APPENDIX

Appendix "A"

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13822

Docket Nos: 2:10-cv-01106-JA-WC; 2:03-cr-00259-WKW-WC-1

LEON CARMICHAEL, SR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(July 22, 2020)

Before WILSON, NEWSOM, Circuit Judges, and PROCTOR,* District Judge.

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* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

PROCTOR, District Judge:

Leon Carmichael is a federal prisoner serving a 480-month sentence. This appeal is from a district court's denial of his 28 U.S.C. § 2255 motion asking that his sentence be vacated. After conducting an evidentiary hearing on Carmichael's habeas petition, the district court found that his counsels' performance fell below minimum constitutional standards. However, the court also determined that, although there was deficient performance, Carmichael was not entitled to relief because he did not show prejudice. Carmichael challenges that ruling. After careful review, and with the benefit of oral argument, we affirm.

I. Background

A. Carmichael's Conviction, Sentence, Section 2255 Motion, and Initial Appeal

In August 2004, a grand jury returned a third superseding indictment charging Carmichael with: (1) conspiring to distribute 3,000 or more kilograms of marijuana, in violation of 21 U.S.C. § 846; and (2) conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h). Carmichael went to trial on these charges in 2005. On June 17, 2005, following an eleven-day trial, a jury found him guilty of conspiring to distribute 7,000 pounds, or more, of marijuana and also convicted him on a money laundering conspiracy charge.

The district court sentenced Carmichael to a total term of imprisonment of 480 months. In addition to the prison sentence, the court ordered Carmichael to

forfeit the Carmichael Center,[1] his personal residence, and an automobile. Carmichael filed a direct appeal. This Court affirmed his convictions and sentences in 2009. See United States v. Carmichael (Carmichael I), 560 F.3d 1270 (11th Cir. 2009). The Supreme Court denied his petition for a writ of certiorari. See Carmichael v. United States, 558 U.S. 1128 (2010).

On December 30, 2010, Carmichael filed a pro se 28 U.S.C. § 2255 motion to vacate his conviction and sentence. In his Motion, Carmichael raised numerous claims. Relevant to this appeal, he contends that when he was deciding whether to plead guilty or proceed to trial, his attorneys failed to: (1) explain to him the weight and extent of the government's evidence; (2) advise him of the applicable sentence he could face, if convicted; (3) properly pursue plea negotiations with the government; and (4) concurrently convey plea offers made by the government.

Initially, a Magistrate Judge issued a report and recommendation ("R&R") recommending denial of Carmichael's section 2255 motion on the merits. Over Carmichael's objections, the district court judge adopted the R&R and denied his section 2255 motion. We reversed and remanded the case to the district court with instructions that it conduct an evidentiary hearing on Carmichael's ineffective assistance of counsel claim. See Carmichael v. United States (Carmichael II), 659

[1] The Carmichael Center was an entertainment venue owned by Carmichael.

F. App'x 1013 (11th Cir. 2016).

B. The Evidentiary Hearing

On remand, the district court conducted an evidentiary hearing. Carmichael testified at the hearing, as did two of the lawyers who represented him at trial, Marion Chartoff and Susan James.[2] The government presented the testimony of three witnesses: two Assistant U.S. Attorneys (Stephen Feaga and Anna Clark Morris), and the Chief of the Criminal Division of the U.S. Attorney's Office (Louis Franklin). Carmichael's primary arguments at the evidentiary hearing focused on his attorneys' alleged deficient performance regarding plea negotiations and communication of plea offers. As such, it was necessary for the district court to hear evidence about the lawyers who defended Carmichael in the criminal action.

Carmichael employed at least twelve attorneys between the time he was first indicted in 2004 and the affirmance of his conviction on direct appeal in 2009.[3] See Carmichael I, 560 F.3d at 1270. Carmichael initially hired criminal defense attorney Stephen Glassroth to serve as lead counsel. In turn, Glassroth selected a

[2] In assessing the argument raised in this appeal, the Court focuses its analysis on the attorneys who played an active part in Carmichael's defense, including Stephen Glassroth, Lisa Wayne, Susan James, and Marion Chartoff. The Court does not, for example, discuss the performance of Attorney Wesley Pitters, who filed a notice of appearance when Carmichael was indicted, but withdrew several months later.

[3] The record does not indicate the precise duties that these twelve attorneys undertook.

team of attorneys, including Chartoff, to perform research and draft motions. Glassroth also tapped Lisa Wayne, a well-known criminal defense attorney from Denver, Colorado, who Glassroth viewed as a prominent attorney. Carmichael urged Glassroth to work with Susan James, but he says Glassroth refused. According to Carmichael, Glassroth's trial strategy was to argue that a rogue Drug Enforcement Agency ("DEA") agent unfairly targeted Carmichael.

Carmichael never admitted guilt to any of his numerous attorneys, but he did ask Glassroth early in the proceedings about the possibility of entering a plea. Glassroth responded by telling Carmichael he thought the best strategy was not to discuss a plea deal until discovery was complete.

Before trial, Glassroth withdrew from the case. Wayne offered to remain in the case, but did so on the condition that Carmichael name her lead counsel. After Glassroth's departure, Carmichael hired James along with Ronald Brunson. Brunson was specifically tasked with defending Carmichael on the money laundering charge.

The testimony offered at the evidentiary hearing revealed that Carmichael's legal team was, at best, dysfunctional. Wayne, as lead counsel, refused to take direction from James, and the lawyers did not communicate with each other. Chartoff described the team, under Wayne's leadership, as a "disaster" and "a rudderless ship." The evidence indicates Carmichael's legal "team" was a team in

name only.

Prior to trial, Carmichael testified that he asked Wayne to pursue settlement negotiations. Wayne agreed to do so when she arrived in Alabama for trial, but she remained in Colorado until the eve of trial. Carmichael claims he had difficulty getting in contact with her before she finally arrived in Alabama. There is no evidence that Wayne ever pursued a plea agreement.

Assistant U.S. Attorney ("AUSA") Stephen Feaga, who joined the government's trial team some four to six weeks before the start of trial, testified on behalf of the government at the evidentiary hearing. At the start of Carmichael's trial, it was Feaga's understanding that some level of plea discussions had taken place, but were not fruitful. Specifically, Feaga believed the government had previously proposed that Carmichael receive a twenty-year sentence in exchange for agreeing to plead guilty, forfeiting the Carmichael Center, and providing substantial assistance to the government. Feaga was under the impression that the offer had been rejected by one of Carmichael's lawyers—but he did not know which one. In their testimony, neither James nor Chartoff referenced such a proposal. On cross-examination, Feaga conceded he had no specific knowledge that an offer had actually been conveyed.

Feaga further testified that he spoke with James about a potential plea agreement prior to trial. James confirmed this was a "Hail Mary" attempt to settle

the case. While talking with Feaga, James suggested Carmichael would be willing to accept a five-year sentence. Feaga conveyed that proposal to his superiors, but it was immediately rejected. Rather, Feaga's superiors authorized him to deliver a counter-proposal—if Carmichael entered a guilty plea, forfeited the Carmichael Center, and provided "super cooperation,"[4] he could receive a sentence as low as ten years. Alternatively, if Carmichael was unwilling or unable to provide "super cooperation," the government would recommend a twenty-year maximum sentence if Carmichael merely provided the government with substantial assistance that was truthful. Consistent with these discussions, Feaga submitted an affidavit indicating the government was initially willing to enter into a plea agreement with a recommendation that the sentence not exceed twenty-years, but he later discussed with counsel that the agreement could provide for a sentence as low as ten years, if the level of cooperation Carmichael provided was extraordinary.

At the hearing, James's testimony was equivocal at best. Astonishingly, she had no specific recollection of relaying this information to Carmichael, and, after reviewing her notes, stated that she did not think she did so. James tried to justify this lapse by stating she believed Carmichael had initially been resistant to the idea of forfeiting the Carmichael Center, and therefore she "might have consciously just

[4] Feaga testified that by "super cooperation" he actually meant the delivery of information and testimony that led to the successful prosecution of others.

kind of blown [that plea proposal] off."

Feaga had a starkly different account than James. He recalled James telling him that Carmichael rejected the proposal. Moreover, two other members of the U.S. Attorney's Office similarly testified that they understood Carmichael had rejected the offer. At the evidentiary hearing, Carmichael testified that the offer was not relayed to him, and had he known about the ten-year "super cooperation" offer, he would have accepted it. But, apart from this conclusory claim, Carmichael gave no specific testimony about either his willingness or ability to testify, or to otherwise provide such high-level cooperation. Nor did he state that he would have accepted the alternative twenty-year offer.

Carmichael also testified that it was his belief—based on a comment by trial counsel that he claims to have overheard—that the government made a plea offer during trial while the jury was deliberating. Carmichael stated that the next time he was informed of a plea proposal was on the day of the forfeiture hearing. He did not provide any more specifics than that.

Carmichael testified that not one of his numerous attorneys informed him of his guideline range or the possibility that he could receive a sentence of life imprisonment without parole. Carmichael further testified that the first time he became aware he could be sentenced to more than twenty-years was when the presentence investigation report came out. Further, on cross-examination,

Carmichael admitted that when he appeared before a Magistrate Judge after his indictment, and on each superseding indictment, the Magistrate Judge informed him of the minimum and maximum penalties he faced if convicted. But, as his own counsel acknowledged at oral argument, Carmichael learned in a post-trial meeting with Feaga that he was looking at a significant sentence.

Carmichael further testified that he was visited in jail by Feaga, after the trial that resulted in his conviction, but before his sentencing. According to Carmichael, Feaga wanted to discuss capping Carmichael's total sentence at twenty years in exchange for his testimony against a co-conspirator. Although James set up the meeting at Feaga's request, none of Carmichael's attorneys were present. After Feaga discussed a possible deal with him, Carmichael told Feaga he would take his chances at appeal. Thereafter, Carmichael shopped the idea of an offer with three of his attorneys: James, Chartoff, and Jim Jenkins (his appellate attorney). Carmichael testified that both James and Jenkins advised him not to take a twenty-year deal. James told Carmichael he should decline the proposal because, in her opinion, Judge Thompson (the sentencing judge) was not likely to sentence him to more than twenty-years, in any event. Jenkins advised Carmichael to decline due to his age. However, Chartoff recommended pursuing a deal. After two months passed, Carmichael authorized Chartoff to find another lawyer to negotiate with Feaga, but by that time the proposal had been withdrawn.

Feaga also testified about his meeting with Carmichael after the trial. According to Feaga's testimony, Carmichael wanted to discuss the possibility of a ten-year sentence, but at that point that deal was off the table. However, Feaga told Carmichael that capping his total sentence at twenty-years might still be possible, so long as he could provide adequate cooperation. Feaga also told Carmichael that while the ten-year proposal had been withdrawn, a ten-year deal was still conceivable, depending on the quality of the information he provided. Carmichael told Feaga he would take his chances on appeal.

AUSA Morris and AUSA Franklin also testified at the hearing. Morris was involved in the pre-trial plea discussions that occurred between Feaga and James. Morris's testimony confirmed that Carmichael's attorney, James, ultimately did not accept the pre-trial deals offered by the government.

Franklin testified that he supervised the government attorneys working on Carmichael's prosecution. He recalled that the U.S. Attorney rejected James's "Hail Mary" request for a five-year deal. Franklin also testified that the government could not make an official offer unless Carmichael was willing to meet with the prosecution and make a proffer. Once a proffer was made, the government would evaluate the information provided by Carmichael and be in a position to make a more formal offer. Franklin stated that Wesley Pitters, one of Carmichael's friends and an attorney who briefly appeared in the case, told him

that Carmichael rejected the idea of making a proffer. Similarly, Feaga and Franklin both testified that Carmichael refused to proffer without a guaranteed sentence, both pre-trial and after his conviction.

Carmichael maintained his innocence throughout trial and the post-conviction proceedings. However, on cross-examination, Carmichael testified that if he had known he was potentially facing a life sentence, he would have pleaded guilty in return for a ten-year sentence.

C. The District Court's Findings and Conclusions

After the evidentiary hearing, the district court denied Carmichael's section 2255 motion. The district court divided its analysis of Carmichael's ineffective assistance of counsel claims into four parts: (1) counsels' collective failure to explain to Carmichael the weight and extent of the government's evidence prior to trial; (2) counsels' failure to advise him, if convicted, about the applicable sentence he would face; (3) counsels' failure to pursue plea negotiations; and (4) counsels' failure to convey plea offers from the government.

First, as to the failure of counsel to explain the weight and extent of the government's evidence prior to trial, the district court found this assertion was not supported by the hearing evidence. Specifically, the court noted that "James testified that she took it upon herself to search for information that could be used to impeach [g]overnment witnesses and that she frequently updated Carmichael on

her investigation and discussed with him what testimony the witnesses would likely give." Although Carmichael claims he did not speak with James on a daily basis, he did not deny that she frequently updated him on the evidence against him. Similarly, Carmichael could not recount a specific instance in which he requested information regarding the government's case and James did not respond to the request. The court also stated that "[a]ny notion that [Carmichael] was not aware of the situation is belied by his background and conduct . . . . [H]e hired a dozen lawyers to defend him and claims to have paid almost a million dollars in fees. Carmichael was consumed by this case; he understood that the maximum sentence if he were convicted was life."

Second, as to counsels' failure to advise Carmichael of his sentencing exposure, the district court determined that counsel did not sufficiently discuss the topic with him. Specifically, the district court found not only that Carmichael was unfamiliar with the sentencing guidelines, but also that his counsel failed to advise him how the guidelines would apply in his case and what his likely guideline range would be. As the district court noted, "[e]ach time [he] was arraigned on the four consecutive indictments, the [M]agistrate [J]udge advised him of the applicable minimum and maximum sentences." In particular, "Carmichael remembers that when he was arraigned for the crimes of conviction, the [M]agistrate [J]udge told him the charges carried a possible life sentence and a minimum sentence of ten

years." However, the district court noted that "although the [M]agistrate [J]udge advised [Carmichael] that he could be sentenced from [ten-]years to life, he had no idea what his guideline score would be." Astoundingly, the testimony of Chartoff and James corroborated Carmichael's assertions. After hearing the evidence, the court concluded that counsels' collective failure to discuss sentencing possibilities under the guidelines with Carmichael was deficient practice.

Third, as to counsels' failure to pursue plea negotiations, the court found that Wayne's failure to broach the possibility of a plea agreement was deficient performance.[5] The court noted that "[o]nce Wayne took over as lead counsel, Carmichael asked her to settle the case. Wayne responded that she would pursue a settlement when she came to Montgomery, but she did not come until just before trial, and there is no evidence she ever pursued a plea agreement." The court found that Wayne's performance was deficient because she failed to attempt to negotiate a plea agreement despite Carmichael specifically directing her to do so.

Finally, as to counsels' failure to convey plea offers, the court concluded there was insufficient evidence presented to support a finding that any plea offer was made prior to Feaga joining the team. Similarly, the court found that there was

[5] The district court further found that "[i]t is not clear [whether] Glassroth was deficient in suggesting to Carmichael that they wait until discovery was complete to pursue a plea offer. There may have been good reasons for waiting. It is impossible to know whether, once armed with discovery, Glassroth would have pursued plea negotiations, because he withdrew from the case and did not testify at the evidentiary hearing."

insufficient evidence that a possible plea agreement was discussed during trial while the jury was deliberating. However, the court found that James's pre-trial "Hail Mary," which resulted in a counteroffer[6] from Feaga, obligated James to inform Carmichael of the discussions. The court found that James's failure to communicate Feaga's counteroffer constituted deficient performance.

Importantly, in its analysis, the district court treated Feaga's proposal as two separate offers: (1) a ten-year deal for "super cooperation;" and (2) a twenty-year deal for other useful information.[7] In regard to the first, ten-year deal, the court noted that it was unclear whether Carmichael could have provided the necessary extraordinary level of cooperation. As to the second, the twenty-year proposal, the court found that Carmichael failed to offer any evidence that he would have accepted that offer as presented. Although the district court found counsels' performance was deficient, it concluded that Carmichael was not entitled to relief

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[6] The district court found the counteroffer outlined two possibilities for Carmichael: "(1) a guilty plea to unspecified offenses, forfeiture of the Carmichael Center, and if Carmichael provided 'super cooperation,' the possibility of a sentence as low as ten years; or (2) a guilty plea to unspecified offenses, and with Carmichael's acceptance of responsibility, a sentence not to exceed twenty years."

[7] At oral argument, Carmichael's appointed counsel acknowledged that Feaga's proposal, properly viewed, is a single offer that existed on a sliding scale, depending on his level of cooperation. That is, Carmichael's counsel characterized the offer as one for a twenty-year recommendation with a chance to reduce the sentence down to ten years if Carmichael provided super cooperation. We think that is the correct characterization, but we do not believe the district court's different, binary treatment of the proposal makes a material difference here. For ease of reference, we analyze the offer as the district court did: a proposal involving two separate offers, one contemplating a ten-year sentence if Carmichael provided super cooperation; and a second involving a twenty-year proposal if he only provided useful information.

under section 2255 because he could not show prejudice. Specifically, Carmichael failed to present evidence indicating that he would have accepted either of Feaga's proposals.

After the district court denied Carmichael's section 2255 motion, he filed a timely pro se notice of appeal. At Carmichael's request, a judge on this Court granted a certificate of appealability ("COA") on the following issue:

> Whether the district court erred in denying Carmichael's claim that he would have pleaded guilty if trial counsel had advised him of his likely sentencing exposure under the Sentencing guidelines, pursued the possibility of a plea deal earlier in the process, and advised him of the government's informal plea offers.

Appellate counsel was appointed to represent Carmichael on this appeal. [8]

II. Standard of Review

In an appeal from a section 2255 proceeding, we review legal conclusions de novo and factual findings for clear error. Devine v. United States, 520 F.3d 1286, 1287 (11th Cir. 2008) (per curiam). Ineffective assistance of counsel claims present some mixed questions of law and fact that we review de novo. Id.

Pro se filings are generally held to a less stringent standard than those drafted by attorneys and are liberally construed. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

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[8] Appointed counsel did not submit briefing for consideration by this Court. At oral argument, counsel affirmed his intent to rest on the briefing filed pro se by Carmichael.

III. Analysis

To prevail on his ineffective assistance of counsel claim, Carmichael must satisfy the familiar two-part test established in Strickland v. Washington, 466 U.S. 668, 687 (1984). See Rosin v. United States, 786 F.3d 873, 877 (11th Cir. 2015). A habeas petitioner claiming ineffective assistance of counsel must carry his burden on both Strickland prongs, and a court need not address both prongs if the petitioner has made an insufficient showing on one of those elements. Johnson v. Alabama, 256 F.3d 1156, 1176 (11th Cir. 2001).

Under the first prong of Strickland, counsel's performance is deficient if it falls below an objective standard of reasonableness and is "outside the wide range of professionally competent assistance." Johnson v. Sec'y, DOC, 643 F.3d 907, 928 (11th Cir. 2011) (quoting Strickland, 466 U.S. at 688, 690) (internal quotations omitted). Courts must indulge the "strong presumption" that counsel's performance was reasonable. Jennings v. McDonough, 490 F.3d 1230, 1243 (11th Cir. 2007) (quoting Strickland, 466 U.S. at 689). As a result, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc).

Here, regarding the first Strickland prong, the parties do not dispute the district court's finding that counsels' performance was deficient due to their failure to: (1) communicate Carmichael's potential total sentence and the application of

the sentencing guidelines; (2) seek a negotiated plea (as Carmichael requested); and (3) relay to him the plea offers that Feaga and James discussed. This Court agrees.

As for Strickland's prejudice prong, Carmichael must show a reasonable probability that, but for counsels' unprofessional errors, the result of the proceedings would have been different. Lafler v. Cooper, 566 U.S. 156, 163 (2012). We have clarified that a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Osley v. United States, 751 F.3d 1214, 1222 (11th Cir. 2014).

The Supreme Court has long recognized that Strickland's two-part inquiry applies to ineffective assistance of counsel related to the plea process. See Hill v. Lockhart, 474 U.S. 52, 57 (1985). In Missouri v. Frye, 566 U.S. 134 (2012), and Lafler, the Court clarified that the Sixth Amendment right to the effective assistance of counsel extends specifically "to the negotiation and consideration of plea offers that lapse or are rejected." In re Perez, 682 F.3d 930, 932 (11th Cir. 2012) (per curiam). In the plea-negotiation context, the prejudice requirement focuses on whether counsel's unconstitutionally ineffective performance adversely affected the outcome of the plea process. Hill, 474 U.S. at 59.

Where a petitioner raises an ineffective assistance claim asserting that his counsel was deficient in plea discussions, to demonstrate prejudice he must show

that, but for the ineffective assistance of counsel, a reasonable probability existed that: (1) the plea offer would have been presented to the court (i.e. the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) the court would have accepted its terms; and (3) under the offer's terms, the conviction or sentence, or both, would have been less severe than under the judgment and sentence that were, in fact, imposed. Lafler, 566 U.S. at 164; see Frye, 566 U.S. at 149-50 (stating that a defendant whose counsel failed to communicate a plea offer to him must show not only "a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court.").

Here, in applying Strickland's second prong, the district court concluded that Carmichael failed to show he was prejudiced by his counsels' failures. The second and third prejudice prongs are not at issue here. As the district court found in regard to prong two, there is no record evidence indicating that the offers would have been withdrawn prior to trial. In regard to prong three, the ten and twenty-year offers are clearly less severe than the forty-year total sentence actually received by Carmichael. Thus, the only issue before this Court is whether the district court erred in determining that the habeas hearing evidence did not establish Carmichael would have accepted either the ten-year or twenty-year plea

offers if counsel had performed reasonably.

A. The Ten-Year Proposal

Under the offer made to his counsel, to earn a ten-year recommendation from the government, Carmichael would have had to enter a guilty plea to unspecified offenses, agree to forfeit the Carmichael Center, and provide "super cooperation." Importantly, this ten-year super cooperation proposal would have required Carmichael to go above and beyond providing mere substantial assistance. That is, Feaga testified that super cooperation from Carmichael would entail more than just providing full details of his criminal activities (which he would have been required to provide in connection with either deal). Rather, super cooperation required Carmichael to give information and testimony that could lead to the indictment and prosecution of other people. To be clear, this proposal involved Carmichael working his sentence down to ten years. And, even if he had provided such high-value cooperation, ten years was not a guarantee.

After conducting a full evidentiary hearing, the district court found that Carmichael "offered no evidence that he would have—or, even could have—given substantial assistance," much less super cooperation. The court stated, "[w]ith so little information in the record, it is impossible to know whether Carmichael could have satisfied the [g]overnment's requirements to file a motion under [section] 5K1.1 of the United States Sentencing Guidelines for a downward departure from

the advisory guideline range."

In particular, the district court found as follows:

> But Carmichael did not show that he would have entered into a plea agreement with the Government based on Feaga's proposals. The ten-year proposal called for Carmichael to provide substantial assistance—what Feaga referred to as "super cooperation." Because of the informality of the relevant discussion between Feaga and James, it is not clear what the Government had in mind by "super cooperation." In his testimony, Carmichael made fleeting reference to Franklin's interest in prosecuting a police lieutenant, but this is the only evidence bearing on the performance expected of Carmichael in return for the Government taking action to reduce his sentence. With so little information in the record, it is impossible to know whether Carmichael could have satisfied the Government's requirements to file a motion under § 5K1.1 of the United States Sentencing Guidelines for a downward departure from the advisory guideline range. Because the ability to seek a reduction of sentence under U.S.S.G. § 5K1.1 is solely within the discretion of the Government, perhaps Carmichael should be entitled to some latitude in showing that he would have accepted an offer including a substantial assistance requirement. But he offered no evidence that he would have—or, even could have—given substantial assistance. When Franklin broached the subject of a proffer, Carmichael refused to speak to the Government without a guarantee of a specific sentence.

The district court honed in on the weaknesses in Carmichael's prejudice assertion. First, the informality of the discussion between Feaga and James left it unclear exactly what the terms of the "offer" were, much less whether Carmichael was willing and able to satisfy those terms. In other words, it is not clear: (1) what extraordinary assistance Carmichael would have had to furnish in order to work his way down to a ten-year recommendation; (2) whether he was willing to supply that high level of cooperation; or (3) even, assuming his willingness, if he would have

been able to do so. Indeed, Carmichael's single, unspecific, fleeting reference to the government's interest in a police lieutenant is the only evidence in the record regarding the performance expected of him in return for the government recommending a reduction in his sentence. Like the district court, we are left to speculate, at best, as to whether Carmichael could have provided super cooperation with respect to that police officer, and whether he would have been willing to do that.

There are strong indications in the record that Carmichael was not so willing. For example, Carmichael's assertion that he would have accepted a ten-year deal is undermined by his refusal to speak with the government when Franklin broached the subject of a proffer. Carmichael refused to provide a proffer unless he was guaranteed a particular sentence on the front end. His refusal to proffer (without a promise of a guaranteed sentence) after he was convicted contradicts his testimony that he would have accepted a ten-year deal (and, for that matter, the twenty-year deal) prior to trial. Further, his position ignores a stark reality in criminal litigation. The government does not guarantee a reduced sentence before it knows the extent of a defendant's cooperation. That is simply not the way the process works. Osley v. United States, 751 F.3d 1214, 1223-24 (11th Cir. 2014) (finding that a petitioner's "unwillingness to accept a plea that offered the prospect of spending fewer than five years in prison utterly undercuts his claim that he

would have accepted a deal that involved a fifteen-year mandatory minimum, yielding a term of imprisonment at least three times as large.").

In Osley, we found that a defendant failed to establish prejudice despite his argument that he would have pleaded guilty if his attorney had correctly informed him of his sentencing exposure. Id. at 1221-23. Although we had "serious doubts" about Osley's counsel's performance, we concluded that he failed to establish a reasonable probability that he would have accepted a plea agreement had his counsel informed him of his sentencing exposure. Id. at 1223. Osley turned down a plea agreement that would have recommended a sentencing range of only 70 to 87 months. He was told that he might serve less time with good behavior or a government motion to reduce the sentence. Id. at 1221-23. The district court found that Osley's unwillingness to accept that offer "utterly undercut" his claim that he would have pleaded guilty if he had been aware of the fifteen-year mandatory minimum. We affirmed that finding. Id. at 1224.

The same is true here. The record evidence strongly indicates that, even if his counsel had presented Carmichael with a plea offer and explained his sentencing exposure, he still would have chosen to take his chances at trial. See Id. at 1223-24. Again, Carmichael refused to accept Feaga's offer to proffer for the chance of a reduced sentence, even after he had been tried and convicted by a jury. Similar to the situation presented in Osley, because Carmichael was unwilling to

accept a plea deal after he was convicted, incarcerated, and awaiting his sentencing, he cannot show that he would have accepted essentially the same deal prior to his conviction.

Carmichael's position that he would not proffer unless and until he was promised a guaranteed sentence simply ignores the realisms of how pleas and cooperation work in the real world. Plea negotiations represent a critical stage of criminal proceedings. The vast majority of cases result in a plea, so pleas are "not some adjunct to the criminal justice system; [they are] the criminal justice system." Frye, 566 U.S. at 143. And, at least in some cases, a cooperation provision is the cornerstone of the parties' plea agreement. As with any other contract, the parties must reach a meeting of the minds on this material part of their agreement. The government does not offer a deal to a defendant based on some metaphysical, undefined agreement to cooperate.

Before the government will commit to making a recommendation of a particular sentence, it must first understand what cooperation a defendant is willing and able to provide. For example, it must confirm that a defendant has assistance that he can provide that rises to a "substantial" level. See U.S. Sentencing Guidelines Manual § 5K1.1 (2018) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense the court may depart

from the guidelines."). Eventually, if a § 5K1.1 motion is filed, the sentencing court will be called upon to assess whether a defendant has in fact provided substantial assistance.[9] Id. The policy statement found at § 5K1.1 lists five factors the court may consider in determining the "appropriate reduction": (1) "the significance and usefulness of the defendant's assistance;" (2) "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;" (3) "the nature and extent of the defendant's assistance;" (4) "any injury suffered [or risk thereof] . . . resulting from his assistance;" and (5) "the timeliness of the defendant's assistance." Id. So, the process begins with the government taking steps to determine whether to present a deal to a defendant. And, at least part of that calculus involves the government seeking to ensure that a defendant is actually willing and able to cooperate to a level that qualifies for a § 5K1.1 departure.

All of this demonstrates a fundamental truism: a defendant cannot just volunteer to cooperate. He must first (among other things) disclose to the prosecution what information he actually has. That disclosure is typically done in a proffer session. "The term 'proffer session' is generally applied to those interviews

[9] To be clear, in Wade v. United States, the Supreme Court held that sentencing courts may make a substantial assistance departure only on a motion by the government and that courts may review the government's refusal to bring a substantial assistance motion only if the government's refusal is based on a constitutionally impermissible motive. 504 U.S. 181, 184-86 (1992).

in which a defendant submits to questioning by prosecutors in the hope of receiving a benefit from the government, such as a decision to offer a defendant a cooperation agreement . . . ." U.S. v. Chaparro, 181 F. Supp. 2d 323, 326 n.2 (S.D.N.Y. 2002). Usually, before such a session even commences, a defendant will be required to sign a proffer agreement,[10] in which he agrees to truthfully furnish the government with helpful information and answer its questions. The information provided by a defendant in a proffer session allows the government to make appropriate prosecutorial decisions, including whether to make a plea offer, and, if so, what offer to make. If a proffering defendant does not have useful information, or if the government concludes that he is unwilling or unable to provide truthful information, there will be no plea offer based upon cooperation. The point is as tautological as it is true: before a defendant proffers, the government cannot possibly determine whether it will offer a plea deal, much less what sentence it will recommend to the sentencing court based upon his cooperation.

To be clear, the proffer session is a gateway into (not the capstone of) the parties' cooperation discussions. At the end of the proffer session, the government may have a better idea about whether it will continue to explore a plea deal with a defendant. But, even at that point, it will not always know whether it will actually offer a plea deal and what the precise terms of any deal may be. Any § 5K1.1

[10] See Kastigar v. United States, 406 U.S. 441 (1972).

motion for departure must be filed with the sentencing court and the government must be in a position to explain to the court the basis for the motion. A number of factors may inform the government's judgment about whether to file a motion for a departure, including: What information has been provided and to whom does it relate? Is the cooperating defendant truthful? Is he credible? Does he appear to have a good memory? Can the information he has provided be authenticated? Is it actionable and useful? Does the defendant have personal knowledge about the information and is he otherwise competent to testify about it? Is the information outdated (i.e., is it stale; has it already been supplied to the government)? Does the information relate to an individual who committed a federal offense (and, if not, is the information of such value to justify a departure for cooperation related to a state offense)? Is the defendant willing to interact with the targets of an investigation (e.g., make calls, meet, or wear a wire)? Will the defendant actually be able to do what he has agreed to do? Will he truthfully testify at a hearing and at trial?[11] So, even if Carmichael had been willing to proffer, and even if he had actually done so, there are a number of considerations that would affect whether he received a sentencing departure and the scope of any such departure.

[11] In some cases, the parties or the government request a continuance of the sentencing hearing so that the defendant will have the opportunity to perform tasks like this in order to complete the process of cooperation.

A major takeaway from all of this is that even a basic understanding of the cooperation process makes clear that Carmichael cannot simply incant that he would have been willing to cooperate and enter a guilty plea in order to receive ten years. The reality is that, even if he had been willing to proffer (and, to be clear, he was unwilling to do so, absent a guarantee on the front end), there is nothing to suggest that his participation in a proffer session would have successfully convinced the government to offer him a particular cooperation deal.

Carmichael's position on this issue is a non-starter. He was unwilling to sit for a proffer (even after his conviction) unless he was guaranteed a specific sentence. It follows that he is in no position to say that he could have offered such substantial assistance—much less "super cooperation"—to qualify for a certain sentencing recommendation. On this record, Carmichael has fallen far short of showing a reasonable probability that, but for counsels' unprofessional errors, he would have earned a ten-year deal.[12]

[12] Further, Carmichael's claim that he would have taken the ten-year deal (or, for that matter, the twenty-year deal) is partially undercut by his repeated claims of innocence. Osley, 751 F.3d at 1224 (noting that although a petitioner's "denial of guilt surely is not dispositive on the question of whether he would have accepted the government's plea offer, it is nonetheless a relevant consideration.") (citations omitted). We understand that criminal defendants sometimes (if not often) claim innocence and at the same time wish to explore a plea deal. But, Carmichael's repeated insistence that he was innocent certainly does not aid him in establishing a claim that he would have taken any deal offered by the government.

B. The Twenty-Year Proposal

The district court noted that "[r]egarding the [twenty]-year proposal, Carmichael's failure to show prejudice is starker." The twenty-year proposal contemplated that Carmichael would not have been required to provide super cooperation. Rather, he was merely required to provide substantial assistance, i.e., "useful information."

Carmichael claims he would have accepted the twenty-year offer if he knew he was facing 360-months to life in prison. But, aside from his own conclusory statements and self-serving protestations at the evidentiary hearing, Carmichael did not offer any testimony or evidence indicating that he would have actually accepted an offer that required him to serve a twenty-year sentence. Again, there are strong indications in the record that he would not have.

At the evidentiary hearing, Feaga testified that, even after Carmichael was found guilty and he (Feaga) apprised Carmichael of the serious sentence he was facing, Carmichael did not accept the twenty-year proposal when it was offered. Instead, Carmichael told Feaga that he would take his chances on appeal. After his meeting with Feaga, and while thinking about whether he should have accepted Feaga's offer, Carmichael may have had second thoughts. He asked three of his attorneys whether he should have accepted the twenty-year proposal. James and Jenkins agreed with his decision to reject the proposal for varying reasons (his age

and the view that Judge Thompson would not likely impose a sentence greater than twenty-years in any event).[13] They confirmed Carmichael's inclination, and what he actually told Feaga—that he should take his chances on appeal. Chartoff was the only lawyer to advise Carmichael to accept Feaga's proposal. After hearing from his lawyers, Carmichael again (at least initially) stayed the course. He made no effort to accept or discuss the offer. Instead, he waited over two months, and then apparently had third thoughts. Only then did he ask Chartoff to help him hire yet another attorney to negotiate a deal with Feaga. By that time, though, it was too late: the twenty-year deal had been pulled off the table.

Based on these facts, we are hard-pressed to conclude the district court erred in finding that Carmichael would not have taken a twenty-year deal before he was convicted, even if he had been fully informed about his potential guideline range.

C. Carmichael's Belated Assertion of Post-Trial Ineffective Assistance

To be clear, our inquiry today is limited to the issue of prejudice regarding Carmichael's counsels' pre-trial performance. The district court clearly found that counsels' performance post-trial was not deficient, and thus, did not reach Strickland's prejudice prong on this issue. Additionally, Carmichael did not raise

[13] Carmichael's counsel argues that James and Jenkins advised Carmichael to reject the plea deal and that their advice was constitutionally deficient. But we think a better interpretation of the record evidence is that Carmichael rejected the Feaga offer, and sought advice after the fact from his counsel about whether he had made the right decision.

this issue on appeal in his briefing. United States v. Wright, 607 F.3d 708, 713 (11th Cir. 2010) (reiterating the long standing rule that "issues not raised in the initial appellate brief are deemed abandoned on appeal."). Despite that failure, at oral argument Carmichael's counsel pressed the claim that there was post-trial ineffective assistance. In response, the government made it clear it does not concede any such error and further pointed out that the record does not support it. We agree.

The only ineffective assistance that Carmichael's attorney contends occurred after the trial was Carmichael's counsels' advice to decline Feaga's twenty-year offer.[14] This offer occurred during a conversation between Carmichael and Feaga at the Elmore County Jail. During the conversation, Feaga suggested that, with cooperation, Carmichael might limit his sentence to twenty-years. When Carmichael asked his attorneys for advice, James and Jenkins advised Carmichael not to take the deal. The district court explicitly found that "[t]here is no evidence

[14] For the sake of clarity, we note that there were two post-trial conversations regarding potential plea offers. The first conversation took place between Carmichael, James, Feaga, and Franklin on the Monday after the jury returned its verdict. At this meeting, Franklin suggested that the prosecution might work out a deal limiting Carmichael's sentence to twenty-years, if Carmichael cooperated. But Carmichael demanded a guaranteed sentence before he cooperated with the government. Franklin explained to Carmichael, "that's just not the way it works." We think it is crystal clear that the district court found that Carmichael himself rejected the government's offer to enter into an agreement that would limit his sentence to twenty-years. The district court did not find that Carmichael's counsels' performance, in this respect, was deficient in any way. The second conversation occurred when Carmichael met alone with Feaga at the Elmore County Jail and is detailed above. There, Carmichael told Feaga he would take his chances on appeal.

that the advice of James and Jenkins to reject the twenty-year post-verdict offer was objectively unreasonable." Specifically, the district court found:

> James and Jenkins were wrong in their advice that the twenty-year offer was not in Carmichael's best interest. But it is difficult to gainsay the advice. No evidence was presented establishing that counsel's prediction of a sentence was unreasonable. Nor was there evidence why counsel believed Carmichael had a chance to prevail on appeal.

We agree. For the reasons we have already discussed, Carmichael cannot show that any post-trial conduct of his lawyers was ineffective. Again, Feaga's proposal was made directly to Carmichael; Carmichael required a commitment to a particular sentence before he would proffer; and absent that, Carmichael was willing to take his chances at sentencing. The fact that two of his three lawyers agreed with his decision does not render their advice unreasonable. So, even if Carmichael had preserved this argument in his briefing, it fails on the merits.

D. Carmichael's Argument that the District Court Failed to Examine the Totality of Counsels' Deficient Performance

Finally, Carmichael argues that had the district court considered the totality of the circumstances, it would have found that his lawyers' performance prejudiced him. In support, he notes that his counsel failed to notify him of plea discussions, never advised him of his guideline range, did not pursue plea negotiations prior to trial, and were woefully unprepared for trial. He contends that when each of these failures is combined with the fact that his lawyers did not inform him of the

government's ten/twenty-year proposal, the district court should have found there is a reasonable probability that he would have accepted the government's offer. First, we are not convinced that the district court failed to consider each of these facts. Second, these were not the only facts before the district court when it made its findings, and those are not the only facts in the record before us.

The district court also assessed, among other things: Carmichael's repeated claims of innocence; Carmichael's refusal to proffer without a promise of a guaranteed sentence; Carmichael's failure to present evidence that he could have (or would have) provided super cooperation; and Carmichael's failure to accept a twenty-year offer even after he was apprised of his sentencing exposure. Thus, while the district court did not expressly reference the phrase "totality of the circumstances," we are confident that the court considered all of these circumstances, made the correct findings,[15] and reached the correct conclusion.

IV. Conclusion

After careful review, we conclude the district court did not err in concluding that Carmichael has not shown he was prejudiced by his counsels' failures. Because Carmichael has failed to establish that, but for counsels' unprofessional errors, the result of his criminal proceedings would have been different, we affirm.

[15] At oral argument, Carmichael's counsel conceded that there is no claim in this case that any of the district court's findings were clearly erroneous. See Fed. R. Civ. P. 52(a).

AFFIRMED.

Appendix "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LEON CARMICHAEL, SR.,
Petitioner,

v. **Case No: 2:10-cv-1106-JA-WC**

UNITED STATES OF AMERICA,
Respondent.

ORDER

On June 17, 2005, following an eleven-day trial, a jury found Petitioner Leon Carmichael, Sr. guilty of (1) conspiracy to possess with intent to distribute 7000 pounds of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and (2) conspiracy to launder the proceeds of the conspiracy, in violation of 18 U.S.C. § 1956(h). After exhausting his appellate remedies challenging the conviction and sentence, Carmichael filed a *pro se* motion seeking relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The district court denied the § 2255 motion, but the Eleventh Circuit Court of Appeals reversed and remanded, finding that Carmichael alleged facts that, if true, would establish he did not receive effective assistance of counsel. In accordance with directions from the Eleventh Circuit, this court conducted an evidentiary hearing on Carmichael's claims. The evidence presented at that hearing confirms that the representation lawyers provided Carmichael fell below the standard guaranteed by the Sixth Amendment. But the evidence does not establish that Carmichael was prejudiced as a result of deficient representation, and thus his § 2255 petition must be denied.

I. PROCEDURAL HISTORY

The almost fourteen-year history of this case began on November 19, 2003, when

a grand jury returned an indictment against Carmichael charging him with possession with intent to distribute 100 kilograms or more of marijuana. Three superseding indictments followed. On August 17, 2004, the grand jury returned the third and last superseding indictment, charging Carmichael with conspiracy to possess with intent to distribute over 3000 kilograms of marijuana and conspiracy to commit money laundering. The Third Superseding Indictment included allegations supporting the Government's intention to forfeit Carmichael's personal and real property, including an entertainment venue known as the Carmichael Center. The final indictment also put Carmichael on notice that the Government would seek sentencing enhancements under the United States Sentencing Guidelines because Carmichael was an organizer and leader of the criminal activity (U.S.S.G. § 3B1.1(a)), used a person under the age of eighteen to commit the offense and assist in avoiding detection (U.S.S.G. § 3B1.4), recklessly created substantial risk of death or serious injury to another (U.S.S.G. § 3C1.2), and possessed firearms during the commission of the charged crimes (U.S.S.G. § 2D1.1(b)(1)).[1] At arraignment, the magistrate judge explained to Carmichael that, if convicted, he could be sentenced to life in prison.

The case proceeded to trial on June 6, 2005, and on June 17, 2005, the jury returned verdicts of guilty on both conspiracy charges. Three days later, Carmichael consented to the forfeiture of property, including the Carmichael Center. On March 28, 2007, the district judge sentenced Carmichael to 480 months in prison for the marijuana-distribution conspiracy conviction and 280 months for the money-laundering conspiracy conviction, to

[1] The grand jury returned the Third Superseding Indictment before the Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005).

be served concurrently. Carmichael appealed, and the Eleventh Circuit Court of Appeals affirmed the conviction and sentence, *United States v. Carmichael*, 560 F.3d 1270 (11th Cir. 2009), and denied his petition for rehearing, *United States v. Carmichael*, 347 F. App'x 556 (11th Cir. 2009). On January 11, 2010, the United States Supreme Court denied Carmichael's petition for writ of certiorari. *Carmichael v. United States*, 558 U.S. 1128, 130 (2010).

Carmichael timely filed his motion seeking relief under 28 U.S.C. § 2255 on December 30, 2010. (Doc. 1). In his § 2255 motion, Carmichael included a lengthy list of grievances against his many lawyers, claiming they failed to provide effective assistance. On April 22, 2014, the magistrate judge entered a thorough 104-page report and recommendation methodically addressing each of Carmichael's claims. (Doc. 132). Without the benefit of an evidentiary hearing, the magistrate judge recommended that Carmichael's § 2255 motion be denied with prejudice. On June 5, 2014, the district court adopted the findings of fact and conclusions of law made by the magistrate judge and denied Carmichael's § 2255 motion. (Docs. 144, 145).

But on August 30, 2016, the Eleventh Circuit Court of Appeals reversed the district court's denial of Carmichael's § 2255 motion and remanded for an evidentiary hearing on certain of Carmichael's claims that his lawyers failed to provide him with effective assistance of counsel. (Doc. 166); *see Carmichael v. United States*, 659 F. App'x 1013 (11th Cir. 2016). Specifically, Carmichael claimed that, when he was deciding whether to plead guilty or risk a conviction at trial, his lawyers failed to (1) "explain the weight and extent of the Government's evidence," (2) "advise him of the applicable sentence if he was convicted," (3) "pursue plea negotiations," and (4) "convey plea offers from the

Government." *Carmichael*, 659 F. App'x at 1014. In reversing, the Circuit Court determined that Carmichael alleged sufficient facts that—if proven true—would "establish both deficient performance and prejudice in the context of plea negotiations." *Id.* at 1020. This court appointed counsel for Carmichael and on February 21, 2017, conducted an evidentiary hearing on the issues outlined by the Eleventh Circuit.[2]

II. TESTIMONY AT EVIDENTIARY HEARING

The purpose of an evidentiary hearing is for the trier of fact—in this case the judge—to assess the credibility of witnesses and the weight of the evidence. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1988). Carmichael testified on his own behalf and called as witnesses two of the lawyers who represented him at trial—Marion Chartoff and Susan James. The Government presented the testimony of three witnesses—Assistant United States Attorneys Stephen Feaga and Clark Morris, and Louis Franklin, Chief of the Criminal Division of the United States Attorney's Office. The following summary of the evidence is based on that testimony.

A. Carmichael's lawyers

From the time the grand jury returned the initial indictment until the Eleventh Circuit affirmed Mr. Carmichael's conviction and sentence, he was represented by at least 12 lawyers.[3] The record does not disclose the role all the lawyers played. Some participated in the trial, some filed motions, and some filed notices of appearance but are not otherwise described as taking an active role in Carmichael's defense. Carmichael hired one lawyer

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[2] On April 5, 6, and 10, 2017, counsel for Carmichael and the Government submitted their final arguments in writing. (Docs. 213, 214, 219, and 220). The Government's brief at Doc. 214 was amended, with permission, at Doc. 220.

[3] He paid these lawyers well over $500,000, including $300,000 to his appellate lawyer.

to handle a *Batson*[4] motion and another as an expert on the sentencing guidelines. And he hired still other lawyers to handle post-trial matters.

Until the appeal of his conviction, two loosely connected groups of lawyers defended Carmichael. Stephen Glassroth, a lawyer practicing in Montgomery, was initially lead counsel for a team he put together. The membership of that first team frequently changed. Ron Wise and Bruce Maddox[5] joined Glassroth in November 2003, and Mary Anthony joined the team in March 2004.

Glassroth persuaded Carmichael to hire Lisa Wayne, a high-profile lawyer from Denver, Colorado, to assist him, and in July 2004, Wayne joined the team. By that time, Maddox had withdrawn, and Wise and Anthony withdrew soon after. In October 2004, Glassroth hired Marion Chartoff[6] to be his ghost writer to do research and draft motions. Chartoff, a young and inexperienced lawyer, remained on the case through Carmichael's sentencing. By November 2004, the first trial team included Glassroth, Wayne, and Chartoff. Carmichael urged Glassroth to bring Susan James, another Montgomery lawyer, onto the team, but Glassroth refused.[7]

The defense got off to a disastrous start. Glassroth suggested that Carmichael

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[4] *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a defendant can establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial).

[5] The record is unclear as to the roles of Wise and Maddox, and at one point it suggests that Wise was the final hired lawyer.

[6] At the time of her involvement with this case, Marion Chartoff was an inexperienced lawyer, but because she was conscientious and understood a lawyer's duty to her client, she was embarrassed about the performance of Carmichael's defense team. Although mistakes were made by members of that team, none is attributable to Chartoff.

[7] Attorney Wesley Pitters, a personal friend of Carmichael, filed a notice of appearance when Carmichael was indicted, but he withdrew a few months later and was never a part of the Glassroth defense team.

create a website identifying the DEA undercover agent who made the case and to describe him as dishonest. In November 2004, Glassroth withdrew from the case. The circumstances surrounding Glassroth's withdrawal were not described in detail during the evidentiary hearing, but it is clear that Glassroth was under threat of indictment because of his involvement in creating the website, the contents of which undermined Carmichael's defense. It is also clear that Glassroth's conduct raised ethical and legal concerns that led to a hearing before the district court followed by Glassroth's withdrawal from the case and departure from the state. Glassroth was eventually disbarred, but no evidence was submitted showing that his disbarment resulted from conduct in this case. Until the time of Glassroth's withdrawal, the theory of defense was that a rogue DEA agent unfairly targeted Carmichael. At its inception, Glassroth was confident this was a winning strategy.

After Glassroth's withdrawal, Carmichael followed through on his desire to hire Susan James, an experienced Alabama criminal defense lawyer, to work with Wayne and Chartoff. Carmichael also hired Ronald Brunson to defend him on the money laundering charge. These four lawyers comprised the second trial team. Although this team never formulated a theory of defense, it abandoned the "rogue DEA defense." Following the advice of his own criminal defense lawyer, Glassroth provided no further input into Carmichael's case.

As a condition of agreeing to stay on the case after Glassroth's withdrawal, Wayne insisted on being lead counsel. She made it clear that she would not take directions from James. Chartoff described the defense team under Wayne's leadership as "a disaster," "dysfunctional"—"a rudderless ship." Those descriptions are on the mark. It was a team in name only. At one point, Wayne sent a memo to other team members suggesting they

divide responsibilities, but there is no evidence of follow-up communications after this memo was sent or in-person meetings with team members.[8] According to Chartoff, Wayne and James refused to work together, and each complained to Chartoff about the other. Wayne overruled suggestions made by James, causing James to become visibly upset. The other lawyers certainly considered Wayne to be lead counsel, waiting for her decisions and acquiescing to her rejections of their suggestions. But despite her role as lead counsel, Wayne did little on her own to prepare, and she failed to direct the other lawyers.

The lawyers on Carmichael's team never had a meeting to discuss strategy, and they did not discuss how witnesses would be handled. Wayne did not talk to the other lawyers about anticipated evidentiary issues, and she did not delegate assignments to other team members. Wayne repeatedly promised Chartoff, who was concerned about the defense team's lack of preparation, that she would come to Montgomery to work on the case when she was free of her responsibilities in other cases, but she kept putting off the visit. Eventually, Chartoff sent Carmichael's file to Wayne in Denver, but Chartoff does not recall whether she did so in response to a request from Wayne or on her own initiative.

Carmichael testified that he met with Wayne three times: in April or May 2004, a few months before he hired her, when she came to Montgomery to talk to him at Glassroth's behest; in November 2004, when Glassroth withdrew from the case; and, finally, when Wayne appeared for trial in June 2005. Carmichael complained that Wayne did not want to talk with him on the telephone and that when he called Wayne, she would advise him to

[8] At least some of the lawyers met with Carmichael's investigator, a retired 25-year veteran of the FBI, just before the trial began. Wayne rejected the investigator's suggestion of impeaching a witness expected to testify about the amount of money found in Carmichael's possession by showing that the bills would not fit in the container the witness described.

speak to James. When Carmichael asked James questions, she referred him to Wayne, reminding him that Wayne was lead counsel. As the trial drew near, Carmichael called Chartoff expressing concern that his lawyers were not prepared and asking her what to do.

Wayne finally arrived in Montgomery the weekend before the trial began. The little time available was spent bringing Wayne up to speed on the status of the trial and speaking to the recently hired investigator. Other than Brunson's handling of the money laundering charge, the roles of the team members were not discussed until that weekend. Leading up to Carmichael's trial, Wayne was involved in a high-profile rape trial and her own divorce case in Colorado. It is Chartoff's opinion that Wayne "did not focus on this case at all." Because of the failure to prepare and tensions between Wayne and James, Carmichael's case proceeded to trial with a team of lawyers who were unprepared, did not coordinate with one another, and had no cohesive theory of defense.

Once the jury returned its verdict, Wayne left the courtroom and had no further involvement with the case. With the benefit of hindsight, James wishes she had asked Carmichael to let her handle his defense.

B. Counsel's advice to Carmichael regarding evidence and possible sentence

Carmichael's main argument at the evidentiary hearing was that his attorneys failed to pursue plea negotiations and failed to communicate to him specific plea offers made by the Government. In its opinion, however, the Eleventh Circuit listed other claims bearing on the reasonableness of counsel's conduct and how that conduct affected Carmichael's decision whether to enter a guilty plea or proceed to trial. Those claims were that his counsel "failed to explain the weight and extent of the Government's evidence, advise him of the applicable sentence if he was convicted, pursue plea negotiations, and convey plea

offers from the Government." *Carmichael v. United States*, 659 F. App'x 1013, 1014 (11th Cir. 2016).

1. Failure to advise of Government's evidence

Carmichael claims that his counsel never told him what evidence the Government would likely present at trial. But James testified that she took it upon herself to search for information that could be used to impeach Government witnesses and that she frequently updated Carmichael on her investigation and discussed with him what testimony the witnesses would likely give. Early on, Glassroth conducted a mock trial, but there is no evidence how long the mock trial lasted, what evidence the mock jury heard, or even what issues were tried.

2. Failure to advise of applicable sentence

Carmichael also maintains that when the trial began he did not know he would likely face a life sentence if convicted. He had never been charged with a federal crime and was ignorant of the federal sentencing guidelines, yet none of his lawyers explained the implications of the guidelines. None of Carmichael's lawyers requested that the probation office prepare a preliminary assessment or explained to Carmichael the significance of the enhancing factors. Each time Carmichael was arraigned on the four consecutive indictments, the magistrate judge advised him of the applicable minimum and maximum sentences. Carmichael remembers that when he was arraigned on the crimes of conviction, the magistrate judge told him the charges carried a possible life sentence and a minimum sentence of ten years. But it was not until after the jury returned its verdict that Carmichael's lawyers counseled him as to what sentence he would likely receive.

Neither Glassroth nor Wayne testified at the evidentiary hearing, but Chartoff and James did. Chartoff denied discussing with Carmichael the guidelines or his likely

sentence. James explained that it was her custom to discuss sentencing with her clients, but she came into this case late and assumed that Glassroth and Wayne had gone over sentencing possibilities, so she did not discuss sentencing issues with Carmichael until after the verdict. At that point, Carmichael hired a lawyer from Washington, D.C. specializing in sentencing.

3. Failure to pursue plea offer

Carmichael never admitted guilt to his attorneys, but early in the proceedings he asked Glassroth about the possibility of entering a plea. Glassroth responded that he did not want to discuss a plea with the Government until discovery was complete. Carmichael did not hear back from Glassroth about a plea before Glassroth withdrew from the case. Once Wayne took over as lead counsel, Carmichael asked her to try to settle the case. Wayne responded that she would pursue a settlement when she came to Montgomery, but she did not come until just before trial, and there is no evidence she ever pursued a plea agreement.

4. Failure to convey plea offers from the Government

Assistant United States Attorney Stephen Feaga joined the Government's trial team four to six weeks before the trial began. At that time, his understanding was that plea negotiations had taken place but were unfruitful. Feaga believed that proposals by the Government included a requirement that Carmichael enter a guilty plea, forfeit the Carmichael Center, and provide assistance to the Government in return for a sentence of not more than twenty years. The parties to this conversation were not identified. Feaga understood that one of Carmichael's lawyers earlier rejected that proposal, but he did not identify the lawyer. Neither James nor Chartoff referenced this proposal, and Carmichael denies knowing of it. On cross-examination, Feaga conceded that he had no specific

knowledge that an offer had been conveyed to Carmichael.

As the trial date approached, James and Feaga had a telephone conversation about the upcoming trial. Feaga recalled that the conversation took place weeks before the trial began, but James recalled it being just days before the trial. The conversation included references to a possible plea agreement. As James recalls, after other issues were discussed, Feaga asked about the possibility of a plea with Carmichael receiving a sentence of ten years and forfeiture of the Carmichael Center. James responded that Carmichael might plea with the understanding that he would receive a five-year sentence. James referred to this suggestion as a "Hail Mary" offer. Feaga told James he would "run that up the flagpole," meaning he would see if his superiors would approve.

Feaga had a slightly different recollection of the telephone call. He remembers that discussion of a possible plea began with a reference to the earlier offer. According to Feaga, it was James who broached the possibility of a plea agreement by telling him that Carmichael might agree to plead guilty if the Government would "work his sentence down to five years." Clark Morris, then an Assistant United States Attorney, was with Feaga when he received the telephone call from James and heard the conversation on speaker phone. Feaga told James he doubted the Government would agree to the five-year sentence but that he would convey the proposal to his superiors. He then discussed James's offer with Leura Canary, the United States Attorney. Canary rejected the proposal "out of hand" but authorized Feaga to deliver a counter-proposal to James.

After his meeting with Canary, Feaga told James that if Carmichael entered a guilty plea, forfeited the Carmichael Center, and provided "super cooperation," Carmichael might get his sentence down to ten years. By "super cooperation," Feaga meant delivery of

information and testimony that led to the successful prosecution of others. Alternatively, Carmichael could receive a twenty-year sentence by entering a guilty plea and merely providing the Government truthful information. There was no guarantee of a ten-year sentence, even with "super cooperation."

On the important question of whether James conveyed Feaga's proposal to Carmichael, James's testimony was equivocal. She has no specific recollection whether she advised Carmichael of the proposal or told other members of the defense team about it. In an affidavit (Doc. 51) that she prepared earlier, James said, "I think [Feaga's proposal] was mentioned to Carmichael." But after reviewing her notes in preparation for the evidentiary hearing, she now thinks she did not tell Carmichael about the proposal, though it is her normal practice to pass plea offers on to her clients. While she has other relevant notes, she has none memorializing a conversation with Carmichael about the proposal. She now believes that because Carmichael adamantly resisted forfeiture of the Carmichael Center, she "might have consciously just kind of blown [the proposal] off."[9] Feaga testified that in a phone call sometime before trial, James told him Carmichael had rejected the ten-year "super cooperation" proposal, but Feaga did not recall James telling him Carmichael's reasons for rejecting it.

Morris and Franklin also understood that Carmichael rejected the proposal. Franklin also explained that before firming up a plea agreement limiting Carmichael's sentence, Carmichael would be required to proffer information he had so that the Government could evaluate the information. Only then could the Government make a representation as to

[9] James testified that she may have "consciously blown [the proposal] off," but it seems she meant that she subconsciously blew it off.

how Carmichael's assistance might affect his sentence. Defense counsel did not communicate Carmichael's willingness to proffer.

Carmichael testified that if he had known of an offer to enter into an agreement providing that his sentence would be limited to ten years and that he would be required to forfeit the Carmichael Center, he would have accepted such an offer. He did not state, however, that he would have been able or willing to provide substantial assistance to the Government. Nor did he state that he would have accepted the offer that limited his sentence to twenty years.

At the evidentiary hearing, the Government challenged Carmichael's testimony that he would have been willing to enter a guilty plea as inconsistent with his previous assertions that the Government's charges against him were unfounded. Carmichael explained that his reluctance to enter a plea had to do with the quantities of marijuana he was accused of possessing.

C. Negotiations for sentence during trial

From time to time, Carmichael referred to having overheard a comment of counsel that led him to conclude that during the trial, the Government made a plea offer to him through his lawyers. There is no evidence to support this conclusion.

D. Post-trial sentencing negotiations

The Monday after the jury returned its verdict, Carmichael and James came to the courthouse for a forfeiture hearing. The hearing did not take place, however, because Carmichael agreed to forfeit the Carmichael Center along with 365 acres with the understanding that his family could keep its home. While in an attorney-client conference room, Carmichael and James met with Feaga and Franklin. At that meeting, Carmichael believes James said something like "can we get the five years we talked about?" This

was the first Carmichael had heard of plea negotiations.[10] Carmichael testified that Feaga's response was that ten years was possible.

James does not recall either Feaga or Franklin making a firm offer at that meeting, but she specifically remembers Franklin saying that "ten years or less is not going to happen." But Franklin did think that Carmichael had information that would be useful to the Government, and Franklin was willing to consider an agreement limiting Carmichael's sentence to twenty years if Carmichael was willing to provide substantial assistance. Carmichael did not embrace the suggestion because he wanted an assurance of a sentence before he would give the Government information. In response to Carmichael's request for an assured sentence, Franklin explained that "that's just not the way it works."

Carmichael remembers things slightly differently. He recalled that Feaga said that he would ask Canary whether she would approve a ten-year sentence. He also recalls that James later called him to say that Canary rejected the proposal.

James continued to talk to Feaga and Franklin about the possibility of limiting Carmichael's sentence, but the Government made no offers. Feaga later met with Carmichael at the Elmore County Jail, where Carmichael was in custody pending sentencing. Carmichael testified that Feaga requested the one-on-one meeting, but this is inconsistent with the testimony of James and Feaga, who testified that it was Carmichael who requested the meeting. Feaga remembers James calling him to tell him that Carmichael wanted to talk to him alone and agreeing that he could do so outside her presence. After getting Franklin's permission, Feaga agreed to meet with Carmichael at

[10] Carmichael recalls hearing a lawyer say something about a settlement while the jury was deliberating, but his recollection is vague and there is no other evidence establishing what was said.

the jail. Before the meeting took place, James told Carmichael that the Government might go along with a twenty-year sentence, but she suggested to Carmichael that at his age, a twenty-year sentence was not a good deal and she did not believe the judge would sentence him to over twenty years in any event.

The conversation at the jail began with Carmichael saying he wanted to revisit the ten-year pretrial offer. Feaga understood that Carmichael was referring to the pretrial proposal and explained that things had changed since that proposal was made—there had been a public trial and Carmichael could no longer provide "super cooperation." Nonetheless, at this point—not earlier—Feaga told Carmichael he would relay the offer to his superiors, although he was sure it would be rejected. But Feaga did offer Carmichael some hope. He said that if Carmichael made a proffer of what information he could provide and the DEA recommended a twenty-year sentence, Carmichael might "work" the sentence down to twenty years. Feaga went on to explain that even though the Government would not agree to a sentence of ten years, it was possible that a DEA agent would "fall in love" with Carmichael if he cooperated and would recommend less prison time. Feaga explained that it was "worth a shot" because he did not think Carmichael would succeed on appeal and without cooperation he would likely spend the rest of his life in prison. Carmichael told Feaga he would be nearly seventy years old at the end of a twenty-year sentence. Feaga responded by telling Carmichael it would be better to be seventy and getting out than to be seventy and know you are never getting out.

At no time during their one-on-one conversation at the jail did Carmichael complain to Feaga that James had failed to mention the pretrial ten-year proposal—information that would have been significantly relevant to the Government in considering

a post-verdict plea agreement.

According to Carmichael, it was during his conversation with Feaga at the jail that he first understood he might be sentenced to more than twenty years in prison. Only when he received the Presentence Report did Carmichael understand that he fell in a 360-month to life guideline range. Carmichael later consulted his appellate lawyer, Jim Jenkins, about Feaga's suggestion. Like James, Jenkins advised Carmichael that, given his age, he should decline and take his chances on appeal.[11] Not satisfied with what he heard from James and Jenkins, Carmichael called Chartoff to get her opinion. Chartoff suggested that Jenkins might be conflicted by the large fee he was charging to handle the appeal. Chartoff suggested that Carmichael consider the twenty-year offer. Upon receiving that advice, Carmichael asked Chartoff if she knew a lawyer who could negotiate with the Government. Chartoff recommended Florida lawyer Michael Ufferman. Later, Ufferman traveled to Montgomery to speak with Feaga, but by then the Government had withdrawn the offer.

At the evidentiary hearing, Carmichael offered no testimony on his willingness to provide substantial assistance. There was no description of what information the Government would demand. And there was no mention of a proffer.

III. LAW

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments under 28 U.S.C. § 2255 are limited. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded the court's jurisdiction, (3) exceeded

[11] No evidence was presented at the evidentiary hearing as to the merits of Carmichael's issues on appeal.

the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255; *United States v. Phillips*, 225 F.3d 1198, 1199 (11th Cir. 2000); *United States v. Walker*, 198 F.3d 811, 813 n.5 (11th Cir. 1999). "Relief under 28 U.S.C. § 2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted).

A convicted person seeking relief on the ground of ineffective assistance of counsel must show: (1) that counsel's performance fell below the objective standard of reasonableness, and (2) that there is a reasonable probability that but for counsel's unreasonable performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88 & 694 (1984); *see Chandler v. United States*, 218 F.3d 1305, 1312–13 (11th Cir. 2000) (en banc). The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel in all critical stages of the process, including the negotiation of plea agreements. *See Missouri v. Frye*, 566 U.S. 133, 140 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012).

A. Performance prong

Objectively unreasonable practice is that practice that is "outside the wide range of professionally competent assistance." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 928 (11th Cir. 2011). This high standard is made even more difficult to meet because it entails a defendant overcoming a strong presumption that counsel's performance was reasonable. *Jennings v. McDonough*, 470 F.3d 1230, 1243 (11th Cir. 2007); *see Carmichael*, 659 F. App'x at 1020. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed

as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In the end, a defendant must show that "no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.3d at 1315.

In *Missouri v. Frye*, 566 U.S. 133 (2012), the Supreme Court explained that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* at 145. A formal offer is one with sufficient terms and processing that it "can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations." *Id.* at 146. And a lawyer's failure to advise her client of a formal offer—allowing the offer to lapse before the client has an opportunity to consider it—falls below an objectively reasonable standard of performance, satisfying the first prong of the *Strickland* test. *Id.* at 145.

Although the Supreme Court provided a general definition of the term in *Frye*, there appears to be no firm rule setting out the elements of a formal plea offer. Some courts have deemed reduction to writing an important factor in determining whether the prosecution has made a formal plea offer. *See, e.g., United States v. Petters*, 986 F. Supp. 2d 1077, 1082 (D. Minn. 2013) ("While no hard-and-fast rule exists, *Frye* made clear that the presence of a writing is a crucial fact when determining whether a formal plea offer has been tendered by the Government."); *Davidson v. United States*, No. 4:11CV1370, 2013 WL 1946206, at *5 (E.D. Mo. May 9, 2013) (finding no formal plea offer "in light of the absence of any documentation of this alleged deal"). Apart from the manner of documentation of a plea offer's terms, courts have also looked to the specificity of the terms discussed in assessing whether a formal plea offer has been made. *See Petters*, 986 F.

Supp. 2d at 1082 (finding no formal plea offer where defendant was charged with multiple counts of fraud, conspiracy, and money laundering when the only term discussed was a 30-year sentencing cap and there was no discussion of the charges to which the defendant would plead guilty, the factual basis for a plea, or restitution or forfeiture issues, which are frequently contentious subjects in fraud cases); *see also Merzbacher v. Shearin*, 706 F.3d 356, 369–70 (4th Cir. 2013) (where prosecution's offer "finalized only one leg of a putative plea agreement, the length of sentence[,] and did not finalize the other legs," no formal plea offer was made); *Fanaro v. Pineda*, No. 2:10–CV–1002, 2013 WL 6175620, at *5, *12 (S.D. Ohio Nov. 22, 2013) (Report & Recommendation of King, M.J.) (no formal plea offer from "very general" telephone conversation in which prosecutor offered four-year sentence and restitution in exchange for guilty plea, as the "offer was never reduced to writing and the parties never discussed which, if any, of the charges pending against Petitioner would be dismissed should Petitioner plead guilty and agree to a sentence of four years' imprisonment and an order of restitution in some unspecified amount"); *United States v. Waters*, Civ. A. No. 13–115, 2013 WL 3949092, at *8 (E.D. Pa. July 31, 2013) ("While we have been unable to find any authority defining the requisite elements of a formal plea offer, it is clear that an oral discussion of the sentencing range for a possible plea agreement that does not include an agreement on the charges to which the defendant will plead guilty and the facts that he will admit, does not constitute a formal plea offer.").

In any event, while the Court in *Frye* speaks specifically of formal plea offers, *Frye* did not foreclose the possibility of showing deficient performance by failure to communicate *informal* offers. The offer of a plea agreement in *Frye* was in writing and contained a fixed expiration date after which the offer was automatically withdrawn. Because the offer was

formal, the *Frye* Court did not discuss possible exceptions to the rule or the duty to communicate informal plea offers. *See* 566 U.S. at 146. Perhaps for the same reason, the Court did not more precisely define what constitutes a formal offer. But the words "plea bargaining," "plea negotiations," and "negotiation of a plea bargain" repeatedly occur in *Frye*, suggesting that the Court did not mean to limit its holding to strictly formal plea offers. Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650, 2662 (2013); *see, e.g.*, 566 U.S. at 140-41 & 143-51.

In *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998) (per curiam), which pre-dated *Lafler* and *Frye*, the Second Circuit rejected the distinction between formal and informal offers, holding that "whether the government . . . made a formal plea offer was irrelevant," and finding that the petitioner "was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial." *Id.* at 381. Furthermore, it is not always entirely clear what distinguishes a formal plea offer from an informal offer or a mere proposal for further negotiation. As the Supreme Court recognized in *Frye*, plea bargaining is, "by its nature, defined to a substantial degree by personal style," 566 U.S. at 145, and formalization of the plea bargaining process varies widely, *see id.* at 145–47 (citing different states' procedures for documenting plea offers). This broader view was embraced by the Eleventh Circuit in *Carmichael*, when it observed that "[a]lthough the Government's plea offers were informal, Carmichael's counsel had a continuing obligation to consult with Carmichael regarding important developments, including plea negotiations, in his case. Otherwise, such informal plea negotiations would be unlikely to turn into formal plea offers." *Carmichael*, 659 F. App'x at 1022 (citations omitted).

This interpretation is consistent with *Frye*, which did not relieve counsel of the duty to tell clients about informal offers. Of course, lawyers do indeed have such a duty, and failure to advise a defendant of an informal offer may constitute deficient performance. *See United States v. Polatis*, No. 2:10-CR-0364, 2013 WL 1149842, at *10 n.16 (D. Utah Mar. 19, 2013) ("Counsel can be constitutionally ineffective in the plea negotiation process if they fail to convey to the defendant the government's articulated willingness to resolve a case by negotiation or [the government's proposed] resolution to the case.").[12]

B. Prejudice prong

While the reasonableness of counsel's failure to deliver an offer to enter a plea will not necessarily turn on the formality of the offer, the details of the offer go to the heart of the prejudice prong and what, if any, remedy is appropriate. A defendant must show with reasonable probability that but for counsel's ineffectiveness:

> (1) the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

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[12] Some courts reject *Frye* claims of deficient performance based upon findings that no formal offer was made. *See Williams v. United States*, No. 2:08-CR-0112 (GZS), 2013 WL 2155390, at *4 (D. Me. May 17, 2013) ("When there is no formal offer on the table, this particular duty [for defense counsel to communicate formal offers, under *Frye*] does not arise."); *Gilchrist v. United States*, No. 08-1218, 2012 WL 4520469, at *19 (D. Md. Sept. 27, 2012) ("Petitioner clearly cannot establish the deficient performance prong under *Strickland* without showing that a formal plea offer was made."); *Silva v. United States*, No. 4:12-CV-0898 (DGK), 2013 WL 1628444, at *4 (W.D. Mo. Apr. 16, 2013) ("[T]he movant must prove that the alleged plea agreement was formally offered by the Government. In the present case, [defendant] has failed to demonstrate that the Government ever offered a binding plea agreement for 63 to 78 months imprisonment . . . ."(citation omitted)).

Carmichael, 659 F. App'x at 1022 (citing *Lafler*, 566 U.S. at 164); *see Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). Whether formal or informal, such an offer must be sufficiently detailed to establish these requirements.

To constitute an offer to enter a plea, a communication—written or oral—must contain more detail than merely the length of a proposed prison term. It must be sufficiently detailed to at least establish the terms of the proposed agreement. *See DeFilippo v. United States*, No. 09-CV-4153 NGG, 2013 WL 817196, at *6 (E.D.N.Y. Mar. 5, 2013) (citing *Lafler*, 566 U.S. at 163-65) (finding a formal offer is an important but not dispositive factor in determining prejudice in plea bargaining context); *United States v. Petters*, 986 F. Supp. 2d 1077, 1082 (D. Minn. 2013) ("In the absence of any discussion of the charges to which [the defendant] would acknowledge guilt, the factual basis for a plea, or restitution or forfeiture issues, the terms here were not sufficiently definite to constitute a 'formal plea offer.'").

IV. DISCUSSION/FINDINGS OF FACT

Carmichael alleged that his lawyers performed deficiently regarding his decision whether to enter a guilty plea. The Eleventh Circuit summarized these allegations as failure "to explain the weight and extent of the Government's evidence, advise him of the applicable sentence if he was convicted, pursue plea negotiations, and convey plea offers from the Government." *Carmichael*, 659 F. App'x at 1014. To the extent these allegations are supported by the evidence—and some are—the failures were not due to lack of skill but rather from lack of organization and coordination.

Members of the second trial team relied on the other members to do the work. James and Wayne did not communicate directly with one another; they strategized more

against one another than they did in attempting to formulate a coherent defense. James was at the mercy of Wayne, who demanded the role of lead counsel but failed to exercise direction. Chartoff understood the seriousness of the charges and her responsibility as one of Carmichael's lawyers, but she was inexperienced and was relying on Wayne for guidance. At the evidentiary hearing, little was said about Brunson, who apparently handled only the money laundering issue, and his performance is not a focus of Carmichael's claims regarding plea negotiations and the pretrial actions of his lawyers. Perhaps any one of Carmichael's lawyers working alone would have done a good job for Carmichael, but working together they did not.[13]

That said, the testimony of James and Chartoff was credible, as was the testimony of Feaga, Morris, and Franklin. There were several minor disparities in the testimony of these witnesses, but those differences were due to confusion or lapses in memory.

A. Failure to explain the weight and extent of the Government's evidence

The evidence does not support Carmichael's assertion that counsel failed to explain the weight and extent of the Government's evidence. Carmichael makes a broad assertion that he did not know what witnesses and evidence the Government would likely present at trial, but he fails to specifically identify evidence presented at trial that surprised him. And his assertion is in direct contradiction to that of James, who testified that she investigated the witnesses the Government intended to call and routinely discussed with Carmichael what they might say. Although Carmichael, in his testimony, rejected James's statement

[13] Then there is Glassroth. Glassroth's conduct was not a focus of the Eleventh Circuit's opinion in *Carmichael, see* 659 F. App'x 1013, and his conduct was not described in detail during the evidentiary hearing. Nonetheless, it is striking that Glassroth was engaged in conduct so egregious that it required him to withdraw from the case. At the very least it deprived Carmichael of counsel of his choice.

that she spoke with him almost daily, he did not deny that she frequently updated him on the evidence against him.

Carmichael did not recount a specific instance of his requesting information about the Government's case that James did not answer. Any notion that he was not aware of the situation is belied by his background and his conduct. Although Carmichael is unsophisticated in some respects, he is clever enough to have amassed significant wealth. It is unlikely that he was disinterested or incurious about the charges against him. After all, he hired a dozen lawyers to defend him and claims to have paid almost a million dollars in fees. Carmichael was consumed by this case; he understood that the maximum sentence if he were convicted was life.

I find that James explained to Carmichael the weight and extent of the Government's evidence against him.

B. Failure to advise defendant of the applicable sentence

Criminal cases in federal court are overwhelmingly resolved by guilty pleas, and most of those pleas are the product of negotiations. Even when a defendant maintains his innocence, it is incumbent upon counsel to discuss with a defendant the option of pursuing a plea agreement. Such discussions should include explanations of the guidelines and how they would be applied in the defendant's case, including adjustments for relevant conduct and other possible upward adjustments. Here, the indictment put counsel on notice that the Government would seek such upward adjustments, increasing Carmichael's total offense level.

Counsel for Carmichael never engaged in this sort of discussion with their client. Carmichael was unfamiliar with the guidelines, and although the magistrate judge advised him that he could be sentenced from 10 years to life, he had no idea what his guideline

score would be. Even though this case was pending before the Supreme Court's decision in *United States v. Booker*, 593 U.S. 220 (2005), when departures from the guidelines ranges were rare, not one of his lawyers took the trouble to advise him. Of course, knowing what the guideline score was likely to be was essential to a meaningful discussion about whether to enter a plea.

The testimony of James and Chartoff corroborates Carmichael's claims that his counsel did not advise him how the sentencing guidelines would apply to him. They did not prepare a scoresheet or ask that the Probation Officer do so. Nor did his lawyers explain how the specific offense characteristics and alleged enhancing factors would increase his guideline score.

The Government correctly points out that the magistrate judge advised Carmichael at arraignment that if he were convicted of the offenses charged in the indictment the sentence would be between 10 years and life in prison. But the advisory guidelines are considered by courts in deciding what would be reasonable sentences. And knowing the likely guideline range is helpful to defendants in making the decision whether to negotiate a plea agreement or proceed to trial. Counsel's failure to discuss sentencing possibilities under the guidelines with Carmichael was deficient practice.

C. Failure to pursue plea negotiations

It is not clear that Glassroth was deficient in suggesting to Carmichael that they wait until discovery was complete to pursue a plea offer. There may have been good reasons for waiting. It is impossible to know whether, once armed with discovery, Glassroth would have pursued plea negotiations, because he withdrew from the case and did not testify at the evidentiary hearing. But Wayne's failure is a different matter. Once discovery was complete, she failed to broach the possibility of a negotiated plea with the Government,

even though Carmichael specifically asked her to do so.

James made an eleventh-hour effort to negotiate a favorable plea agreement, but Wayne failed to do so. And she failed to do so even though Carmichael requested that she pursue a plea agreement soon after she took control of the case. I find that Wayne's failure to pursue a plea agreement constitutes deficient practice, falling below the objectively reasonable standard.

D. Failure to convey plea offers from the Government

The testimony at the evidentiary hearing included reference to five alleged conversations regarding potential agreements limiting Carmichael's sentence. There is insufficient evidence to support a finding that two of those conversations in fact took place.

Feaga testified that he believed that before he joined the prosecution team, someone from his office had a conversation with one of Carmichael's many lawyers about the possibility of Carmichael entering a plea. This alleged conversation was not mentioned in Carmichael's § 2255 motion, and it was not the focus of the evidentiary hearing. Nonetheless, both Feaga and Morris testified they understood a possible offer was "out there" when Feaga joined the prosecution team. However, none of the witnesses at the evidentiary hearing was a party to the alleged conversation and none offered a firsthand account of its content or when it took place. The terms and circumstances of that early discussion were only vaguely described, and the participants in the conversation were not identified.

Based on the evidence, I find no plea offer was made by the Government before Feaga joined the prosecution team.

The second conversation—which Carmichael suspects took place during the trial—did not occur at all. In his § 2255 motion and his testimony at the evidentiary hearing,

Carmichael referred to an alleged conversation between one of his lawyers and one of the prosecutors while the jury was deliberating. Carmichael believes that a plea offer was made during the alleged conversation. Carmichael did not hear the conversation, but he speculates based on later statements he overheard that the Government made a plea offer to one of his lawyers that was not conveyed to him. Defense counsel and the prosecutors deny that a plea was discussed during the trial.

I find counsel did not discuss a possible plea agreement during the trial.

The third conversation—the focus of the evidentiary hearing—did take place between Feaga and James a short time before the trial started. It began with James's "Hail Mary" suggestion that Carmichael might agree to a plea if he could get a five-year sentence. Feaga's response to James, which followed his discussion with United States Attorney Canary, outlined two possibilities: (1) a guilty plea to unspecified offenses, forfeiture of the Carmichael Center, and, if Carmichael provided "super cooperation," the possibility of a sentence as low as ten years; or (2) a guilty plea to unspecified offenses and, with Carmichael's acceptance of responsibility, a sentence not to exceed twenty years. The contents of this conversation were not memorialized by contemporaneous notes or later written communications. It is not clear the conversation was sufficiently specific to qualify as an offer to enter into a plea agreement; nevertheless, defense counsel was obligated to inform Carmichael of the discussions.

The Government argues that James did in fact communicate the contents of this conversation to Carmichael and that Carmichael rejected Feaga's proposals. There is evidence supporting this conclusion. First, in her earlier affidavit, James stated that she thought she had told Carmichael about the conversation. Second, Feaga testified that

James telephoned him before trial to say that Carmichael rejected the proposal. And, based on her long working relationship with James, Morris testified that she would be shocked if James failed to convey a plea proposal from the Government. Finally, by the time Carmichael met with Feaga at the Elmore County Jail, Carmichael knew about the "offer" but did not mention it to Feaga.

But James was a credible witness, making admissions of error on her part. Her earlier statement in her affidavit was equivocal; she did not say she remembered telling Carmichael about her conversation—only that she thought she had. Her testimony now is still not based on clear recollection. Instead, she now believes that if she had passed the information on to Carmichael, it would have been memorialized in her recently discovered notes. And because it is not, she allows that she "may have dropped the ball" by not attaching importance to Feaga's proposal because she believed Carmichael would not accept an agreement that called for forfeiture of the Carmichael Center. Of course, Carmichael has consistently maintained that James never conveyed Feaga's proposal to him.

Balancing these versions, I find that Feaga communicated these options to James but James failed to communicate them to Carmichael; this failure satisfies the deficient performance prong of *Strickland*.

The fourth conversation about a potential agreement referenced at the evidentiary hearing took place on the day of a scheduled forfeiture hearing the Monday after the jury returned its verdict. It occurred in an attorney-client conference room at the courthouse where Carmichael and James met with Feaga and Franklin. At this meeting, Franklin suggested that if Carmichael cooperated, the prosecution might work out a deal limiting his

sentence to twenty years. But Carmichael demurred, demanding a guaranteed sentence before he would cooperate with the Government. In response to Carmichael's demand, Franklin correctly explained that "that's just not the way it works."

I find that Feaga did not tell Carmichael that it was possible that he could receive a ten-year sentence, and I also find that Carmichael rejected the Government's offer to enter into an agreement limiting his sentence.

After the jury returned its verdict, Carmichael's concern about his upcoming sentence prompted him to request a private meeting at the Elmore County Jail. By then, the time for a plea agreement had of course passed, but Feaga responded to Carmichael's entreaties. Feaga's meeting with Carmichael at the jail was the fifth conversation regarding a potential agreement referenced at the evidentiary hearing. During this meeting, Feaga suggested that by providing substantial cooperation, Carmichael might limit his sentence to twenty years. Given Carmichael's age and her own experience with the sentencing judge, James advised Carmichael against accepting an agreement to a twenty-year sentence. Jenkins also advised against it. James was incorrect in her belief that the judge would not sentence Carmichael to more than twenty years—he received a forty-year sentence.

As it turned out, James and Jenkins were wrong in their advice that the twenty-year offer was not in Carmichael's best interest. But it is difficult to gainsay the advice. No evidence was presented establishing that counsel's prediction of a sentence was unreasonable. Nor was there evidence why counsel believed that Carmichael had a chance to prevail on appeal.

There is no evidence that the advice of James and Jenkins to reject the twenty-year

post-verdict offer was objectively unreasonable.

E. Prejudice

Despite the finding that counsel's performance was *in* certain respects objectively unreasonable, Carmichael failed to present evidence showing that these shortcomings resulted in prejudice to him. As noted above, to demonstrate prejudice, a defendant must make a showing that he would have accepted the plea offer, that the Government would not have withdrawn the plea, that the court would have accepted the terms, and that the judgment and sentence imposed were harsher than the terms contained in the offer. *See Osley*, 751 F.3d at 1222. At the evidentiary hearing, Carmichael proved two of the three requirements necessary to establish prejudice. The forty-year sentence imposed was greater than the ten- and twenty-year terms of confinement suggested by Feaga. Carmichael presented no evidence at the evidentiary hearing that the sentencing court would have accepted an agreement for a sentence of ten or twenty years or that the Government would not have withdrawn the agreement. The appellate court is, however, satisfied that there is nothing in the record showing that a plea offer would have been withdrawn or the sentencing court would have rejected an agreement. *See Carmichael*, 659 F. App'x at 1022–23.

But Carmichael did not show he would have entered into a plea agreement with the Government based on Feaga's proposals. The ten-year proposal called for Carmichael to provide substantial assistance—what Feaga referred to as "super cooperation." Because of the informality of the relevant discussion between Feaga and James, it is not clear what the Government had in mind by "super cooperation." In his testimony, Carmichael made fleeting reference to Franklin's interest in prosecuting a police lieutenant, but this is the only evidence bearing on the performance expected of Carmichael in return for the Government

taking action to reduce his sentence. With so little information in the record, it is impossible to know whether Carmichael could have satisfied the Government's requirements to file a motion under § 5K1.1 of the United States Sentencing Guidelines for a downward departure from the advisory guideline range. Because the ability to seek a reduction of sentence under U.S.S.G. § 5K1.1 is solely within the discretion of the Government, perhaps Carmichael should be entitled to some latitude in showing that he would have accepted an offer including a substantial assistance requirement. But he offered no evidence that he would have—or, even could have—given substantial assistance. When Franklin broached the subject of a proffer, Carmichael refused to speak to the Government without a guarantee of a specific sentence.

Regarding the twenty-year proposal, Carmichael's failure to show prejudice is starker. That proposal did not include a substantial assistance component, but Carmichael offered no testimony that he would have accepted an offer that included a requirement that he serve a twenty-year sentence. And there is evidence indicating that he would not have accepted such an offer. Even after he was found guilty and apprised of his sentencing exposure, Carmichael did not timely accept Feaga's proposal limiting his sentence to twenty years. And two of his lawyers advised him to reject the twenty-year proposal.

Based on the above, I find that Carmichael failed to make the requisite showing that he would have entered into a plea agreement based on any of the Government's proposals. Consequently, I find that Carmichael failed to show prejudice. And where no prejudice is shown, no relief can be had on a claim of ineffective assistance of counsel.[14]

[14] Because the evidence does not support a finding of prejudice, it is unnecessary to craft a remedy. But, assuming Feaga's pretrial proposals to James were sufficiently specific to constitute an offer and that Carmichael could show prejudice, it would be the task of this

V. CONCLUSION

Carmichael's counsel's performance fell below an objectively reasonable standard because they failed to pursue plea negotiations, failed to advise Carmichael regarding sentencing, and failed to convey to Carmichael Feaga's pretrial plea proposals. However, because Carmichael failed to show that he suffered prejudice attributable to his counsel's deficient practice, his § 2255 motion is denied.

DONE and **ORDERED** in Orlando, Florida, on August 22, 2017.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record

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court to devise a remedy that would neutralize the taint of the Sixth Amendment violation, while at the same time not granting a windfall to Carmichael. *See Lafler*, 566 U.S. at 170. Ideally, the remedy would return the parties to the same position they were in when Feaga made the proposals, allowing Carmichael to accept or reject the terms of the proposal.

As noted, Carmichael has presented no evidence that he would have accepted the terms of Feaga's ten-year proposal, which included the requirement that he forfeit the Carmichael Center and that he provide high-value substantial assistance to the Government. Overlooking for a moment the fact that, with his conviction and the passage of time, it is unlikely Carmichael would now be able to assist the Government, there is no evidence that he was able provide such assistance at the time the proposal was made.

Of course, it would be easy to construct a remedy regarding Feaga's alternative proposal that Carmichael plead guilty and receive a twenty-year sentence under an agreement that did not require substantial assistance. In that case, the appropriate remedy would simply be to resentence Carmichael to a term no greater than twenty years. But Carmichael did not testify he would accept such terms. What the evidence did show is that even after his conviction, Carmichael was unwilling to provide a proffer of information to be considered as a basis for a § 5K1.1 motion limiting his sentence to twenty years without first receiving assurances from the Government that the sentence would be guaranteed.

Lafler provides some latitude in determining an appropriate remedy. The Court explained that if a defendant shows there is a "reasonable probability that but for counsel's errors he would have accepted the plea," the trial court has the discretion to impose the sentence the Government offered, the sentence the defendant received, "or something in between." *Lafler*, 566 U.S. at 171. But, as noted, Carmichael has failed to establish a reasonable probability that he would have accepted Feaga's proposals even had he been aware of them.

Additional material from this filing is available in the Clerk's Office.

Appendix "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13822-JJ

LEON CARMICHAEL, SR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

BEFORE: WILSON, NEWSOM, Circuit Judges, and PROCTOR,* District Judge.

PER CURIAM:

The Petition for Panel Rehearing filed by Leon Carmichael, Sr. is DENIED.

* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

ORD-41