No. 24-5405

ORIGINAL

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL E. HARDING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether contrary to *Lee v. United States,* 137 S.Ct. 1958 (2017), the district court applied the incorrect prejudice standard to support its decision to deny Mr. Harding's claim for relief predicated on his counsel's ineffective assistance arising from counsel's erroneous advice, affirmative misrepresentations, false assurances, and concealment of material facts regarding Mr. Harding's sentencing exposure that ultimately convinced him to forfeit his right to go to trial and to instead plead no contest to the attempted enticement charge that resulted in the imposition of a life sentence.

II. Whether defense counsel provided ineffective assistance by advising Mr. Harding to enter pleas of guilty and no contest to the charges in the second superseding indictment where counsel, the government, and the court agreed during a status conference at which Mr. Harding was not present that his guidelines, even after a plea and a reduction for acceptance of responsibility, would exceed the offense level (level 43) threshold for a guideline-mandatory life imprisonment sentence, where counsel: (a) failed to inform Mr. Harding of what occurred at the status conference; and (b) affirmatively misrepresented to Mr. Harding that a plea would result in lowering his guidelines.

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner MICHAEL E. HARDING respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit Court, rendered and entered in case number 21-14133 in that court on February 8, 2024, affirmed the final order of United States District Court for the Southern District of Florida denying relief under Title 28 U.S.C. § 2255.

OPINIONS BELOW

A copy of the Order granting in part, Petitioner's motion for a certificate of appealability ("COA"), entered by a single judge (Hon. Barbara Lagoa) of the Court of Appeals for the Eleventh Circuit is contained in Appendix A. A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *Harding v. United States*, 2024 WL 490839 (11th Cir. 2/8/2024), which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), *Hohn v. United States*, 524 U.S. 236 (1998) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on February

8, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13.1, following the Court's granting a 30-day extension of time to file the petition in Application No. 23A976. The district court had jurisdiction pursuant to 28 U.S.C. § 2255. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2253 in light of the court's granting a limited certificate of appealability as to two claims for relief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved and are set forth below:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

28 U.S.C. § 2253(c):

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under section 2255. A certificate of appealability may issue if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2255 in pertinent part provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the

constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

28 U.S.C.§ 1254(1):

Cases in the court of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

(i) Introduction

Mr. Harding's case presents a unique, yet strikingly clear-cut, example of ineffective assistance of counsel. During the course of a status conference held days before Mr. Harding entered his plea following the advice of counsel whom he trusted, counsel, the government and the court unanimously agreed that Mr. Harding's adjusted guideline offense level was 49, and that even if he was to plead guilty and receive a three-level reduction for acceptance of responsibility, his total offense level would be 46-still well above the level 43 threshold calling for a guideline sentence of life imprisonment. Crim-DE:127. Unsurprisingly,

the district court then questioned counsel why, given those guidelines calculations calling for life imprisonment, Mr. Harding would plead guilty or no contest. Crim-DE:127:11-12. Counsel's answer was non-responsive and evasive. Crim-DE:127:12.

Counsel never disclosed to Mr. Harding what occurred at the status conference. Instead, he again told Mr. Harding as he had done several times during the pendency of the case, that if he pled, he would not receive a sentence of more than 30 years and could receive a downward variance from that number. Moreover, counsel incorrectly advised Mr. Harding that a plea would result in lowering his guidelines. Counsel used those assurances to convince Mr. Harding to abandon his firmly held desire to go to trial on Count 5 (the enticement count, which was the only charge carrying a maximum sentence of life imprisonment), even though he had a defense to that charge and the government itself was unsure of who the alleged victim was. Counsel similarly failed to pursue a case-dispositive motion to suppress evidence, contributing to the mis-advice regarding the plea. Simply put, counsel misadvised and convinced Mr. Harding, who sought to avoid a life sentence, to plead despite knowing the guidelines would be life, that the government would vigorously oppose anything but a life sentence. Unquestionably, there was no benefit to entering a plea in this case. As counsel knew or certainly should have known, assuming

Mr. Harding was convicted on all counts, the same sentence would be imposed regardless of whether Mr. Harding pled guilty or was convicted at trial. No competent counsel would have advised Mr. Harding to plead and forfeit his right to a trial under these circumstances.

(ii) Factual Background and Course of Proceedings

On July 23, 2015, a special agent with Homeland Security Investigations ("HSI") signed into an undercover Kik Messenger user account as part of a child exploitation investigation. While in a Kik messenger chat room, the agent observed two images of child pornography posted earlier that day by an individual using the screen name "desthfromabove." The HSI agent signed into the Kik messenger account on three other occasions during the month of August and observed posted images and videos of child pornography associated with the account with the screen name "desthfromabove." Summonses served on Kik messenger and AT&T revealed that the IP address used to post the images was registered to Michael Harding in Port St. Lucie Florida.

On September 22, 2015, a federal search warrant was executed on Mr. Harding's residence. During the course of the search, a PNY thumb drive and an LG-D800 cellular phone were recovered. A forensic examination of the thumb drive and cellular phone revealed that they contained hundreds of still images and

videos depicting minors involved in sexually explicit conduct with other minors and adults. During a subsequent forensic examination of the cell phone, agents found a number of chat conversations between Mr. Harding and other unidentified individuals discussing sexual activity with children. Between August 12 and September 10, 2015, agents identified a chat conversation between Mr. Harding and an individual using the screen name "daddydearaimee" who apparently discussed exchanging their minor children for the purposes of engaging in sexual acts with them. Mr. Harding and "daddydearaimee" discussed where they would meet, however, no meeting or travel plans ever materialized. According to the government, the investigation into the identity of "daddydearaimee" was still continuing, however, as of the date of this filing, daddydearaimee's identity has never been discovered nor his existence confirmed.

After a second forensic examination of Mr. Harding's cellular telephone, agents located a thumbnail image which they believe depicted Mr. Harding's nine-year old stepdaughter, C.W. performing oral sex on Mr. Harding. The thumbnail image was purportedly created when a video of the event was recorded in November 2014.

In October 2015, a federal grand jury in the Southern District of Florida returned an indictment charging Mr. Harding with three counts of

distributing material involving sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(2) and one count of possession of material involving sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(4)(B). Crim-DE:12. A superseding indictment added a count of attempting to coerce or entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). Crim-DE:16. Finally, on November 12, 2015, a grand jury returned a six-count second superseding indictment charging Mr. Harding with three counts of distributing material involving sexual exploitation of minors, in violation of 18 U.S.C. § 2252(a)(2) (Counts 1-3), one count of possession of material involving sexual exploitation of minors, in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 4), one count of attempting to coerce and entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) (Count 5), and one count of producing child pornography, in violation of 18 U.S.C. § 2251(a) and (e) (Count 6). Crim-DE:32. Counts 1-4 carried a 20-year statutory maximum sentence. The statutory maximum on Counts 5 and 6 were life and 30 years respectively.

Following Mr. Harding's arrest, he was provided with court appointed counsel, who conducted no independent investigation on Mr. Harding's behalf, nor evidenced any desire to present a defense or advocate on his client's behalf. In fact, the court docket reflects that court appointed counsel filed no substantive motions, despite Mr. Harding's request that he do so. During a status conference before the

district court, Harding's court appointed federal lawyer falsely conveyed to the court that Mr. Harding was interested in entering a plea. The district court judge recognizing that the guidelines called for a life sentence, even with a reduction for acceptance of responsibility, questioned Mr. Harding's counsel as to the incentive or benefit for entering such a plea, however, counsel's response was to simply state that he "was not prepared to give any definitive statement" in that regard. On February 22, 2016, Mr. Harding, based on the affirmative mis-advice of court appointed counsel, entered a guilty plea to Counts 1-4 and no contest pleas to Counts 5 and 6 of the second superseding indictment. Crim-DE:128.

Mr. Harding's sentencing hearing was held on May 16 and May 23, 2016. Crim-DE:129,130. At the beginning of the hearing, Mr. Harding's counsel informed the district court that any factual objections to the presentence investigation report had been resolved and that Mr. Harding's counsel and the government both agreed that his total offense level was 43 and his guideline range dictated a sentence of life imprisonment. Crim-DE:129:8.[1]

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[1] According to the Presentence Investigation Report, Mr. Harding's calculated guideline range, after applying a 3-point reduction for acceptance of responsibility pursuant to U.S.S.G. § 3El.1(a)(b), was actually 44. Pursuant to U.S.S.G. Chapter 5 Part A (comment n.2), in those rare instances where the total offense level is calculated in excess of 43, the offense level will be treated as a level 43. Clearly, Mr. Harding received absolutely no guideline offense level reduction benefit from entering his pleas. Had he gone to trial and been convicted of all the offenses he pled to his guideline would still have

Mr. Harding appealed his convictions and sentence, raising issues concerning the adequacy of the plea colloquy (including the district court's failure to inform him that he would be required to register as a sex offender and would be subject to possible indefinite civil commitment) and the substantive reasonableness of the sentence imposed. His convictions and sentence were affirmed. *United States v. Harding*, 696 Fed. Appx. 955 (11th Cir. 2017).

In September 2018, Mr. Harding filed a timely 28 U.S.C. § 2255 motion to vacate his plea and sentence. Mr. Harding presented eight claims for relief, including an ineffective assistance of counsel claim based on court appointed counsel's failure to properly advise Mr. Harding of the application of the federal sentencing guidelines, and affirmatively providing inaccurate legal advice that was fundamental to, and determinative of, the decision to plead guilty. Moreover, court appointed counsel affirmatively misadvised Mr. Harding concerning the consequences of a (guilty and nolo contest) plea; and specifically failed to advise him that a plea would subject him to mandatory registration as a sex offender and possible indefinite civil commitment.

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been calculated at 43.

On July 27 and July 28, 2021 a magistrate judge conducted an evidentiary hearing only as to the grounds for relief presented in claims 2 and 4 and denied an evidentiary hearing on the remaining claims.

During the hearing Mr. Harding testified that he was advised that the superseding indictment added an attempted enticement count charging a violation of 18 U.S.C. 2422(b) and that the charge carried a statutory maximum sentence of life imprisonment. DE:76:10- 12; Pet. Ex. 1. Mr. Harding recalled that he received a letter from his counsel, R. Fletcher Peacock, dated November 4, 2015 outlining his belief that there was a viable defense to the attempted enticement charge. Pet. Ex. 4. In the letter, Mr. Peacock explained that he felt that there was a lack of a substantial step having been taken in connection with the charged attempt and that the government could not prove the elements of the charge. In support of his opinion. Mr. Peacock enclosed a copy of a case, *United States v. Lee,* 603 F.3d 904 (11th Cir. 2010). Pet. Ex. 3; DE:76:17. Although Mr. Harding was adamant about going to trial on the attempted enticement charge because he felt he did not commit the crime, Mr. Peacock explained that, in his opinion, Count 5 was no longer a concern and that the focus should now be on Count 6 (the production count charging a violation of 18 U.S.C. § 2251), since there was an identifiable victim. DE:76:17-19. Mr. Harding recalled that, during this meeting, Mr. Peacock explained that the

guidelines were pretty high, somewhere around the 30-year range, and that range could fluctuate. DE:76:22.

During a January 21, 2016 meeting with his court appointed counsel, Mr. Harding inquired about his sentencing exposure, at which time counsel provided him with a copy of *United States v. Irey,* 612 F.3d 1160 (11th Cir. 2010). Pet. Ex. 6. Counsel assured Mr. Harding that Mr. Irey's offense conduct that resulted in a 30-year sentence was far more egregious in his opinion than Mr. Harding's. He went on to explain there would be absolutely no way the guidelines would justify anything more than 30 years for Mr. Harding; and certainly a life sentence was not possible. Based on counsel's representations, Mr. Harding understood that the guidelines could not get to life imprisonment; and that life was not even on the table because of the guidelines. DE:76:26. Although Mr. Harding reiterated that he still wanted to go to trial on the attempted enticement charge, counsel responded by telling Mr. Harding that if he were convicted at trial he would be assured to receive the maximum penalty, but if he pled he would not be exposing himself to more than 30 years. *Id.*

On August 13, 2021, the magistrate judge issued his Report and Recommendation recommending that Mr. Harding's claims for relief be denied. Civ-DE:72. Mr. Harding timely filed his Objections to the Report, specifically

noting that the magistrate judge had employed an incorrect "prejudice" analysis in his Report & Recommendation by completely ignoring this Court's decision in *Lee v. United States*, 582 U.S. 357 (2017), which addressed the exact issue presented. Just like in *Lee*, court appointed counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. Civ-DE:80. On September 28, 2021, the district court entered its Order Adopting the Magistrate Judge's Report, Denying Mr. Harding's Motion to Vacate Sentence, and refused to issue a certificate of appealability. Civ-DE:84. On March 23, 2022, Mr. Harding moved for a Certificate of Appealability in the Eleventh Circuit Court of Appeals. On June 10, 2022, the Eleventh Circuit granted Mr. Harding a limited Certificate of Appealability as to two claims for relief. On February 8, 2024, after inexplicably limiting the scope of the COA, the Eleventh Circuit affirmed the district court's denial of Harding's ineffective assistance claim as to Counts 5 and 6.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit Court of Appeals erred in its interpretation and application of Title 28 U.S.C. § 2253(c), by limiting the scope of the certificate of appealability, which conflicts with this Court's decisions in *Hohn v. United States*, 524 U.S. 236 (1998), *Miller-El v. Cockrell*, 537 U.S. 332 (2003), and *Lee v. United States*, 582 U.S. 357 (2017), where Petitioner Harding made a substantial showing

of the denial of his constitutional rights. The Eleventh Circuit's opinion directly conflicts with and contravenes this Court's decision in *Lee*.

As the Eleventh Circuit's opinion noted, it granted a certificate of appealability on two issues, but disingenuously limited the second issue to simply address "whether his court appointed attorney rendered ineffective assistance by failing to advise him that his *nolo contendere* plea could result in post-incarceration civil confinement, and if so, whether that ineffective assistance prejudiced him." Mr. Harding's second issue properly raised an ineffective assistance of counsel claim, which was predicated on court appointed counsel's affirmative and inaccurate legal mis-advice concerning the application of the federal sentencing guidelines, which mis-advice was fundamental to, and determinative of, Mr. Harding's decision to plead guilty. Mr. Harding's court appointed counsel misadvised him and misrepresented that by entering a *nolo contendere* plea to the added charges in Counts 5 and 6 of the second superseding indictment, he would limit his sentencing exposure to no more than 30 years. The additional basis which rendered court appointed counsel's representation deficient, was counsel's failure to advise Mr. Harding that a plea would subject him to mandatory registration as a sex offender and possible indefinite civil commitment, the discrete portion of the claim for which the certificate of appealability had been issued. As the record demonstrates, counsel's constitutionally deficient

representation led Mr. Harding to enter a plea that was neither knowingly, voluntarily, nor intelligently entered.

By limiting the scope of the certificate of appealability, Mr. Harding was precluded from properly addressing the district court's misapplication of this Court's controlling decision in *Lee, supra*, as it pertained to counsel's misrepresentations that led to Mr. Harding's decision to accept a plea to a life sentence, with no discernible benefits, which is a compelling reason to grant this petition, vacate the judgment and remand to the Eleventh Circuit. Rather than addressing the totality of the circumstances that led to Mr. Harding's ineffective assistance of counsel claim, which was predicated on this Court's decision in *Lee*, the Eleventh Circuit limited the scope of Mr. Harding's claim and only considered whether court appointed counsel's affirmative misadvice regarding Petitioner's exposure to civil commitment would have caused him to insist on going to trial as to Counts 5 and 6. After mischaracterizing and limiting the scope of Mr. Harding's claim, the Eleventh Circuit disingenuously concluded that Mr. Harding did not offer any contemporaneous evidence suggesting that had he known of the possibility of post-incarceration civil commitment, he would have rejected his defense counsel's strategy to enter a plea and instead gone to trial on Counts 5 and 6.

The standard for the issuance of a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(2) indicates that a COA should issue if the applicant can make a "substantial showing of the denial of a constitutional right" in the proceedings underlying his conviction and sentence. To obtain a certificate of appealability, the applicant must demonstrate that an issue is debatable among jurists of reason or that the questions deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327. This Court has held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 337. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief, as COA's are not reserved merely for claims that will ultimately prevail. *Id.* at 337. The determination whether to issue a certificate of appealability should be a threshold inquiry into whether the District Court's decision was debatable and does not require a decision on the merits. *Id.* at 342.

Applying the principles set forth by this Court in *Slack v. McDaniel*, 529 U.S. 473 (2000), *Miller-El*, and *Hohn*, a review of the issues presented by Petitioner in his application for a COA, demonstrate that a substantial showing was made of the denial of his constitutional rights and that reasonable jurists could have debated each of the claims presented.

I. Habeas Relief Is Warranted Where Petitioner's Motion Presented A Cognizable Claim For Relief Pursuant To This Court's Decision in *Lee v. United States.*

The Sixth Amendment guarantees criminal defendants the assistance of counsel in defending against criminal charges. *See Hall v. Head,* 310 F.3d 683, 691 (11th Cir. 2002) (citing *Strickland v. Washington,* 466 U.S. 668, 686 (1984). The right to counsel "is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986). Additionally, the right to counsel encompasses the right to "effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 (1970).

The Sixth Amendment also guarantees the accused the effective assistance of counsel in all critical stages of a criminal prosecution, including during the process of plea negotiations and in deciding whether to forego his right to trial and enter a plea. Counsel's obligations include providing an accurate assessment of the accused's sentencing exposure and informing him of all matters that may affect his decision of whether to plead or go to trial. *Strickland v. Washington* held that relief is warranted upon a showing that: (1) counsel's performance fell below an objective standard of reasonableness (the performance prong); and (2) there is a reasonable probability (sufficient to undermine confidence in the outcome) that, but for counsel's objectively unreasonable performance, the proceedings results

would have differed (the prejudice prong). *Strickland,* 466 U.S. at 688-89. One year later, addressing the situation in which an attorney's erroneous advice lead the accused to plead guilty, this Court held that the prejudice standard required the defendant to show "a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart,* 474 U.S. 52, 59 (1985). Subsequent cases have suggested that the defendant, consistent with *Strickland,* cannot establish prejudice solely by showing he would have gone to trial. He must also show that he would likely have obtained a more favorable result in the end, or that his decision to reject a plea and proceed to trial must have been rational. If that was ever the law, it most certainly is not now.

This Court has now made it clear that the traditional *Strickland* prejudice analysis does not apply where, as in Mr. Harding's case, counsel's constitutionally deficient performance resulted in a forfeiture of the accused's right to a trial. *See Lee* v. *United States,* 137 S. Ct. 1958, 1965 (2017) ("When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord' any such presumption 'to judicial proceedings that never took place.'" (quoting *Roe v. Flores-Ortega,* 528 U.S. 470, 482-83

(2000)).

In *Lee,* the accused, a non-U.S. citizen facing overwhelming evidence of guilt with no real defense to the drug related charges, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial. His decision was motivated by his counsel's erroneous advice that the government would not deport him if he pleaded guilty. In denying his § 2255 motion, the district court, applying *Strickland's* two-part test for ineffective assistance of counsel claims, concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea, but that "[i]n light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly been found guilty and received a significantly longer prison sentence and subsequent deportation had he gone to trial." *Lee,* 137 S.Ct. at 1964.

The Sixth Circuit, relying on *Hill v. Lockhart,* 474 U.S. 52, 59 (1985), affirmed the denial of relief on the basis that to establish he was prejudiced by counsel's errors Lee would be required to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Lee,* 137 S.Ct. at 1964. Because the Sixth Circuit determined Lee had "no bona fide defense, not even a weak one," he "stood to gain nothing from going to trial but more prison time." *Id.* Relying on circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison

sentence," the Sixth Circuit determined that Lee could not show prejudice. *Id.*

In *Lee,* this Court rejected the analysis of both the district court and the Sixth Circuit and explained why a different prejudice analysis must apply in this type of case. 137 S.Ct. at 1963. First, it observed that a claim of ineffective assistance of counsel will often involve a claim of attorney error during the course of a legal proceeding, for example that counsel failed to raise an objection at trial or to present an argument on appeal. Thus, under *Roe v. Flores -Ortega,* 528 U.S. 470,481 (2000), a defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 482 (quoting *Strickland,* 466 U.S. at 694; internal quotation marks omitted).

The *Lee* Court explained that where a defendant has pled guilty and forfeited his right to go to trial, the analysis is different and instead focuses on whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." 137 S.Ct. at 1965 (citing *Roe v. Flores-Ortega,* 528 U.S. at 483); *see id.* ("As we held in *Hill v. Lockhart,* when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial.' 474 U.S., at 59, 106 S.Ct. 366.").

Second, the *Lee* Court rejected the government's request to adopt a per se rule embraced by the Sixth Circuit that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. 137 S.Ct. at 1966. In doing so, the Court observed that when the consequences are from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. *See id.* at 1966-67 ("For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation-even if it shaved off prison time-in favor of throwing a 'Hail Mary' at trial.")

Lee was well-established law by the time Mr. Harding filed his § 2255 motion. Despite consistently urging that the *Lee* prejudice standard applied, in both his petition and objections, both the magistrate judge and the district court failed to acknowledge the *Lee* decision in any way. Instead, both the magistrate judge and the district court (by adopting the Report and Recommendation) applied a prejudice standard that *Lee* decided was patently incorrect. Initially, in the Report and

Recommendation, the magistrate judge applied the *Strickland* prejudice standard, noting that Movant "must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." DE72:17.

Then, in reliance on *Jackson v. United States,* 463 Fed. Appx. 833 (11th Cir. 2012), the magistrate judge engrafted an additional prejudice requirement: that the movant must show that rejecting the plea bargain would have been rational under the circumstances. DE:72:20.[2]

Finally, relying on *Dickey v. United States,* 437 Fed. Appx. 851, 852 (11th Cir. 2011) (which was decided prior to *Lee v. United States),* the magistrate judge erroneously concluded that a movant cannot show prejudice from an attorney's mis-advice if he was advised of the correct maximum sentence during the plea colloquy. To begin with, in addressing the prejudice prong, the *Dickey* Court applied what, in light of *Lee,* is a clearly incorrect analysis, stating that "the evidence against Dickey was both overwhelming and inflammatory, such that there

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[2] During the evidentiary hearing, the magistrate judge permitted the government to cross-examine Mr. Harding regarding the facts surrounding Counts 5 and 6, finding that such inquiry (despite the privilege against self-incrimination) was relevant on the issue of whether rejecting the plea bargain would have been rational under the circumstances. DE:76:64-67. This mid-hearing ruling confirms that the magistrate judge was relying on a prejudice standard deemed to be erroneous by *Lee v. United States.*

was no realistic chance of acquittal at a trial. Dickey has failed to establish that but for any errors by counsel, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 852. As *Lee* has made clear, the likely lack of success at trial is not determinative with regard to whether the defendant would have rejected a plea and gone to trial had he been properly advised. In fact, in *Lee* that was precisely the case-even with overwhelming evidence and no realistic chance of acquittal, counsel's erroneous advice led the accused to forfeit his right to trial and his opportunity to throw a Hail Mary.

In addition, the effectiveness of the plea colloquy conducted by the district court was undermined by at least two factors. First, the district court itself affirmatively misrepresented the potential impact of the guidelines on Mr. Harding's case. As it had done in numerous previous cases, the district court, consistent with standard bench book language, informed Mr. Harding:

> Neither the court nor anyone else will be able to determine with certainty the advisory guideline range for your case until after the Pre-Sentence Report has been completed and you and the Government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the Probation Officer... If that sentence was higher than you expected, maybe even higher than what the guideline range is, higher than what your attorney has indicated may be a likely outcome, do you understand that that would not be a basis for you to seek to withdraw your guilty plea?

Crim-DE:128:20-21.

Although the above admonishment may have been sufficient in the usual

case, it was not in Mr. Harding's. It was not only inaccurate but grossly misleading. The district court should have, but failed to, inform Mr. Harding that, at a status conference held three days before the plea, the district court, the government, and Mr. Harding's court appointed attorney unanimously agreed that even if Mr. Harding were to plead guilty and receive a three-level reduction for acceptance of responsibility, his guidelines would still be well above level 43, the threshold for a guideline life sentence.

The district court also should have asked Mr. Harding the same question that was asked of his counsel at the status conference and prompted an evasive response--essentially, why, given that his guidelines were indisputably life, would he want to plead guilty when it was clear the government would be aggressively seeking a life sentence? DE:127:11-12. Counsel's troubling response at the status conference was "I guess I am not prepared to give any definitive statement." DE:127:12.

The district court should also have directly addressed with Mr. Harding the concerns raised at the status conference when she asked whether there was any risk in accepting a no contest plea from the defendant on Counts 5 and 6 when he might be innocent. At the status conference, the district court again received an evasive response from counsel, who stated, "[J]ust to make clear, Mr. Harding does intend to challenge those allegations in State Court. I take no

position with regard to that, Your Honor. We just choose not to contest the government's proof on 5 and 6." DE:127:21. The district court's question effectively remained unanswered. However, as counsel well knew when he made this statement, Mr. Harding had consistently maintained he was not guilty, at a minimum, of the attempted enticement charges alleged in Count 5, and wanted to go to trial on that count.

The impact of the district court's misleading admonishment was compounded by counsel's February 18, 2016 letter to Mr. Harding, where he advised him, "A plea will put you in a better light in front of the judge at sentencing and we need all the help we can get to lower your sentencing guidelines and support a motion for downward variances." Pet. Ex. 7. That was a blatant misrepresentation. As counsel well knew (and conceded at the status conference held hours later), there was no conceivable way to lower the guidelines to a level that would call for anything less than life imprisonment. Court appointed counsel wholly failed to exhibit the degree of candor owed to his client. Had he done so, he would have disclosed that there was no hope of lowering the guidelines to a level other than life, that the government and his wife would aggressively pursue a life sentence, and that by pleading, he was purely at the mercy of the court.

The Court in *Lee v United States* made it clear that cases such as *United*

Statesv. Akinsade, 686 F.3d 248, 253 (4th Cir. 2012), noting that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice, should not apply where the misadvice undermines the judge's warnings themselves. *Lee,* 137 S.Ct. at 1968 n. 4. In this case, counsel's affirmative misrepresentations to Mr. Harding, including but not limited to those in his February 18 letter, had exactly that effect; and as we have explained, the district court's admonishments to Mr. Harding were misleading and omitted critical information Mr. Harding needed to make an informed decision whether to proceed with the plea.

Mr. Peacock's advice to Mr. Harding to plead where he, Mr. Peacock, knew that the guidelines far exceeded the life imprisonment threshold fell well below any objective standard of reasonableness. The magistrate judge effectively conceded as much when he characterized counsel's strategic decision as unorthodox and noted that other criminal defense attorneys might well have rejected that approach. DE:72:26.[3]

In this case, counsel's decision to advise his client to plead where the

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[3] The very word, unorthodox, embraces conduct that may fall well beyond the boundaries of an objective standard of reasonableness. Unorthodox connotes actions contrary to what is usual, traditional, or accepted; conduct not conforming to rules, tradition, or modes of conduct; different from what is generally accepted.

inevitable result would be the imposition of a life sentence is simply not strategic. A decision cannot be fairly characterized as strategic unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance in attention or neglect. *See, e.g., Wood v. Allen,* 558 U.S. 290, 307 (2010) (Stevens, J dissenting); *see also Moore v. Johnson,* 194 F.3d 586, 604, 615 (5th Cir. 1999) (court not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate strategic decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all; "*Strickland* does not require deference to those decisions of counsel that, viewed in light of the facts known at the time of the purported decision, do not serve any conceivable strategic purpose.").

Count 5, the attempted inducement charge, was the only charge that carried a statutory maximum sentence of life imprisonment. From the moment he was indicted on that charge, Mr. Harding repeatedly declared he did not feel he was guilty and wanted to go to trial. Counsel, at least at first, wholeheartedly agreed. He sent Mr. Harding a letter explaining why he believed the government cannot prove an element of the offense, i.e., that a substantial step had been taken toward the commission of the offense, and he

enclosed decisional authority supporting that view. Moreover, the government itself remained confused as to the identity of the alleged victim of the attempted enticement charge claiming, for example, at the February 19 status conference that it was Mr. Harding's stepdaughter, yet three days later claiming it was one of the daughters of "daddydearaimee." The government's confusion, coupled with the lack of evidence supporting a substantial step in furtherance of the attempt, demonstrate that Mr. Harding had a far better chance of success than the accused in *Lee,* who was left with nothing but an attempt to throw a Hail Mary.

Mr. Harding never relinquished his desire to go to trial on Count 5 until counsel advised that, by pleading, his guidelines could be lowered, and he would not get more than a 30-year sentence. Counsel failed to disclose what was discussed at the February 19 status conference where he, the government, and the court unanimously agreed that even with a reduction for acceptance of responsibility his guidelines still far exceeded the level 43 life threshold.

II. This Court, Or Any Of Its Members, Should Grant A Certificate Of Appealability.

If this Court determines that it lacks the power to review the court of appeals' decision, petitioner respectfully requests that the Court or any individual Justice issue him a certificate of appealability so that he may obtain the relief to

which he is entitled – the right to properly have his meritorious appeal of the denial of his § 2255 relief heard by the court of appeals.

CONCLUSION

For the foregoing reasons, Petitioner HARDING respectfully requests this Court grant this Petition for Writ of Certiorari review, vacate the judgment and remand to the Eleventh Circuit for further consideration thereof, or alternatively, issue an expanded certificate of appealability based on the substantial showing of the denial of a constitutional right, in this extraordinary case involving the most severe non-capital sentence.

Dated this 3rd day of June, 2024.

Respectfully submitted,

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