No. 23-925

In the Supreme Court of the United States

MICHAEL SHANE MCCORMICK, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in rejecting petitioner's claim "that counsel was required to repeat his advice after sentencing" regarding a potential appeal, where counsel had already "consult[ed] him" on that subject. Pet. App. 5a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 72 F.4th 130. The opinion of the district court (Pet. App. 11a-33a) is unreported but available at 2022 WL 2528240.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2023. A petition for rehearing was denied on September 26, 2023 (Pet. App. 10a). On December 14, 2023, Justice Kavanaugh extended the time within which to file a petition for certiorari to and including February 23, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of conspiring to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 846; possessing 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Judgment 10. Petitioner was sentenced to 276 months of imprisonment. Judgment 2. He did not appeal. Pet. App. 2a.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 38a. The district court denied the motion. *Id.* at 11a-33a. The court of appeals affirmed. *Id.* at 2a-9a.

1. Petitioner, his son, their girlfriends, and others ran a methamphetamine distribution operation in Georgia, Tennessee, and Kentucky. Presentence Investigation Report (PSR) ¶¶ 10-12. In November 2016, after his son fled the scene of a car accident, officers searched petitioner's house in Corbin, Kentucky. PSR ¶¶ 23, 27. The search uncovered 107 grams of methamphetamine and nine firearms. Petitioner admitted that the drugs and guns were his. PSR ¶¶ 25, 28.

A grand jury in the Eastern District of Kentucky returned an indictment charging petitioner with conspiring to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 846; possessing 50 grams or more of a mixture or substance containing a

detectable amount of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). See Superseding Indictment.

Petitioner pleaded guilty, without a plea agreement, to all four counts asserted against him in the superseding indictment. Pet. App. 12a. The Probation Office calculated petitioner's Sentencing Guideline range on the distribution conspiracy, possession with intent to distribute, and felon in possession of a firearm counts to be 262 to 327 months of imprisonment. PSR ¶ 131. The presentence report also noted that the count of possession of a firearm during a drug trafficking crime carried a mandatory minimum term of 60 months of imprisonment, to be served consecutively with his other sentences. PSR ¶ 129. The district court sentenced petitioner to a below-Guidelines term of 276 months' imprisonment. Pet. App. 12a-13a.

At the sentencing hearing, the district court provided petitioner with a form titled "Court's Advice of Right to Appeal," which informed petitioner that he had "a right to appeal [his] case to the Sixth Circuit Court of Appeals, which on proper appeal will review this case and determine that there has or has not been error of law." D. Ct. Doc. 299 (Oct. 9, 2018) (emphasis omitted). The form also stated that petitioner had the right to appeal in forma pauperis if he did not have sufficient money to pay for an appeal; that the clerk of the district court would prepare and file a notice of appeal on petitioner's behalf if he did not have an attorney, wished to appeal, and so requested; and that a notice of appeal would need to be filed within 14 days from the date of

entry of the judgment. *Ibid.* Petitioner signed the form and allowed the appeal deadline to pass. Pet. App. 6a.

2. Roughly ten months later, petitioner filed a pro se motion to vacate his sentence under Section 2255. See Motion to Vacate Sentence, D. Ct. Doc. 316 (Aug. 16, 2019). The motion argued, as relevant here, that petitioner's attorney, Wayne Roberts, had provided ineffective assistance of counsel by not filing a notice of appeal. *Id.* at 3-4. The government filed a response opposing petitioner's motion and urging the district court to hold an evidentiary hearing. D. Ct. Doc. 343 (Dec. 20, 2019). Attached to the government's opposition was an affidavit from Roberts asserting, among other things, that he had "discussed [petitioner's] case at length with [petitioner]" and had "advised" petitioner to "let" him "know immediately after sentencing" if he "desired to appeal any aspect of his case," but that petitioner had not expressed interest in an appeal after sentencing. D. Ct. Doc. 343-1 at ¶¶ 2, 5-6.

A magistrate judge held an evidentiary hearing during which petitioner and Roberts each testified. Petitioner, acknowledging that Roberts had explained the "risks" and "rewards" of an appeal before sentencing, Pet. App. 78a, claimed that he had instructed Roberts at the conclusion of the sentencing hearing to file a notice of appeal, *id.* at 79a. Roberts, however, provided contrary testimony. *Id.* at 137a. Roberts explained that in "several discussions" before the sentencing hearing, he had made clear to petitioner that petitioner could appeal any sentence he believed to be "unreasonable." *Id.* at 134a. He further testified that he had advised petitioner that if petitioner "wanted to appeal" his sentence, he "just" needed to "let [Roberts] know" and Roberts

"would do that," *ibid.*, but that petitioner never made such a request, *id.* at 137a.

Following the hearing, and after receiving post-hearing briefing, the magistrate judge issued a report recommending that the district court deny petitioner's motion. Pet. App. 35a-68a. The magistrate judge recognized that petitioner and Roberts disputed whether petitioner had instructed Roberts to file a notice of appeal, and found that "Roberts's testimony [was] more credible." *Id.* at 50a. The magistrate judge further found that Roberts consulted with petitioner regarding a potential appeal, *id.* at 54a-55a, and that, even if Roberts had not consulted with petitioner, petitioner had failed to show that a rational defendant would have wanted to appeal under the circumstances or that he reasonably demonstrated to Roberts that he was interested in appealing. *Id.* at 55a-59a. And the magistrate judge found that petitioner's claim of ineffective assistance would fail even if he could show that Roberts performed unreasonably, as petitioner had not shown that "he would have timely appealed" "but for [Roberts's] failure," as required for the prejudice component of an ineffective-assistance claim. *Id.* at 59a.

The district court adopted the magistrate judge's recommendation and denied petitioner's motion. Pet. App. 11a-33a. Like the magistrate judge, the court concluded that Roberts had told petitioner before sentencing that petitioner should "inform him if he wanted to file an appeal," and that petitioner had not "demonstrate[d] by a preponderance of the evidence that" petitioner ever did so. *Id.* at 23a-24a. The court also found that Roberts "adequately consulted with [petitioner] about an appeal" and that, even if he had not, petitioner

had "failed to show that a rational defendant" in his circumstances "would" have "want[ed] to appeal or that he reasonably demonstrated to Mr. Roberts that he wanted to appeal." *Id.* at 25a, 28a.

4. The court of appeals affirmed. Pet. App. 2a-9a.

In addressing petitioner's claim of ineffective assistance, the court of appeals applied this Court's guidance from *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), asking (1) whether Roberts had disregarded instructions from petitioner to file an appeal, and (2) whether Roberts should have, but did not, consult petitioner about an appeal. Pet. App. 3a (citing *Flores-Ortega*, 528 U.S. at 477-478). As to the first question, the court saw no clear error in the district court's finding that petitioner never instructed Roberts to file an appeal. *Id.* at 3a-4a.

Turning to the second question, the court of appeals determined—based largely on petitioner's own admissions—that the district court did not clearly err in finding that Roberts had consulted petitioner about an appeal. See Pet. App. 3a-5a. Specifically, the court observed that petitioner had testified that he told Roberts "he wanted to appeal under only two conditions: if he lost at trial, or if he 'didn't feel like [he] was treated fairly' at sentencing." *Id.* at 3a (brackets in original). And the court of appeals could identify no clear error in the district court's finding that "[n]either of those conditions were met." *Id.* at 4a.

The court of appeals also rejected petitioner's argument that even though Roberts had consulted him about an appeal, Roberts nonetheless performed ineffectively, on the theory that "was required to repeat his advice after sentencing." Pet. App. 5a. The court emphasized that *Florea-Ortega* had "rejected a rigid, technical rule

in favor of a standard that ensures the defendant understands his appeal rights." *Id.* at 6a. The court observed that, "[f]or example," under *Flores-Ortega*, "counsel need not consult his client about an appeal if the sentencing court's instructions were clear and informative." *Ibid.* (citing *Flores-Ortega*, 528 U.S. at 479-480). The court explained that if such a colloquy "can relieve counsel of *any* obligation to consult, surely it's also relevant to whether counsel must repeat himself." *Ibid.* And here, because "the district court's model colloquy ensured that [petitioner] understood his rights" regarding appeal, the court of appeals found no constitutional requirement for Roberts to have "repeat[ed]" his advice to petitioner after sentencing. *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 9-21) that his counsel was required to repeat after sentencing the advice regarding appeal that counsel had already provided to petitioner before sentencing. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This case would in any event be a poor vehicle for addressing the question presented because petitioner failed to establish prejudice from any error counsel may have committed and thus petitioner would not be entitled to relief even if this Court were to reverse the decision of the court of appeals.

1. The court of appeals correctly determined that petitioner had failed to establish that his counsel's performance was deficient.

a. In *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational

defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. And the Court explained that, to determine whether counsel "consulted with the defendant about an appeal," a court must ask whether counsel "advis[ed] the defendant about the advantages and disadvantages of taking an appeal" and "ma[de] a reasonable effort to discover the defendant's wishes" about an appeal. *Id.* at 478.

In adopting that standard, the Court rejected a "bright-line rule" requiring counsel to "file a notice of appeal unless the defendant specifically instructs otherwise." *Flores-Ortega*, 528 U.S. at 478. The Court also emphasized that, "as a *constitutional* matter," an attorney is not required to consult with his client about an appeal "in every case." *Id.* at 479. To illustrate that point, *Flores-Ortega* described (*inter alia*) a scenario where "a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult." *Id.* at 479-480. "In some cases," the Court explained, "counsel might then reasonably decide that he need not repeat that information." *Id.* at 480.

b. The court of appeals correctly applied those principles to the circumstances of petitioner's case. The court of appeals observed that the district court had "provided [petitioner] written notice of his appeal rights" and "instructed [petitioner] to 'talk to [his] lawyer about it' and then sign it when he was 'comfortable.'" Pet. App. 6a (citation omitted). "After that colloquy and counsel's earlier consultation, [petitioner] knew everything he needed to decide whether to appeal," and

"counsel's decision not to repeat himself was permissible under the Constitution." *Ibid.*

Although that was all that the court of appeals needed to do to resolve this case, it went on to separately explain that "[e]ven without this kind of model colloquy, we have held that counsel need not repeat information that the defendant's already received." Pet. App. 7a. And here, as the court observed (see *id.* at 3a-4a), Roberts discussed the possibility of an appeal with petitioner on multiple occasions.

Through those discussions, Roberts learned petitioner's intentions regarding an appeal, including specifically that petitioner wished "to appeal under only two conditions: if he lost at trial, or if he 'didn't feel like [he] was treated fairly' at sentencing." Pet. App. 3a (citation omitted; brackets in original). Because the second of those conditions turned on petitioner's state of mind, Roberts "told [petitioner] that if he felt he was * * * treated unfairly, he'd have to expressly tell [Roberts] to file an appeal." *Ibid.*

Ultimately, Roberts did not file an appeal for petitioner because "[n]either of those conditions were met." Pet. App. 4a. Specifically, "the first condition wasn't met" because petitioner "pled guilty, there was no trial." *Ibid.* "And the district court found," without any clear error in that finding, "that the second condition wasn't met either." *Ibid*. Thus, in these particular circumstances, counsel in fact "ma[de] a reasonable effort to discover the defendant's wishes," *Florea-Ortega*, 528 U.S. at 478, about an appeal.

c. Petitioner errs in suggesting (Pet. 21-24) that the disposition of his case rests on a misapplication of *Flores-Ortega*. Nothing in that decision supports his claim. The first question under *Flores-Ortega* is "whether

counsel in fact consulted with the defendant about an appeal"—*i.e.*, "advis[ed] 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. If so, "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Ibid.* Here, Roberts consulted with petitioner, Pet. App. 3a-4a; petitioner "really never said that he was going to appeal anything," *id.* at 134a; and counsel's efforts to ascertain petitioner's desires were reasonable.

Moreover, even assuming that petitioner were correct in asserting the attorney-client discussions here were not proper consultations, *Flores-Ortega* makes clear that an attorney must consult his client about an appeal only "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. Petitioner does not identify any nonfrivolous appellate argument, or other reason why a rational defendant would have appealed a below-Guidelines sentence. And the circumstances—which include petitioner's signing of the district court's appellate-rights form—do not show that he made any "reasonabl[e] demonstrat[ion]" of a desire to appeal. *Ibid.*[1]

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[1] Petitioner errs in comparing his case to *Garza* v. *Idaho*, 139 S. Ct. 738 (2019) because there, unlike here, the defendant made multiple "clear requests" for his counsel to file an appeal. *Id.* at 746.

Petitioner characterizes (Pet. 27) the court of appeals as "placing" on the client the attorney's constitutional "burden" of consulting about an appeal. See *ibid.* (alleging that Roberts "tried to pass off his constitutional duties to his client") (emphasis omitted). But on the facts here, Roberts did not pass off any burden to petitioner. Instead, as petitioner acknowledges, Roberts spoke with petitioner on multiple occasions about the possibility of an appeal and learned from petitioner directly that petitioner wished to appeal only in one of two circumstances: loss a trial or if he was "treated unfairly" at sentencing. Pet. App. 3a. The first circumstance was mooted out by petitioner's guilty plea. *Id.* at 4a. And because the second was wholly subjective, counsel did not act unreasonably in asking petitioner—who was informed of his appellate rights—to follow up if he decided to invoke those rights.

Even if petitioner indicated disappointment at the (below-Guidelines) sentence after the hearing, counsel could not intuit that petitioner wanted to file an appeal, where—after sentencing—petitioner signed the district court's notice of appellate rights and provided no indication that his frustration should be channeled into an appeal.[2] Pet. App. 6a. Finally, in all events, any error here would be case-specific and warrant no further review in this court. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a

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[2] Petitioner suggests that Roberts acted unreasonably by not "consider[ing] 'whether [petitioner] received the sentence bargained for as part of [his] plea.'" Pet. 25 (quoting *Flores-Ortega*, 528 U.S. at 480). But petitioner did not "bargain[] for" a particular "sentence." *Ibid.* He instead pleaded guilty without a plea agreement, Pet. App. 12a and did not bargain for any particular sentence.

[writ of] certiorari to review evidence and discuss specific facts."); see also *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

2. Petitioner is incorrect in his claim (Pet. 9-21) that his case implicates a circuit conflict.

a. Contrary to petitioner's contention (Pet. 9, 11), neither the Sixth Circuit nor the Second or Seventh Circuits conflicts with other circuits by finding *Flores-Ortega*'s consultation requirement satisfied even where counsel fails to "make a reasonable effort to discover the defendant's wishes." Pet. 11 (brackets and citation omitted).

For reasons explained above, the Sixth Circuit did not do so in the decision below. And petitioner does not identify any decision in which the Sixth Circuit has "found that counsel 'consulted' *without* evidence that counsel * * * made a reasonable effort to discover his client's wishes." Pet. 15. In the only other published decision that he cites, *United States* v. *Doyle*, 631 F.3d 818 (6th Cir. 2011), the court expressly applied the specific definition of "consult" from *Flores-Ortega*, which requires an attorney to both advise his client about the plusses and minuses of appealing and make a reasonable effort to determine the defendant's wishes about an appeal. See *ibid*. And it highlighted the district court's "factual findings" that "Doyle knew of his right to appeal," that "Doyle's counsel discussed with him at

length the merits of an appeal," and that "Doyle did not instruct his counsel to file a notice of appeal." *Ibid.*[3]

Petitioner also misplaces his reliance on the Second Circuit's unpublished summary order in *Kapelioujnyi* v. *United States*, 422 Fed. Appx. 25 (2011). There, the Second Circuit determined that the district court had not abused its discretion by dismissing a habeas petition alleging ineffective assistance of counsel without first holding an evidentiary hearing. That was so, the Second Circuit explained, because although the petitioner claimed that his attorney had failed to consult him about an appeal, "the record" as a whole "demonstrate[d]" the opposite. *Id.* at 26. In particular, the petitioner's own affidavit stated that after he expressed interest in appealing, his counsel had explained that petitioner's appellate rights had been curtailed by a provision in his plea agreement, after which point the petitioner did not "express[] any further interest in appealing." *Ibid.* In

[3] Petitioner also misconstrues the Sixth Circuit's unpublished decisions in *Johnson* v. *United States*, 364 Fed. Appx. 972 (2010) and *Spence* v. *United States*, 68 Fed. Appx. 669 (2003). In *Johnson*, to determine whether the attorney there had consulted his client about an appeal, the court "consider[ed] all the facts" of the case and found "that [counsel had] consulted" because "he 'advis[ed] the defendant about the advantages and disadvantages of taking an appeal, and ma[de] a reasonable effort to discover the defendant's wishes.'" 364 Fed. Appx. at 976 (quoting *Flores-Ortega*, 528 U.S. at 478) (fourth and fifth sets of brackets in original). And in *Spence*, the court of appeals found it "clear from the record that * * * a consultation occurred" between attorney and client, noting that the client "repeatedly acknowledge[d] that he and his attorney discussed the possibility of filing an appeal." 68 Fed. Appx. at 671. Nothing in either decision suggests the Sixth Circuit was concerned about only the advising prong of consultation and not whether the attorney made a reasonable effort to discover the defendant's wishes. And in any event, such nonbinding decisions are not circuit law.

its analysis, the court specifically cited *Flores-Ortega* and acknowledged in a parenthetical that "'consult[ing]' requires advising [a] client regarding 'advantages and disadvantages' of appeal and 'making a reasonable effort to discover' client's wishes." *Ibid.* (quoting *Flores-Ortega*, 528 U.S. at 478).

The Seventh Circuit's decision in *Bednarski* v. *United States*, 481 F.3d 530 (2007), likewise does not, as petitioner claims, look to "just the first half of *Flores-Ortega*'s definition" of "consult." Pet. 16. *Bednarski* expressly states that *Flores-Ortega* "defined 'consult' as advising the defendant about the advantages and disadvantages of taking an appeal[] *and* making a reasonable effort to discover the defendant's wishes." 481 F.3d at 535 (quoting *Flores-Ortega*, 528 U.S. at 478) (emphasis added). And although the analysis in *Bednarski* spoke primarily to the first component, it did so only because the petitioner in that case had focused on the first component, asserting his counsel performed ineffectively by "failing to advise him of the pros and cons of taking an appeal." *Id.* at 531; see *id.* at 533 (describing petitioner as "claim[ing] that [his] attorney never * * * address[ed] the advantages and disadvantages of filing an appeal"); *id.* at 534 (same). The court's focus on the first sub-requirement of consultation thus reflects the specificity of petitioner's argument, and in no way indicates that the Seventh Circuit reads *Flores-Ortega* incompletely.

b. Petitioner also errs (Pet. 16) in contending that the courts of appeals are divided on the question of whether "counsel has a duty to consult * * * at or after sentencing under certain circumstances." According to petitioner, while five courts of appeals—the First, Third, Fourth, Fifth and Eleventh Circuits—"require"

an attorney to "consult" his client "at or after sentencing" when the client "chooses to wait until after sentencing to decide whether to appeal" or "is obviously dissatisfied or surprised by his" actual sentence, three courts of appeals—the Seventh, Ninth and the Sixth Circuit here—do not. Pet. 16, 19. But what petitioner claims is a divergence in legal interpretation among the circuits is in fact merely an observation that the *Flores-Ortega* test produces different results on different facts.

For example, petitioner cites the Fourth Circuit's decision in *United States* v. *Witherspoon*, 231 F.3d 923 (2000), as endorsing the blanket proposition that where a client at any point expresses a "'conditional desire to appeal,'" "counsel must make a reasonable effort at or after sentencing to discover," or rediscover "the defendant's wishes" about appealing. Pet. 17 (citation omitted). But in that case, the defendant had informed his counsel before sentencing that he wished to appeal his sentence if the district court overruled two specific objections he raised to the PSR, *Witherspoon*, 231 F.3d at 925; the district court then overruled the objections, resulting in "the application of a guideline range much higher than the one that would have applied had his objections been sustained," see *id.* at 927; and counsel nonetheless failed to file a notice of appeal, *id.* at 925. The court of appeals accordingly explained that "[i]f it" were "true that [the defendant] expressed his intention to appeal if his objections were overruled and counsel decided not to file an appeal without having discussed the matter further with [the defendant] after he was sentenced, counsel's performance clearly was constitutionally deficient." *Id.* at 927. This case, however, lacks such a clear countermand of a defendant's expressed

desire to appeal in an objectively determinable circumstance.

The First Circuit's decision in *Rojas-Medina* v. *United States*, 924 F.3d 9 (2019), is similarly inapposite. That case involved a defendant who, in addition to indicating dissatisfaction with his sentence, also "made * * * luminously clear" to his attorney following the imposition of his sentence "that" he was "interested in whatever" post-sentence "relief might be available." *Id.* at 17. The lower courts here, in contrast, found that although petitioner may have indicated disappointment in his sentence, he never indicated to Roberts at or after sentencing that he wished to appeal. See Pet. App. 3a-4a, 23a-24a. As the First Circuit recognized in *Rojas-Medina*, "a defendant must have done more than merely express his displeasure at sentencing" to have " 'reasonably demonstrat[ed]' an interest in appealing" such that his attorney had a "duty to consult." 924 F.3d at 16-17. And here, where petitioner—advised of his appellate rights both by his counsel and by the district court—did not even mention the possibility of an appeal after his sentence was imposed.

The Third Circuit's decision in *United States* v. *Shedrick*, 493 F.3d 292 (2007), likewise reflects a difference in factual circumstances, not a difference in legal standards. There, the court of appeals determined that counsel had been required to consult with his client about an appeal after the imposition of sentence because, *inter alia*, the defendant had "vehemently contest[ed] the factual issues that led to his upward departure," *id.* at 301, and the district court had, after being contacted by the defendant, "specifically informed [defense] counsel * * * of his [client's] desire to appeal by leaving a message on counsel's phone." *Ibid.* The Third

Circuit's determination that counsel had a duty to consult "[i]n th[at] context," *ibid.*, says nothing as to whether it would have reached the same conclusion on the facts of petitioner's case.

In the Fifth Circuit decision on which petitioner primarily relies, *United States* v. *Cong Van Pham*, 722 F.3d 320 (2013), the court of appeals found deficient performance when counsel did nothing after sentencing even though the defendant had expected a specific sentence, received a higher sentence, and told his attorney that he "wanted to do something to get less time." *Id.* at 325. The court made clear, however, that it "d[id] not mean to impose a 'mechanical rule' that consultation must always follow sentencing," emphasizing its case-specific determination that "counsel's cursory discussion before sentencing did not compensate for the complete failure to mention the possibility of appeal after sentencing." *Id.* at 324 n.16 (emphases omitted). And in *United States* v. *Tighe*, 91 F.4th 771 (5th Cir. 2024), the court found deficient performance only where counsel did not discuss the possibility of an appeal either before or after sentencing. See *id.* at 775.

Finally, the Eleventh Circuit's decision in *Thompson* v. *United States*, 504 F.3d 1203 (2007), found deficient performance not because the defendant was dissatisfied with his sentence, but because counsel had never "explain[ed] * * * the advantages and disadvantages of * * * an appeal" to his client, instead asserting only that an appeal would not be successful. *Id.* at 1207. Similarly, in *Rios* v. *United States*, 783 Fed. Appx. 886 (11th Cir. 2019) (per curiam)—which is in any event nonbinding— the court of appeals found that counsel had failed his duty to consult where not only had the defendant exhibited "obvious[] distress[]" about his

sentence, but counsel ignored "repeated and urgent requests" from his client (and the client's family) that "convey[ed the client's] desperation about the sentence and his desire to speak with [the attorney] about his options going forward." *Id.* at 892-893. That was not the case here.

3. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering it. To prove ineffective assistance of counsel, petitioner must make two showings: that counsel acted unreasonably, and that counsel's unreasonable performance prejudiced the defendant. *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984). As applied in the context of a notice of appeal, prejudice requires the defendant to show "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484.

Here, the district court found that petitioner "was not prejudiced even if Mr. Roberts failed to consult with him about an appeal." Pet. App. 29a. The court of appeals did not disturb or cast doubt on that finding, and petitioner has not challenged it before this Court. Thus, even if this Court agreed with petitioner that counsel's performance was deficient, petitioner would still not be able to establish the prejudice necessary to show ineffective assistance of counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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