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No.____________________

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM CARSON - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT(S)

APPLICATION TO JUSTICE KAVANAUGH TO VACATE OPINION
IN US COURT OF APPEALS FOR THE SIXTH CIRCUIT CASE NO. 22-3386/3419
PURSUANT TO SUPREME COURT RULE 22 TO
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER ADAM CARSON

ADAM CARSON 64595-060

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JURISDICTION

This is an Application to an individual justice, NOT A PETITION FOR A WRIT OF CERTIORARI. The jurisdiction of this court is invoked under Supreme Court Rule 22, 28 U.S.C. 1253, and 28 U.S.C. 2101(f) regarding the erroneous decision issued by the Sixth Circuit Court of Appeals on December 13, 2023 in Case No. 22-3386/3419.

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No.______________

IN THE
SUPREME COURT OF THE UNITED STATES

ADAM CARSON - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

APPLICATION TO JUSTICE KAVANAUGH TO VACATE OPINION IN US COURT OF APPEALS FOR THE SIXTH CIRCUIT CASE NO. 22-3386/3419 PURSUANT TO SUPREME COURT RULE 22

*THIS IS AN APPLICATION TO AN INDIVIDUAL JUSTICE, NOT A PETITION FOR A WRIT OF CERIORARI

Now comes the Petitioner, Adam Carson, pro se, who respectfully submits this application for relief to Justice Kavanaugh regarding the deprivation of Petitioner Carson's constitutional rights. The opinion issued by the Sixth Circuit Court of Appeals in Case No. 22-3386/3419 on December 13, 2023 was in error and directly conflicts with Supreme Court precedent and totally ignores the constitutional concerns raised by another circuit judge from the Sixth Circuit regarding Carson's case. Petitioner Carson is seeking that the opinion in Case No. 22-3386/3419 be vacated and/or the mandate stayed and the case be remanded for further proceedings based upon the following.

I. CASE BACKGROUND

In 2018, a jury found Adam Carson guilty of bank robbery, in violation of 18 U.S.C. 2113(a), and witness tampering, in violation of 18 U.S.C. 1512(b)(1). He was sentenced to 240 months in prison, to be followed by three years of supervised release. (R. 131: Sent. Trans, pg id # 1542) The Sixth Circuit Affirmed Carson's conviction on November 26, 2019, See: United States v. Carson, 796 F. App'x 238 (6th Cir. 2019) and the United States Supreme Court denied certiorari on May 4, 2020. (Sup. Ct. Case No. 19-8172)

On October 12, 2021, Carson filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. 2255 (R. 167:Motion to Vacate, pg id # 1714-81). Carson's petition claimed three grounds for relief: (1.) Ineffective assistance of counsel with eleven subparts to this claim related to Attorney Donald Butler's deficient performance; (2.) He was denied his

right to testify at trial; and (3.) the special conditions of his supervised release were unconstitutional.

On March 22, 2022, the District Court denied Carson's motion to vacate without holding an evidentiary hearing. (R. 183: Order, pg id # 1927-43). Carson filed a notice of appeal as to the denial of his 2255 petition (R. 188:NOA, pg id # 1969) and he filed a motion for a certificate of appealability (COA) in the Sixth Circuit (Case No. 22-3386).

On January 18, 2023, Carson was granted the largest Certificate of Appealability Grant in the history of the Sixth Circuit with 10 COA's granted. See: Carson v. United States, 2023 U.S. App. LEXIS 1239 (6th Cir. 2023). The Court granted the following COA's regarding:

1. Carson's claims that trial counsel was ineffective for failing to accept a plea agreement on his behalf
2. Counsel failing to object to testimony by Carson's parole officer
3. Counsel failing to object to the Government's improper comments
4. Counsel inadequately presenting opening and closing arguments
5. Ineffective assistance of appellate counsel relating to the ineffective assistance of trial counsel claim
6. Carson's claim that he was denied his right to testify at trial
7. Whether the District Court erred in denying Carson's Rule 59(e) motion
8. Whether the District Court erred in denying Carson's motion for an evidentiary hearing
9. Whether the District Court erred in denying Carson's motion for supplemental discovery
10. Whether the District Court erred in denying Carson's motion for an expanded record

Carson's case was an absolute constitutional abomination. In the order granting Carson's COA's the court provided specific examples of exactly how Carson's constitutional rights were violated. In regards to the failure to accept the Government's plea offer, the court stated,"the record shows the Government had extended some type of plea proposal, and Carson pointed to evidence (e.g. letters to Butler and the sentencing transcript) he wanted to accept it and had communicated that to Butler." (R. 197: COA Order, pg id # 1994-95)

Regarding the failure to object to the parole officer's testimony, the court stated, "Warchol's [Carson's parole officer] testimony presented substantial risks of unfair prejudice. See Fed. R. Evid. 403(a). The record also indicates that there may be concerns about whether this testimony implicated Fed. R. Evid. 404(b) and 609 that renders Butler's failure to object ineffective." (R. 197: COA Order, pg id # 1998)

On the issue of the failure to object to the prosecutor's improper comments about Carson's friends "dead heroin overdosed body," this court stated that "the failure to object to the prosecutor's statement or move for a mistrial was so prejudicial that it could not have been a tactical strategy but deficient performance." (R. 197: COA Order, pg id # 1999-2000)

Regarding Carson's right to testify at trial, the court stated, "a reasonable jurist could find that Carson did alert the District Court to his desire to testify at trial" (R. 197: COA Order, pg id # 2005) and explained how the District Court erred by denying Carson an evidentiary hearing. (R. 197: COA Order, pg id # 2007)

On December 13, 2023, a panel from the Sixth Circuit denied all ten issues that Carson was granted a COA on and declined to remand his case back to the District Court for an evidentiary hearing despite the existence of several factual disputes. In denying Carson's appeal, the panel stated "Carson's ineffective assistance claims fail on prejudice grounds. Even if a dispute of fact exists over whether he asked counsel to look into a plea deal, only speculation supports his claim that the parties would have reached a deal but for counsel's inaction. The overwhelming evidence of his guilt also shows that counsel's conduct at trial did not affect the verdict. Lastly, Carson did not object to his counsel's statement that he did not want to testify. So our cases require us to presume that he knowingly waived this right. And while Carson now asserts that counsel misrepresented his wishes, he cannot rebut our presumption with this after the fact allegation." (Carson v. United States, No. 22-3386, p. 1-2)

How can one judge recognize such blatant constitutional violations but other judges not see ANY constitutional concerns? The panel's decision on Carson's claims was completely in error. The facts were misconstrued and the law was wrongfully applied. Carson's case deals with significant issues of constitutional importance and deserves the attention of the Supreme Court. In this petition there is a national importance in deciding Carson's issues because Carson presents issues of importance beyond the particular facts and parties involved and the decision affects other similarly situated defendants. Carson presents the following for this courts consideration:

II. ISSUES PRESENTED FOR CONSIDERATION

A. If the Court holds a hearing to put a plea proposal on the record, and the Government OFFERS a 3 point deduction for acceptance of responsibility if the defendant PLEADS guilty, which allows for a significantly lower sentencing range, is that considered a PLEA OFFER?

The answer to that question is YES! When a court holds a hearing for the specific purpose of having the Government put a PLEA PROPOSAL on the record, the offered proposal is a PLEA OFFER and the hearing held was a PLEA HEARING. "A defendant has a right to effective assistance of counsel which includes accepting a plea on terms and conditions that may be favorable." Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L.Ed. 2d 379 (2012)

There seems to be some serious confusion in the Sixth Circuit Court of Appeals in regards to this important issue of constitutional significance. One Circuit Judge emphatically states that "the record shows the Government had extended [Carson] some type of plea proposal and Carson pointed to evidence...he wanted to accept it and had communicated that to [his attorney]" (R. 197: COA Order, pg id # 1994-95) Yet another panel ruled that "the prosecution never made a plea offer

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to Carson or his attorney." (Carson v. United States, Case No. 22-3386, p.9) The underlying facts regarding this issue severely forecloses the panel's erroneous position on this matter. A plea proposal was put on the record in this case.

At a hearing held on February 15, 2018, AUSA Skutnik stated, "Your Honor, when the Court is ready, I believe on a previous date, the court ordered me to be prepared to discuss Mr. Carson's perspective Guidelines placement of the PLEA." (R. 139: Hear. Trans. pg id # 1584) Ms. Skutnik continued,"If he pled guilty and received acceptance of responsibility with these, that same criminal history category, he would be at an advisory range of 151-188." (ID at 1586)

A plea did exist in this case. If Carson pled guilty, he would have received points deducted for acceptance of responsibility and received a significantly lesser sentence. This is fully supported by the record of the hearing. (R. 139: Hear. Trans.) Having heard the benefit in sentencing by pleading guilty, Mr. Carson wrote two letters to Attorney Butler, instructing counsel to arrange a guilty plea so he could receive the benefit of acceptance of responsibility. These letters, sent two months before trial began, dated April 9 and April 19, 2018, expressed an unequivocal desire to plead guilty. (R. 180-2: Letter, pg id # 1906-07; R. 180-4: Letter, pg id # 1910) The first letter states, "will plea guilty today! No trial! (R. 180-2: Letter, pg id# 1906-07) The second letter states,"I do not want to go to trial. I want to get this case over with." (R. 180-4: Letter, pg id # 1910) At sentencing, Carson referenced these letters and had the letters with him. (R. 131: Sent. Trans. pg id # 1519-20)

The Supreme Court's decision in Lafler v. Cooper, 566 U.S. 156, 162-64 (2012) made clear that defendant's must show a "reasonable probability that they would have accepted a plea that would have resulted in a less severe sentence." If the court were to analyze Carson's statements, he made it abundantly and unequivocally clear to Attorney Butler that (1.) He was willing to plead out (2.) He wanted to get this case over with (3.) He did not want to proceed to trial (4.) He did not want to risk going to prison for 20 years. Carson's preference was to hopefully plead to just witness tampering so he could be eligible to participate in the Residential Drug Abuse Program (RDAP) (A bank robbery conviction is considered a crime of violence and would make Carson ineligible to participate in the RDAP program.) However, Carson also stated he would plead to an offense level 29. An offense level 29 can only include the bank robbery charge. CARSON NEVER STATED HE WOULD NOT ACCEPT A PLEA THAT INCLUDED THE BANK ROBBERY CHARGE. He did state in both letters that he wanted to get this

case over with. A plea was offered by the government at the February 15, 2018 hearing that would have provided Carson with a 3 point deduction for acceptance of responsibility, which would have enable Carson to receive a significantly lesser sentence. Butler rendered ineffective assistance of counsel when he never contacted the government and arranged for Carson to plea guilty after Carson expressed his desire to plead guilty.

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The panel affirming the denial of Carson's 2255 erroneously states in their opinion that, "The prosecution never made any plea offer to Carson or his Attorney so he can not prove prejudice" and that in order to obtain relief under Lafler and Frye, the prosecution must make a "formal plea offer" and that counsel deficiently precluded their clients from accepting it. (Carson v. United States, Case No. 22-3386, opinion p. 8-9) The panel's assessment is completely wrong.

First, nowhere in Frye did it state that a defendant could obtain relief ONLY if a lawyer deficiently precluded their clients from accepting the prosecutions "formal plea offer." Frye specifically stated, "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." See: Frye, ante, at 148, 132 S. Ct. 1399, 182 L. Ed. 23 379. See also: Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) ("The...prejudice requirement...focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.")

The plea hearing held on February 15, 2018, was part of the plea process in this case. The court ordered the AUSA to put a plea proposal on the record so Carson can become aware that a guilty plea will earn him a significantly lower sentencing range. At the plea hearing, the Government offered Carson a 3 point deduction for acceptance of responsibility which lowered his sentencing range by 70 months. In order to receive this benefit, all he had to do was plead guilty. A formal plea offer was not required. The record belies the panel's claim that "the prosecution never made any plea offer to Carson or his attorney." If the court holds a hearing, and the government OFFERS a 3 point deduction for acceptance of responsibility, and the defendant PLEADS guilty and gets the benefit of a significantly lower sentencing range, THIS IS CONSIDERED A PLEA

OFFER.

Blacks Law Dictionary, Deluxe Ninth Edition defines GUILTY PLEA as - "An accused person's formal admission in court of having committed the charged offense. A guilty plea must be made voluntarily and only after the accused has been informed and understands his or her rights. A guilty plea is usu. PART OF A PLEA BARGIN. See also: Sentence Bargin."

SENTENCE BARGIN is defined as - "A plea bargin in which a prosecutor agrees to recommend a LIGHTER SENTENCE in exchange for a PLEA OF GUILTY or no contest from the defendant." The Government offering Carson 3 points off for acceptance of responsibility, which resulted in a LIGHTER SENTENCE meets this standard.

The purpose of the February 15th hearing was to put a plea proposal on the record. The District Court tried to persuade Carson into taking the Government's plea proposal by stating, "But, I'm saying, if everything went poorly for you at trial, you

got a significant sentence, this prevents you from two years later saying oh, I didn't know I could potentially get 150 months." (R. 139: Hear. Trans. pg id # 1588) As the court stated, Carson's guilty plea could have resulted in a 150 month sentence which is 90 months less than his current 240 month term. That is a significant disparity! Carson stated in his letters to Butler that he "can't risk going to prison for 20 years." (R. 180-2: Letter, pg id # 1907-08) Having heard the benefit of pleading guilty and the court's suggestion of a 150 month sentence, Carson instructed Butler to "plead this case out," meaning take the plea proposal that was offered by the Government at the February 15th hearing.

A PLEA did exist in this case. Carson's letters to Butler and affidavits prove he wanted to resolve this case by pleading guilty and had communicated that to Butler. Butler never contacted the Government to resolve this case as Carson requested which constituted deficient performance. It also prejudiced Carson because, but for counsel's failure to do what Carson asked, he would have pled guilty and not gone to trial. Carson proved a plea did exist and the panel was wrong to state otherwise.

Carson's case deals with the same issues that were presented in Frye...the ineffective assistance of counsel led to the rejection of the Government's plea proposal and having to stand trial, not choosing to waive it, is the prejudice alleged. Far from curing the error, the trial caused the injury from the error. To establish prejudice, a defendant must show that but for the ineffective assistance of counsel, there is a reasonable probability that the plea proposal would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence or both, under the offers terms would have been less severe than under the judgment and sentence that were imposed. Carson meets these standards here.

The Supreme Court's decision in Lafler v. Cooper, 566 U.S. 156, 162-64 (2012), made clear that defendant's must show a "reasonable probability that they would have accepted a plea that would have resulted in a less severe sentence." Carson maintains that absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice and would be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. If a plea proposal has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a more severe sentence. See: Frye, 566 U.S. 134, 140-44. Carson's situation is also similar to Lafler's in which "inadequate assistance of counsel caused inacceptance of a plea offer and further proceedings led to a less than favorable outcome" Lafler, 182 L.Ed 2d 398

Carson proves that he was prejudiced by Attorney Butler for failing to arrange for Carson to plead guilty so he could have

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B. If a Petitioner loses his Direct Appeal, and another Circuit Judge issues 10 COA's regarding constitutional concerns relating to the petitioner's case, which relates back to and calls into question the reliability of the panel's decision of his Direct Appeal, should the judge who wrote the opinion in the Direct Appeal, who claimed there were no constitutional concerns or errors, be allowed to sit on the panel that ultimately scrutinizes her own decision because it raises concerns of impartiality? (This is a question of first impression for the court)

The issue presented here questions if a judge is allowed to be the reviewing authority to determine if one of their prior opinions was proper and constitutionally sound after another Circuit Judge called into question the reliability of the prior decision. Common sense dictates that a judge can not be their own reviewing authority and must recuse themselves if this type of situation presents itself. There must be a system of checks and balances to ensure the publics confidence in the fair administration of justice. Carson presents the following in support:

On November 26, 2019, Judge Larsen wrote the opinion that denied Carson's Direct Appeal and Affirmed his sentence even after Carson proved that several of his constitutional rights were violated in his appellate brief. See: United States v. Carson, 796 F. App'x 238 (6th Cir. 2019). Another Judge reviewed Carson's case when he submitted his motion for a certificate of appealability and found several issues of concern. See: United States v. Carson, 2023 U.S. App. Lexis 1239 (6th Cir. 2023).

In this matter, the same set of facts were presented to two different judges. One judge (Judge Larsen) claimed that no constitutional violations or errors occurred during Carson's legal proceedings. Another judge (Judge Moore) determined that there were numerous errors and violations of Carson's constitutional rights and issues a record ten certificates of appealability. In this scenario, Judge Moore makes Judge Larsen look bad for overlooking the violations of Carson's constitutional rights.

For example, in Carson's Direct Appeal, he claimed the District Court violated Fed. R. Evid. 404(b) by allowing his parole officer to testify, which, by definition, insinuated prior conviction. Judge Larsen denied Carson's claim stating, "The parole officer never identified himself as such, instead testifying that he worked at a state agency. And his testimony made no mention of Carson's prior convictions."

Judge Moore examined the same issue and stated, "Warchol's [Carson's parole officer] testimony reveals a familiarity with law enforcement, uses law-enforcement jargon, addresses concerns about maintaining the integrity of an ongoing

investigation, and outlines the routine aspects of a parole officer's position. An average juror could easily glean that Warchol is a member of law enforcement and specifically Carson's parole officer." She further explained, "Warchol's testimony presented substantial risks of unfair prejudice. See Fed. R. Evid. 403(a). The record also indicates that there may be concerns about whether this testimony implicated Federal Rules of Evidence 404(b) and 609." (R. 197: COA Order, pg. id # 1998)

Both Judges read the same trial transcript. It was clear and obvious to Judge Moore that Warchol was a parole officer, his testimony violated the Federal Rules of Evidence, and presented substantial risks of unfair prejudice. But somehow, Judge Larsen didn't see any of these concerns.

Carson also explained in his Direct Appeal how Attorney Butler rendered constitutionally ineffective assistance. Judge Larsen stated the alleged ineffectiveness of Carson's trial counsel is not apparent from the record. However, Judge Moore reviewed the same trial transcripts and found that trial counsel was ineffective for failing to accept a plea agreement on his behalf, failing to object to testimony from Carson's parole officer, failing to object to the Government's improper comments, and inadequately presented opening and closing arguments.

For Judge Larsen to not acknowledge ANY of these errors that occurred during Carson's trial demonstrates that she was biased against Carson and violated his appellate due process rights. Judge Moore explained with precision in her COA order exactly how Attorney Butler rendered ineffective assistance of counsel and prejudiced Carson, but somehow, Judge Larsen didn't see anything at all wrong with Carson's trial.

No one likes to to be told that they were wrong and judges are no different than the average person. If it came to be determined that all these constitutional violations occurred in Carson's case, and Judge Larsen knowingly ignored them, which affected Carson's significant liberty interests and resulted in him being kept in prison for an extra decade, she could get in big trouble and possibly face disciplinary action or lose her judgeship. A judge facing these potential problems and accusations of misconduct would want to get on the panel that makes the final determination in this matter so their willful disregard of another individuals constitutional rights won't come to light.

Under 28 U.S.C. 455(a), all judges of the United States must disqualify themselves in any proceeding in which [their] impartiality might reasonably be questioned. The goal of section 455(a) is to avoid even the appearance of partiality. See: Liteky v. United States, 510 U.S. 540, 548, 114 S. Ct. 1147 (1994). The standard for recusal is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his [or her] position is likely to be neutral, or whether there is an unconstitutional potential for bias." Williams v. Pennsylvania, 579 U.S. 1 (2016). The potential for bias presents itself here.

It is Carson's position that fraud upon the court was committed during the panel selection process of his 2255 Appeal. It is Carson's belief that Circuit Judge Joan Larsen is interfering with the panel selection process and requested to be placed on Carson's panel for his 2255 Appeal to protect her erroneous and unconstitutional decision in Carson's Direct Appeal. Carson is questioning the integrity of the panel selection process and here's why. In addition to Judge Larsen writing the opinion that denied Carson's Direct Appeal, she was also assigned to the panel that denied Carson's appeal to obtain his case file from his attorney so he could gather more evidence for his ineffective assistance of counsel claims for his 28 U.S.C. 2255 petition. See: United States v. Carson, 2021 U.S. App. LEXIS 27036 (6th Cir. 2020)

Judge Larsen also denied Carson's Recall Mandate even after he proved that he was no longer subject to the career offender enhancement and was entitled to be resentenced based upon the new precedential decision decided by the Sixth Circuit in United States v. Butts, 40 F. 4th 766, 773 (6th Cir. 2022) which held that second degree robbery in Ohio was no longer a crime of violence under the elements clause of 4B1.2(a) of the Guidelines.

Then, Judge Larsen was somehow "randomly" placed on the panel which determined that none of the ten COA issues that were granted to Carson had ANY merit. There are over 20 Judges in the Sixth Circuit. Panels are suppose to be randomly selected. The odds of the same judge appearing on 4 different panels is astronomical. If you put all the judges names in a hat, and draw 4 panels, it is phenomenally unlikely that the same judge would be on all 4 panels. Try it. While mathematically possible, the odds would be infinitesimal. This statistical improbability calls into question the fairness and integrity of the panel selection process.

It is the Petitioner's belief that Judge Larsen is interfering with the panel selection process and requested to be placed on Carson's panel for his 2255 Appeal to protect her erroneous and unconstitutional decision in Carson's Direct Appeal. Another Circuit Judge had the courage and integrity to do the right thing and raised several concerns of constitutional importance regarding Carson's trial that was overlooked or ignored by Judge Larsen on his Direct Appeal. If a panel ruled in Carson's favor on his 2255 appeal, it would have exposed Judge Larsen for disregarding Carson's constitutional rights and ignoring all the errors that occurred in Carson's case.

This scenario is why it is absolutely necessary to NEVER allow a judge to be the reviewing authority to determine if their opinion was constitutionally sound. A neutrality requirement must be applied or else the integrity of our judicial system will be compromised. "The appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." Therefore, "an unconstitutional failure to recuse is structural error and thus not amenable to harmless error review." (See ID) Williams, 579 U.S. 1 (2016)

Structural errors are "so intrinsically harmful to the proceeding that they render the proceeding an unreliable vehicle for determining innocence or guilt." An error may qualify as structural if it "calls into question the objectivity of those charged

with bringing a defendant to judgment." Vasquez v. Hillery, 474 U.S. 254, 263, 106 S. Ct. 617 (1986)

A judge can not be their own reviewing authority and failure to recuse oneself if this type of situation arises is unconstitutional and amounts to structural error. Carson has proven that Judge Larsen's failure to recuse herself violated his constitutional rights and demonstrated the near impossibility of the same judge appearing on Carson's appellate panels four different times. This statistical improbability calls into question the integrity of the panel selection process and amounts to fraud upon the court. Carson is entitled to have the opinion issued in Sixth Circuit Case No. 22-3386/3419 VACATED and Judge Larsen be disqualified from appearing on Carson's 2255 Appeal panel.

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C. Whether the panel was allowed to ignore violations of the Federal Rules of Evidence and Carson's constitutional rights, because they felt there was overwhelming evidence of his guilt, violates the precedents established in Srtickland v. Washington,466 U.S. 668, 687 (1984) and Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2039, 80 L.Ed. 2d 657 (1986)?

Carson was granted four certificates of appealability by a Circuit Judge relating to the ineffective assistance of his trial counsel...Donald Butler. Each issue was briefed separately, and arguments were presented as to how Attorney Butler rendered ineffective assistance of counsel and how Carson suffered prejudice by his counsel's deficient performance. A brief summary of the issues is as follows:

1. FAILING TO ARRANGE FOR CARSON TO PLEAD GUILTY

Carson proved in the previous section that a PLEA PROPOSAL was offered, Carson was willing to accept it, and Attorney Butler rendered ineffective assistance of counsel for failing to arrange for Carson to plead guilty

2. FAILURE TO OBJECT TO PAROLE OFFICER'S TESTIMONY

In granting Carson's COA, a Circuit Judge explained, "an average juror could easily gleam that Warchol [Carson's parole officer] is a member of law enforcement and specifically Carson's parole officer. The court also stated that allowing the parole officer's testimony violated Fed. R. Evid. 403(a), 404(b), and 609 because the testimony is unduly prejudicial because it can alert the jury that the defendant is on parole for prior crimes. (ID at 1998-99) Butler rendered ineffective assistance by his failure to object or move for a mistrial. Carson was prejudiced by his Attorney's failure to prevent the jury from learning he was on parole and that he had prior convictions.

3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE GOVERNMENTS IMPROPER COMMENTS

Defense counsel rendered ineffective assistance by failing to object during the cross-examination of Carson's mother. While the line of questioning began with the prosecutor asking Ms. Carson about her son's drug use, it then proceeded to the prosecutor asking Carson's mother whether she knew whether "the furnace that your son tried to return to Webb Heating and Cooling had actually been taken out of the back of the van where Tim King's dead heroin overdosed body lay." (R. 102: Trial Trans. pg id # 1275)

Despite the impropriety of the prosecutor's question, Carson's attorney failed to lodge any objection to this question. Carson himself was so outraged by this improper question that he, not his lawyer objected (ID at 1275). This question was not inextricably intertwined with the bank robbery, it had no relevance to the bank robbery, and certainly was not res gestae

evidence. The Government's question only served to persuade the jury that Carson stole from a dead person- to which there was no evidence - and consequently that Carson was the type of character who would also rob a bank. It sought to mislead the jury and seek to unfairly prejudice Carson, which is inadmissible under Fed. R. Evid 403.

In granting Carson's COA, the Sixth Circuit stated that the prosecutor's statement was improper impeachment of the witness and "the failure to object to the prosecutor's statement or move for a mistrial was so prejudicial that it could not have been a tactical strategy, but deficient performance." (ID at 1999-2000) The prosecutor's cross-examination of Ms. Carson, introducing unsupportive and inadmissible character evidence, should have been objected to by counsel and excluded by the court. Therefore, Attorney Butler's failure to object was not objectively reasonable and constituted deficient performance. Strickland, 466 U.S. at 688. Given the magnitude of this question - accusing Carson of stealing from a dead person - along with counsels decision not to echo his clients pro se objection, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Therefore, under Strickland, Carson was prejudiced by his counsel's failure to object to the prosecutor's improper comments.

4. DEFENSE COUNSEL'S OPENING AND CLOSING STATEMENTS RENDERED COUNSEL CONSTITUTIONALLY INEFFECTIVE

Attorney Butler's opening and closing statements each contained objectively unreasonable statements which constituted deficient performance and prejudiced Carson. At the beginning of opening statements, Attorney Butler told the jury that Carson had, in fact, stolen a car from a gas station, another crime that occurred days after the bank robbery (R. 99: Trial Trans. pg id # 510-11) Right after that, he admitted Carson's connection to Karin Deeb indicating that they went on "various drug binges" (R. 99: Trial Trans. pg id # 511) Defense counsel then offered their theory of the crime, which was that Karin Deeb had been the one that robbed the bank. (ID at 511)

In closing argument, Defense counsel claimed Karin Deeb was the bank robber. In seeking to convince the jury of this fact, Attorney Butler claimed his client was "just over five feet tall" whereas the bank teller testified the robber was "at least 5'6, 5'7" therefore Carson was not the robber. (R. 103: Trial Trans. pg id # 1373-74). Defense counsel was wrong about this fact, which prompted the government, in rebuttal, to show Carson's driver's license to the jury, which listed his height at 5'6. (R. 103: Trial Trans. pg id # 1400) This error was significant and constituted ineffective assistance of counsel.

In granting Carson's COA, the Sixth Circuit stated, "Based on the significance of this revelation and its prejudicial effect, cumulative with the prejudice described above, Hewitt-El, 53 F. 4th at 981-82 a reasonable jurist could find that Carson was prejudiced by Butler's performance."

With this overview of these four subissues of ineffective assistance of counsel, Carson has proven that he has met the Strickland standard, he was prejudiced by his counsel's performance, that his counsel's representation fell below an

objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694

There are instances where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) this court held that, "the constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." The fact that the petitioner was found guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that an Attorney's deficient performance, which results in prejudice, during pretrial matters or during the trial is excused.

A court must apply the Strickland standard to asses claims of ineffective assistance. Here, the panel tries to minimize and diminish Carson's certified claims of ineffective assistance as mere complaints and refused to analyze the issues because they felt there was overwhelming evidence of his guilt. The panel completely disregarded Judge Moore's order which specifically explained how Carson was prejudiced by his attorney's deficient performance, how his constitutional rights were violated, and how the Federal Rules of Evidence were ignored. By failing to apply Strickland to asses the certified ineffective assistance of counsel claims raised by another Circuit judge, the courts adjudication was contrary to clearly established federal law. The evidence the panel states is overwhelming IS NOT. If Carson had competent counsel or was allowed to represent himself, the so called "evidence" could have been easily explained and defended. For example:

1. The bank surveillance video - The bank surveillance video does not prove Carson robbed the bank. Facial recognition software never identified Carson as the bank robber

2. Johnson's testimony that she noticed a tattoo near the collar of the robbers neck - Johnson drew the tattoo she saw on the bank robbery suspect for detectives immediately after the robbery. The tattoo Johnson remembered seeing was not on Carson's body.

3. People who identified Carson from the bank surveillance photo - The only people who identified Carson were biased members of law enforcement and scorned exlovers. Carson filed complaints against the two Rocky River Police Officers for illegally seizing his car and cell phone in October of 2016. Coincidently, those were the only police officers to identify Carson. The other identification was Carson's neighbor. When Carson started going out with Karin Deeb, he stopped sleeping with his neighbor, which created a resentment and resulted in her "identification" of the petitioner.

Carson worked at some of the busiest restaurants and clubs in Cleveland as a server. (The Cheesecake Factory, Music Box Supper Club, Brio Tuscan Grille, The Rosewood Grill, The Big Bang Dueling Piano Bar, and Punch Bowl Social) Carson encountered thousands of people per week, but somehow no one other than people that were biased against Carson were

able to identify him as the robber.

4. Holiday Inn Video - Carson was seen on police body cam video with two socks filled with money. When asked by officers where Carson acquired the money from, he stated, "I work as a server and do HVAC on the side." Carson made hundreds of dollars per night working as a server, and made good money doing HVAC side jobs during the day. The government tried to insinuate that the money Carson had came from bank robbery proceeds. There was absolutely no proof that the money Carson possessed came from a bank robbery.

5. Shirt - The government claims that the shirt Carson possessed was the same one worn by the robber. No forensic expert ever corroborated that claim. Carson asserts that the shirt the robber had on during the robbery contained darker stripes and was a different color. No testing was ever done to show that Carson's shirt was a match for the bank robbers.

6. Gloves - The government speculates that the generic dollar store gloves thousands of people wear in Northern Ohio in November that Carson had in his possession were the same ones worn by the bank robber. Fibers were found at the bank robbery scene that did not match the gloves that were in Carson's possession.

7. Facebook Identification - Carson's Facebook page was Private. It would have been impossible for anyone who worked at the bank to pull up his Facebook page unless they were friends with Carson

Carson proved that the "evidence" against him was not "overwhelming" and could have been easily explained and defended and that his counsel "failed to assert rights that may have altered the outcome." Kimmelman, 477 U.S. at 380, 106 S. Ct. 2574. Attorney Butler's failure to object or move for a mistrial regarding Carson's parole officer's testimony and the flagrant remark made by the prosecutor resulted in Carson being extremely prejudiced and harmed. The testimony and remarks were damaging to Carson. Attorney Butler should have moved to have the improper testimony stricken from the record. The Federal Rules of Evidence and Carson's constitutional rights were clearly violated and counsel's failure to assert Carson's rights resulted in inadmissible evidence being presented to the jury and contributed to Carson's conviction. This puts into question the fairness and integrity of Carson trial. Carson was not afforded his Sixth Amendment protections and counsel's conduct so undermined the proper functioning of the adversarial process that the trial can not be relied on as having provided a just result. See: United States v. Cronic, 466 U.S. 648, 658 104 S. Ct. 2039, 80 L. Ed 2d 657 (1984). The clear violation of several Federal Rules of Evidence should have resulted in a mistrial being decaled. The cumulative effect of Attorney Butler's errors violated the precedents established in Strickland and Kimmelman and Carson was not provided his Sixth Amendment right to effective assistance. The only way to remedy all the errors that occurred is to Grant this Application and vacate the opinion issued against Carson.

FROM: 64595060
TO:
SUBJECT: Conclusion
DATE: 02/27/2024 08:28:56 PM

*

CONCLUSION

Carson has proven that the panel's opinion was wrong and the constitutional concerns raised by another circuit judge were completely ignored. Carson has provided evidence proving that a plea was offered in his case, he was willing to accept it, communicated that to his attorney, and the outcome of the plea process would have been different. Carson also demonstrated he was denied his right to testify at trial, that there were multiple violations of the Federal Rules of Evidence, how his constitutional rights were violated, and he established how he was prejudiced by the deficient performance of his counsel and was injured by his errors. Most importantly, Carson has proven that a judge is not allowed to be the reviewing authority to determine if one of their prior opinions was proper and constitutionally sound after another judge calls into question the reliability and constitutionality of that prior decision.

This Application to vacate opinion should be GRANTED. Carson has shown that the opinion issued by the panel directly conflicts with the precedents established in Lafler v. Cooper, 132 S. Ct. 1376, Missouri v. Frye, 132 S. Ct. 1399, Fontaine v. United States, 411 U.S. 213, 215, Strickland v. Washington, 104 S. Ct. 2052, and Kimmelman v. Morrison, 106 S. Ct. 2039. Carson is entitled to have the opinion issued by the United States Court of Appeals for the Sixth Circuit, Case No. 22-3386/3419 Vacated and/or the Mandate stayed and the case remanded for further proceedings.

Done this 29th day of February, 2024

Respectfully submitted,

Adam Carson 64595-060
Petitioner, pro se
USP Lewisburg
PO Box 1000
Lewisburg, PA 17837

FROM: 64595060
TO:
SUBJECT: Proof of service
DATE: 02/27/2024 08:22:39 PM

*

PROOF OF SERVICE

I, Adam Carson, do swear or declare that on this 28th day of February 2024, as required by Supreme Court Rule 29, I have served the enclosed Application to Justice Kavanaugh to vacate opinion in CA6 22-3386/3419 pursuant to Supreme Court Rule 22 on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States, Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of February, 2024

Adam Carson 64595-060
Petitioner, pro se

Appendix A

Nos. 22-3386/3419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 18, 2023
DEBORAH S. HUNT, Clerk

ADAM CARSON,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Before: MOORE, Circuit Judge.

In these consolidated appeals, Adam Carson appeals (1) the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255 and (2) the district court's order denying his Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment denying his motion to vacate. Carson moves this court for a certificate of appealability (COA), for the appointment of counsel, and for leave to proceed in forma pauperis on appeal.

In 2018, a jury found Carson guilty of bank robbery, in violation of 18 U.S.C. § 2113(a), and witness tampering, in violation of 18 U.S.C. § 1512(b)(1). He was sentenced to 240 months in prison, to be followed by three years of supervised release. Carson's supervised release includes several special conditions, including mandatory drug testing, substance-abuse and mental-health treatment, restrictions on the possession of alcohol and weapons, and various financial restrictions. On appeal, this court affirmed Carson's conviction and sentence. *United States v. Carson*, 796 F. App'x 238 (6th Cir. 2019).

Carson then filed a motion to vacate, claiming that (1) trial and appellate counsel were ineffective in various respects, (2) he was denied his right to testify on his own behalf, and (3) the district court failed to state adequately its rationale for his special conditions of supervised release.

Appendix A

The district court denied the motion on the merits and declined to issue a COA. Carson then filed a timely motion to alter or amend the judgment under Rule 59(e), which the district court denied.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003). That standard is met when the movant demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Ineffective Assistance of Counsel

Carson's first ground for relief raises several claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. To prevail on these claims, Carson must establish that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, Carson must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Next, establishing prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To show the requisite prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Our prejudice inquiry "consider[s] the cumulative effect of [counsel's] deficient performance." *Hewitt-El v. Burgess*, 53 F.4th 969, 981-82 (6th Cir. 2022).

Failure to Accept the Government's Plea Offer

Carson claims that his trial counsel, Donald Butler, ignored his directive to accept the Government's plea offer, which would have resulted in a "significantly lesser sentence." The district court rejected this claim, finding that it had no support in the record. But there is some support in the record. Most significantly, the record shows that the Government had extended some type of "plea proposal," and Carson pointed to evidence (e.g., letters to Butler and the

sentencing transcript) that he wanted to accept it and had communicated that to Butler. Carson also submitted an affidavit stating that he "instructed Attorney Butler to accept the plea offered by the Government because [he] did not want to proceed to trial with Attorney Butler representing [him]." Butler counters Carson's assertions in his own affidavit. Given the factual contradictions in the record and conflicting affidavits, reasonable jurists could debate the district court's conclusion that Carson failed to show that "Butler's performance was deficient for failing to accept a plea that did not exist" and for further failing to show prejudice. A COA therefore shall issue on this ineffective-assistance-of-trial-counsel subclaim.

Failure to File a Motion to Suppress

Carson argues that Butler was ineffective for failing to file a motion to suppress certain evidence—namely, a blue and white striped shirt found in a stolen vehicle that was never established to contain his DNA or to be the shirt worn by the bank robber, as seen in the surveillance video; a pair of his gray gloves (the surveillance video shows that the bank robber wore gray gloves); and video footage from a hotel the night after the robbery showing him holding a sock full of money.

Fatal to Carson's claim is that, though he asserts that presentation of this evidence to the jury was prejudicial, he does not assert—much less show—that the three items were illegally seized. As the district court explained: "the shirt was in the vehicle [that Carson allegedly] stole when [the vehicle] was impounded, the gloves were on Mr. Carson's person at the time of arrest, and [the hotel] owned and supplied the camera footage." A motion to suppress the lawfully obtained evidence therefore would have been meritless. But an ineffective-assistance-of-counsel claim premised on the failure to file a motion to suppress requires that a habeas petitioner "prove that his Fourth Amendment claim is meritorious." *Robinson v. Howes*, 663 F.3d 819, 825 (6th Cir. 2011) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). No reasonable jurist therefore could debate the district court's rejection of this ineffective-assistance claim on Fourth Amendment grounds.

Failure to Present Defense Witnesses

According to Carson, one bank teller, Mylissa Johnson, testified that she identified Carson as the bank robber when another teller, Autumn Duran, pulled up Carson's Facebook page. But Carson avers that his Facebook page was private so Johnson could not have accessed it and was thus lying; Carson claims that Butler was ineffective for failing to subpoena Duran to testify and impeach Johnson on this point. Carson argued before the district court that if Butler called Duran to testify, Duran would have testified that "she never pulled up Carson's Facebook page and the identification at the bank never occurred." Carson does not offer any evidence to support this potential testimony. Carson also claims that Butler failed to present other impeachment witnesses "to further discredit" his accomplice, Karin Deeb.

Carson, however, failed to present any proof (such as affidavits), beyond his conclusory and speculative assertions of what testimony Duran and the unnamed "impeachment witnesses" would have presented. A claim of ineffective assistance for failing to call witnesses cannot be based on mere speculation. *See Clark v. Waller*, 490 F.3d 551, 557 (6th Cir. 2007) (concluding that petitioner could not show prejudice arising from counsel's failure to call a particular witness when "he has offered no evidence, beyond his assertions, to prove what the content of [the witness's] testimony would have been"). The district court's rejection of this ineffective-assistance claim therefore is not debatable among jurists of reason.

Failure to Hire a Private Investigator and Expert Witnesses

Carson also claims that counsel failed to hire (1) a private investigator to interview bank tellers to prove that Johnson could not have identified him on his "private" Facebook page, to get an alibi witness's statement that the Government intimidated the witness to prevent him from testifying, and to obtain impeachment evidence, (2) a forensic expert to testify that the shirt worn by the robber, as seen in the surveillance video, was not his and that his DNA was not found at the crime scene, (3) a computer expert to testify that his Facebook page is private and thus Johnson could not have identified him through the page, and (4) a facial-identification expert to prove he was not the bank robber.

As noted by the district court, Carson's subclaims about the failure to hire a private investigator and computer expert are largely speculative. For example, his subclaim regarding Johnson lying about seeing his photo on Facebook is premised on his unsupported allegation that Duran would have contradicted Johnson's testimony. Speculative arguments, such as this one, are insufficient to support a claim of ineffective assistance of counsel. *See Fautenberry v. Mitchell*, 515 F.3d 614, 634 (6th Cir. 2008). The district court also explained that it was sound trial strategy not to retain the other experts that Carson desired. In particular, "a forensic expert would have been useless" in light of testimony that the robber wore gloves and that no DNA was found at the crime scene, and a facial-identification expert was pursued but not used because, in all likelihood, he "may have been unable to testify about suspect identification because the bank robber was wearing a disguise" and thus Butler instead chose to "vigorously cross-examine[] witnesses" about their identification of Carson as the bank robber. Reasonable jurists would agree and would further agree that Carson failed to show prejudice "because the jury was shown the bank robbery surveillance video and could come to their own conclusions about whether the person in the footage, accounting for all the other evidence presented, was in fact Mr. Carson."

Failure to Object to Parole Officer Testimony

Carson claims that Butler was ineffective and should have objected to testimony from Ronald Warchol, Carson's parole officer, which prejudiced him by implying that he had a parole officer and prior convictions. Neither the Government nor Warchol stated that Warchol was Carson's parole officer, but nonetheless, references to "Officer Warchol" during opening and closing statements and the content of Warchol's testimony strongly implied that he served as Carson's parole officer.

In the Government's opening statement, it promised the jury that it would "hear from seven different people who can tell you that they were able to identify Adam Carson as the man who robbed that bank." The Government told the jury that at least five witnesses would be able to identify Carson as the individual in a surveillance photo from the robbery distributed by law enforcement. The Government told the jury that they would "hear from *Officer* Warchol, who has

met with Adam Carson, and [Warchol will] tell you that he saw that photo and he recognized it to be him." At closing argument, the Government again referred to "*Officer* Warchol."

During Warchol's direct examination,[1] he testified that he graduated from college, worked for a state agency, "me[]t and de[alt] with" Carson beginning in January 2016, met with Carson in Warchol's downtown office at least six times for 10 to 30 minutes where they would discuss Carson, that he learned about Carson's background and his family, and that he had interacted with Carson's mother by telephone to discuss Carson on numerous occasions. Warchol testified that he learned about the robbery from "either discussions with Rocky River Police Department or Lakewood in regards to something and they brought it to [his] attention" and then discussed it again with a "detective from Amherst Police Department." Warchol explained that he then came across an article about the robbery that included the photograph, which he recognized as being a photograph of Carson. He testified that he then communicated that identification to the Amherst detective (and made the same identification in court). The Government asked whether Warchol discussed the article and his identification with Carson's mother; Warchol responded that he had not because "[t]hat was an ongoing investigation" and "shar[ing] information [about] . . . an open investigation" was "not proper or appropriate."

Warchol's testimony reveals a familiarity with law enforcement, uses law-enforcement jargon, addresses concerns about maintaining the integrity of an ongoing investigation, and outlines the routine aspects of a parole officer's position. An average juror could easily glean that Warchol is a member of law enforcement and specifically Carson's parole officer. Carson argues that this biased him and prejudiced the jury and that Butler was ineffective when he failed to exclude Warchol as a witness or object to this line of questioning. Though *another* identification of Carson (through Warchol's testimony) is probative, Warchol's testimony presented substantial risks of unfair prejudice. *See* Fed. R. Evid. 403(a). The record also indicates that there may be concerns about whether this testimony implicated Federal Rules of Evidence 404(b) and 609 that renders Butler's failure to object ineffective. Under these circumstances, a reasonable jurist could

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[1]Butler did not cross examine this witness.

find that Butler's performance was deficient in failing to object to this testimony. And, cumulative with the prejudice that occurred elsewhere during trial, *Hewitt-El*, 53 F.4th at 981-82, a reasonable jurist could find that Carson was prejudiced by Butler's performance. A COA therefore shall issue on this ineffective-assistance-of-trial-counsel subclaim.

Failure to Object to Prosecutor's Improper Comments

Carson claims that Butler was ineffective because he failed to object to the prosecutor's comments about Carson's drug use and criminal conduct. Carson also argues that Butler failed to object to or move for a mistrial when the prosecutor suggested on cross-examination that Carson may have taken and sold a furnace that "had actually been taken out of the back of [a] van where [his friend's] dead heroin overdosed body lay." Carson argues that this comment could have led the jury to believe that he had "no respect for human life." The district court concluded that the prosecutor's comments were not so prejudicial as to support an ineffective-assistance-of-counsel claim because the jury would still have heard about Carson's history of drug use through his mother's testimony; it also noted that the prosecutor's comment about Carson's friend's dead body was proper to impeach Carson's mother and to discredit her direct testimony.

As we have previously said:

> Decisions not to object to *inadmissible evidence* already heard by the jury can in many cases be classified as part of a deliberate strategy to avoid calling the jury's attention to that evidence. Nonetheless, such concerns are not themselves sufficient to preclude a conclusion of deficient performance, as the court must still consider whether the decision not to object was objectively reasonable. By contrast, a failure to object to comments on witness credibility or derogatory statements by the prosecutor is much less susceptible to the argument that it should be considered reasonable trial strategy.

Hodge v. Hurley, 426 F.3d 368, 385–86 (6th Cir. 2005) (citing *Strickland*, 466 U.S. at 688; *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000)). Contrary to the district court's unexplained determination, the record does not demonstrate that the prosecutor's statement that Carson stole from a "van where [his friend's] dead heroin overdosed body lay" was "proper impeachment" of the witness. From this record, reasonable jurists could find that the failure to object to the prosecutor's statement or move for a mistrial was so prejudicial that it could not have

been a tactical strategy but deficient performance. Alongside the prejudice discussed above, reasonable jurists could find counsel was ineffective with regards to this sub-issue and the court will grant a COA on this sub-issue.

Counsel's Opening and Closing Statements

Next, Carson claims that Butler's remarks and conduct during opening statements and closing arguments prejudiced him. In particular, he takes issue with (1) Butler's admission in his opening statement that Carson "stole a vehicle and goes on drug binges," (2) Butler's failure successfully to introduce photographs of Deeb into evidence thereby barring him from showing the photographs to the jury and using them during his closing argument, which Carson argues would have raised reasonable doubt about his identity as the bank robber, (3) Butler's statement to the jury during his closing argument that Carson was around five feet tall, not five feet and six inches like the robbery suspect (as described by a witness), which allowed the Government to undermine the defense during its rebuttal closing argument with a copy of Carson's driver's license listing his height as five feet and six inches, and (4) Butler's remark in closing arguments that Carson had another criminal case pending with Deeb, that Carson stole a car, and that he was strung out on heroin.

The district court found that Butler's remarks during opening statements and closing arguments were a matter of sound trial strategy and were intended to build rapport with the jury and add merit to the defense theory. For instance, denying that Carson stole a vehicle and used drugs could have destroyed the defense's credibility because there was "abundant evidence" at trial that these things occurred. Instead, Butler made this concession but argued that Carson did not rob the bank—rather, Deeb did. Often, being the first to present damaging facts is a strategy to appear forthcoming and avoid looking as if one is hiding something. These strategic approaches to opening statements and closing arguments merit deference. *See Strickland*, 466 U.S. at 690. As for Butler's failure to ensure that photos refuting Carson's identity as the bank robber were admitted into evidence, Carson has not explained what the photographs show nor has he provided them. Without more, Carson has failed to meet his burden here. But reasonable jurists could find

Butler's statement that Carson was around five feet tall and thus could not possibly be the five-feet-and-six-inch bank robber was deficient and prejudicial given that, as the Government dramatically revealed at the tail end of trial, Carson was actually five feet and six inches. Based on the significance of this revelation and its prejudicial effect, cumulative with the prejudice described above, *Hewitt-El*, 53 F.4th at 981-82, a reasonable jurist could find that Carson was prejudiced by Butler's performance. The court will grant a COA on this sub-issue.

Failure Adequately to Cross-Examine Witnesses

Carson claims that Butler's cross-examination of several witnesses was inadequate because he failed to impeach them, failed to ask them questions that would have established reasonable doubt as to Carson's guilt, and never objected to their prejudicial testimony (e.g., regarding Carson's drug use). Carson's complaints regarding Butler's performance on cross-examination—some of which have been addressed already—fail to make a substantial showing of the denial of a constitutional right. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Whether and to what extent a witness should be cross-examined involve some of these strategic choices. *See id.* at 690; *Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002). By way of example, Carson claims that Butler "should have focused more on the tattoo [that Johnson,] the bank teller[,] specifically remembered seeing and how it was not on Carson's body." But Butler *did* question Johnson about her perception of the tattoo on the robber's body, getting her to admit that she saw only "a very small portion" of the tattoo. Counsel's decision not to press Johnson further on this issue—and others like it—is entitled to great deference; the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Reasonable jurists would agree that Carson has not overcome this strong presumption.

Deficiencies at Sentencing

Carson claims that Butler "failed to raise viable [mitigating] arguments that would have reduced [his] sentence"—namely, that he should have received a downward departure in view of his drug abuse, childhood sexual abuse, and mental-health struggles—and that Butler should have presented supporting testimony from a psychiatrist. The district court rejected this claim, explaining that Butler did present mitigating evidence.

Indeed, the record shows that Butler objected to the presentence report and argued that Carson's drug abuse and mental-health struggles, along with his educational and vocational background, warranted a downward variance. And even if Butler performed deficiently by failing to present additional mitigation evidence (e.g., through a psychiatrist's testimony), Carson has failed to establish prejudice. In order to establish prejudice for ineffective-assistance claims related to sentencing, a movant "must show a reasonable probability that, but for counsel's errors, [Carson's] sentence would have been different." *Weinberger v. United States*, 268 F.3d 346, 352 (6th Cir. 2001). Carson has not done so. His drug abuse, childhood sexual abuse, and mental-health struggles were detailed in the presentence report, and, in addition to Butler's arguments at sentencing, Carson himself discussed those and other mitigating factors at length during his allocution. Carson also received a forensic evaluation before sentencing. Ultimately, the district court imposed a within-guidelines sentence of 240 months in prison, expressly acknowledging Carson's mitigating arguments but concluding that a downward variance was not warranted in light of the seriousness of the offenses, Carson's lengthy criminal history, repeated violations of probation and post-release control, disrespect for the law, failed rehabilitative efforts, and danger to the public. Any claim that Carson's sentence would have been lower but for Butler's alleged ineffectiveness is speculative. *See Spencer v. Booker*, 254 F. App'x 520, 525 (6th Cir. 2007) (explaining petitioner cannot rely on "pure speculation on whether the outcome of . . . the penalty phase could have been any different" (ellipsis in original) (quoting *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004))). Carson therefore has failed to make a substantial showing of the denial of a constitutional right with respect to this ineffective-assistance claim.

Ineffective Assistance of Appellate Counsel

In addition to a right of effective trial counsel, "[o]n the first appeal of right, a defendant is entitled to effective assistance of appellate counsel." *Goff v. Bagley*, 601 F.3d 445, 462 (6th Cir. 2010). We apply the same *Strickland* standard to claims of ineffective assistance of appellate counsel. *Id.* at 462-63. In the appellate context, "[c]ounsel's failure to raise an issue on appeal" satisfies the prejudice prong "if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *Valentine v. United States*, 488 F.3d 325, 338 (6th Cir. 2007) (quoting *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004)). Carson claims that his appellate counsel was ineffective because appellate counsel failed to (1) adequately brief arguments that Carson was prejudiced by certain testimony and statements by the prosecutor that were admitted in violation of the Federal Rules of Evidence, resulting in this court finding those arguments forfeited on direct appeal; (2) challenge the "mistruths, lies, and erroneous facts" in the Government's appellate brief; and (3) challenge Carson's sentence on the grounds that a sentence disparity existed between Carson and Deeb.

The district court found that Carson's second subclaim was unsupported by any specific examples. The record supports this finding. As to Carson's third subclaim, the district court determined that it was meritless because his sentence was unrelated to Deeb's sentence and was based on his own offense level and criminal-history category, which were calculated independent of Deeb's sentence. Because of the many differences between Carson and Deeb—different conduct during the offense, an additional witness-tampering charge, more extensive criminal history, and Deeb's decision to plead guilty—no reasonable jurist could disagree with the district court's resolution of these subclaims. *See United States v. Thompson*, 218 F. App'x 413, 416-17 (6th Cir. 2007).

As for Carson's first subclaim, the district court explained that, although this court did not consider Carson's argument that certain testimony and statements violated Rule 404(b) because appellate counsel's brief was "underdeveloped," Carson failed to show that he suffered prejudice such that the outcome of his appeal would have been different. This court will grant a COA on

Carson's ineffective-assistance-of-appellate-counsel claim to the extent it relates to the ineffective-assistance-of-trial-counsel claim on which a COA is granted.

Right to Testify

Next, Carson claims that he was denied his constitutional right to testify at trial. He maintains that he "told Butler repeatedly that he wanted to testify, but his requests were ignored." At the close of evidence, Carson "told Butler he wanted to testify on his own behalf," but Butler never came to meet with him about it or prepare him to testify. Butler told the district court on Thursday, June 7, 2018, that "[Carson] says he wants to testify, and I think he better think about it," to which the district court replied, "[h]e can. That's your right, of course. So maybe we'll hear from Mr. Carson on Monday morning." Carson argues that the district court knew Carson wanted to testify at this point. When court reconvened Monday morning, Butler told the district court that Carson "has informed [him that Carson] does *not* want to testify, but [Carson] wants to do closing arguments." The district court sustained the Government's objection to that request. The district court then stated, "[w]e're ready to go" on to jury instructions; at that point, Carson stated that there was "[o]ne issue, Your Honor." The district court replied: "Talk to your lawyer," and announced that it would give the initial jury instructions, turn to closing arguments, and then return to the concluding jury instructions. Trial then proceeded to the jury-instruction phase.

In response, the Government provided Butler's affidavit attesting that Butler "discussed . . . with Mr. Carson his right to testify at trial . . . and his right to remain silent at trial." Butler attested that they discussed "the potential for vigorous cross-examination by" the Government, including questioning about Carson's prior criminal history. Butler also attested that "Mr. Carson elected not to testify at trial. [Butler] did not stop [Carson] from testifying." The Government argued that Carson had otherwise felt comfortable speaking up during trial but "never corrected Attorney Butler's statement that [Carson] would not testify." In response, Carson argued that he was not "more forceful" about raising his right to testify because Butler had told him, "prior to trial, that if he acted out or caused a scene in Court he would be barred from the courtroom." The district court rejected this claim, finding that Carson "waived his right to testify and that assent

to his counsel's tactical strategy is presumed" because Carson never affirmatively notified the district court of his wish to testify.

"'The right of a defendant to testify at trial is a constitutional right of fundamental dimension and is subject only to a knowing and voluntary waiver by the defendant'; nevertheless, '[b]arring *any* statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record.'" *Goff*, 601 F.3d at 471 (alteration in original) (emphasis added) (quoting *United States v. Webber*, 208 F.3d 545, 550-51 (6th Cir. 2000)). We presume that the defendant has assented to refrain from testifying "when a tactical decision is made not to have the defendant testify." *Id.* (quoting *Webber*, 208 F.3d at 551). "[I]f a defendant disagrees with this decision, he 'must alert the trial court that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand.'" *Id.* (quoting *Webber*, 208 F.3d at 551). Absent "alert[ing] the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct." *Id.* (quoting *Webber*, 208 F.3d at 551). Evidence that the defendant "alerted the trial court to [their desire] . . . to testify" rebuts the presumption. *See id.; Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009) (explaining a defendant must "present record evidence that he somehow alerted the trial court to his desire to testify."). Based on this record, reasonable jurists could disagree on whether Butler's statement on Thursday that Carson "want[ed] to testify" alongside Carson's comment on Monday that he had "one issue" when discussing Butler's statement to the district court that Carson did not want to testify but wanted to conduct his own closing argument constitutes waiver of Carson's right to testify at trial. Put another way, a reasonable jurist could find that Carson did "alert the district court to his desire to testify at trial" such that the presumption does not apply. *Id.* The court therefore grants a COA on this issue.

Conditions of Supervised Release

Carson also claims that his special conditions of supervised release are unlawful because the district court failed to state its rationale for imposing them or explain how they further the goals set forth in 18 U.S.C. § 3583(d). A district court must (1) "adequately state[] in open court at the time of sentencing" its reasons for imposing special conditions of supervised release, *United States v. Brogdon*, 503 F.3d 555, 563 (6th Cir. 2007); and (2) the conditions must be "reasonably related to" the 18 U.S.C. § 3553(a) sentencing factors, "involve[] no greater deprivation of liberty than is reasonably necessary," and be "consistent with any pertinent" Sentencing Commission policy statements, 18 U.S.C. § 3583(d). Reasonable jurists would agree that the district court's rationale for imposing special conditions of supervised release is evident from the overall record: in particular, the district court admonished Carson for his past parole, community control, and post-release control violations and thoroughly evaluated the relevant § 3553(a) factors, including Carson's need for mental-health and substance-abuse treatment and required he make restitution. On this record, no reasonable jurist could debate the district court's rejection of Carson's third ground for relief.

Carson's Rule 59(e) Motion

After the district court denied Carson's motion to vacate his sentence and entered judgment on March 22, 2022, Carson moved on April 11, 2022, to alter or amendment the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied Carson's motion, stating that a Rule 59 motion is "intended for the initial judgment in a matter, and not a method for post-conviction relief," and found the motion untimely because it was filed long after Carson's underlying criminal judgment. Rule 59(e), however, applies in habeas and § 2255 proceedings; it allows a habeas petitioner, like other civil litigants, to seek reconsideration of their civil habeas judgment. *See Banister v. Davis*, 140 S. Ct. 1698, 1705-08 (2020). When the Supreme Court rejected the argument that a Rule 59(e) motion served as a second or successive habeas petition, it clarified that the filing of a Rule 59(e) motion is part of the petitioner's "first habeas proceeding."

Id. at 1708. Accordingly, the court grants a COA on whether the district court erred in denying Carson's Rule 59(e) motion.

Denial of an Evidentiary Hearing, Supplemental Discovery, and Expanded Record

Alongside his § 2255 motion, Carson sought an evidentiary hearing, supplemental discovery, and moved to expand the record, which the district court denied. "In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" *Valentine*, 488 F.3d at 333 (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). A § 2255 petitioner's burden in "establishing an entitlement to an evidentiary hearing is relatively light." *Id.* (quoting *Turner*, 183 F.3d at 477). The district court must provide an evidentiary hearing "unless the record conclusively shows that the petitioner is entitled to no relief." *Id.* (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)). As to discovery, "a district court may authorize a movant to conduct discovery upon a showing of good cause. Good cause is established 'where specific allegations . . . show reason to believe that [the movant] may, if the facts are fully developed, be able to demonstrate' entitlement to relief." *Cornell v. United States*, 472 F. App'x 352, 354 (6th Cir. 2012) (alterations in original) (quoting *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997)). Because reasonable jurists could debate the district court's conclusion, the court grants a COA on whether the district court erred by denying Carson an evidentiary hearing, supplemental discovery, and an expanded record.

Carson's Sentence Enhancement

In supplemental motions for a COA, Carson claims that he is no longer subject to the career-offender enhancement in view of *United States v. Butts*, 40 F.4th 766, 773 (6th Cir. 2022), wherein we held that "an Ohio Revised Code § 2911.02(A)(2) robbery conviction—at least one predicated on an unspecified § 2913.02 theft offense—is not a crime of violence under the elements clause of § 4B1.2(a) of the Guidelines." Carson's career-offender enhancement is based on his having at least two prior robbery convictions under § 2911.02. Carson's claim, however, is not cognizable on collateral review. *See Bullard v. United States*, 937 F.3d 654, 657 (6th Cir. 2019) ("[A] non-constitutional challenge to [an] advisory guidelines range . . . is not cognizable

under § 2255." (alterations in original) (quoting *Snider v. United States*, 908 F.3d 183, 189 (6th Cir. 2018))).

Accordingly, the court **GRANTS** a COA as to Carson's claims that trial counsel was ineffective for failing to accept a plea agreement on his behalf, failing to object to testimony by Carson's parole officer, failing to object to the Government's improper comments, and inadequately presenting opening and closing arguments; and Carson's claim that appellate counsel was ineffective to the extent it relates to the ineffective-assistance-of-trial-counsel claim. The court also **GRANTS** a COA as to Carson's claim that he was denied his right to testify at trial. The court **GRANTS** a COA as to whether the district court erred in denying Carson's Rule 59(e) motion and his motions for an evidentiary hearing, supplemental discovery, and an expanded record. Finally, the court **GRANTS** the motions for the appointment of counsel and for leave to proceed in forma pauperis. The Clerk's Office is directed to appoint Carson counsel and to issue a briefing schedule after counsel has been appointed.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0268p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ADAM CARSON,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Nos. 22-3386/3419

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
Nos. 1:17-cr-00008-1; 1:21-cv-01939—Donald C. Nugent, District Judge.

Decided and Filed: December 13, 2023

Before: BUSH, LARSEN, and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: Jeffrey B. Lazarus, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

OPINION

MURPHY, Circuit Judge. A jury convicted Adam Carson of robbing a bank and tampering with a witness; a district court sentenced him to 20 years in prison; and we upheld his convictions and sentence on direct appeal. In these post-conviction proceedings, Carson argues that his trial attorney provided ineffective assistance by failing to initiate plea negotiations and by committing several trial mistakes. He also argues that he did not knowingly waive his right to testify. Yet Carson's ineffective-assistance claims fail on prejudice grounds. Even if a dispute

Appendix B

of fact exists over whether he asked counsel to look into a plea deal, only speculation supports his claim that the parties would have reached a deal but for counsel's inaction. The overwhelming evidence of his guilt also shows that counsel's conduct at trial did not affect the verdict. Lastly, Carson did not object to his counsel's statement that he did not want to testify. So our cases require us to presume that he knowingly waived this right. And while Carson now asserts that counsel misrepresented his wishes, he cannot rebut our presumption with this after-the-fact allegation. We affirm.

I. Background

In September 2016, Carson lived outside Cleveland, Ohio. He met and soon began a relationship with Karin Deeb. Both Carson and Deeb suffered from a drug addiction. After Carson got arrested that November, his mother learned that his relationship with Deeb had caused him to relapse. She tried to find a rehabilitation center for him to enter treatment. But no centers had immediate openings. She thus paid for Carson to stay temporarily at a Days Inn.

While staying at the hotel, Carson quickly reconnected with Deeb. The couple spent the next week smoking crack and brainstorming how they could get more money to fund their drug habit. They decided to rob a bank and began to plan the robbery. Among other things, they bought Carson inconspicuous clothes to wear and a fake mustache and goatee to disguise him.

On November 21, Carson and Deeb drove west of Cleveland to commit the robbery. Stopping in Amherst, they chose a Chemical Bank branch as their target. Deeb first scoped out the bank. She then waited in the car while Carson entered around 4:30 p.m.

The bank's security cameras captured the robbery. Carson wore a baseball cap, black glasses, a green jacket, gray gloves, a blue pinstriped shirt, jeans, and fake facial hair. He held up a note to a teller that read: "I want all your money, no bait, or I'll hurt you." Johnson Tr., R.100, PageID 541. After she gave him the money, he told her to wait two minutes until she set off the alarm. He then ran to the car and told Deeb: "Let's go, let's go, let's go." Deeb Tr., R.102, PageID 1053. Carson made off with $5,590.

The couple drove back to Cleveland. They immediately bought more drugs. That night, they chose to stay at a pricier Holiday Inn with a jacuzzi in downtown Cleveland. Carson hid the cash in their hotel room.

Carson and Deeb got into a fight while away from the hotel after midnight on November 23. She left him at a gas station. Around 1:00 a.m., Carson called the Holiday Inn to alert staff not to let Deeb into their room because "she was coming to steal all of his money[.]" Austin Tr., R.101, PageID 936. A security guard smelled smoke and found drugs when checking on the room. Staff locked the room down. Carson returned that morning. While escorted by security and the police, he gathered his belongings. Carson showed the officers two socks filled with money that he pulled from hidden locations in the room.

Carson and Deeb soon made up, bought more drugs, and checked into a Motel 6. Yet they got into another fight that evening. Carson eventually passed out. Deeb drove off with the rest of the money in the early morning hours on November 24.

Without money or a ride, Carson left the motel on foot. He walked for miles. Eventually, he stopped at a gas station and called Deeb. When she did not pick up, he stole a car from a gas-station customer just before 7:00 p.m.

Police apprehended Carson about two hours later. While still under the influence of drugs, he told the police that a woman with a last name of "Deeb" had drugged him and taken "everything with her" from their hotel. Perhacs Tr., R.101, PageID 797. The police took an inventory of items found on Carson's person and in the stolen car. They discovered gray gloves and a blue shirt that resembled the gloves and shirt the robber had worn.

Around the same time, a local newspaper's website affiliate ran a story about the robbery that contained a picture of the suspect from the bank's cameras. The picture generated many calls identifying Carson as the culprit. Two officers with another local police department had recently investigated him. They believed that Carson matched the picture and alerted Amherst police. Carson's neighbor also saw the picture on her Facebook newsfeed and told the police that it resembled Carson. Carson's parole officer likewise recognized him and did the same.

Meanwhile, Deeb spent the remaining robbery proceeds on drugs and another hotel. The authorities soon contacted her. She lied to the FBI and to the grand jury about her involvement. She then robbed a second bank while high. After the authorities detained Deeb for this second heist, they discovered her role in Carson's robbery and brought charges against her in federal court. Deeb pleaded guilty to aiding and abetting Carson's robbery and lying to the grand jury. As part of that plea agreement, she agreed to testify at Carson's trial.

The government eventually charged Carson with bank robbery, in violation of 18 U.S.C. § 2113(a). After Carson learned of Deeb's cooperation, he sent her a letter from jail. While continuing to profess his love for Deeb, Carson attempted to cajole her not to testify. Among other things, he threatened that her "character will be assassinated" if she testified. Letter, R.144-1, PageID 1615. "[T]o make things right," he instructed, Deeb should "either explain the Detectives pressured" her into falsely accusing him or stay silent. *Id.* Deeb gave this letter to the authorities. The government decided to charge Carson with a second count: witness tampering, in violation of 18 U.S.C. § 1512(b)(1).

The jury found Carson guilty on both counts. The district court sentenced him to 240 months' imprisonment. We affirmed. *United States v. Carson*, 796 F. App'x 238, 239 (6th Cir. 2019).

Carson then moved to vacate his sentence under 28 U.S.C. § 2255. Among his grounds for relief, Carson alleged that his trial counsel had provided ineffective assistance and that he had not knowingly waived his right to testify. He also requested an evidentiary hearing. Without holding a hearing, the district court denied Carson's motion and denied him a certificate of appealability. *Carson v. United States*, 2022 WL 845478, at *8 (N.D. Ohio Mar. 22, 2022).

Carson appealed. A circuit judge granted Carson a certificate of appealability on several grounds. *See Carson v. United States*, 2023 U.S. App. LEXIS 1239, at *28 (6th Cir. Jan. 18, 2023). But we will consider only his claims that his trial counsel provided ineffective assistance and that the district court violated his right to testify. He has forfeited all other claims by failing to raise them in his briefing. *See Maldonado v. Wilson*, 416 F.3d 470, 478 (6th Cir. 2005).

II. Ineffective Assistance of Counsel

The Sixth Amendment gives a criminal defendant the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has interpreted this text to guarantee indigent defendants the right to the effective assistance of a lawyer paid for by the government. *See Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). When defendants disapprove of their lawyer's performance, they must satisfy two well-known elements to establish a Sixth Amendment violation. *Id.* at 687. A defendant first must show deficient performance: "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant then must show prejudice: "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Here, Carson alleges that his attorney violated the Sixth Amendment both at the plea stage and at the trial stage. We will address these claims in turn.

A. Counsel's Conduct at the Plea Stage

1. *Pretrial Proceedings.* Carson's argument that his lawyer performed deficiently during the plea process requires us to summarize his pretrial proceedings. Given Carson's indigency, the district court appointed Donald Butler to represent him in January 2017. Five months later, Carson asked for new counsel on the ground that Butler had not done enough work. The district court denied this motion. After months of litigation over Carson's competency, Carson again complained about Butler. The court told him that he could either pay for the lawyer of his choice or stick with Butler. Lacking funds, Carson chose the second option.

In February 2018, the court held a hearing about the status of the parties' plea negotiations. The court told Carson that it generally scheduled this type of hearing so that defendants who go to trial cannot later allege they did not know they "could have pled guilty" and obtained a shorter sentence. Tr., R.139, PageID 1584–85. The prosecutor explained that the parties had not engaged in any "discussions" about a plea deal and that it had made "no real plea offer" to Carson. *Id.*, PageID 1585, 1590. She estimated Carson's guidelines range as 210 to 262 months' imprisonment if he went to trial or 151 to 188 months' imprisonment if he accepted responsibility by pleading guilty. While recognizing the risks of trial, Carson responded: "I can't

plead guilty to a crime I didn't commit." *Id.*, PageID 1586. He then reraised his complaints about Butler, suggesting that his lawyer had overlooked "a lot of evidence that's going to prove that I didn't rob this bank[.]" *Id.*, PageID 1588.

The court set the trial for April 9. Three days before, however, a medical emergency put Butler in the hospital. The trial thus could not occur as scheduled. On April 9, Carson instead sent a letter to his then-hospitalized attorney expressing a newfound willingness to plead guilty. After thinking "long and hard," Carson said, he could not risk a 20-year sentence. Letter, R.180-2, PageID 1906. Carson proposed a plea bargain in which he would plead guilty to witness tampering, the government would dismiss the bank-robbery count, and he would receive a sentence between six and eight years. Carson emphasized: "Will plead guilty today! No trial!" *Id.*, PageID 1907.

The next day, the court held a hearing to discuss how proceedings would move forward in light of Butler's hospitalization. Carson said he would consent to the appointment of another lawyer and to a delay of the trial. The court decided that it would check on Butler's status before making any decisions. Carson did not mention a willingness to plead guilty to the court.

On April 19, though, Carson sent a second letter to Butler about a plea. He asked for documents in this letter. In a "P.S.," he added: "I wrote you about 10 days ago about wanting to take a plea. Please let me know what's happening. I do not want to go to trial! I want to get this case over with." Letter, R.180-4, PageID 1910.

After Butler's health improved, the court reset the trial for June. That May, Carson moved for substitute counsel because of Butler's medical problems. Carson again did not mention a desire to plead guilty. The district court denied the motion. This time, the trial occurred on schedule.

At sentencing, Carson reiterated his criticisms of Butler. He mentioned that he had sent Butler "two letters instructing him to work out a plea agreement" because he feared that Butler would do a poor job at trial. Tr., R.131, PageID 1519. According to Carson, Butler told him that "the plea agreement was off the table and not to worry because this is a good trial case." *Id.*, PageID 1520. Carson alleged that Butler's refusal to look into a plea deal "was unethical,

unprofessional, unlawful, and unconstitutional." *Id.* In response, Butler accused Carson of "misleading" the court because Carson had "never wanted to plead" guilty. *Id.*, PageID 1532–33. Butler suggested that Carson never discussed taking a plea with him.

In his § 2255 motion, Carson asserted that Butler provided ineffective assistance by failing to "accept the plea agreement offered by the Government," and he attached his two letters about a plea in support. The government responded with an affidavit from Butler. Butler averred that "Carson never expressed a desire to plead guilty to the bank robbery charge" and that the prosecutors "would not entertain a plea that did not include" that charge. Aff., R.176-4, PageID 1864. The government's briefing added that Carson's proposed plea to witness tampering "was not one that the Government" had any interest in pursuing. Resp., R.176, PageID 1829.

The district court denied Carson's claim. It saw no evidence that the government offered Carson a plea. *Carson*, 2022 WL 845478, at *3. The court also pointed to Carson's unequivocal statements during the February 2018 hearing that he wanted to go to trial. *Id.* The court ultimately held that Butler was not "deficient for failing to accept a plea that did not exist." *Id.*

2. *Law.* The Supreme Court has held that the Sixth Amendment right to the effective assistance of counsel applies at all "critical" stages of the criminal proceedings, including the plea-bargaining stage. *See Missouri v. Frye*, 566 U.S. 134, 140–44 (2012). The Court has also identified various ways in which lawyers can violate this right during plea bargaining. Sometimes, a lawyer's deficient performance might lead a client to *plead guilty* rather than *stand trial*. Counsel, for example, might wrongly inform an immigrant client that a guilty plea will have no deportation consequences. *See Lee v. United States*, 582 U.S. 357, 369 (2017); *Padilla v. Kentucky*, 559 U.S. 356, 366–69 (2010). To prove prejudice in this situation, defendants must show that they would have stood trial if their lawyers had not committed the mistakes that made their representation deficient. *See Lee*, 582 U.S. at 364–65.

Other times, a lawyer's deficient performance might lead a defendant to *stand trial* rather than *accept a plea offer*. *See Lafler v. Cooper*, 566 U.S. 156, 162–64 (2012). Counsel might wrongly fail to convey the prosecution's offer to a client. *Frye*, 566 U.S. at 145. Or counsel

might convince a client to reject the offer based on an overestimation of the strength of the client's case. *See Lafler*, 566 U.S. at 160–61, 166. The Supreme Court's decisions in *Lafler* and *Frye* establish the rules for proving prejudice in these circumstances. Defendants must show a "reasonable probability" that they would have accepted the offer but for counsel's deficiency. *Lafler*, 566 U.S. at 164. And they must show a "reasonable probability" that the court would have approved of the plea deal and that the deal would have led to a "less severe" outcome for the client than the outcome that resulted from the trial. *Id.*; *see Frye*, 566 U.S. at 147.

Yet *Lafler* and *Frye* left an important question unanswered. Those cases addressed claims that lawyers deficiently precluded their clients from accepting the prosecution's "formal" plea offer. *Frye*, 566 U.S. at 145; *see Lafler*, 566 U.S. at 161. What happens if the prosecution never makes an offer? Many courts have held that a defendant cannot make out an ineffective-assistance claim unless the prosecution puts a plea deal on the table. *See Byrd v. Skipper*, 940 F.3d 248, 263–68 (6th Cir. 2019) (Griffin, J., dissenting) (collecting cases). After all, defendants do not have a right to have the prosecution offer a deal or for the trial court to accept one. *See Frye*, 566 U.S. at 148; *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

Nevertheless, our court has rejected this approach. In *Byrd*, we held that defense counsel can provide ineffective assistance in violation of the Sixth Amendment by failing to *initiate* plea negotiations even when the prosecution has proposed no plea terms. *See* 940 F.3d at 255–57. At the same time, we recognized that a defendant raising this type of ineffective-assistance claim must meet a "formidable standard" to prove prejudice. *Id.* at 257. The defendant must show a reasonable probability that the prosecution would have offered a plea deal, that the defendant would have accepted the proposed terms, that the trial court would have approved it, and that the deal would have contained better terms than the judgment that resulted from the trial. *Id.*

Carson cannot meet these standards here. His ineffective-assistance claim has evolved over the course of these § 2255 proceedings. But both of his theories lack merit.

Theory One: In the district court, Carson tried to make his case look like *Lafler* and *Frye*. He alleged that Butler wrongly failed "to accept the plea agreement offered by the Government"

despite his instructions. Mot., R.167, PageID 1733. According to Carson, Butler "lied" to him that the prosecution had rescinded its offer. *Id.*

This theory has an obvious problem: The prosecution *never* made any plea offer to Carson or his attorney. The district court held a hearing in February 2018 to put the status of the plea negotiations on the record and prevent Carson from later asserting "fabricated claims" of ineffective assistance in the plea process. *Frye*, 566 U.S. at 146. At that hearing, the prosecution clarified that it had made "no real plea offer" to Carson. Tr., R.139, PageID 1590. And Carson clarified that he "[a]bsolutely" wanted to go to trial while knowing that a guilty verdict would result in a higher sentence. *Id.*, PageID 1588. Carson also cites no evidence that the prosecution offered a plea deal in between this hearing and the trial. He thus now admits that "no plea agreement from the government existed[.]" Appellant's Br. 30.

Theory Two: On appeal, Carson pivots to argue that Butler wrongly ignored his request to *initiate* plea negotiations with the government. This new theory fares no better. To be sure, we agree that a dispute of fact exists over Carson's communications with Butler about a plea deal. On the one hand, Carson points to his two letters asking Butler to seek a plea and his comments at sentencing that Butler told him that a plea deal was "off the table[.]" Tr., R.131, PageID 1520. On the other hand, Butler claims that he and Carson never discussed a plea deal—at least not one in which Carson would plead guilty to bank robbery.

But this factual disagreement does not matter to the outcome. Carson has not met our "difficult" prejudice test in the plea-negotiations context. *Byrd*, 940 F.3d at 259. He must show a "reasonable probability" that the government would have made a plea offer and that he would have accepted its terms. *Id.* at 257. Yet Carson points to no evidence establishing these elements. *Cf. Merzbacher v. Shearin*, 706 F.3d 356, 370 (4th Cir. 2013). The record contains nothing about what the prosecution's terms might have been or whether those (unknown) terms would have been acceptable to Carson. Carson instead asks us to engage in the type of "speculation" that cannot establish prejudice. *United States v. Rendon-Martinez*, 497 F. App'x 848, 849 (10th Cir. 2012) (Gorsuch, J., denying certificate of appealability) (citation omitted); *see Delatorre v. United States*, 847 F.3d 837, 846–47 (7th Cir. 2017); *Osley v. United States*, 751

F.3d 1214, 1225 (11th Cir. 2014); *Ramirez v. United States*, 751 F.3d 604, 608 (8th Cir. 2014); *United States v. Boone*, 62 F.3d 323, 327 (10th Cir. 1995).

If anything, the "contemporaneous evidence" cuts the other way. *Lee*, 582 U.S. at 369. In his first letter about a plea, Carson noted that he would plead guilty to the witness-tampering charge in exchange for the dismissal of the bank-robbery charge and a sentence of six to eight years. Letter, R.167-4, PageID 1776–77. Yet nothing suggests that the prosecution would have considered such a lenient plea deal. To the contrary, the only record evidence on this point shows that the prosecution would not "entertain a plea that did not include the bank robbery charge." Aff., R.176-4, PageID 1864. Carson also continued to say that he "didn't commit this crime" all the way through sentencing. Tr., R.131, PageID 1519. That fact undermines his claim that he would have accepted a plea, which would have required him to testify that he committed it (under oath and subject to the penalties for perjury). *See, e.g.*, *Welch v. United States*, 370 F. App'x 739, 743 (7th Cir. 2010) (order); *Humphress v. United States*, 398 F.3d 855, 859 (6th Cir. 2005).

The absence of evidence about the terms of any potential plea deal rebuts any reliance on *Byrd*. The defendant there was "uniquely" situated to prove prejudice. *Byrd*, 940 F.3d at 259–60. The prosecutor testified that he wanted to obtain a plea agreement but did not negotiate with defense counsel because counsel obstinately pushed for a trial based on a mistaken view of the law. *Id.* And since a codefendant had separately pleaded guilty, the defendant could point to a rough "comparator" of the plea offer that the prosecution would have made. *Id.* at 258. Here, by contrast, Carson does not even attempt to guess what the hypothetical terms might have been.

Carson responds that the district court at least should have held an evidentiary hearing because of the factual dispute over Carson's communications with Butler about a plea. He is correct that a district court must hold an evidentiary hearing if a genuine dispute of fact exists. *See Martin v. United States*, 889 F.3d 827, 832 (6th Cir. 2018); *Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013); *see also* 28 U.S.C. § 2255(b). But this dispute must concern a "legally important fact." *Wallace v. United States*, 43 F.4th 595, 607 (6th Cir. 2022). If a claim would fail even if a court construed the disputed fact in the defendant's favor, the court need not hold a hearing. *See id.* And here, Carson's claim fails on prejudice grounds even assuming that he

asked Butler to pursue a plea deal. Simply put, Carson has presented nothing to show that the parties would have reached a plea agreement but for Butler's failure to negotiate.

B. Counsel's Conduct at Trial

Carson next argues that Butler committed four errors at trial. First, he asserts that Butler should have objected to the testimony of Ronald Warchol, his parole officer. A parole officer's testimony identifying a defendant as the suspect in a photograph can raise prejudice concerns under Federal Rule of Evidence 403 because the testimony can alert the jury that the defendant was on parole for a prior crime. *See United States v. Calhoun*, 544 F.2d 291, 296 (6th Cir. 1976). Yet the prosecutors in Carson's case sought to minimize this risk by concealing Carson's relationship with Warchol. Carson now claims that Butler should have required the prosecutors to do more to conceal Warchol's role. In opening and closing statements, for example, a prosecutor referred to Warchol as an "Officer." Tr., R.99, PageID 502; Tr., R.103, PageID 1355–56. Warchol also testified that he had "the occasion to meet and deal with" Carson while working for a "state agency[.]" Warchol Tr., R.100, PageID 758–59. According to Carson, the jury would have figured out from these statements that Warchol served as Carson's parole officer.

Second, Carson complains about Butler's silence when the prosecutor asked an allegedly improper question to his mother, who testified in his defense. On direct, Carson's mother opined that the man in the bank-robbery picture was not her son. She also explained the circumstances in which she had dropped him off at the Days Inn in mid-November. She picked Carson up from jail after the police had arrested him for the possession of a potentially stolen furnace. On cross, a prosecutor asked her whether she knew the circumstances of this arrest. His mother conceded that she lacked personal knowledge. The prosecutor then asked: "So you didn't know . . . that the furnace that your son tried to return to Webb Heating & Cooling had actually been taken out of the back of the van where [his friend's] dead heroin overdosed body lay?" Carson-Lipscomb Tr., R.102, PageID 1275. In response, Carson yelled out: "It's not true. What's she talking about?" *Id.* The court did not respond to Carson's "objection." Rather, his mother answered that she did not know anything about these facts. Carson argues that Butler should have objected to the prosecutor's question because it amounted to prejudicial misconduct.

Third, Carson criticizes Butler for agreeing with some of the prosecutor's assertions during opening statements. Butler conceded that Carson had taken a car "that did not belong to him" and that he had gone on "drug binges" with Deeb while in a relationship with her. Tr., R.99, PageID 510–11. But Butler sought to lay the groundwork for the theory that Deeb (not Carson) had robbed the Chemical Bank. According to Carson, Butler should not have conceded that he had done drugs with Deeb or stolen a car because these facts undermined this defense and put him in a negative light with the jury.

Fourth, Carson criticizes Butler's closing argument. After recalling the bank teller's testimony that the robber stood around 5'6" to 5'7" tall, Butler opined that Carson's booking photo showed that he "barely reaches 5 feet or just over 5 feet." Tr., R.103, PageID 1374. Butler used this discrepancy to suggest that the teller misidentified Carson. Yet the prosecutor rebutted Butler's argument with Carson's driver's license, which listed him as 5'6". The prosecutor also explained the apparent height discrepancy by noting that the booking camera was "angled down" at Carson when it took his booking photo. *Id.*, PageID 1400. Carson now suggests that this part of Butler's closing helped to convict him.

The district court held that Butler had not performed incompetently in any of these ways. *See Carson*, 2022 WL 845478, at *4. Yet we need not reach these issues. Even considering the cumulative effect of Carson's complaints, he cannot establish prejudice. *See Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017). To prove prejudice in this trial context, Carson must establish a "reasonable probability" that the jury would have acquitted him if Butler had not made the four purported errors. *Strickland*, 466 U.S. at 694. The Supreme Court has described a "reasonable probability" as one that "undermine[s] confidence in the outcome." *Id.* And counsel's errors generally will not undermine a court's confidence in a guilty verdict when "overwhelming" evidence establishes that the defendant committed the crime. *Gabrion v. United States*, 43 F.4th 569, 589 (6th Cir. 2022); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004).

That type of evidence existed here. The government presented an air-tight case that Carson robbed the Chemical Bank branch and tampered with Deeb to prevent her testimony. Indeed, Carson's briefing does not even try to prove prejudice for his witness-tampering

conviction. For good reason. The jury saw Carson's letter to Deeb and heard her testimony that he was trying to coerce her to lie.

We thus need only focus on his robbery conviction. There, too, Deeb testified in detail about the crime. She described how she and Carson planned the robbery in mid-November while doing drugs at the Days Inn his mother had paid for. She also explained how they executed the robbery on November 21. And she described the events that occurred in the next few days until she took the money and left Carson on November 24.

To be sure, Deeb lied to the police and the grand jury and also committed a second robbery without Carson. So Carson correctly notes that she had plenty of credibility issues. But overwhelming evidence also corroborated nearly every aspect of her story. To begin with, a Days Inn employee and Carson's mother both confirmed that he had been staying at the Days Inn the week before the robbery.

Next, apart from Deeb and Carson's parole officer, four witnesses identified him as the robber. A few weeks after the robbery, employees at the Chemical Bank learned that Carson had become a suspect. They found a picture of him on Facebook. When an employee showed Carson's picture to the bank teller who had been robbed, she exclaimed: "Oh, my gosh, that's him." Johnson Tr., R.100, PageID 555. She expressed "a hundred percent" confidence in her identification. *Id.*, PageID 557. Although the robber had facial hair and Carson did not, the teller had recognized at the time that the "mustache" and "goatee" were "fake" because "they were just so black" and "stuck on" with glue. *Id.*, PageID 536, 551–52. And contrary to the defense theory that Deeb committed the robbery, the teller opined that the robber had a "male's voice" and could not have been a female. *Id.*, PageID 548, 553.

Three others confirmed the teller's identification. Carson's neighbor expressed one "hundred percent" confidence that Carson was the robber portrayed on her Facebook newsfeed. Tabach Tr., R.100, PageID 744. She would not have called the police if she had any doubt. Two officers with a nearby police department also testified that they recognized Carson. Although the robber had facial hair, one of the officers explained that the goatee "stood out to [him] as being a fake." Selong Tr., R.100, PageID 696. And while Carson's mom did opine at trial that the

robber in the picture was not her son, the prosecution impeached her with her own prior inconsistent statements. During a jail call with Carson, she told her son that the picture looked just like him.

Apart from the eyewitness identifications, Carson's conduct also implicated him in the robbery. For example, staff at the Holiday Inn testified that Carson stayed there with a woman starting on November 21. One employee took a call from him in which he stated that the woman "was coming to steal all of his money . . . that he had in his room." Austin Tr., R.101, PageID 936. Both a security officer and a police officer then saw him pull out what looked "like a brick of money" hidden in two socks. Underwood Tr., R.101, PageID 947. He even showed the officers that the socks contained money. After his arrest for stealing a car, he also called Deeb. An officer heard him ask: "Are you enjoying the money?" Perhacs Tr., R.101, PageID 810.

Lastly, physical evidence confirmed Deeb's story. Officers found gray gloves and a blue pinstriped shirt (items that matched the robber's apparel) in Carson's possession or the car he stole. The jury also saw the bank-security video and pictures of the robber. In short, given all the evidence pointing to Carson's guilt, none of Butler's alleged shortcomings would have affected the outcome.

III. Right to Testify

Switching to a different argument, Carson claims that he did not knowingly and voluntarily waive his constitutional right to testify at trial. He is again mistaken.

A. *Trial Proceedings*. After Carson's mother and her boyfriend testified in Carson's defense, Butler announced that Carson would "have no other witnesses." Tr., R.102, PageID 1308. The court began to discuss the plans for the last day of trial on the following Monday. Butler soon interrupted to disclose new information: "Judge, he says he wants to testify, and I think he better think about it." *Id.*, PageID 1309. The court responded: "He can. That's your right, of course. So maybe we'll hear from Mr. Carson on Monday morning." *Id.* The court then recessed for the weekend.

By Monday, Carson had changed his mind. Butler explained to the court: "Judge, my client has informed me he does not want to testify, but he wants to do closing arguments. So if the Court allows it, I have no objection to it." Tr., R.103, PageID 1323. The court rejected Carson's request to conduct his own closing because it did not permit hybrid representation. It then asked whether the defense had any further testimony. Butler said no and moved for acquittal under Federal Rule of Criminal Procedure 29. The court denied this motion and prepared to call the jury into the courtroom to read the jury instructions. At that point, Carson spoke up: "One issue, Your Honor." *Id.*, PageID 1324. The court responded: "Talk to your lawyer." *Id.* Neither Butler nor Carson ever put this purported "issue" on the record.

In his § 2255 motion, Carson argued that he did not knowingly waive his right to testify. In an affidavit, he asserted that Butler did not meet with him over the weekend after he asked to testify. Instead, Butler showed up on Monday and announced that Carson would "not be testifying." Aff., R.167-3, PageID 1770. Carson also claimed that he was attempting to invoke his right to testify when he asked the court to speak, but the court cut him off and told him to talk to his lawyer. In response, the government again relied on Butler's affidavit. Butler explained that he and Carson had discussed whether Carson should testify and Carson "elected not" to take the stand. Aff., R.176-4, PageID 1864. Butler swore that he "did not stop" Carson from testifying. *Id.*

The district court denied this claim too. *Carson*, 2022 WL 845478, at *6. Whatever Carson's subjective wishes, the court reasoned, he had a duty to "notify the court" if he sought to testify despite his attorney's claim. *Id.* But Carson never flagged the issue at trial. *Id.*

We review the district court's decision on the merits de novo. *See United States v. Minor*, 2017 WL 11622729, at *1 (6th Cir. Nov. 27, 2017) (order); *United States v. Webber*, 208 F.3d 545, 550 (6th Cir. 2000). Yet we first flag a non-merits question: Did Carson procedurally default this claim by failing to raise it in the district court before a final judgment or in his direct appeal? *See Bousley v. United States*, 523 U.S. 614, 621–22 (1998). The answer is not obvious to us. *Cf. United States v. Anderson*, 695 F.3d 390, 396 (6th Cir. 2012), *overruled on other grounds by United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc); *United States v. Willis*, 273 F.3d 592, 595–97 (5th Cir. 2001). However, the government has raised no

procedural-default defense here, and we are "not 'required' to raise the issue … sua sponte." *Trest v. Cain*, 522 U.S. 87, 89 (1997). So we can save this preservation question for another day.

B. *Law*. The Constitution contains no clause expressly granting criminal defendants a right to testify at trial. The Supreme Court has instead found this right in a combination of different clauses. *See Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987). The Fifth Amendment clarifies that no defendant "shall be compelled in any criminal case to be a witness against himself" or "deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. And the Sixth Amendment clarifies that a defendant has a right "to have compulsory process for obtaining witnesses in his favor[.]" U.S. Const. amend. VI. According to the Court, the implied right to testify arises from these express clauses as well as the implied right to self-representation that the Court has also rooted in the Fifth and Sixth Amendments. *See Rock*, 483 U.S. at 51–53.

Yet defendants need not use their implied right to testify. Rather, the Fifth Amendment also gives them an express right *not* to testify. *See United States v. Yono*, 605 F.3d 425, 426 (6th Cir. 2010). So defendants may remain silent and waive this right—as long as they do so in a knowing and voluntary manner. *See Anderson*, 695 F.3d at 396.

But what qualifies as a knowing and voluntary waiver? The Supreme Court has followed a "right-specific" approach to identify the steps that a district court must take to ensure that a defendant has knowingly and voluntarily waived a right. *See New York v. Hill*, 528 U.S. 110, 114 (2000). For some rights (like the right to stand trial), a district court must ensure a knowing and voluntary waiver on the record. *See United States v. Webb*, 403 F.3d 373, 378–79 (6th Cir. 2005); Fed. R. Crim. P. 11(b)(1). For others (like the right to represent oneself), a defendant may waive the right by engaging in conduct inconsistent with its exercise. *See United States v. Stover*, 474 F.3d 904, 908 (6th Cir. 2007); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996). And for still others (like the right to object to evidence), defense counsel may waive the right on the defendant's behalf. *See Hill*, 528 U.S. at 115.

The right to testify falls in the second group. *See Webber*, 208 F.3d at 551. Defendants (not their counsel) must personally waive the right. *See id.* at 550–51. Yet we presume that

defense lawyers have discussed the pros and cons of testifying with their clients. *See id.* at 551. So we also presume that defendants have knowingly declined to testify whenever they raise no objection to counsel's decision not to put them on the stand. *See id.* That is, defendants must place a desire to testify on the record to show that they have not knowingly waived this right through their conduct (their failure to testify). *See id.*; *see also Hodge v. Haeberlin*, 579 F.3d 627, 639–40 (6th Cir. 2009). And unless a defendant objects, the district court need not undertake the type of on-the-record colloquy that it must perform when the defendant pleads guilty and waives the right to a jury trial. *See Stover*, 474 F.3d at 908.

Our presumption of a knowing waiver exists to protect a defendant's right "*not* to testify." *Webber*, 208 F.3d at 552. A rule that required district courts to ask defendants a litany of questions to ensure that they knowingly decided not to testify might pressure them to exercise the right. And defendants might then later allege that the district court's questioning "inappropriately" interfered with their right to remain silent. *See id.*; *see also Yono*, 605 F.3d at 426.

This presumption also applies even when a defendant initially asserts a desire to testify. *See Minor*, 2017 WL 11622729, at *1; *United States v. Campbell*, 86 F. App'x 149, 154 (6th Cir. 2004). If defense counsel later informs the court that the defendant has had a change of heart, the court need not follow up to ensure that the waiver was knowing. *See Minor*, 2017 WL 11622729, at *1. In that event, too, a defendant must object on the record by expressing a continued desire to testify. *See id.*; *see also Ortiz*, 82 F.3d at 1072.

The presumption has teeth. After a bad trial outcome, defendants often assert in post-conviction proceedings that they wanted to testify but that their attorney prohibited them. *See Freeman v. Trombley*, 483 F. App'x 51, 58–59 (6th Cir. 2012); *Hodge*, 579 F.3d at 639. We treat conclusory and belated affidavits of this kind as "inherently unreliable" and "insufficient to rebut" our presumption that a defendant knowingly declined to testify. *Freeman*, 483 F. App'x at 58–59; *see Pagani-Gallego v. United States*, 76 F. App'x 20, 23 (6th Cir. 2003) (order); *Pelzer v. United States*, 1997 WL 12125, at *2 (6th Cir. Jan. 13, 1997); *High v. United States*, 1996 WL 742222, at *1 (6th Cir. Dec. 20, 1996). A contrary view would allow a defendant to obtain an evidentiary hearing merely by asserting an "after-the-fact" statement that the defendant wished to

take the stand. *Hodge*, 579 F.3d at 639; *see also United States v. Meacham*, 567 F.3d 1184, 1188 (10th Cir. 2009); *Underwood v. Clark*, 939 F.2d 473, 475–76 (7th Cir. 1991).

These rules doom Carson's claim. To be sure, Carson told Butler that he would like "to testify" on the second-to-last day of trial. Tr., R.102, PageID 1309. Butler dutifully conveyed Carson's request to the court. On the next trial day, though, Butler told the court that Carson no longer wished to testify. This statement sufficed to trigger our presumption that Carson knowingly changed his mind. *See Minor*, 2017 WL 11622729, at *1. And Carson did not place any objection on the record to Butler's statement that he did not want to testify. So he has not overcome our presumption of a knowing waiver. *See id.*; *Webber*, 208 F.3d at 551–52.

Carson's two responses do not change things. Carson first argues that he proposed a "contingent" waiver: he would not testify if he could conduct the closing argument. He thus asserts that the district court's refusal to allow him to perform the closing resuscitated his demand to testify. This argument gets the facts and law wrong. As a factual matter, nothing in the record connects Carson's waiver of the right to testify to his request to perform the closing. Butler told the court that "my client has informed me he does not want to testify, but he wants to do closing arguments." Tr., R.103, PageID 1323. Butler did not tell the court that Carson wanted to remain silent *only if* he could conduct the closing. In fact, after the court denied Carson's request to conduct the closing, it asked: "Any further testimony on behalf of the defense?" *Id.* Butler said: "No, your honor." *Id.* So the one did not depend on the other.

As a legal matter, our cases foreclose Carson's contingent-waiver theory. If a defendant disagrees with a lawyer's statement that the defendant does not wish to testify, the defendant should object to the lawyer's statement on the record. *See Webber*, 208 F.3d at 551. And a defendant who "does not alert" the court of the disagreement waives the right to testify. *Id.* Carson never objected to Butler's repeated statements that Carson did not want to testify.

That conclusion leads to Carson's second response. After the district court denied Butler's motion for a judgment of acquittal, it noted that they were "ready to go." Tr., R.103, PageID 1324. Carson then said that he had "[o]ne issue," but the court directed him to "[t]alk to [his] lawyer." *Id.* According to Carson's after-the-fact affidavit, he planned to "alert" the court

at this time that he objected to Butler's statement that he did not want to testify. *Webber*, 208 F.3d at 551. All the same, Carson never objected on the record—not at that time, not at sentencing, nor at any other point before a final judgment. And the court did not merely bar Carson from speaking. He told Carson to discuss the issue he wanted to raise with his counsel. *Cf. Freeman*, 483 F. App'x at 58. So if Carson did immediately tell Butler that he wanted to testify and Butler refused to notify the court (contrary to what Butler had just done on the prior day of trial), perhaps Carson could have raised an ineffective-assistance claim. Under our caselaw, however, his right-to-testify claim depended on the record's objective statements—not on Carson's uncommunicated beliefs. *See Webber*, 208 F.3d at 551–52. And regardless, Carson's affidavit does not allege that he informed Butler he wanted to testify in response to the court's instruction to speak to his lawyer.

At the least, Carson responds, the district court should have held an evidentiary hearing because of the dispute of fact between Carson and Butler over what they said to each other off the record. Yet Carson's "barebones" claim that Butler would not let him testify does not create a genuine factual dispute over whether he knowingly waived his right to testify. *Underwood*, 939 F.2d at 476; *see Freeman*, 483 F. App'x at 58–59; *Pagani-Gallego*, 76 F. App'x at 23. Under our presumption, Carson's right-to-testify claim instead depends on what he told the court on the record. And because Carson made no contemporaneous objection, he cannot obtain an evidentiary hearing merely by lodging this type of conclusory after-the-fact allegation. *See Hodge*, 579 F.3d at 639; *cf. Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020).

We affirm.

Appendix C

Nos. 22-3386/3419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 26, 2024
KELLY L. STEPHENS, Clerk

ADAM CARSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: BUSH, LARSEN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Appendix C

Appendix D

Case No. 22-3386/22-3419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ADAM CARSON

Petitioner - Appellant

v.

UNITED STATES OF AMERICA

Respondent - Appellee

BEFORE: BUSH, Circuit Judge; LARSEN, Circuit Judge; MURPHY, Circuit Judge;

Upon consideration of appellant's motion to recall or stay the mandate,

It is **ORDERED** that the motion is **DENIED**.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

Issued: February 21, 2024

Appendix D

Appendix E

"Exhibit A"

Adam Carson 0273938
Cuyahoga County Jail
PO Box 5600
Cleveland, OH 44101

Re: Case No. 1:17-cr-00008 US v. Carson

April 9, 2018

Dear Attorney Butler,

I just found out today about what happened to you. I hope that you are feeling better and that you are going to be alright. Take your time and recover. There is no need for you to rush back and deal with the stress of a trial.

To make sure that you have plenty of time to get back to normal, I will be willing to sign a time waiver so you can put this on the back burner and relax for a little bit. Take all the time that you need.

Also, I have thought about this long and hard. I can't risk going to prison for 20 years. I am willing to plea out to get this case over with. I have enclosed my purposed plea bargain. Talk to the Judge and see if he will be cool with 6-8 years. Some things to consider: (1) It was only 5500 doll[ars] taken from the bank

Appendix E

Exhibit B

Plea Bargin

- 6 - 8 years to witness Tampering so I can be eligible for the Drug program

- Bank Robbery makes me inelligable for Drug Program because it is considered offense of violence

- Will plea Guilty today! No trial!

- Reccomend Terre Haute, Indiana

- I will not file any prosecutorial Misconduct claims Appeals or 2255 motions.

Or

Offense level 29 Cat VI
- 3 for responsibility
offense level 26 Cat VI

Exhibit C

Adam Carson - 0273938
Cuyahoga County Jail
PO Box 5600
Cleveland, OH 44101

Re: Case No. 1:17-cr-00008 USA v. Carson

April 19, 2018

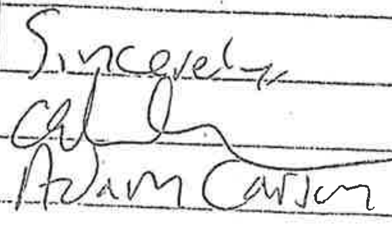
Dear Attorney Butler

I Just received an updated copy of my Docket today. I noticed that there are several Documents that were filed that I never received copies of. Can you please send me the following

Doc #	Name
62	Proposed Jury Instructions
63	Proposed Voir Dire
64	Motion to file motion in limine
65	Trial Brief
67	Sealed motion in Limine

Please send these Documents as soon as possible. I Don't know why I haven't already recieved them.

Sincerely,



Adam Carson

P.S. I wrote you about 10 days ago about wanting to take a plea. Please let me know what's happening. I do not want to go to trial! I want to get this case over with