No. 23-925

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

To "consult" in accordance with the Sixth Amendment requires two distinct actions: "*advising* the defendant about the advantages and disadvantages of taking an appeal, *and making a reasonable effort to discover* the defendant's wishes" in that regard. *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (emphasis added). Here, the Sixth Circuit upheld a "consultation" based solely on the first action and without finding any effort by counsel to discover McCormick's wishes. The government does *not* dispute that this issue is important and likely to recur. Nor does it dispute *Flores-Ortega*'s observation that a complete consultation will be required "in the vast majority of cases." *Id.* at 481. But on every other score, the government's opposition falls flat.

First, the decision below does not stand alone in committing this definitional error: three other circuits likewise misapply *Flores-Ortega*'s "specific" definition, whereas seven appropriately give both halves effect. *Id.* Indeed, *the decision below recognized* this circuit conflict over the extent and timing of the consultation duty, Pet.App.7a & n.1—a fact that the government's brief entirely neglects to mention. And the government's efforts to sew up the acknowledged circuit split suffer from several more glaring omissions, confirming that confusion calls for this Court's resolution.

Second, the government's cursory take on the merits likewise fails. Its selective account of the record leads it to mischaracterize both McCormick's arguments and the Sixth Circuit's legal errors. Exhibit A is the government's sham question presented, which

asks for affirmance based on counsel's mere "advice … regarding a potential appeal." BIO I. Again, that's only half the duty, by definition. The Court's intervention is required to correct this foundational error.

Last and even more remarkable is the government's eleventh-hour plea on prejudice. It suggests that this Court should ignore the *circuit* court's errors and leave this important issue for another day because the *district* court found no prejudice. BIO 18. Never mind that: (i) McCormick appealed that finding to the Sixth Circuit; (ii) the Sixth Circuit received briefing and argument on it; and (iii) the decision below failed to even mention the subject. Far from endorsing the government's position (*sub silentio*), the Sixth Circuit's whiff on prejudice parallels its error on the question presented: it just stopped halfway.

That job half-done cries out for review.

ARGUMENT

I. THE GOVERNMENT FAILS TO SEW UP THE RECOGNIZED CIRCUIT SPLIT.

When the decision below recognizes and entrenches a circuit split, the government typically would confront that fact. Not so here. Even as the government defends parts of the decision that are entirely missing (like prejudice), the Sixth Circuit's candid recognition of inter-circuit conflict goes unmentioned. *See* Pet.App.7a & n.1. That recognized divide among the circuits requires this Court's resolution.

1. The government's efforts to shore up the three circuits that fail to give effect to half of *Flores-Ortega*'s two-part definition suffer from the same error that plagues the government's approach to the merits: it

believes that merely discussing the pros and cons counts as "a reasonable effort to discover the defendant's wishes" regarding appeal. *Flores-Ortega*, 528 U.S. at 478; *see* BIO 12–14. That mistake, reflected in Sixth, Second, and Seventh Circuit decisions, Pet. 14–16, demonstrates this divide.

The decision below cites no evidence and makes no finding that counsel made a reasonable effort to discover McCormick's wishes regarding appeal at any stage. Pet. 14–15, 21–24. Instead, it found that discussing the "risks [and] rewards" before sentencing fully sufficed. Pet.App.5a. It dubbed this the entire "point" of *Flores-Ortega* and called it a day once the defendant "knew everything he needed to decide whether to appeal." Pet.App.6a. That neglects counsel's duty to discover the defendant's actual wishes regarding an appeal and collapses *Flores-Ortega*'s two-part definition.

Three other Sixth Circuit decisions confirm this misguided approach, even in the government's telling. In *United States v. Doyle*, the court cited just three "factual findings" to determine that "counsel consulted." 631 F.3d 815, 818 (6th Cir. 2011). "Doyle knew of his right to appeal, Doyle's counsel discussed with him at length the merits of an appeal, and Doyle did not instruct his counsel to file a notice of appeal." *Id.* The first and third say nothing about *counsel's* effort and the second represents just part of the first half of *Flores-Ortega*'s definition. Likewise, the only "facts" cited in *Johnson v. United States* to find sufficient consultation were "discussions" that "explained to Johnson that [certain] objections … were unlikely to win on appeal." 364 F. App'x 972, 976 (6th Cir. 2010). So

too in *Spence v. United States*, where the court emphasized that it could *not* definitively conclude that Spence expressed his desires regarding appeal. 68 F. App'x 669, 671 & n.1 (6th Cir. 2003).

The Second Circuit similarly cited no evidence of counsel's effort to discover the defendant's wishes in upholding the "consultation" in *Kapelioujnyi v. United States*. 422 F. App'x 25, 26 (2d Cir. 2011). Instead, it cited only counsel's "expla[nation] that petitioner had waived his appeal rights and that the sentence was within the plea agreement's stipulated Guidelines range" (*i.e.*, discussion of the disadvantages of appealing). *Id*. That's just half the standard.

So too in the Seventh Circuit, which the decision below cited as "agree[ing]" with its approach "[i]n contrast" to others. Pet.App.7a & n.1 (citing *Bednarski v. United States*, 481 F.3d 530, 534 (7th Cir. 2007)). The government admits that *Bednarski* "spoke primarily to [*Flores-Ortega*'s] first component." BIO 14. Indeed, the court cited no evidence of an effort to discover the defendant's wishes, only "advice" about the "ability to appeal." 481 F.3d at 535.[1]

Moreover, the government's repeated suggestion that these courts should get credit merely for quoting *Flores-Ortega*'s full definition (before misapplying it) is wrong. *See* BIO 12–14. If merely quoting the correct standard satisfied lower courts' duty to follow this

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[1] The government's own brief there refutes its suggestion now that Bednarski failed to adequately address the second half of *Flores-Ortega*'s definition. *Compare* BIO 14, *with* Br. of United States, 2006 WL 3014383 (Oct. 10, 2006) ("Specifically, the defendant contend[ed] that [counsel] did not … make a reasonable effort to discover his wishes about appealing.").

Court's precedents, then this Court would have a much lighter docket. Instead, what matters is whether the lower courts faithfully apply that standard. The government does not dispute that seven courts of appeals do so. *See* Pet. 11–14. And because three others do not, this Court should step in.

2. The government's plea to disregard the closely related split (over whether and when counsel must try to discover his client's wishes *at or after sentencing*) as factbound also misses the mark. Indeed, the Sixth Circuit's recognition of a circuit conflict focused on this timing aspect. Pet.App.7a & n.1; *see* Pet. 16–17.

In five circuits, if a defendant waits to decide about appeal or expresses obvious dissatisfaction or surprise at sentencing, counsel must make a reasonable effort at or after sentencing to discover his client's wishes. Three others (including the decision below) reject such a rule—something the government does not dispute. *See* BIO 14–18. That's a conflict this Court should resolve.

The Fourth Circuit's position—that "a conditional desire to appeal" that depends on what happens at sentencing triggers a duty to consult after sentencing—turns on that conditionality. *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000). It does not turn, as the government imagines, on whether the condition itself is "objectively determinable." BIO 16. Here, as in *Witherspoon*, the defendant expressed a desire to appeal *if* something happened at sentencing. Counsel then had good reason to know that thing happened. But here, unlike in *Witherspoon*, the court said counsel need not follow up. Pet.App.3a–4a.

The government's attempt to distinguish the First Circuit's decision also errs. *See* BIO 16. *Rojas-Medina v. United States* rejected the government's reliance on mere "conversations … prior to sentencing" about the possibility of appeal *because* the defendant made clear his "dissatisf[action] with the sentence imposed." 924 F.3d 9, 17–18 (1st Cir. 2019). "Even if [that court] were disposed to consider the pre-sentencing conversations," counsel "did not properly discharge his duty to consult" because he failed to follow up on his client's dissatisfaction. *Id.* So too here.

No need to take Petitioner's word for the Third Circuit's "contrast" with the Sixth Circuit; the decision below highlights it. Pet.App.7a n.1. In *United States v. Shedrick*, "[t]here [was] no indication in the record that [counsel] consulted with Shedrick post-sentencing as required by *Flores-Ortega*." 493 F.3d 292, 301 (3d Cir. 2007). That requirement arose "post-sentencing" because Shedrick clearly expressed dissatisfaction with factual issues that informed his sentence. *Id.* Here, the Sixth Circuit found no such need despite McCormick's clear dissatisfaction.

The Fifth Circuit holds that counsel performs deficiently when a defendant is "visibly upset" at sentencing and "*after* sentencing, when the sentence actually imposed be[comes] known and the time period for filing a notice of appeal beg[ins] to run, counsel neither mention[s] the possibility of an appeal at all nor ma[kes] any effort to discover [his client]'s wishes in that regard." *United States v. Cong Van Pham*, 722 F.3d 320, 324 (5th Cir. 2013). That conflicts with the decision below. And *United States v. Tighe* and *United States v. Calderon* similarly require post-sentencing

consultation when circumstances change at sentencing such that counsel is on notice that his client may wish to appeal. 91 F.4th 771, 775–76 (5th Cir. 2024) (severity of sentence meant counsel had to "ask Tighe after sentencing whether he wanted to appeal"); 665 F. App'x 356, 365 (5th Cir. 2016) ("new issue" raised at sentencing required consultation "after the sentence was imposed").

In the Eleventh Circuit, a defendant's expression of "unhapp[iness] with his sentence" triggers the duty to make a "reasonable effort … to discover [his] informed wishes regarding an appeal." *Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007). In other words, counsel has "a duty to consult with his obviously distressed client about an appeal" *at or after sentencing* when he has demonstrated that distress. *Rios v. United States*, 783 F. App'x 886, 893 (11th Cir. 2019). The government's suggestion that additional facts in *Thompson* and *Rios* bolstered their holdings does not change their approach to the question of timing. *See* BIO 17–18. Because McCormick expressed obvious dissatisfaction at sentencing, the outcome below would have been different in the Eleventh Circuit.[2]

II. THE GOVERNMENT'S ATTEMPT TO HALVE *FLORES-ORTEGA*'S DEFINITION, LIKE THE SIXTH CIRCUIT'S, IS WRONG.

The government's attempt to redefine McCormick's question presented falls flat. Properly understood, the

[2] The government offers no response to the state-court confusion McCormick demonstrated. Pet. 16 n.4.

petition seeks to enforce counsel's duty to try to discover whether a defendant wishes to appeal, a duty properly grounded in the distinct roles of defendant and counsel. Pet. 22.

1. The government completely misreads the petition's question presented. As McCormick said at the outset, the issue here is whether consulting about an appeal requires making reasonable efforts to discover the defendant's wishes. Pet. i. That is how *Flores-Ortega* framed the inquiry, and that is how McCormick framed his petition.

Attempting to skate around thin ice, the government posits an entirely unrelated question—whether "counsel was required to repeat his advice after sentencing regarding a potential appeal." BIO I (quotation marks omitted); *see also* BIO 7–9. That is not the issue here. To consult, defense counsel must do two things: (1) "advis[e] the defendant about the advantages and disadvantages of taking an appeal," and (2) "mak[e] a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478. This second part does not require "repeating" information; it requires *asking* for information.

The government's mischaracterization of McCormick's position is especially head-scratching given that McCormick explicitly stated he is not challenging the Sixth Circuit's statement that counsel is not "required to repeat … advice after sentencing." BIO I (quoting Pet.App.5a). Rather, he agreed that there is no requirement to always repeat information communicated earlier or to consult after sentencing in every case. Pet. 25–26. But that does not decide this matter. Defense counsel cannot merely inform a defendant

about the opportunity to appeal; he must also make a reasonable effort to discover if the defendant wishes to appeal. None of the lower courts found that Roberts made that effort, and the government does not claim otherwise.

2. Because the government has misread the question presented, it thinks that the form McCormick signed at sentencing helps its case. BIO 8, 10–11. Quite the opposite.

This form told McCormick that the court would perfect his appeal *if he did not have a lawyer*. D. Ct. Doc. 299 (Oct. 9, 2018). But McCormick *did* have a lawyer, who also signed this form. So if anything, it communicated that because McCormick had counsel, he did not need to do anything more to appeal. It certainly said nothing about Roberts's backwards requirement that McCormick must remember, in the heat of receiving a devastating sentence, to ask counsel to perfect the appeal. Pet. 26–28.

If a novel duty to "repeat" information after sentencing were the only issue here, BIO I, 7–9, then McCormick's form might bolster the argument that counsel need not reinform regarding appellate rights after the court has just finished doing so. But the form did nothing to help Roberts discover McCormick's wishes, which was required to adequately consult.

3. Most fundamentally, the government misunderstands the rule from *Flores-Ortega* that McCormick seeks to enforce. The petition does not concern a "case-specific" factual error. BIO 11. *Flores-Ortega* was clear: if there is "reason to think" a defendant has "reasonably demonstrated … he [is] interested in ap-

pealing," counsel must consult, which requires "making a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478, 480. And if a defendant has told counsel he will not decide about an appeal until sentencing, and he is clearly upset by his sentence, it should be obvious to counsel that (1) there is reason to think the defendant might want to appeal and (2) he has not yet discovered the defendant's wishes. Under *Flores-Ortega*, #1 triggers the duty to consult, and #2 needs to be part of the consultation.

Despite this Court's clarity, three circuits, including the Sixth below, simply do not require counsel to try to determine the defendant's interest in appealing. Pet. 14–16. Likewise, three circuits, again including the Sixth, say the duty to consult ends *before* sentencing, even if the defendant said he will decide about an appeal *after* sentencing. Pet. 19–21.

The government makes the same mistakes. To the government, Roberts's decree that McCormick must remember to inquire about an appeal absolved Roberts of any responsibility to make reasonable efforts to determine McCormick's wishes. BIO 9, 11. This even though McCormick was clearly "interested in appealing"—he made an open guilty plea to preserve his appellate rights, said he would appeal depending on how sentencing went, and was then upset with his sentence. The government says Roberts "did not act unreasonably" by demanding that McCormick remember to renew the conversation about an appeal. BIO 11. But it can cite nothing for this proposition, either in the caselaw or the record.

Remarkably, the government sees no problem with casting Roberts as a mere passive observer, sitting

through sentencing, watching McCormick sign a form suggesting he needed to do nothing to appeal so long as he had an attorney, armed with nothing beyond his "intuit[ion]" to know whether McCormick wanted to appeal. *Id.* *Flores-Ortega* does not direct counsel to passively observe and wait for intuition to strike; rather, it instructed counsel to discover his client's wishes. Here, all Roberts had to do was ask. He did not, and it was error to say that was effective assistance.

III. The Government Does Not Dispute That The Question Presented Is Important And Likely To Recur.

The question here is immensely significant and frequently recurring. Pet. 29–31. Deciding in McCormick's favor would (i) protect defendants' right to effective assistance regarding the fundamental decision whether to appeal, (ii) uphold proper standards for defense counsel regarding an issue that arises in almost every criminal case, and (iii) forestall belated, protracted habeas litigation over what should be a straightforward proposition. The glut of consultation litigation (both federal and state) further underscores the need for this Court's review. And the government contests none of this.

IV. The Government's Vehicle Argument Stalls From The Get-Go.

The government's three sentences on prejudice do not dispute any of the reasons McCormick gave to demonstrate suitability for *certiorari*. No factual dispute is material; no extraneous legal issues are presented; and the question's 24 years of percolation have sufficiently aired the issues. Pet. 31–32.

Instead of disputing these vehicular advantages, the government remarkably suggests that McCormick should have asked this Court to review the Sixth Circuit's *silence* on prejudice. That issue was thoroughly briefed before the Sixth Circuit yet entirely omitted from its decision. As such, it has no bearing on the question presented. Instead, when this Court upholds *Flores-Ortega*'s specific definition of "consult," McCormick will establish ineffective assistance and can renew his prejudice arguments below.[3] *See Stinson v. United States*, 508 U.S. 36, 48 (1993) ("[T]his aspect of the case [can] be addressed … on remand.").

CONCLUSION

The Court should grant the petition.

[3] A "presumption of prejudice" applies because Roberts denied McCormick an appeal he would have taken. *Flores-Ortega*, 528 U.S. at 483. There also is "a reasonable probability" McCormick would have appealed but for Roberts's deficiency. *Id.* at 484. For example, all agree McCormick took an open plea to preserve his appeal rights. Pet. 5. All agree he expressed his desire to appeal if he "didn't feel like [he] was treated fairly" at sentencing. Pet.App.3a. McCormick received 276 months, whereas the next-closest co-defendant received 188. Pet.App.49a. And all agree he promptly expressed dissatisfaction with his sentence. Pet. 5. This "substantial and uncontroverted evidence" demonstrates prejudice. *Lee v. United States*, 582 U.S. 357, 371 (2017).

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Respectfully submitted,

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