *See* App. J (*pro se* Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody); App.

K (Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255). In his amended motion, Petitioner raised the following claims:

1. "Counsel rendered ineffective assistance in advising Petitioner on acceptance of plea offer."

2. "Counsel rendered ineffective assistance ensuring that the terms of the plea agreement were fulfilled."

3. "The government breached the plea agreement."

4. "The government breached the plea agreement."

Id. at 3-4. With respect to the first two claims, Petitioner alleged that counsel misadvised him that his "Guidelines range would be capped at the statutory maximum sentence of 240 months, and repeatedly advised [him] that his worst-case sentence would be 120 months." *Id.* at 24. Petitioner further alleged that "Defense Counsel misadvised [him] that the statutory maximum sentence was effectively [his] Guidelines range, and [that] a 5K1.1 downward departure would begin from that starting point." *Id.* at 25. And although the plea agreement was silent as to what level any downward departure would begin from, Petitioner argued that "Defense Counsel was negligent in not seeing that such was included in the plea agreement." *Id.* To the extent that this term was not actually part of the plea agreement, Petitioner argued that "Defense Counsel's advice was deficient in telling [him] that it was." *Id.* Petitioner further alleged that counsel was deficient

in failing to inform the court "that the cooperation aspect of the plea agreement . . . was predicated on a downward departure starting at the 240-month level." *Id.* at 28. Finally, Petitioner alleged, that had counsel not so misadvised him, he would "not have entered into the plea, but instead would have gone to trial or entered a blind plea, and advocated for a proper base offense level and sentencing enhancements." *Id.* at 25; *see also, Id.* at 29.

To support his claims of misadvice, Petitioner alleged that after he was sentenced, "Defense Counsel expressed disbelief as to the 188-month term." *Id.* at 25. Specifically, Petitioner alleged that counsel informed him that "I thought at most [you would be sentenced to] 10 years." *Id.* To corroborate his claims regarding this misadvice, Petitioner attached to his Amended Motion an email from counsel. *See Id.* at 35 (Exhibit 1 to Amended Petition). In this email, sent to Petitioner on August 1, 2013, less than a week after he was sentenced, counsel expressed that he believed that the Government and the District Court "were working from a false premise." *Id.* Specifically, counsel expressed his belief that the District Court erred in applying the 5K1.1 downward departure from offense level 39, which translated into a sentenced in excess of the statutory maximum of 240 months. Instead, counsel pointed out, the District Court should have applied the downward departure from offense level 38, which correlated to the statutory maximum.

Id. Counsel further opined that the sentence was "much to (sic) harsh" and that "[t]he worst I expected was 120 months." *Id.* Finally, counsel inquired from Petitioner whether he planned to appeal and offered that he would "gladly help in any way" with the appellate process, notwithstanding the waiver of appeal. *Id.*

On May 15, 2018, the Government filed a response in opposition to Petitioner's § 2255 motion. App. L. The Government argued that Petitioner was specifically allocuted by the District Court regarding his sentencing exposure and that he acknowledged that he was facing up to twenty years in prison during the plea hearing. *Id.* at 16-18. Thus, the Government argued, his claim that counsel misadvised him that his sentence would be capped at 10 years was conclusively contradicted by the record. The Government also annexed an affidavit from counsel. *Id.* at 151-56 (Exhibit 6, Affidavit of James R. Murphy, Esq.). While counsel claimed that he discussed the various enhancements contained within the plea agreement, which related to Petitioner's role in the conspiracy and the quantity of drugs involved, *id.* at 154, counsel did not directly address Petitioner's claim that counsel had advised him that the most he would be sentenced to was 120 months. Similarly, counsel did not address Petitioner's claim that counsel had advised him that the downward departure earned by Petitioner's cooperation would be applied from the Guideline offense level commensurate with the statutory maximum and not a Guideline range that exceeded

it. Nor did counsel address Petitioner's contention that counsel failed to ensure that the starting point for any potential downward departure was memorialized in the cooperation agreement.

In an opinion dated September 30, 2019, the District Court denied Petitioner's motion without an evidentiary hearing and dismissed his petition. *See* App. B at 12. The court found that Petitioner's claims of ineffective assistance of counsel related to counsel's misadvice regarding his sentence exposure was meritless because, even if he "was under the impression that he would only be sentenced to 120-months, the court's [plea] colloquy eliminated any confusion." *Id.* at 22. Thus, even if counsel had rendered this misadvice, Petitioner could not show prejudice under the *Strickland/Hill* analysis. *Id.* Finally, the court denied a Certificate of Appealability finding that Petitioner had failed to establish "that jurists of reason could disagree with [its] resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 18-19 citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Petitioner filed a notice of appeal. On May 28, 2020, the Third Circuit, construing Petitioner's notice of appeal as a motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c), granted the certificate on the following issue: "Did the District Court err by denying Appellant's motion under 28 U.S.C. § 2255

without first conducting an evidentiary hearing on his ineffective-assistance-of-counsel claims, given the assertions in his motion and the email from counsel which he included as an exhibit?" *See* App. M (Certificate of Appealability).

On appeal, Petitioner argued that the District Court abused its discretion in denying his § 2255 motion without first conducting an evidentiary hearing because he alleged sufficient facts to establish both prongs of the *Strickland/Hill* standard for establishing a claim of ineffective assistance of counsel at the plea stage. Thus, at the very least, a hearing was required.

Petitioner argued that he sufficiently plead the deficient performance prong by alleging that, *inter alia*, counsel misadvised him that his likely sentence would be capped at 120 months, that counsel was deficient for advising him that any potential downward departure that Petitioner earned by his cooperation would begin from the offense level commensurate with the statutory maximum sentence of 240 months and not from an offense level above that maximum and that these claims of misadvice were corroborated counsel's email to Petitioner. Thus, Petitioner argued, if accepted as true, these facts established the deficient performance prong.

Petitioner also argued that he had sufficiently plead the prejudice prong by alleging that, but for the erroneous advice of counsel, he would have rejected the plea agreement and proceeded

to trial or entered a blind plea and advocated for a Guideline range that was consistent with his true culpability, especially given his primary desire to enter his plea and cooperation agreement so that he could "return to some portion of his son's youth" after he finished serving his sentence. *See* App. K at 29.

Petitioner further argued that, contrary to the District Court's holding, the record did not conclusively refute his claim of prejudice. Specifically, although Petitioner acknowledged during the plea colloquy that his maximum potential sentence was 20 years and that any potential estimate by counsel as to what Petitioner's Guideline range might be inaccurate, that was insufficient to *conclusively* disabuse Petitioner of counsel's assurance that the maximum sentence he would actually receive was 120 months. After all, Petitioner argued, during the plea hearing, neither the District Court nor counsel for either party mentioned the existence of the cooperation agreement and its conditional promise of a 5K downward departure. And because this was the *primary* promise that induced Petitioner's guilty plea, the failure to admonish Petitioner of his potential maximum sentence even in light of the cooperation agreement and its promise of a 5K rendered the colloquy incomplete and, therefore, incapable of conclusively refuting Petitioner's claim of prejudice.

Similarly, Petitioner argued, the colloquy (and the rest of the record) was insufficient to conclusively refute his claim that

counsel misadvised him that any potential 5K downward departure he earned would be applied from a Guideline offense level commensurate with the statutory maximum and not from a level that exceeded it (as the first sentencing court did in this case). While the cooperation agreement was silent on this point, the Government conceded at sentencing that this was, at the very least, an open question. Thus, contrary to the District Court's decision, this claim is not conclusively refuted by the record or the cooperation agreement.

Finally, Petitioner argued, even assuming *arguendo* that the case against him was overwhelming, he sufficiently established the prejudice prong because he established that the misadvice he received were *the* deciding factor in his decision to accept the guilty plea. Thus, by him accepting the guilty plea based on counsel's misadvice, Petitioner was prejudiced in that he was deprived of the opportunity to throw a "Hail Mary" and proceed to trial.

On June 13, 2022, a divided panel of the Third Circuit issued a decision affirming by a 2-1 vote the District Court's decision summarily denying Petitioner's 2255 motion. The Third Circuit held that even assuming counsel's deficient performance in advising Petitioner that "the worst he could expect was 120 months of incarceration," and that that Petitioner 's motivation for his plea and cooperation was "to return to some portion of his son's

youth" after he finished serving his sentence, "the District Court's fulsome plea colloquy obviated any potential prejudice." *See* App. A at 3. Specifically, the Third Circuit reasoned that Petitioner was disabused of counsel's misadvice when the district court informed Petitioner of the statutory maximum sentence, that it was not bound by the plea agreement, that his sentence "may be different from any estimate [his] attorney may have given [him]," and that "at this point it may be impossible for [counsel] to make a completely accurate assessment as to the Guidelines range which will actually apply in your case because he does not yet have all the necessary information and has not seen the Presentence Report." Thus, regardless of counsel's misadvice and despite the Third Circuit accepting Petitioners premise that he only plead guilty in reliance on counsel's misadvice to be able to return to some portion of his son's youth after he finished serving his sentence, he could not show prejudice given the "textbook plea colloquy." Accordingly, an evidentiary hearing was not required. *See* App. A at 4-5.

The Dissent, however, pointed out that Petitioner had established a prima facie case as to the harm he suffered. Specifically, the Dissent argued, Petitioner had had "plausibly contend[ed] in his pro se motion that he entered the plea agreement based on his understanding that "the statutory maximum sentence was effectively [his] Guidelines range, and a [Section] 5K1.1

downward departure would begin from that starting point, a contention that was "supported by his wife's sworn declaration" and was not denied by counsel in his own declaration; that he had established that counsel failed to ensure that the plea agreement confirm that the starting point of any departure would be the statutory maximum; that Petitioner had relied on counsel's advise; and that "but for his counsel's misadvice, he would have gone to trial or entered an open plea in lieu of accepting the plea bargain[, e]ven if going to trial or pleading openly would have almost certainly increased his sentencing exposure," in hopes of receiving a lower sentence after trial or after entering an open plea. *See* App. A at 10.

Thus, the dissent urged, the District Court erred by not granting Petitioner a hearing, in violation of 28 U.S.C. § 2255(b)'s command that "the court shall ... grant a prompt hearing" unless the movant's claim is "conclusively" undermined by the record. *Id*. at 7, *citing United States v. Arrington*, 13 F.4th 331, 334 (3d Cir. 2021) (where Section 2255 movant alleges facts capable of satisfying each part of his theory, "a hearing must be held").

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY, WITHOUT A HEARING, PETITIONER'S MOTION PURSUANT TO 28 U.S.C. § 2255 BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL, DESPITE THE EMAIL FROM COUNSEL TO PETITIONER, WHICH CORROBORATED PETITIONER'S CLAIM THAT COUNSEL ADVISED HIM THAT AT "WORST" HE WOULD BE SENTENCED TO 120 MONTHS, NOTWITHSTANDING THE STATUTORY MAXIMUM OF 240 MONTHS, AND THAT ANY POTENTIAL 5K DOWNWARD DEPARTURE THAT PETITIONER EARNED BY HIS COOPERATION WOULD BE APPLIED FROM THE GUIDELINE OFFENSE LEVEL COMMENSURATE WITH THE STATUTORY MAXIMUM.

In the courts below, it was undisputed that defense counsel erroneously advised Petitioner that the "most" he would be sentenced to was 120 months, advised Petitioner that any 5K downward departure would start from a Guideline offense level commensurate with the statutory maximum, and that Petitioner established a *prima facie* case that he would not have entered the plea agreement but for counsel's erroneous advice. In rejecting Petitioner's claims and holding that the plea colloquy conclusively disabused Petitioner of any potential prejudice from counsel's misadvice, the courts below relied heavily on Petitioner's statement during the plea colloquy that no other promises had been made to his to induce the guilty plea, despite the court failing to mention the existence of the cooperation agreement and its concomitant promises of a 5K letter. For the reasons set forth below, the Court should grant *certiorari* so that it can side with the majority of courts that have addressed the

issue and held definitively that a district court taking a guilty plea pursuant to a cooperation agreement must directly inquire of the defendant whether any promises were made specifically with regard to the cooperation agreement, as opposed to the plea agreement itself. Had the courts below so held, those court could not have held that the plea colloquy "conclusively" refuted Petitioner's claim such that he was not entitled to a hearing. To the contrary, the courts should have ordered an evidentiary hearing, at which point, the Petitioner would have shown that he relied to his detriment on counsel's erroneous advice and would not have accepted the plea agreement had he been properly advised, thus establishing his claim of prejudice from counsel's irrefutably erroneous advice.

a. The Standard of Review:

Section 28 U.S.C. § 2255(b) 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 . . .

(emphasis added). *See also, Fontaine v. United States*, 411 U.S. 213, 215 (1973) ("[i]t is equally clear that § 2255 calls for a hearing on such allegations unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief'").

In considering whether a lower court has properly denied a motion to vacate a conviction, this Court analyzes the petition to determine whether the allegations, "when viewed against the record of the plea hearing," are "palpably incredible," so "patently frivolous or false", so "as to warrant summary dismissal." *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). (internal quotations and citations omitted).

Although the record of a plea colloquy constitutes a formidable barrier to a collateral attack on a guilty plea, that barrier is not "invariably insurmountable." *Id.* at 74. Indeed, this Court has specifically rejected a *per se* rule that a defendant may not subsequently repudiate his representations made to the court at the time of his guilty plea, when the defendant claims that the earlier representations arose from misunderstanding, duress, or misrepresentation to an unconstitutional degree. *Id.; see also*, *Fontaine*, 411 U.S. at 215; *Machibroda v. United States*, 368 U.S. 487, 494 (1962); *Sanders v. United States*, 373 U.S. 1, 19 (1963).

It is well-established that the Sixth Amendment's right to effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012); *McMann v. Richardson*, 397 U.S. 759, 771 (1970). For a defendant to prevail on a claim of ineffective assistance of counsel at the plea-stage he must meet the two-prong test established in *Strickland v.*

Washington, 466 U.S. 668, 688 (1984) and applied in the plea-context in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). First, a defendant must show that "'counsel's representation fell below an objective standard of reasonableness,'" *Hill*, 474 U.S. at 57 quoting *Strickland*, 466 U.S. at 688.

Second, a defendant must establish "prejudice," which focuses on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also*, *Lafler*, 566 U.S. at 163 ("In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.").

At the plea stage, counsel must "make an independent examination of the facts, circumstances, pleadings and laws involved and then ... offer his informed opinion as to what plea should be entered." *See Burt v. Titlow*, 571 U.S. 12, 25 (2013) quoting *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). (alternation in original). Similarly, counsel is required to give a defendant accurate advice regarding his potential sentence. *Cf. Hill*, 474 U.S. at 60; *see also*, *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)(Knowledge of the comparative sentence exposure

between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.").

b. Petitioner Sufficiently Plead Both Prongs of the *Strickland/Hill* Standard and the Third Circuit Erred in Affirming the Denial of His 2255 Motion Without a Hearing:

Here, Petitioner alleged sufficient facts to establish both prongs of the *Strickland/Hill* standard. Thus, the Third Circuit erred in affirming the District Court's decision to deny the 2255 motion without conducting a hearing.

With respect to the deficient performance prong, Petitioner established this prong by alleging that counsel rendered erroneous advice regarding his likely sentence and the offense level from which his potential 5K downward departure would begin. Specifically, as Petitioner alleged, counsel "advised that under the plea agreement, the top of the Guidelines range would be capped at the statutory maximum sentence of 240 months, and repeatedly advised [Petitioner] that his worst-case sentence would be 120 months." *See* App. K at 29. Counsel further advised Petitioner that any potential "5K1.1 downward departure would begin from" the Guideline range-equivalent of statutory maximum sentence of 240 months. *Id.* at 25. In this case, that would have translated into the downward departure being applied from Guideline offense level of 38 as opposed to 39 – the level from which the District Court actually applied the downward departure. *See* App. G at 7.

Furthermore, to the extent that the plea agreement and cooperation agreement were silent on this understanding, counsel was deficient in failing to ensure that this understanding was memorialized and bringing this understanding to the attention of the court when it questioned Petitioner about the terms of the plea agreement. App K at 25, 28. Finally, with respect to the prejudice prong, Petitioner alleged that but for this misadvice he would "not have entered into the plea, but instead would have gone to trial or entered a blind plea, and advocated for a proper base offense level and sentencing enhancements." *Id.*; *see also*, *id.* at 29. Given these allegations, under the liberal pleading standards for § 2255 motions, Petitioner established a question of fact that required a hearing to decide. *Fontaine v. United States*, 411 U.S. at 215.

Furthermore, Petitioner's claim that counsel offered erroneous assurances regarding the likely sentence and offense level from which the potential downward departure would be applied is strongly corroborated by the email counsel sent Petitioner a week after the sentencing. In this email, counsel expressed that, in his opinion, the sentence was "much to (sic) harsh" and that the "worst [he] expected was 120 months." *See* App. K at 35 (Exhibit 1 to Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255). Counsel further expressed his opinion that the court (and the Government) were

operating from a "false premise" in "starting" the 5K downward departure from an offense level (39) that exceeded the statutory maximum of 240 months for the offense to which Petitioner plead guilty. *Id.*

Given that counsel held this opinion, it is reasonable, as Petitioner alleged, that counsel conveyed this opinion to Petitioner before he entered his guilty plea – something counsel never specifically denied in his affidavit submitted by the Government in opposition to Petitioner's motion. *See generally,* App. L at 151-56. Indeed, counsel was so sure of his opinion that despite the clearly-applicable waiver of appeal contained within the cooperation agreement, counsel urged Petitioner to take a direct appeal – a course of action that ultimately earned Petitioner an additional twelve months. Thus, this email strongly supports Petitioner's allegation that counsel rendered the misadvice alleged in his motion.

Contrary to the court's below, the plea colloquy did not conclusively disabuse Petitioner of the alleged misadvice because the cooperation agreement was never mentioned by the court or by either counsel. As a result, Petitioner was put in the untenable position of having to declare that no other promises other than those in the plea agreement were made to him to induce the guilty plea or risk raising something on his own that apparently everyone else in the courtroom – in particular, the professionals – were

all consciously avoiding. *See United States v. Rodriguez*, 725 F.3d 271, 278 (2d Cir. 2013). Under those circumstances, Petitioner was justified in concluding that whether "anyone made any other or different promises or assurances to you of any kind in an effort to induce you to enter a plea of guilty in this case?" did not contemplate the promises made by the Government in the cooperation agreement. App. E at 12. Moreover, Petitioner was justified in believing that this question, and all others posed to him, was a mere formality lacking the type of verity necessary to conclusively disabuse him of counsel's misadvice. And because the cooperation agreement was *the* primary motivation behind Petitioner's decision to plead guilty, the failure of the district court to mention this inducement significantly undermines the conclusiveness of the plea colloquy. *See, e.g.*, App. K at 23-25 (Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255); App. L at 152 (Murphy Affidavit).

Similarly, when the court admonished Petitioner that the actual sentence imposed "may be different from any estimate your attorney may have given you," *see* App. L at 21, that was insufficient to disabuse him of counsel's assurance that, at worst, he would be sentenced to 120 months. After all, this admonition by the court, standing in isolation from the cooperation agreement, could have been understood by Petitioner as a possibility that existed *without* factoring in his cooperation. Indeed, as

Petitioner alleged, he understood the court's silence related to the cooperation agreement as merely a "'nod and a wink' sort of thing." *See* App. K at 20 (Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255).

Thus, the plea colloquy cannot serve as a conclusive refutation of Petitioner's claims of misadvice to justify summarily denying his § 2255 motion. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (Plea colloquy "is neither always perfect *nor uniformly invulnerable* to subsequent challenge calling for an opportunity to prove" allegations inconsistent with the plea colloquy) (emphasis added).

Similarly, the written plea and cooperation agreements did not either conclusively disabuse Petitioner of counsel's misadvice. While they were silent on the level from which the potential downward departure would begin, even the Government conceded at sentencing that there was, at the very least, still "some question as to where to start" the downward departure from. *See* App. G at 9 (Sentencing Transcript).

Thus, as Petitioner alleged, to the extent that this open "question" was not the mutually agreed-upon understanding between the parties, counsel was deficient in advising Petitioner that it was part of the agreement. To the extent that this was actually part of the agreement that was not reduced to writing, counsel was

deficient in failing to insist that it be memorialized in the agreement. *See* App. K at 25 (Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255). Thus, the record does not conclusively refute this claim by Petitioner.

Here, even assuming *arguendo* that the Government's case was overwhelming, Petitioner established a legally sufficient claim of prejudice. As the dissenting judge in the Third Circuit observed:

> Erwin claims he would have taken any risk necessary for the chance of obtaining a sentence that would see him released in time to experience the remainder of his son's childhood. So he has adequately alleged that, had he known that the downward departure would start from the mandatory maximum—that the Guidelines range he was hoping for would have required an eight-level departure—he would have pursued the "smallest chance of success" at trial or by pleading openly. *Id.* at 1966. After all, "calculation of the Guidelines range can rarely be shown not to affect the sentence imposed," *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008), and the starting point of a downward departure is a key component of a Guidelines range calculation. Thus, Erwin has stated a prima facie claim that counsel's error deprived him of his right to be "reasonably informed" of his chances of obtaining his desired result in entering the plea agreement. *United States v. Bui*, 795 F.3d 363, 367 (3d Cir. 2015).

Erwin v. United States, No. 19-3849, 2022 WL 2802298, at *4 (3d Cir. July 18, 2022)

Accordingly, at the very least, a hearing was required on these claims as well.

II. BY HOLDING THAT THE PLEA COLLOQUY CONCLUSIVELY REFUTED PETITIONER'S CLAIMS SUCH THAT A HEARING WAS NOT REQUIRED, DESPITE THE DISTRICT COURT NEVER MENTIONING THE EXISTENCE OF A COOPERATION AGREEMENT AND ITS PROMISE OF A 5K LETTER AND WHAT, IF ANY EFFECT, THIS WOULD HAVE ON PETITIONER'S POTENTIAL SENTENCE, THE THIRD CIRCUIT SPLIT FROM OTHER CIRCUIT'S THAT REQUIRE THAT DISTRICT COURTS ALLOCUTE A DEFENDANT REGARDING THE TERMS OF A COOPERATION AGREEMENT DURING A PLEA COLLOQUY, AND THIS COURT SHOULD GRANT *CERTIORARI* TO MAKE EXPRESSLY CLEAR THAT THOSE TERMS MUST BE ADDRESSED DURING A PLEA COLLOQUY.

Because the United States Sentencing Guidelines provide a significant incentive for cooperators who provide "substantial assistance" to the Government in the prosecution of others, *see* U.S.S.G § 5K.1.1, defendants who enter into cooperation agreements with the promise of a potential "5k" letter are ubiquitous throughout the Federal Criminal Justice system. Indeed, the procuring of a cooperation agreement and 5K letter—which can even permit a court to sentence a defendant below a statutory mandatory minimum, *see* 18 U.S.C. § 3553(e); U.S.S.G. § 5K.1.1, Application Note 1—is one of primary arrows in the federal criminal practitioner's quiver.

Since this Court's decision in *United States v. Booker*, 533 U.S. 220 (2005), which rendered the United States Sentencing Guidelines merely advisory, trial courts have been provided with enormous discretion in fashioning sentences. Nonetheless, it is a fundamental "truism" that "[e]very judge and lawyer in the federal criminal justice system knows that arguments and evidence

in mitigation carry much greater weight when they come from the government instead of the defense[and t]his truism carries extra force when it comes to assessments of cooperation, where the government is better informed and less likely than the defense to exaggerate the value." *United States v. Wyatt*, 982 F.3d 1028, 1030–31 (7th Cir. 2020). Indeed, "[t]hat's why a promise from the government to present such mitigating information is so important." *Id.*

It is against this backdrop that Petitioner entered into his cooperation agreement with the Government to help prosecute the doctors who supplied him with the prescription drugs that he sold and without whom the entire scheme would never have existed. As Petitioner alleged in his § 2255 petition, his primary goal in negotiating a plea agreement and cooperating with the Government at 29.

The record clearly establishes – and, indeed, the courts below seemingly accepted as true – Petitioner's allegation that counsel misadvised him that the most he would be sentenced to was 120 months and that any 5K downward departure would begin from an offense level commensurate with the statutory maximum. After all, this claim was clearly corroborated by counsel's email to Petitioner sent less than a week after Petitioner was initially sentenced. Thus, Petitioner surely established the deficient performance prong of his ineffective assistance of counsel claim.

Yet, in rejecting his claim of prejudice, the Third Circuit relied heavily on the "textbook plea colloquy" as a conclusive refutation of Petitioner's claim of prejudice. App. A at 5. Conspicuously absent, however, from the plea colloquy was *any* mention of the *primary* inducement of Petitioner's guilty plea – namely, the cooperation agreement. In ascribing to this incomplete colloquy the ability to conclusively refute Petitioner's claim of prejudice, the Third Circuit apparently held that a district court need not allocute a defendant about his understanding of the *primary* promise made to him to induce the guilty plea – namely the promise of a 5K motion by the Government if certain conditions are met.

This position of the Third Circuit is contrary to Rule 11 of the Federal Rules of Criminal Procedure, which requires that a district court ensure that a guilty plea is voluntary, *see* Rule 11(b)(2), and that the parties disclose the existence of a plea agreement, "unless the court for good cause allows the parties to disclose the plea agreement in camera." Rule 11(c)(2).

Furthermore, the position taken by the Third Circuit—evidently granting district courts *carte blanche* to ignore cooperation agreements while conducting plea colloquies—conflicts with the practice engaged in by other Circuits. For example, the Second Circuit has repeatedly held that a district court is required to question a defendant regarding his understanding of a

cooperation agreement and its potential effect on a sentence, especially in light of the Court's decision in *Booker* and the wide discretion afforded district courts.

Addressing the potential concern that a plea colloquy in open court in which a cooperation agreement is discussed might pose security risks for defendants and impede ongoing investigations, the Second Circuit has noted that numerous remedies are at the disposal of district court, including sealing the courtroom and documents related to the plea. indeed, the Second Circuit has emphasized the importance that the defendant fully understand *all* consequences of his guilty plea:

> [T]here is an understandable reluctance during plea hearings to refer openly to a cooperation agreement. Advances in technology and the advent of the Federal PACER system make us ever mindful of the significant public safety risks to cooperating defendants or the hazards to ongoing government investigations that exposing even the fact of cooperation may pose. But we find it difficult to reconcile the tactic of remaining completely silent about such an agreement with the judicial obligation to ensure that the defendant understands the range of possible consequences of his plea and to "determine that the plea is voluntary and did not result from ... promises [ ]other than promises in a plea agreement[ ]." Fed.R.Crim.P. 11(b)(2). For example, where a cooperation agreement that states that the Government may make a motion to reduce the defendant's sentence is never referenced during the plea colloquy, the defendant will be unable to answer accurately the critical question of whether additional promises have been made to him concerning his sentence, and the district judge will have failed to ensure that the defendant truly understands the range of applicable penalties. Indeed, here, Rodriguez was put in just such

> a quandary and answered "no" to that question, notwithstanding the existence of a separate agreement. 11 When necessary, judges have various tools at their disposal to reduce if not eliminate the risks that may arise from fulfilling their obligation to ensure that the defendant understands the range of potential penalties. For example, they may delay the disclosure of a cooperation agreement or the fact that a defendant is cooperating. Where appropriate and after making the necessary findings, they may close the courtroom during the plea proceedings, seal the transcript of the proceedings, or even opt to refer to a cooperation agreement without specifically referring to the defendant's promise to cooperate.4 Cf. United States v. Alcantara, 396 F.3d 189, 199–200 (2d Cir.2005).

United States v. Rodriguez, 725 F.3d 271, 278 (2d Cir. 2013) (emphasis added); *see also United States v. Tarbell*, 728 F.3d 122, 127 (2d Cir. 2013) ("We note that the District Court's decision not to discuss the confidential cooperation agreement in open court is perfectly understandable and appropriate, especially considering that such a discussion in open court can endanger the life of a defendant by revealing his intent to cooperate with the government; that said, the better practice in these circumstances would have been for the District Court to use one of the 'various tools at [its] disposal to reduce if not eliminate the risks that may arise from fulfilling [its] obligation to ensure that the defendant understands the range of potential penalties,' rather than simply 'remaining completely silent about such [a] [cooperation] agreement'"); *United States v. Doe*, 568 F. App'x 30, 32 (2d Cir. 2014) ("this case illustrates the tension that exists

between the principle that all relevant aspects of the plea proceeding should be discussed, preferably in open court, and the need to preserve the confidentiality of a defendant's cooperation with the government in criminal proceedings[; a]t a minimum, we believe that the terms of the cooperation agreement, if not the agreement itself, should be before the sentencing judge at the time the plea is accepted").

Other circuits have similarly recognized the importance of fully allocuting a defendant regarding the terms of a cooperation agreement and the delicate balance that must be struck given the sensitive nature of discussing a cooperation agreement in open court. *See Peavy v. United States*, 31 F.3d 1341 (6th Cir. 1994) (remanding for further proceedings where record of guilty plea and sentencing provided insufficient grounds to conclude that claims underlying motion to vacate sentence were subject to summary dismissal; parties made no reference to cooperation agreement during plea hearing, there was no evidence that district court was aware of agreement when it accepted plea, and defendant alleged that federal agents promised him reduction of sentence in exchange for his cooperation in ongoing investigations and that written plea agreement did not contain all agreed-upon terms because of concern for safety of defendant and his family); *see also United States v. Kennedy*, 205 F. App'x 178, 180 (4th Cir. 2006) ("We do find, and the Government concedes, that the parties failed to

disclose Kennedy's plea agreement during the Rule 11 hearing, that this omission was error, and that the error was plain," although not affecting defendant's substantial rights since he did not represent that he would not have pled guilty but for agreement); *Jones v. United States*, 167 F.3d 1142, 1146 (7th Cir. 1999) ("We recognize that in the case of a cooperation agreement-as opposed to a plea agreement-a trial court is not bound by the strictures of Rule 11[, but n]evertheless, prior to sentencing, the trial court should take adequate steps to verify that any cooperation agreement represents a voluntary waiver of the defendant's rights").

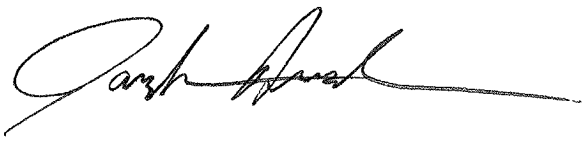
Given the ubiquity of cooperation agreements in federal court, and the inconsistent approaches taken by the various Circuit Courts of Appeals, it is vital that this Court promulgate a national standard to govern how district courts conduct plea colloquies with cooperators. Undoubtedly, a defendant pleading guilty pursuant to a cooperation agreement only does so in consideration of the promise of a 5K motion if he upholds his end of the bargain with the Government. This Court should not permit district courts in part of the country to conduct incomplete plea colloquies and, worse, permit defendants to continuously (and falsely) respond that "no other" promises were made to induce the guilty plea, when the court makes no mention of the existence of a cooperation agreement. Permitting such a state of affairs

certainly undermines the "strong presumption of verity," *Blackledge*, 431 U.S. at 74, that generally attaches to a plea colloquy. This case, in which the courts below not only chose to rely on the representations that there were no other promises, but declined to even hold a hearing to determine whether Petitioner would have entered into a plea but for his attorney's misadvice, presents a prime opportunity for this Court to address this question and to establish clear guidelines for the courts throughout the federal system.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 15, 2022



JOSEPH Z. AMSEL
Counsel of Record
Law Offices of Joseph Z. Amsel, PLLC
43 West 43rd Street, Suite 265
New York, NY 10036
888-558-7425
JZAmsel@AmselLaw.com
Attorney for Petitioner