No. ____

IN THE

Supreme Court of the United States

MICHAEL SHANE MCCORMICK, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Sixth Amendment, counsel's duty to "consult" regarding a criminal appeal has two independent requirements—"advising the defendant about the advantages and disadvantages of taking an appeal, *and* making a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (emphasis added).

Here, the Sixth Circuit conceded it split from other circuits, deepening lower-court confusion in two closely related respects: First and most fundamentally, the Sixth Circuit neglected the second requirement of *Flores-Ortega*'s definition by upholding a "consultation" without finding that counsel made a reasonable effort to discover the defendant's wishes *at any point*. Two other circuits have followed this approach, but seven circuits require such a finding. Relatedly, the Sixth Circuit declined to require that counsel make a reasonable effort *at or after sentencing* to discover his client's wishes even though all agree that the defendant decided to wait until after sentencing to decide whether to appeal and was obviously dissatisfied by the sentence. Again, two other circuits have followed this approach, but five others have explicitly disagreed.

How to analyze counsel's duty to consult about an appeal has drawn *nearly every* circuit into conflict, and this confusion can arise in every criminal conviction.

The question presented is:

Whether, to adequately "consult" regarding an appeal when the defendant says he will decide after sentencing or is obviously dissatisfied with his sentence, defense counsel must make a reasonable effort to discover the defendant's wishes at or after sentencing.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT 3

A. Legal Background. 3

B. Factual Background. 4

C. Postconviction Proceedings. 6

D. The Sixth Circuit's Decision. 7

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION BELOW DEEPENS A RECOGNIZED CIRCUIT SPLIT REGARDING DEFENSE COUNSEL'S DUTY TO CONSULT ABOUT AN APPEAL AFTER SENTENCING 9

II. THE DECISION BELOW IS INCORRECT. 21

III. THE QUESTION PRESENTED IS IMPORTANT AND LIKELY TO RECUR. 29

IV. THIS CASE PRESENTS AN IDEAL VEHICLE. 31

CONCLUSION 32

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit (June 27, 2023) 1a

TABLE OF CONTENTS
(continued)

Page

APPENDIX B: Denial of En Banc by the United States Court of Appeals for the Sixth Circuit (Sept. 26, 2023) 10a

APPENDIX C: Memorandum Opinion and Order by the United States District Court for the Eastern District of Kentucky (July 7, 2022) 11a

APPENDIX D: Judgment Denying § 2255 Relief by United States District Court for the Eastern District of Kentucky (July 7, 2022) 34a

APPENDIX E: Magistrate Judge's Recommended Disposition in the United States District Court for the Eastern District of Kentucky (Feb. 23, 2022)..... 35a

APPENDIX F: Transcript of Motion Hearing Proceedings (July 20, 2021)..... 69a

APPENDIX G: Amendment VI to the United States Constitution..... 153a

TABLE OF AUTHORITIES

Page(s)

CASES

Arroyo v. State,
434 S.W.3d 555 (Tenn. 2014).....30

Bednarski v. United States,
481 F.3d 530 (7th Cir. 2007).....16, 20

Campusano v. United States,
442 F.3d 770 (2d Cir. 2006) 29

Commonwealth v. Parrish,
273 A.3d 989 (Pa. 2022) 16

Flores-Ortega. Rojas-Medina v. United States,
924 F.3d 9 (1st Cir. 2019) 11, 12, 17, 18

Garza v. Idaho,
586 U.S. ---, 139 S. Ct. 738 (2019) 25, 29, 32

Gomez-Diaz v. United States,
433 F.3d 788 (11th Cir. 2005).....14

Hodge v. United States,
554 F.3d 372 (3d Cir. 2009) 12

Jackson v. Att'y Gen. of Nev.,
268 F. App'x 615 (9th Cir. 2008).....20, 21

Johnson v. United States,
364 F. App'x 972 (6th Cir. 2010).....15

TABLE OF AUTHORITIES
(continued)

Page(s)

Jones v. Barnes,
463 U.S. 745 (1983) 29

Jones v. State,
98 S.W.3d 700 (Tex. Crim. App. 2003) 30

Kapelioujnyi v. United States,
422 F. App'x 25 (2d Cir. 2011) 16

Lafler v. Cooper,
566 U.S. 156 (2012) 27

Maddox v. State,
407 P.3d 152 (Haw. 2017) 30

McBride v. Weber,
763 N.W.2d 527 (S.D. 2009) 16

McMann v. Richardson,
397 U.S. 759 (1970) 3

Missouri v. Frye,
566 U.S. 134 (2012) 32

Morga v. State,
466 P.3d 1288 (Nev. 2020) 30

Owens v. State,
621 N.W.2d 566 (S.D. 2001) 16

Rios v. United States,
783 F. App'x 886 (11th Cir. 2019) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Roberts v. Ky. Bar Ass'n,
599 S.W.3d 870 (Ky. 2020).....6

Roe v. Flores-Ortega,
528 U.S. 470 (2000).... 2, 4, 7–12, 14, 20–28, 30–32

Rowe v. United States,
74 Fed. App'x 650 (7th Cir. 2003).....20

Smith v. Robbins,
528 U.S. 259 (2000).....25

Spence v. United States,
68 F. App'x 669 (6th Cir. 2003) 15

State v. Ammons,
990 N.W.2d 897 (Neb. 2023).....16

State v. Shelly,
371 P.3d 820 (Kan. 2016).....16

Strickland v. Washington,
466 U.S. 668 (1984).....3, 25, 26, 29

Thompson v. United States,
504 F.3d 1203 (11th Cir. 2007).....14, 19

United States v. Calderon,
665 F. App'x 356 (5th Cir. 2016).....18, 19

United States v. Cong Van Pham,
722 F.3d 320 (5th Cir. 2013).....13, 18, 32

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Doyle,
631 F.3d 815 (6th Cir. 2011).....15

United States v. Golden,
255 F. App'x 319 (10th Cir. 2007).....13

United States v. Herring,
935 F.3d 1102 (10th Cir. 2019).....28

United States v. Kelley,
253 F. App'x 743 (10th Cir. 2007).....13

United States v. Kelley,
318 F. App'x 682 (10th Cir. 2009).....13

United States v. McCormick,
No. 16-cr-56 (E.D. Ky. Apr. 27, 2017).....4

United States v. Rivas,
450 F. App'x 420 (5th Cir. 2011).....13

United States v. Shedrick,
493 F.3d 292 (3d Cir. 2007) 12, 18

United States v. Taylor,
339 F.3d 973 (D.C. Cir. 2003).....14

United States v. Tighe,
91 F.4th 771 (5th Cir. 2024) 13, 18

United States v. Witherspoon,
231 F.3d 923 (4th Cir. 2000).....12, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Whitmore v. State,
203 N.W.2d 56 (Wis. 1973) 30

Wiggins v. Smith,
539 U.S. 510 (2003) 28

Wilson v. United States,
395 F. App'x 610 (11th Cir. 2010) 14

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. VI 1, 2, 3, 29

18 U.S.C. § 3142 28

28 U.S.C. § 1254 1

28 U.S.C. § 2255 ..... 1, 4, 5, 6

Cal. Penal Code § 1240.1 30

N.Y. Jud. Law § 671.3 30

OTHER AUTHORITIES

ABA Standards for Criminal Justice,
Criminal Appeals 21-2.2
(2d. ed. 1980) 29, 30

ABA Standards for Criminal Justice,
Defense Function 4-5.2 29

TABLE OF AUTHORITIES
(continued)

Page(s)

ABA Standards for Criminal Justice,
Defense Function 4-9.2 29

Fed. R. Crim. P. 29 28

Fed. R. Evid. 103 28

Idaho Rules of Pro. Conduct 1.3 30

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Sixth Circuit affirming the denial of McCormick's § 2255 petition is reported at 72 F.4th 130 and is reproduced at Pet.App.1a. The order of the court of appeals denying rehearing en banc is not reported in the Federal Reporter but is available at 2023 WL 6532611 and is reproduced at Pet.App.10a.

The decision of the U.S. District Court for the Eastern District of Kentucky adopting the recommended disposition of the magistrate judge is not reported in the Federal Supplement but is available at 2022 WL 2528240 and is reproduced at Pet.App.11a.

The recommended disposition of the magistrate judge is not reported in the Federal Supplement but is available at 2022 WL 3337165 and is reproduced at Pet.App.35a.

JURISDICTION

The Sixth Circuit issued its opinion and entered judgment on June 27, 2023. Pet.App.1a. It denied rehearing en banc on September 26, 2023. Pet.App.10a. On December 14, 2023, Justice Kavanaugh extended the time to file this petition until February 23, 2024. No. 23A545 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

The Sixth Amendment is reproduced in full at Appendix G.

INTRODUCTION

Criminal defendants who do not file a timely notice of appeal almost always lose their appeal rights entirely. Because we do not expect them to understand all the implications of losing their appeal, or to know the procedures they must follow to avoid that loss, our justice system relies on defense counsel: "in the vast majority of cases, … counsel ha[s] a duty to consult with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

Over two decades ago, this Court set out clear rules for defining and applying this Sixth Amendment duty: As relevant here, whenever "there is reason to think" that a defendant is "interested in appealing," counsel must consult. *Id.* at 480. And "consult" has a "specific meaning" that requires counsel to discuss two topics: (1) the "advantages and disadvantages" of an appeal, and (2) "the defendant's wishes" about an appeal. *Id.* at 478. If counsel does not explain the pros and cons of appealing, or if he does not "mak[e] a reasonable effort to discover the defendant's wishes" about appealing, he has not sufficiently consulted under the Sixth Amendment. *Id.*

Despite this clarity, the circuits have split. Some, like the Sixth Circuit below, have found that counsel consults sufficiently when he discusses only the pros and cons of an appeal *without* making any effort to find out whether the defendant wants to appeal. Those circuits do not require counsel to seek to discover the defendant's desire to appeal at any stage in the proceedings, even when the duty to consult applies.

The majority of circuits correctly hold that to "consult" counsel must make a reasonable effort to discover the defendant's wishes—whether that is before, at, or after sentencing. But three circuits, including the Sixth below, fail to uphold the second half of *Flores-Ortega*'s definition. Moreover, a subset of that majority specifically requires counsel to make that reasonable effort at or after sentencing if either: (i) the defendant decides to wait until after sentencing to decide on appeal, or (ii) the defendant is obviously dissatisfied with or surprised by the sentence. But three circuits, including the Sixth below, also get this wrong. Because the conflict has now reached nearly *every* circuit, the time has come for this Court to set things right.

Doing so would resolve fundamental questions that can arise in every criminal case. And doing so in this case makes sense because it cleanly tees up this dispositive question without factual or extraneous legal issues.

STATEMENT

A. Legal Background.

The Sixth Amendment guarantees "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Defendants who claim their counsel was ineffective must show two things: (i) that counsel performed deficiently, and (ii) that this deficient performance prejudiced their case. *Id.* at 687.

Defense attorneys must provide effective assistance specifically when discussing the possibility of an ap-

peal with their clients. This Court detailed these responsibilities in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). There, the Court first gave the term "consult" "a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, *and* making a reasonable effort to discover the defendant's wishes." 528 U.S. at 478 (emphasis added). The Court then held that counsel has a constitutional duty to "consult" "when there is reason to think either (1) that a rational defendant would want to appeal … or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. Only in rare cases does counsel not have a duty to consult. *Id.* at 481 ("We expect that courts … will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal.").

Convicted federal defendants who believe they received ineffective assistance of counsel may petition for relief under 28 U.S.C. § 2255, which permits district courts to vacate sentences "imposed in violation of the Constitution."

B. Factual Background.

Michael Shane McCormick, Sr., was charged with various drug and gun offenses in 2017. Superseding Indictment, *United States v. McCormick*, No. 16-cr-56 (E.D. Ky. Apr. 27, 2017), ECF No. 91. The district court appointed H. Wayne Roberts to serve as defense counsel. *Id.*, ECF No. 17.

Roberts and McCormick discussed the possibility of pleading guilty. Eventually, McCormick settled on an open guilty plea so that he could preserve his appellate rights. Pet.App.22a, 45a–46a.

Prior to sentencing, McCormick and Roberts discussed McCormick's appellate rights.[1] They agreed that McCormick had taken an open plea to ensure that he could still appeal after sentencing. *Id.* McCormick told Roberts that he would wait until sentencing to decide whether to appeal: "if he 'didn't feel like [he] was treated fairly' at sentencing," he would appeal. Pet.App.3a (alteration in original). Roberts told McCormick that it was his job to request an appeal if he wanted one. *Id.*

At sentencing, McCormick received a prison term of 276 months. Pet.App.12a–13a. The court provided him with an "Advice of Right to Appeal" form, which he signed. Pet.App.13a.

In the courtroom after sentencing, McCormick was upset with his sentence, and he immediately made that known to Roberts. Pet.App.22a, 47a. McCormick and Roberts disagree about what exactly was said, but both agree that McCormick was "heated" and told Roberts, "Thanks for nothing." Pet.App.49a, 53a. McCormick says that Roberts suggested filing an appeal, and that he told Roberts to do that right away. Pet.App.22a. Roberts says that he and McCormick did not discuss an appeal after sentencing, and suggested that he never discusses filing an appeal with his clients post-sentencing. Pet.App.49a, 130a–32a, 134a.

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[1] At a later § 2255 evidentiary hearing, Roberts "testi[fied] that he didn't consult with McCormick." Pet.App.5a, 55a–56a. But the district court credited McCormick's testimony that Roberts had discussed the "risks [and] rewards … for appealing" and counted that as fully consulting. *Id.*; *see* Pet.App.47a ("Roberts stated there was no such consultation…. and he never asked what his client thought an unreasonable sentence was.").

(The district court later credited Roberts' version of the events. Pet.App.23a.)

The deadline to file an appeal passed without Roberts filing any appeal for McCormick. At a later § 2255 hearing, McCormick testified that he repeatedly called and emailed Roberts about an appeal, but Roberts never responded. Pet.App.22a. McCormick later wrote Roberts a letter, asking him why he had not filed an appeal. Pet.App.44a. Roberts again failed to respond. Pet.App.81a–82a.

C. Postconviction Proceedings.

McCormick timely filed a § 2255 petition. As relevant here, McCormick argued that Roberts provided ineffective assistance by failing to file his requested appeal, or, alternatively, by failing to consult about an appeal.[2] Pet.App.20a.

McCormick and Roberts both testified at an evidentiary hearing before a magistrate judge. Their testimony disagreed on several key matters, but none of those disputes is at issue in this Petition. *See* Pet.App.43a–48a. Roberts testified that he did not ask McCormick after sentencing if he wanted to appeal, that he thought it was McCormick's job to call him after sentencing to request an appeal, and suggested that he never consults with clients after sentencing. Pet.App.129a–32a, 133a. Even so, the magistrate judge found that Roberts performed adequately and recommended denying McCormick's petition.

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[2] This was not the first time Roberts had been accused of ineffectiveness. *See Roberts v. Ky. Bar Ass'n*, 599 S.W.3d 870, 872 (Ky. 2020).

Pet.App.67a–68a. He also recommended issuing a Certificate of Appealability. *Id.*

The district court agreed. It credited Roberts' testimony that although McCormick was upset after sentencing, McCormick never directly asked him to file an appeal. Pet.App.21a–25a. And even though Roberts testified that he did not discuss the strengths and weaknesses of an appeal with McCormick, the district court credited McCormick's testimony that he and Roberts had discussed "the risks and rewards of appealing" *before* sentencing. Pet.App.25a–28a. And to the court, that was enough to find that Roberts sufficiently consulted under *Flores-Ortega*. *Id.* The district court made no factual finding that Roberts ever discussed an appeal with McCormick *after* sentencing, nor that he made a reasonable effort to discover McCormick's wishes at any stage. Pet.App.21a–25a; *cf.* Pet.App.130a, 133a (Roberts testifying that he did not discuss an appeal after sentencing). It denied McCormick's petition and issued a Certificate of Appealability. Pet.App.32a–33a.

D. The Sixth Circuit's Decision.

The Sixth Circuit affirmed. It agreed that McCormick never expressly asked Roberts to appeal. Pet.App.3a–4a. In fact, because Roberts had told McCormick to let him know if he wanted to appeal, the Sixth Circuit believed it was *McCormick's* responsibility to expressly request an appeal. *Id.* So even though McCormick had said his decision to appeal would depend on the results of sentencing and even though all agree he was obviously upset with his sentence, the Sixth Circuit held that Roberts had no duty to consult at or after sentencing. Pet.App.5a–8a. And

the Sixth Circuit held that, in any event, Roberts fulfilled any duty under *Flores-Ortega* merely by discussing "the risks [and] rewards … for appealing" with McCormick before sentencing. Pet.App.5a.

The Sixth Circuit also observed that its decision deepens a circuit split, for it "agrees" with one other circuit in "contrast" with the decisions of at least four other circuits regarding whether and when "*Flores-Ortega* requires post-sentencing consultation." Pet.App.7a & n.1.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions regarding counsel's constitutional duty to consult with criminal defendants about an appeal. The decision below expressly recognized a conflict among the circuits over the extent and timing of that duty and further entrenched it. Moreover, by deciding the case in a way that cannot be reconciled with this Court's precedent, the Sixth Circuit deepened the split in the wrong direction. This Court should grant the petition to resolve the circuit conflict, reverse the Sixth Circuit's deeply flawed decision, and bring clarity to this vital and virtually ubiquitous issue of criminal law.

I. THE DECISION BELOW DEEPENS A RECOGNIZED CIRCUIT SPLIT REGARDING DEFENSE COUNSEL'S DUTY TO CONSULT ABOUT AN APPEAL AFTER SENTENCING.

The Sixth Circuit candidly recognized that its sister circuits are divided over how to apply *Flores-Ortega* post-sentencing. *Id.* (noting the "contrast" between its decision and the Seventh Circuit on one side, and decisions of the First, Third, Fifth, and D.C. Circuits on the other). The conflict is even broader than the panel realized—spanning a 7-4 split that has been deepening for decades. This divide turns on when *Flores-Ortega* requires that counsel make a reasonable effort to discover a defendant's wishes.[3]

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[3] As the Sixth Circuit described it, the First, Third, Fifth, and D.C. Circuits have indicated that counsel must *always* consult regarding appeal *after* sentencing has occurred. Pet.App.7a & n.1. Meanwhile, the Sixth and Seventh Circuits do not impose such a

Most fundamentally, the courts of appeals have divided over whether *Flores-Ortega* requires counsel to make a reasonable effort to discover the defendant's wishes regarding an appeal at any stage (before or after sentencing) in order to "consult." The Sixth, Second, and Seventh Circuits say no—upholding "consultations" without any indication that counsel ever made such an effort. Instead, they have reasoned that counsel need not "repeat" advice on the pros and cons of appealing after sentencing because counsel has already "consulted." And based on that *non sequitur*, they have approved definitionally inadequate consultations. Pet.App.7a. By contrast (and unsurprisingly given *Flores-Ortega*'s "specific" definition), seven other circuits correctly recognize that counsel must make a reasonable effort to discover the defendant's wishes at some point in the proceedings.

Closely examining the divide that the Sixth Circuit acknowledged also reveals that the circuits are similarly divided over whether counsel must make a reasonable effort specifically *at or after* sentencing under either of two circumstances present here: when the client chooses to wait to decide to appeal or when the client expresses obvious dissatisfaction or surprise at the actual sentence. Five circuits have said yes. Three circuits—including the Sixth here—have said no. Now this Court's intervention is needed to uphold the duty

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rule. *Id.* But the divide is both broader and more nuanced. These cases (and others) reveal a deep division not over whether *Flores-Ortega* requires post-sentencing consultation in all cases, but rather under what circumstances *Flores-Ortega* requires counsel to make a reasonable effort at or after sentencing to discover his client's wishes.

to consult, especially at the crucial stage of the window to appeal.

1a. No fewer than seven circuits have held that for a court to determine that counsel "consulted" under *Flores-Ortega*, counsel had to "mak[e] a reasonable effort to discover the defendant's wishes" at some point in the proceedings. 528 U.S. at 478. This weight of authority comes as no surprise given *Flores-Ortega*'s clear, "specific" definition. *Id.*

Nevertheless, the decision below joins decisions from the Second and Seventh circuits in approving definitionally inadequate "consultations." These three circuits have found that counsel "consulted" based on evidence only that counsel discussed the pros and cons of an appeal (without also finding that counsel made a reasonable effort to discover the defendant's wishes). This Court's intervention is needed to correct that recurrent error and uphold the "specific" definition set forth in *Flores-Ortega*. *Id.*

The seven courts of appeals that have upheld *Flores-Ortega*'s definition are the First, Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits.

The First Circuit has held that when a defendant expresses dissatisfaction with his sentence and interest in further relief, mere "conversations between the petitioner and trial counsel prior to sentencing" about whether an appeal is available are inadequate under *Flores-Ortega*. *Rojas-Medina v. United States*, 924 F.3d 9, 17–18 (1st Cir. 2019). That court found that such conversations were insufficient because, "[a]t a minimum, trial counsel was required to advise his client about the pros and cons of taking an appeal, and

then to make a reasonable effort to ascertain his client's wishes." *Id.* at 17. Counsel failed to satisfy that requirement because he "did no more than inform the petitioner that his appeal waiver would prevent him from filing an appeal" (*i.e.*, counsel discussed the disadvantages but neither the advantages nor defendant's wishes). *Id.* at 18.

The Third Circuit has held that counsel must make a reasonable effort to determine his client's wishes regarding appeal specifically after sentencing when a defendant has expressed dissatisfaction with factual issues that informed the eventual upward departure in his sentence. *United States v. Shedrick*, 493 F.3d 292, 301–02 (3d Cir. 2007). That dissatisfaction "reasonably demonstrated" interest in appeal and counsel's failure to consult "post-sentencing as required by *Flores-Ortega*" constituted ineffective assistance. *Id.* The Third Circuit also has observed that "[o]f course, an attorney may not speak cursorily with a client about an appeal and call it a 'consultation.'" *Hodge v. United States*, 554 F.3d 372, 380 (3d Cir. 2009). Instead, both pieces of *Flores-Ortega*'s definition are required. *Id.*

In one of the early appellate decisions to apply *Flores-Ortega*, the Fourth Circuit held that expressing "a conditional desire to appeal" triggered a duty to consult after sentencing. *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000). There, counsel did not fulfill that duty because he did not allege "any discussion with Witherspoon concerning whether to appeal after the sentence was imposed." *Id.* at 926–27.

The Fifth Circuit's leading case on this issue makes clear that pre-sentencing discussion about appeal in

the "abstract" does not satisfy *Flores-Ortega*'s definition. *United States v. Cong Van Pham*, 722 F.3d 320, 324 (5th Cir. 2013). For, "*after* sentencing, when the sentence actually imposed became known and the time period for filing a notice of appeal began to run, counsel neither mentioned the possibility of an appeal at all nor made any effort to discover Pham's wishes in that regard." *Id.*; *see United States v. Tighe*, 91 F.4th 771, 775–76 (5th Cir. 2024) (requiring an "effort to obtain [the defendant's] wishes"); *United States v. Rivas*, 450 F. App'x 420, 427 (5th Cir. 2011) ("Counsel's duty to consult required him to at least make an honest effort to determine Rivas's wishes—something he made *no* attempt to do.").

In a pair of decisions regarding the same habeas petition, the Tenth Circuit twice recognized the importance of counsel's efforts to discover a defendant's wishes regarding an appeal. That court initially remanded for an evidentiary hearing specifically "because the district court's order never address[ed] whether trial counsel was ineffective for not … determining [the defendant's] wishes regarding appeal." *United States v. Kelley*, 253 F. App'x 743, 745 (10th Cir. 2007). Then, when that factfinding revealed that counsel merely informed Kelley pre-sentencing that "there would be nothing to appeal" if he pleaded guilty, the Tenth Circuit held that such advice does not "meet[] the Supreme Court's definition of 'consult'" because it does not "make an effort to determine the defendant's wishes regarding an appeal, *as the Supreme Court requires*." *United States v. Kelley*, 318 F. App'x 682, 686 (10th Cir. 2009) (emphasis added); *accord United States v. Golden*, 255 F. App'x 319, 321 n.3 (10th Cir. 2007) (Gorsuch, J.) (consultation requires

making a reasonable effort to determine whether the defendant wants to appeal).

Merely stating that the defendant had a right to appeal and "that [counsel] did not think an appeal would be successful or worthwhile" does not constitute "consultation" in the Eleventh Circuit. *Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007). That is because "no reasonable effort was made to discover [the defendant's] informed wishes regarding an appeal." *Id.*; *see Wilson v. United States*, 395 F. App'x 610, 612 (11th Cir. 2010) (recognizing counsel's "affirmative duty to … try to determine his [client's] wishes"); *Gomez-Diaz v. United States*, 433 F.3d 788, 792 (11th Cir. 2005) ("[I]f the allegations in the pleadings are true, the attorney had the affirmative duty to consult with Petitioner and to try to determine his wishes.")

And the D.C. Circuit has observed that merely advising a defendant "in advance of the sentencing hearing that he would have the right to appeal" does not constitute consultation where counsel did not make any effort to discover the defendant's wishes thereafter. *United States v. Taylor*, 339 F.3d 973, 978 (D.C. Cir. 2003).

1b. By contrast, three courts of appeals have held that counsel "consulted" *without* finding that counsel ever made an effort to discover the defendant's wishes regarding appeal. Instead, these decisions base their findings of "consultation" merely on discussion of the advantages or disadvantages of appeal, shaving off half of the duty to consult as *Flores-Ortega* defined it.

Here, the Sixth Circuit determined that Roberts "consulted" merely because he discussed the "risks

[and] rewards … for appealing." Pet.App.5a. The court made no finding that Roberts made a reasonable effort to discover McCormick's wishes (and neither did the district court). Instead, the decision below says that *Flores-Ortega*'s entire "point is for counsel to help the defendant weigh the pros and cons of taking an appeal." Pet.App.6a. But that's only half the story. The missing half is for counsel to determine whether his client wants to appeal (so that he can either file that appeal or conclude the representation). Otherwise, counsel may well frustrate a defendant's desire to appeal or at least inadequately assist a defendant in actually making that decision.

And this is not the Sixth Circuit's first such decision. In at least three other cases, the Sixth Circuit found that counsel "consulted" *without* evidence that counsel also made a reasonable effort to discover his client's wishes. *See United States v. Doyle*, 631 F.3d 815, 818 (6th Cir. 2011) (basing determination that "counsel consulted" only on the fact that "Doyle's counsel discussed with him at length the merits of an appeal"); *Johnson v. United States*, 364 F. App'x 972, 976–77 (6th Cir. 2010) (counsel's "consultation" "centered around Johnson's objections to certain sentencing calculations" and merely "explained [that they] were unlikely to win on appeal"); *Spence v. United States*, 68 F. App'x 669, 671 (6th Cir. 2003) (counsel "consulted" because he "discussed the possibility of filing an appeal").

The Second Circuit has similarly erred. That court found that "the record demonstrates that counsel consulted sufficiently" based solely on the following finding: "counsel explained that petitioner had waived his appeal rights and that the sentence was within the

plea agreement's stipulated Guidelines range." *Kapelioujnyi v. United States*, 422 F. App'x 25, 26 (2d Cir. 2011). In other words, the Second Circuit ruled that sufficient consultation does not require any effort to discover the defendant's wishes. *See id.*

And likewise, the Seventh Circuit has approved a "consultation" it viewed as limited to "advice" "regarding the impact a guilty plea would have on [the defendant's] ability to appeal his sentence," without any indication that counsel also made any effort to discover the defendant's wishes. *Bednarski v. United States*, 481 F.3d 530, 535 (7th Cir. 2007).

These courts have mistakenly focused on just the first half of *Flores-Ortega*'s definition. And based on that erroneously narrow view, they have incorrectly approved definitionally inadequate consultations.[4]

2a. Five of the seven circuits discussed *supra* Part I.1a have also indicated that counsel has a duty to consult specifically at or after sentencing under certain circumstances. When the defendant chooses to

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[4] State courts of last resort also have applied *Flores-Ortega*'s definition in conflicting ways. *Compare Commonwealth v. Parrish*, 273 A.3d 989, 1001, 1006–07 (Pa. 2022) (if petitioner's claim that "counsel failed to meaningfully consult with him regarding his right to appeal" were true, then counsel performed deficiently); *State v. Shelly*, 371 P.3d 820, 835–36 (Kan. 2016) (counsel's "consultation" about only "disadvantages of taking an appeal" "inadequate," especially where defendant has expressed interest in potential appeal); *McBride v. Weber*, 763 N.W.2d 527, 533 (S.D. 2009) ("never ask[ing client] if he wished to appeal" inadequate), *with State v. Ammons*, 990 N.W.2d 897, 903 (Neb. 2023) (no failure to consult where defendant alleged counsel disregarded express instruction to file appeal); *and Owens v. State*, 621 N.W.2d 566, 570 (S.D. 2001) (consultation containing only advice that "there was [sic] no grounds for appeal" adequate).

wait until after sentencing to decide whether to appeal or when a defendant is obviously dissatisfied or surprised by his actual sentence, these courts require that counsel make a reasonable effort to discover the defendant's wishes at or after sentencing—regardless of whether counsel has made an effort previously.[5]

The Fourth Circuit has held that the duty to consult post-sentencing arose from a defendant's pre-sentencing statement that "if the district court overruled his objections he wanted to appeal." *Witherspoon*, 231 F.3d at 926. This "conditional desire to appeal" leaves the decision open and leaves counsel's duty unfulfilled. *Id.* Accordingly, in such cases, counsel must make a reasonable effort at or after sentencing to discover the defendant's wishes, *especially* if one of the conditions for appeal that the defendant identified has been met. *Id.*

The First Circuit has held that when a defendant makes it "clear that he was dissatisfied with the sentence imposed," mere "conversations between the petitioner and trial counsel prior to sentencing" about whether an appeal is available are inadequate under *Flores-Ortega*. *Rojas-Medina*, 924 F.3d at 17–18. That court refuses to let the government "sidestep" the full

[5] The decision below suggested that circuits on this side have imposed an always-consult-after-sentencing rule or a duty for counsel to "repeat himself," Pet.App.6a–7a n.1; Pet.App.5a (characterizing McCormick's argument as requiring counsel "to repeat his advice after sentencing"); but again, that oversimplifies things. *See supra* Note 3. Instead, these courts simply uphold counsel's duty to discover his clients wishes regarding appeal at the reasonable time to complete that part of the "consultation."

import of *Flores-Ortega*'s definition by pointing to inadequate pre-sentencing conversations, because doing so "defies reason." *Id.* at 18.

The Third Circuit has agreed. It has held that counsel has a duty to consult with a defendant "post-sentencing" when a defendant has expressed dissatisfaction with factual issues that informed the eventual upward departure in his sentence. *Shedrick*, 493 F.3d at 301–02. That court reasoned that because the defendant "vehemently" and "hotly contested" factual issues leading to his sentence's upward departure, including "during his sentencing proceedings," counsel had a duty to consult with him "concerning a possible appeal" after that happened (*i.e.*, "post-sentencing"). *Shedrick*, 493 F.3d at 301.

The Fifth Circuit also requires consultation "*after* sentencing" when the defendant expresses obvious dissatisfaction with the sentence by saying that he wanted to serve less time. *Cong Van Pham*, 722 F.3d at 324. This duty to make a reasonable effort to discover the defendant's wishes regarding appeal arose because of this dissatisfaction even though counsel had discussed appeal in the "abstract" before sentencing. *Id.* The Fifth Circuit has developed a similar rule for when a defendant is surprised by his sentence. In *Tighe*, where the defendant was "shocked by the court's sentence," counsel then had to make "an effort to obtain his wishes about an appeal after sentencing." 91 F.4th at 775–76. This surprise could come from the severity of the sentence, as in *Tighe*, *see id.*, or "because the sentencing raised a new issue," *United States v. Calderon*, 665 F. App'x 356, 365 (5th Cir. 2016). Either way, only *pre*-sentencing discussion does not suffice because of changed circumstances—at

least when a defendant puts counsel on notice through obvious dissatisfaction or surprise. *See id.*

Likewise, the Eleventh Circuit has held that a defendant's "unhapp[iness]" "right after sentence was imposed" triggers counsel's duty to consult. *Thompson*, 504 F.3d at 1207. So too does a defendant's "obvious[] distress[]." *Rios v. United States*, 783 F. App'x 886, 893 (11th Cir. 2019). In those circumstances, counsel does not fulfill a duty to consult merely by stating the defendant had a right to appeal and "that [counsel] did not think an appeal would be successful or worthwhile." *Thompson*, 504 F.3d at 1207. Instead, counsel must make a reasonable effort to determine the defendant's wishes *after* sentencing. *Id.*

That makes five courts of appeals where a defendant either waiting to decide on appeal *or* expressing obvious dissatisfaction or surprise at a sentence requires counsel to make a reasonable effort after sentencing to discover his client's wishes.

2b. By contrast, at least three circuits have declined to find deficient performance even where: (i) the defendant chooses to wait until after sentencing to decide whether to appeal, the defendant is obviously dissatisfied or surprised by the sentence he receives, or both, and (ii) counsel fails to make a reasonable effort to discover the defendant's wishes after sentencing. The Sixth and Seventh Circuits again headline this side, but the Ninth Circuit has erred in this regard as well.

As explained further below, the Sixth Circuit here denied an ineffective assistance claim even though McCormick decided to wait until sentencing (until he knew whether he had been "treated fairly") to decide

whether to appeal and even though all parties agree that McCormick was dissatisfied by his sentence. *See infra* Part II.2; Pet.App.3a. Roberts did not make any effort to discover McCormick's wishes after sentencing,[6] even though either of these facts should have put him on notice that such an effort reasonably was required under *Flores-Ortega*. And the Sixth Circuit upheld that "consultation" as reasonable.

Similarly, the Seventh Circuit has denied relief for a defendant who was "surprised by the harshness of [his] sentence" but never was asked by his counsel whether he wanted to appeal. *Bednarski*, 481 F.3d at 534. There, the defendant was "blindsided" by his sentence and obviously dissatisfied at its length. *Id.* at 533–34. But rather than require that counsel make an effort to discover his client's wishes after that surprise, *Bednarski* denied an ineffective assistance claim because, prior to sentencing, counsel had discussed only the potential merits of an appeal. *Id.* at 535–36. That is, predictions about the chances on appeal substituted for asking the defendant whether he wanted to appeal after all agreed the defendant was "surprised by the harshness of the [actual] sentence." *Id.* at 534; *see also Rowe v. United States*, 74 Fed. App'x 650, 652 (7th Cir. 2003) (faulting defendant for failing to consult with counsel after sentencing where defendant "expressed interest in an appeal before").

Likewise, the Ninth Circuit has found that a defendant's manifest displeasure at sentencing does not trigger a duty to consult. *Jackson v. Att'y Gen. of Nev.*, 268 F. App'x 615, 620 (9th Cir. 2008). At his sentencing

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[6] In fact, no court has found that Roberts made such an effort at any stage. *See supra* Part I.1b, *infra* Part II.1.

hearing, Jackson "unsuccessfully moved to withdraw his *Alford* plea, professed his innocence, and expressed frustration that his trial counsel had rushed him into pleading guilty." *Id.* at 621 (Paez, J., concurring in part). All agreed that he had "express[ed] unhappiness at [his] sentencing hearing." *Id.* at 620. But to the Ninth Circuit, that was not enough to demonstrate an interest in appealing sufficient to give rise to a duty to consult. *Id.*

That makes three courts of appeals where waiting to decide or being obviously dissatisfied or surprised by a sentence does not require counsel to make a reasonable effort at or after sentencing to discover his client's wishes. Only this Court can resolve that conflict.

* * *

This recognized division among the lower courts regarding whether and when counsel must make a reasonable effort to discover his client's wishes cries out for this Court's intervention.

II. THE DECISION BELOW IS INCORRECT.

The Sixth Circuit's decision is seriously mistaken. By (1) disregarding half of this Court's definition of "consult," (2) allowing counsel to act unreasonably after sentencing, and (3) forcing defendants to shoulder counsel's responsibilities, the Sixth Circuit has deepened a circuit conflict and defied this Court's precedent. These errors should not stand.

1. In *Flores-Ortega*, the Court established a "specific," two-part definition for "consulting" about an appeal:

> advising the defendant about the advantages and disadvantages of taking an appeal, and

> making a reasonable effort to discover the defendant's wishes.

528 U.S. at 478. This requires two separate discussion topics: (1) the pros and cons of appealing, and (2) the defendant's decision whether to appeal. *Flores-Ortega* plainly makes this definition conjunctive—for a court to find that a defense attorney consulted with his client, he must have discussed *both* topics.

This makes sense. A defendant needs his attorney to explain the advantages and disadvantages of appealing before he can decide whether to appeal. And an attorney needs to know that his client wants to appeal before he can have a constitutional duty to perfect the appeal. *Id.* ("Counsel performs in a professionally unreasonable manner [after consulting] only by failing to follow the defendant's express instructions with respect to an appeal."). But a "consultation" that neglects to cover one of these required topics is necessarily deficient. The defendant cannot decide whether to appeal until his attorney explains the costs and benefits. And the attorney must not discuss the merits of appealing merely in the abstract, without learning whether the defendant has in fact decided to appeal. For once the defendant has decided to appeal, it is the attorney's job to perfect the appeal. *Id.* at 477. If an attorney "consults" without making a reasonable effort to learn whether his client has decided to appeal, he has not actually consulted (regardless of whether that "consultation" occurs before, after, or partially before and after sentencing). *See id.* at 478–79. Indeed, completing an adequate consultation often must wait until after sentencing, when the defendant has all the information necessary to make an informed decision.

The Sixth Circuit got this wrong. In finding that Roberts did sufficiently consult with McCormick, its only evidence was testimony that Roberts had discussed the "risks [and] rewards … for appealing." Pet.App.5a. Nowhere did the court discuss any evidence that Roberts had made a "reasonable effort to discover [McCormick's] wishes" about appealing. *Flores-Ortega*, 528 U.S. at 478. This misses half of the definition for what is required to "consult."

Plus, this error was a legal one, not a factual one. The Sixth Circuit said that it was leaving undisturbed the district court's "factual" finding that Roberts consulted with McCormick. Pet.App.4a–5a. But *Flores-Ortega* provided a *legal* definition of "consult": counsel must discuss both the merits of an appeal and the defendant's desire to appeal for a consultation to occur. Deciding whether those two topics were discussed is of course a factual matter. But it is a legal error to say that counsel has sufficiently "consulted" without addressing both.

Yet the Sixth Circuit affirmed precisely that legal error. Pet.App.8a n.2 (declining to reach "McCormick's argument that it was unreasonable for counsel not to consult him" because some consultation had occurred). The district court found only that "Roberts discussed the risks and rewards of appealing with" McCormick. Pet.App.25a. It never considered whether Roberts adequately addressed McCormick's desire to appeal. *See id.* Elsewhere in its opinion, the district court mentioned Roberts' statement that it was McCormick's responsibility to ask for an appeal. Pet.App.24a. But it made no finding that this constituted "a reasonable effort to discover" McCormick's decision about whether to appeal. Nor could it: McCormick said he wanted to

appeal if he did not like the results of sentencing, and immediately after sentencing he was upset. It was Roberts' responsibility to determine his client's wishes, not the client's job to ask about an appeal in the heat of an unfavorable sentence. *See infra* Part II.3.

By failing to ever make a reasonable effort to discover McCormick's desire to appeal, Roberts did not sufficiently consult. It was wrong for the Sixth Circuit to find otherwise.

2. The Sixth Circuit found that counsel has no duty to consult after sentencing even when a defendant says he will wait until sentencing to decide whether to appeal or when the defendant is obviously dissatisfied or surprised by his sentence. This contradicts *Flores-Ortega* and should be corrected.

Not much is needed to trigger a defense attorney's duty to consult about an appeal. A defendant does not need to request an appeal, ask about an appeal, or even want to appeal. In fact, he does not even need to "reasonably demonstrate[] to counsel that he [is] interested in appealing." *Flores-Ortega*, 528 U.S. at 480. All that is needed is a "reason to think" that the defendant is interested in an appeal. *Id.* As long as that reason exists, counsel has a "constitutionally imposed duty" to consult. *Id.*

Here, there were very good reasons for Roberts to think that McCormick was interested in appealing. As the Sixth Circuit observed, McCormick told Roberts that "he wanted to appeal … if he didn't feel like he was treated fairly at sentencing." Pet.App.3a (alterations adopted, quotation marks omitted). And he "pled guilty without a plea agreement" specifically "to pre-

serve his appellate rights." Pet.App.2a, 22a. So Roberts knew that McCormick was at least "interested" in an appeal. That is all *Flores-Ortega* requires. Moreover, McCormick was visibly upset about the results of sentencing. Pet.App.22a. Going into sentencing, Roberts knew that McCormick's decision about an appeal would depend on sentencing. Because McCormick was upset after sentencing, there was a particularly good "reason to think" he might want to appeal.

The Sixth Circuit correctly noted that there is no bright-line rule that counsel must always consult after sentencing in every case. *See* Pet.App.5a–8a. But that misses the point. Under *Strickland*, Roberts needed to conduct himself reasonably, both before and after sentencing. *Cf. Flores-Ortega*, 528 U.S. at 481 ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.")

This Court has repeatedly explained that the duty to act reasonably continues after sentencing. *See, e.g.*, *Smith v. Robbins*, 528 U.S. 259, 285 (2000). This applies to the duty to consult when it arises post-sentencing. For example, when defense counsel considers whether his client has shown an interest in appealing, counsel should consider "whether the defendant received the sentence bargained for as part of [a] plea." *Flores-Ortega*, 528 U.S. at 480. The only time counsel could do this is *after* the court imposes sentence. In *Garza v. Idaho*, this Court extended *Flores-Ortega* to cases where a defendant has signed an appeal waiver. 586 U.S. ---, 139 S. Ct. 738 (2019). There, the defendant had told counsel "[s]hortly after sentencing" that he wanted to appeal. *Id.* at 743. By failing to file the defendant's requested appeal, his "attorney rendered

deficient performance." *Id.* at 746. This Court thus reaffirmed counsel's duty to respond reasonably to post-sentencing requests to appeal. *Id.* at 746.

So Roberts needed to act reasonably after sentencing. When Roberts and McCormick discussed an appeal before sentencing, the result of their discussion was that McCormick wanted to wait and see what happened at sentencing. Then, after sentencing, Roberts recognized that he was plainly upset. If a defendant says he will wait until sentencing to decide about whether to appeal, and it is obvious to counsel that the defendant is upset after sentencing, a reasonable attorney must consult about an appeal. That consultation need not necessarily "repeat" information that was conveyed before sentencing. Pet.App.8a. But because the defendant's decision about appeal depended on the sentence imposed, a reasonable attorney will recognize that he has not yet learned the defendant's wishes regarding appeal. So counsel must make a reasonable effort to discover those wishes. The Sixth Circuit erred by finding otherwise.

3. The Sixth Circuit also erred by faulting a defendant for not fulfilling his counsel's duty to consult. Deciding that it was McCormick's responsibility to communicate his desire to appeal turns *Flores-Ortega* on its head. Defense counsel has a duty to consult; defendants do not have a duty to request.

In *Flores-Ortega*, the Court kept the spotlight on the responsibilities of counsel. And rightly so, because defense attorneys are "necessary to ensure that [a criminal proceeding] is fair." *Strickland*, 466 U.S. at 685. After all, "defendants cannot be presumed to make critical decisions without counsel's advice."

Lafler v. Cooper, 566 U.S. 156, 165 (2012). So *Flores-Ortega* focused on the duties of defense counsel, addressing such issues as when counsel must consult about an appeal and what counsel must do after consulting.

The Sixth Circuit inverted that focus. Before sentencing, McCormick "told [Roberts] that he wanted to appeal … if he didn't feel like he was treated fairly at sentencing." Pet.App.3a (alterations adopted, quotation marks omitted). Based on that statement, Roberts should have known he would need to discuss an appeal after sentencing. *See supra* Part II.2. But instead, he (at most) tried to pass off his constitutional duties *to his client*: "[Roberts] told McCormick that if he felt he was being treated unfairly, he'd have to expressly tell [him] to file an appeal." Pet.App.3a. Remarkably, the Sixth Circuit went along. Applying clear-error review, it affirmed the district court's finding that McCormick never expressly requested an appeal and found no constitutional violation. And it refused to find that Roberts should have made a reasonable effort after sentencing went poorly to discover McCormick's wishes as to appeal.

By placing the burden to request an appeal on McCormick, the Sixth Circuit compounded its error about what counts as consulting. A true consultation should reveal whether a defendant wants to appeal. *See supra* Part II.1. But Roberts never even tried to find that out. Instead, he told McCormick that it was McCormick's responsibility to request an appeal. Pet.App.135a. That is not the constitutional arrangement. *See Flores-Ortega*, 528 U.S. at 478–80.

Permitting defense counsel to offload duties onto defendants makes no sense in other contexts. Counsel could never explain the pretrial detention factors to a defendant and then tell the defendant that he must argue for his own pretrial release. *Cf.* 18 U.S.C. § 3142(g) (listing factors). Nor could counsel make it the defendant's responsibility to meet filing deadlines. *Cf.* Fed. R. Crim. P. 29(c)(1) (deadline to move for judgment of acquittal). And counsel cannot explain the pros and cons of making evidentiary objections and then tell the defendant that he must object during trial. *Cf.* Fed. R. Evid. 103. Nor can counsel explain the positives and negatives of presenting mitigating evidence at sentencing and then tell the defendant that he will not submit such evidence until the defendant expressly tells him to do so. *Cf. Wiggins v. Smith*, 539 U.S. 510 (2003) (deficient performance for failing to adequately investigate defendant's background or present mitigating evidence).

So too here: counsel cannot merely "advis[e] the defendant about the advantages and disadvantages of taking an appeal," *Flores-Ortega*, 528 U.S. at 478, and then tell the defendant that he must "expressly tell counsel to file an appeal," Pet.App.3a. "Trial attorneys cannot outsource their constitutional obligation to advise their clients about filing an appeal nor their duty to make a reasonable effort to discover their clients' wishes." *United States v. Herring*, 935 F.3d 1102, 1109 (10th Cir. 2019).

Contrary to this Court's precedent, the Sixth Circuit faulted a defendant for failing to satisfy his counsel's duty to consult. This error should be corrected.

III. The Question Presented Is Important And Likely To Recur.

1. The question here could hardly be more significant: it can arise in every criminal case (federal or state), and it determines whether a defendant has a meaningful right to effective assistance regarding one of the most "fundamental decisions" in a case (whether to take an appeal). *Jones v. Barnes*, 463 U.S. 745, 751 (1983). If the right to appeal can be extinguished by counsel's failure to follow up after sentencing when circumstances reasonably so demand, then countless cases will terminate contrary to a defendant's wishes and "the defendant's prerogative." *Garza*, 139 S. Ct. at 746; *see Campusano v. United States*, 442 F.3d 770, 777 (2d Cir. 2006) (Sotomayor, J.) ("[W]e do not cut corners when Sixth Amendment rights are at stake."); ABA Standards for Criminal Justice, Defense Function 4-5.2(b)(viii) (4th ed. 2017) (identifying the decision to appeal as among those to be made by the defendant); *id.* 4-9.2(f) (similar).

The rule applied below does not just deny defendants both their "ultimate authority … whether to … take an appeal" and their right to effective assistance on that "important decision[]." *Jones*, 463 U.S. at 751; *Strickland*, 466 U.S. at 688. It also excuses attorney conduct that falls below professional standards. *See* ABA Standards for Criminal Justice, Criminal Appeals 21-2.2(a) (2d. ed. 1980) ("Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new

counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time."); *id.* 21-2.2(b) ("Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing.").[7] No defendant deserves to have his right to appeal taken away, let alone by shoddy lawyering.

Moreover, belated and protracted habeas litigation is the inevitable result of the unclear constitutional requirements here. Many such petitions could be avoided (and countless judicial resources conserved) if counsel's constitutional duties were clarified so that they could more easily fulfill them. The division in lower court authority over such a simple proposition as whether to follow up after sentencing when defendants say they will wait until after sentencing to decide on appealing also underscores the imperative to provide clearer guidance.

2. The question presented recurs frequently. As discussed above, at least 22 federal courts of appeals decisions involve the question, and the district and magistrate judge opinions interpreting *Flores-Ortega* (with widely varying degrees of precision) are legion.

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[7] *See also id.* cmt. ("Regardless of whether trial counsel will also represent the defendant on appeal, there is the continuing responsibility of trial counsel to provide assistance to a client beyond entry of final judgment in the trial court."); N.Y. Jud. Law § 671.3(a); Cal. Penal Code § 1240.1(a); Idaho Rules of Pro. Conduct 1.3 cmt. [4]; *Maddox v. State*, 407 P.3d 152, 159–60 (Haw. 2017); *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014); *Whitmore v. State*, 203 N.W.2d 56, 63 (Wis. 1973); *Morga v. State*, 466 P.3d 1288, at *1 (Nev. 2020) (table opinion); *Jones v. State*, 98 S.W.3d 700, 702–03 (Tex. Crim. App. 2003).

Let alone state cases. The question here goes to the core of *Flores-Ortega*: What does it mean to consult regarding appeal, and when does counsel have a constitutional duty to do so? In the 24 years since that decision, divergent rules and foundational errors have proliferated, too often leaving the rights to effective assistance and to appeal a criminal sentence disregarded.

The Court can now resolve this confusion by granting review and reversing the decision below.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE.

This case presents a clean challenge to erroneous understandings of counsel's duty to consult that have propagated across lower courts for decades. It is an excellent vehicle to clarify the duty to consult about an appeal, a duty that exists in "the vast majority" of criminal convictions. *Flores-Ortega*, 528 U.S. at 481.

First, the petition is not plagued by factual issues. Cases applying *Flores-Ortega* often turn on the specific facts involved. *See id.* at 480 ("Only by considering all relevant factors in a given case can a court properly determine whether" counsel should have consulted.). Not so here. Though McCormick maintains that the lower courts made several factual errors, none of those factual disputes is material to this Petition, which addresses only *legal* errors made by the Sixth Circuit.

Second, this case cleanly tees up the question presented. Whether Roberts properly consulted was presented and preserved at each stage of the proceedings. And the district court's Certificate of Appealability eliminated any extraneous issues.

Finally, this important question has percolated in the lower courts for long enough. Almost all criminal cases yield a guilty plea. *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). These pleas inevitably result in a sentence. And because guilty pleas narrow the issues available on appeal, appeals often focus on the results of sentencing. *Cf. Garza*, 139 S. Ct. at 745 n.6. Thus, most defendants cannot decide whether they are interested in an appeal until their sentence has been imposed. *Cf. Cong Van Pham*, 722 F.3d at 322–23. This case allows the Court to clarify the scope and timing of defense counsel's duty to consult about an appeal, a duty that is triggered in "the vast majority of cases." *Flores-Ortega*, 528 U.S. at 481.

CONCLUSION

The Court should grant the petition.

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