[ORAL ARGUMENT NOT YET SCHEDULED]
No. 21-3044

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES,
Appellee,

v.

DWIGHT HAYMAN,
Appellant.

Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel hereby submits the following certificate as to parties, rulings, and related cases.

I. Parties and Amici

The parties to this proceeding in the district court and in this Court are Dwight Hayman, the Defendant–Appellant, and the United States of America, the Appellee.

II. Rulings Under Review

This appeal challenges the May 7, 2021 decision of the district court, the Hon. Amit P. Mehta, denying Mr. Hayman's 28 U.S.C. § 2255 motion. That decision is not reported, but a transcript of the court's oral ruling is reproduced at pages 360–384 of the Joint Appendix filed with this brief.

III. Related Cases

This case has not previously been before this Court, and counsel is not aware of any related cases.

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GLOSSARY

IAC: Ineffective assistance of counsel

STATUTES AND REGULATIONS

28 U.S.C. § 2255:

Federal custody; remedies on motion attacking sentence:

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

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

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

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

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
   (1) the date on which the judgment of conviction becomes final;
   (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
   (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
   (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
   (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
   (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Fed. R. Crim. P. 11:
Pleas:
(a) ENTERING A PLEA.
(1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.
(2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
(3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.
(4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.
(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.
(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
(C) the right to a jury trial;
(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination,

to testify and present evidence, and to compel the attendance of witnesses;
(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
(G) the nature of each charge to which the defendant is pleading;
(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
(I) any mandatory minimum penalty;
(J) the court's authority to order restitution; and
(K) that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of removal, deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea*. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(4) *Innocence Protection Act*. If the defendant is entering a plea to a crime of violence, the court must ensure that the defendant has been advised as required by D.C. Code § 22-4132 (2012 Repl.).

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement*. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement*.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. If, however, the defendant enters a plea of guilty or nolo contendere to an offense involving a victim, and the agreement is of the type specified in Rule 11(c)(1)(C), the court must defer that decision until the conditions of Rule 32(a) are met.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement*. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement*. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA.

A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason;

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal; or (3) after the court imposes sentence, in order to correct manifest injustice.

(e) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

Except as otherwise provided in this section, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.

However, such a statement is admissible:

(1) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it; or

(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) RECORDING THE PROCEEDINGS.

The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(g) HARMLESS ERROR.

A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

STATEMENT OF JURISDICTION

Dwight Hayman seeks review of the district court's May 7, 2021, final judgment denying his 28 U.S.C. § 2255 motion. JA365, 382. Mr. Hayman timely filed a notice of appeal on June 18, 2021. JA391; *see* Fed. R. App. P. 4(a)(1)(B)(i). The district court granted a Certificate of Appealability on October 19, 2021. JA392–94; *see* 28 U.S.C. § 2253(c)(1)(B).

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2255. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and Rule 22(b)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether adequate consultation about the right to appeal required trial counsel to both:

    a. Inform Mr. Hayman, an indigent client, that he had a constitutional right to an attorney on direct appeal where counsel was steering Mr. Hayman to instead seek relief through § 2255 proceedings that did not guarantee counsel; and

    b. Inquire whether Mr. Hayman wanted to appeal beyond reminding Mr. Hayman post-sentencing about the deadline for filing a notice of appeal.

2. Whether trial counsel had a duty to consult with Mr. Hayman about appeal where counsel knew of Mr. Hayman's persistent dissatisfaction with the case's outcome and gave Mr. Hayman post-plea advice about plea withdrawal and § 2255 proceedings.

3. Whether trial counsel's failure to file a notice of appeal prejudiced Mr. Hayman.

STATEMENT OF THE CASE

Dwight Hayman appeals the district court's denial of his 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel (IAC) for failure to file a notice of appeal from his conviction and sentence.

Mr. Hayman was represented in his underlying criminal case by Howard Katzoff ("trial counsel"), an attorney appointed under the Criminal Justice Act. Mr. Hayman pleaded guilty to: (1) conspiracy to distribute and possession with the intent to distribute cocaine and cocaine base, 21 U.S.C. §§ 841 and 846, and (2) carrying and possessing a firearm during a drug trafficking offense, 18 U.S.C. § 924(c). JA112, 118, 124, 137. On January 26, 2018, he was sentenced in accordance with the plea agreement to ten years in prison for the drug charge and to a consecutive five-year term for the gun charge. JA204, 233.

Mr. Hayman timely filed a pro se § 2255 motion alleging IAC. JA149. Relevant to this appeal, Mr. Hayman alleged that trial counsel rendered constitutionally ineffective representation by failing to file a timely notice of appeal. JA149. The district court appointed new counsel for Mr. Hayman and held an evidentiary hearing on December 22, 2020,

at which both Mr. Hayman and trial counsel testified. The facts established at that hearing are set forth below.[1]

I. Evidentiary Hearing Testimony About Trial Counsel's Representation of Mr. Hayman

A. Discussions Between Counsel and Mr. Hayman Before the Plea Hearing

The government extended a Fed. R. Crim. P. 11(c)(1)(C) plea offer to Mr. Hayman on August 25, 2017. JA124. The plea offer required Mr. Hayman to plead guilty to a drug conspiracy charge and a § 924(c) gun charge, with an agreed-upon sentence of fifteen years composed of ten years for the drug conspiracy charge and five years for the § 924(c) charge. JA124, 126. In return, the government agreed to withdraw the notice it had filed requiring a statutory life sentence upon conviction of any drug charge, and to drop remaining charges. JA126. The offer also

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[1] The district court credited trial counsel's recollection that Mr. Hayman did not ask trial counsel to file a notice of appeal over Mr. Hayman's contrary assertion. JA373, 381. It made only one other explicit credibility finding and relied on the testimony of both trial counsel and Mr. Hayman in its oral ruling. *See* JA366, 374–75. This statement of the case relies on the district court's findings and testimony from trial counsel and Mr. Hayman that was consistent with those findings.

required Mr. Hayman to waive his right to appeal, with exceptions for appeals arguing IAC or an illegal or above-Guidelines sentence. JA132.

The offer gave Mr. Hayman six days—until August 31—to decide whether to accept it. JA124. Over the course of several discussions with counsel about the terms of the plea, Mr. Hayman told trial counsel that he was dissatisfied because he saw fifteen years as too long to spend away from his family. JA265, 268, 297, 366. He also had doubts about the government's case against him, especially the § 924(c) charge. JA268, 334. Mr. Hayman's research of § 924(c) case law led him to believe that a defendant cannot constructively possess a gun in furtherance of a drug crime. JA334. Mr. Hayman shared that research with trial counsel because he believed the charge was not "legally sufficient," and a jury would acquit him on it. JA334. Trial counsel explained that the legal issue "wasn't as clear as [Mr. Hayman] thought it was." JA334. Trial counsel nonetheless asked the government to modify the plea offer to permit Mr. Hayman to plead guilty only to the drug charge, but the government declined. JA298, 334.

Trial counsel knew that Mr. Hayman remained unsatisfied with the plea offer. JA297, 300, 302, 334–35. Mr. Hayman testified that he told trial counsel he wanted to "get less of the time" or "work [his] way down from the fifteen years." JA265, 285. Trial counsel advised Mr. Hayman that it was in his best interest to accept the offer because he otherwise risked facing a life sentence. JA265, 295. Counsel informed Mr. Hayman that the deal would not improve and instructed him to make a final decision. JA298. On September 6, 2017, the day before the plea hearing, the government told trial counsel that it was reconsidering the plea agreement and planned to take the plea off the court's calendar. JA299. After a phone call and an in-person meeting with trial counsel, the government kept the plea offer open. JA299. Mr. Hayman signed the plea agreement on September 7, 2017, JA137, and entered his guilty plea before the district court that same day, JA155.

B. Discussions Between the Plea and Sentencing Hearings

Mr. Hayman and trial counsel had "several" conversations after the plea hearing and before sentencing. JA299–300. During those conversations, Mr. Hayman told trial counsel that he still "wanted to try

to convince the government that the deal wasn't really fair, that he was being asked to take too much time, and it wasn't justified." JA300. Trial counsel knew that Mr. Hayman was "never happy" with the § 924(c) charge and its consecutive five-year sentence. JA334–35.

During this time, trial counsel reminded Mr. Hayman that "his appeal rights were limited by the waiver of appeal," and he subsequently advised Mr. Hayman against appealing. JA314–15, 332. Trial counsel testified that he advised Mr. Hayman about § 2255 relief "more than once," and that appeal and § 2255 were "definitely part of the same conversation." JA293, 304, 329. Mr. Hayman testified that he did not understand what § 2255 meant. JA271. Trial counsel did not recall much discussion with Mr. Hayman about the differences between a direct appeal and a § 2255 motion beyond the differing deadlines and the waivers of those rights in the plea agreement. JA328.

Mr. Hayman testified that trial counsel told him that he would not be able to represent Mr. Hayman on an IAC claim after sentencing, and that Mr. Hayman would have to proceed with a § 2255 motion to assert that claim. JA285, 286–87. Trial counsel, for his part, testified that he

did not explain to Mr. Hayman various aspects of Mr. Hayman's post-sentencing options, including that counsel would be appointed if he appealed but that Mr. Hayman might have to represent himself or hire a lawyer if he elected to file a § 2255 motion instead. JA329–30.

"[A]s it got closer to sentencing," trial counsel remained aware that Mr. Hayman was still "discontent[ed] with the plea numbers" and dissatisfied with the § 924(c) charge. JA300. In January 2018—the month of Mr. Hayman's sentencing hearing—trial counsel advised Mr. Hayman on multiple occasions about the possibility of withdrawing his guilty plea and told Mr. Hayman that if he wished to do so, he should do so before the sentencing hearing. JA301, 305. When asked about Mr. Hayman's "final decision" on this matter, trial counsel testified that their "conversations . . . in the end" remained "driven" by Mr. Hayman's "dissatisfaction with the 15-year number." JA302. But ultimately, Mr. Hayman decided not to withdraw his plea and went forward with sentencing. JA302.

C. The Day of the Sentencing Hearing

Trial counsel met with Mr. Hayman for about fifteen minutes in the cellblock right before the January 26, 2018 sentencing hearing. JA272, 302. Although this was the meeting when counsel "most specifically addressed" Mr. Hayman's appeal rights, they first discussed an issue unrelated to sentencing or appeal, and trial counsel advised Mr. Hayman on that matter. JA302–03. The discussion then turned to Mr. Hayman's appellate rights: trial counsel reminded Mr. Hayman that the appeal waiver permitted "very limited bases for appeal" and that trial counsel found none of them meritorious. JA303. Trial counsel also informed Mr. Hayman that he "didn't think that [his] representation [of Mr. Hayman] was ineffective" and that filing a notice of appeal might be to Mr. Hayman's disadvantage because the government might see it as a breach of the plea agreement, but that if he wanted to file a notice of appeal, he should contact trial counsel within fourteen days. JA303–04.

At this meeting, trial counsel reminded Mr. Hayman that he could file an IAC claim "via a Section 2255 petition and 'that the 2255 time period would be a lot longer than the period for appeal.'" JA369. Mr.

Hayman gave "no response" as to whether he understood the meaning of § 2255 relief. JA305. And "there was [no] great discussion of the differences" between habeas and direct appeal. JA328. Mr. Hayman left this meeting under the impression that he had a year "to appeal." JA305, 367, 382.

Trial counsel thought it "clear" that Mr. Hayman's "only possible recourse" was a § 2255 motion alleging ineffective assistance against trial counsel. JA326, 359. When asked at the evidentiary hearing why he had advised Mr. Hayman about a § 2255 motion raising ineffective assistance but did not tell Mr. Hayman that ineffective assistance could also be raised on direct appeal, trial counsel responded that he was "not sure exactly." JA327. Trial counsel agreed that the appeal waiver did not foreclose a direct appeal raising an IAC claim. JA327.

Moments after their cellblock conversation, the district court sentenced Mr. Hayman to fifteen years and advised him of the fourteen-day deadline for an appeal. JA237. Trial counsel testified that he was "pretty sure" he advised Mr. Hayman shortly after sentencing "not to lose

sight" of the appeal deadline. JA307, 309. Trial counsel did not recall if Mr. Hayman gave any sort of response. JA307.

D. Post-Sentencing

In the week following the sentencing hearing, Mr. Hayman and trial counsel met alone twice: once at the jail, prior to a meeting between Mr. Hayman and the government, and then later in an interview room at the courthouse. JA277, 308. As far as Mr. Hayman's appeal rights were concerned, these meetings included only "standard reminders" and "relatively brief reminders not discussing fully appellate rights." JA315–16, 321.

There is no evidence that counsel discussed appeal rights with Mr. Hayman when they met at the jail. JA309. This meeting was "very focused on" a separate matter. JA309. Trial counsel testified that he was "pretty certain" that he reminded Mr. Hayman about the fourteen-day deadline later in the interview room because trial counsel did not "expect" he would be seeing Mr. Hayman again "for a while." JA309. No notice of appeal was filed within fourteen days.

Mr. Hayman subsequently contacted the Federal Public Defender's office and "asked for a lawyer to help [him] in [his] appeal process." JA287. On January 3, 2019, Rosanna Taormina, an assistant federal public defender, emailed trial counsel to familiarize herself with Mr. Hayman's case. JA359. Trial counsel told Ms. Taormina that he had "advised [Mr. Hayman] against an appeal." JA359. Trial counsel recalled that he had been "concerned" the government would see an appeal as a breach of the plea agreement and concluded that Mr. Hayman's "only possible recourse" was a § 2255 motion alleging IAC. JA359. Though trial counsel was conflicted from representing Mr. Hayman on such a claim, Ms. Taormina asked trial counsel to contact Mr. Hayman to explain the deadline for § 2255 motions and other information. JA322. Sometime after the email exchange with Ms. Taormina, trial counsel spoke with Mr. Hayman by phone and told Mr. Hayman that the one-year deadline for a § 2255 motion was quickly approaching. JA322. On January 14, 2019, proceeding pro se, Mr. Hayman petitioned the district court for § 2255 relief, arguing that trial counsel's failure to file a notice of appeal was IAC. JA138–49.

II. District Court Proceedings Post-Evidentiary Hearing

Following the evidentiary hearing described above and supplementary briefing on Mr. Hayman's § 2255 motion, the district court orally ruled on May 7, 2021. The district court first found that Mr. Hayman did not expressly instruct trial counsel to file a notice of appeal. JA373–74.

On the legal issues, the court held that (1) trial counsel had adequately consulted with Mr. Hayman about appeal; and (2) even if trial counsel had not consulted with Mr. Hayman, trial counsel had no constitutional duty to consult with Mr. Hayman about appeal because Mr. Hayman had not reasonably demonstrated an interest in appeal.[2] JA374, 381.

As to the first issue, the district court noted that there is "no minimum checklist of advice that counsel must provide" and concluded that failure to advise about the right to counsel and the relative merits

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[2] The district court also held that Mr. Hayman failed to establish that a rational defendant would have wanted to appeal. JA379. This brief does not consider that issue because it is not certified for appeal. *See* JA392.

of a direct appeal versus a § 2255 petition did not constitute a failure to consult in this case. JA376. Regarding whether trial counsel made a reasonable effort to determine Mr. Hayman's wishes, the district court found this to be a "closer call." JA377. Ultimately, the court reasoned that trial counsel's reminders about the appeal deadline constituted "good-faith efforts." JA377.

As to the second issue, the district court relied on its finding that Mr. Hayman did not ask to appeal during the two weeks following his sentencing. JA381. This holding rested solely on its conclusion that Mr. Hayman did not "sa[y] or impl[y] that he wished to file an appeal." JA381, 394 n.2.[3]

But recognizing that reasonable jurists could debate these issues, the district court granted Mr. Hayman a certificate of appealability on

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[3] Although the district court also initially asserted that Mr. Hayman did not express doubts about the legality of the § 924(c) charge after accepting the plea, JA381, it later recognized that that assertion was inaccurate, JA394 n.2.

both issues. JA392. On January 28, 2022, undersigned counsel was appointed by this Court to represent Mr. Hayman.

SUMMARY OF THE ARGUMENT

Trial counsel failed to consult with Mr. Hayman about an appeal because he did not adequately advise Mr. Hayman about the advantages and disadvantages of appealing and because he made insufficient attempts to determine Mr. Hayman's wishes regarding appeal. That failure was deficient performance because trial counsel, who was on notice that Mr. Hayman wanted further judicial proceedings, had a constitutional duty to consult. This Court should reverse the district court's denial of Mr. Hayman's § 2255 motion and remand for further proceedings.

Consultation required trial counsel to both: (1) adequately advise Mr. Hayman about benefits and risks of appeal, and (2) make a reasonable effort to discern Mr. Hayman's wishes. Trial counsel did neither. In the plea agreement, Mr. Hayman preserved his right to raise an IAC claim on direct appeal, but trial counsel steered Mr. Hayman to raise that claim through a § 2255 claim. In doing so, counsel failed to advise Mr. Hayman about a significant advantage—the right to counsel—that Mr. Hayman would have enjoyed had he raised his IAC claim on direct appeal rather than in a § 2255 motion. Trial counsel's

warning that an appeal risked breaching the plea agreement was misleading because counsel did not clarify that an appeal raising IAC would *not* breach the agreement. Trial counsel's advice, based on his erroneous belief that a § 2255 petition was Mr. Hayman's "only possible recourse," JA359, was not proper consultation about appeal under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

Trial counsel also failed to determine Mr. Hayman's wishes regarding appeal. Under this Court's precedent, trial counsel's offer to speak about or proceed with appeal at a future date was insufficient. And after that offer, trial counsel's cursory mentions of the filing deadline did not conceivably equate to a follow-up effort to determine Mr. Hayman's wishes.

Counsel also had a constitutional duty to consult. The district court's conclusion to the contrary rested on the fact that Mr. Hayman did not say or imply that he wanted an "appeal." The analysis must not end there: courts are obliged to consider "everything" counsel knew. Trial counsel's repeated advice to Mr. Hayman that he could seek relief for ineffective assistance under § 2255—which was not his "standard

practice" with other clients—reveals that he knew Mr. Hayman was especially displeased and wanted further judicial proceedings. In fact, trial counsel testified that he knew Mr. Hayman was "never" satisfied with the outcome of his case. That dissatisfaction, along with trial counsel's apparent awareness that Mr. Hayman required advice about post-conviction proceedings, establishes that Mr. Hayman reasonably demonstrated an interest in appeal.

Finally, Mr. Hayman is presumed to have suffered prejudice because trial counsel's failure to file a notice of appeal entirely denied Mr. Hayman the ability to pursue a direct appeal of his conviction. That presumption is bolstered because Mr. Hayman timely filed a pro se § 2255 petition alleging IAC, demonstrating an unwavering interest in relief.

ARGUMENT

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court explained that *Strickland*'s IAC framework applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. *Id.* at 477; *see also Strickland v. Washington*, 466 U.S. 668, 688–92 (1984) (holding that a defendant must show that counsel's performance was objectively unreasonable and that the deficient performance prejudiced the defendant). On the deficient performance prong, if a defendant did not explicitly instruct counsel to file an appeal, this Court asks: (1) "whether counsel in fact consulted with the defendant about an appeal," and if not, (2) "whether counsel ha[d] a constitutionally imposed duty to consult." *Flores-Ortega*, 528 U.S. at 478, 480. Prejudice is presumed if Mr. Hayman establishes deficient performance. *Id.* at 483. This Court reviews the denial of a § 2255 motion filed on IAC grounds *de novo*. *United States v. McLendon*, 944 F.3d 255, 260 (D.C. Cir. 2019).

I. Mr. Hayman's Counsel Did Not Adequately "Consult" with Him as Defined by *Flores-Ortega*.

Trial counsel neither properly informed Mr. Hayman of the advantages and disadvantages of taking an appeal, nor made a

reasonable effort to determine Mr. Hayman's wishes regarding appeal. Either demonstrates a failure to consult.

A. *Trial Counsel Did Not Adequately Advise Mr. Hayman About the Advantages and Disadvantages of Appeal.*

At no point did trial counsel adequately discuss with Mr. Hayman the key issues surrounding the "advantages and disadvantages of taking an appeal." *Flores-Ortega*, 528 U.S. at 478. Trial counsel failed to inform Mr. Hayman that he had a right to counsel on direct appeal but not on a § 2255 motion, even though trial counsel advocated strongly in favor of the latter. Additionally, trial counsel's advice that Mr. Hayman could bring a § 2255 IAC claim, in the absence of information that he could raise that claim on direct appeal, led to Mr. Hayman's confusion about his options. Finally, the remaining information provided by trial counsel to Mr. Hayman did not constitute consultation under this Court's precedent. The totality of these facts demonstrates a failure to consult.

Trial counsel never told Mr. Hayman about a distinct and significant advantage to bringing an IAC claim via direct appeal instead of a § 2255 motion: On direct appeal, he would have a constitutional right

to appointed counsel.[4] JA329. The issue of representation certainly arose when trial counsel told Mr. Hayman in a pre-sentencing discussion that he would not be able to assist Mr. Hayman with an IAC claim. JA330. But counsel never told Mr. Hayman that if he chose to pursue a § 2255 motion (the option that trial counsel put forth most clearly), he was *not* guaranteed appointed representation. JA330. The result was that Mr. Hayman had no notice that his decision about an appeal would impact his right to counsel.

When determining whether counsel has adequately advised a defendant about appeal under *Flores-Ortega*, this Court should consider whether counsel advised an indigent defendant about the right to appellate counsel. *See Keys v. United States*, 545 F.3d 644, 648 (8th Cir. 2008) (noting that in order to provide the defendant sufficient information to make a decision, a defendant should "be told of his right

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[4] Unlike the defendant in *Flores-Ortega* who received explicit notice from the district court at sentencing about his right to appellate counsel, 528 U.S. at 474, Mr. Hayman was not advised of this right by the district court at his sentencing hearing, *see* JA204.

to appeal, the procedures and time limits involved in proceeding with an appeal, and, if indigent, of his right to appointed counsel on appeal"); *United States v. Rivas*, 450 F. App'x 420, 424 (5th Cir. 2011) (same). Because access to appointed counsel is a significant strategic advantage, the failure to advise Mr. Hayman about the right to counsel on appeal deprived Mr. Hayman of critical knowledge about the benefits of raising IAC on direct appeal.

Trial counsel failed to bring to Mr. Hayman's attention another advantage of direct appeal: development of a record by appointed counsel that would be available for use in any later § 2255 motion. By contrast, bypassing direct appeal and raising IAC in a § 2255 motion would mean that Mr. Hayman would use his only chance for habeas relief without the benefit of that evidentiary record. Even if Mr. Hayman lost on direct appeal, he still could use the record developed by his attorney in a later § 2255 motion.

Trial counsel's advice also misled Mr. Hayman regarding direct appeal because trial counsel emphasized a strategic risk to Mr. Hayman in filing a notice of appeal—breach of his plea agreement—that did not

exist. As a threshold matter, "simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope." *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019). And in any event, an IAC claim was explicitly exempted from the appeal waiver in Mr. Hayman's plea agreement. *See* JA132, 327. A notice of appeal would not have breached Mr. Hayman's plea agreement, and counsel's advice on that point was wrong.

Further clouding the picture for Mr. Hayman was the fact that in those same discussions, trial counsel told Mr. Hayman that he "always had ineffective assistance of counsel as a basis to pursue relief and that the § 2255 time period would be a lot longer than the appeal period," so that if Mr. Hayman "wanted to pursue a claim of ineffective assistance, he would have a year to do that." JA304–05. These specific details about a § 2255 motion, particularly in combination with trial counsel advising against direct appeal and failing to discuss that an IAC claim would not lead to a breach, led to Mr. Hayman's confusion about direct appeal. Indeed, the district court concluded that trial counsel's discussions with

Mr. Hayman about the § 2255 option was the possible source of Mr. Hayman's confusion regarding appeal. *See* JA367 ("Perhaps due to the discussion of a 2255 petition, Mr. Hayman walked away from the conversation thinking that 'he had a year to appeal.'").

Trial counsel's discussions reflected his "clear" belief that a § 2255 motion IAC claim was Mr. Hayman's "only possible recourse." JA326, 359. But this was also wrong. This Court has recognized that it generally does not require a defendant to raise an IAC claim collaterally. *See United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003) ("[R]emand of the record in a case raising ineffective assistance as the sole issue is appropriate if the trial record does not conclusively show whether the defendant is entitled to relief."). Because there was no evidentiary record pertaining to an IAC claim, this Court would have remanded the IAC claim for an evidentiary hearing had Mr. Hayman appealed.

Because trial counsel chose to emphasize the § 2255 IAC option while simultaneously advising there was "no merit to appeal," JA304, 325, counsel had an obligation to also tell Mr. Hayman that selecting the § 2255 path meant *not* having the right to counsel. *See Thompson v.*

United States, 504 F.3d 1203, 1207 (11th Cir. 2007) (holding that counsel failed to adequately consult because his advice did not enable the client to "intelligently and knowingly" decide whether to appeal). Mr. Hayman's trial counsel did not provide this critical information. In fact, he conceded that other than some talk about the difference in deadlines, he did not "recall a great deal of discussion about the differences between appeal and 2255" *except* "in relation to the waivers in the appeal and in terms of his rights to . . . try to raise those issues on either appeal or 2255." JA328. Because an IAC claim was *not* one of those "waivers in the appeal," counsel's testimony establishes that he did not discuss the differences between a direct appeal and a § 2255 motion as they pertained to an IAC claim. Therefore, trial counsel did not adequately advise Mr. Hayman on the advantages and disadvantages of taking an appeal.

Finally, trial counsel's other conversations with Mr. Hayman provided no actual advice; they were mechanistic and ministerial in nature. Trial counsel told Mr. Hayman that he had the right to appeal his sentence and that he needed to file any notice of appeal within fourteen days. JA302–04. Counsel also told Mr. Hayman that Mr.

Hayman could contact counsel if he wanted to talk, and trial counsel would file an appeal if Mr. Hayman wanted. JA302–04. But *none* of this constitutes advice on the advantages or disadvantages of taking an appeal. Advising that there is a right to appeal, without adequate additional substantive information, does not qualify as consultation. *See United States v. Taylor*, 339 F.3d 973, 978 (D.C. Cir. 2003) (noting that merely advising defendant that he has a right to appeal is insufficient consultation where counsel does not provide adequate additional advice).

B. *Counsel Did Not Make a Reasonable Effort to Discover Mr. Hayman's Wishes.*

Even if trial counsel adequately advised Mr. Hayman about the advantages and disadvantages of appeal, trial counsel still did not consult within the meaning of *Flores-Ortega* because he did not make a reasonable effort to determine Mr. Hayman's wishes. *See In re Sealed Case*, 527 F.3d 174, 175 (D.C. Cir. 2008) ("Whether or not defense counsel adequately advised appellant about the relative advantages and disadvantages of appealing, he made no effort to discover his client's wishes regarding an appeal.").

The closest that trial counsel came—in any conversation—to trying to determine Mr. Hayman's wishes was the discussion immediately prior to the sentencing hearing. In that discussion, counsel told Mr. Hayman that if he wanted to talk about "any of [the topics of discussion] further with me, just—all he had to do was call me and I would come and speak to him and, if he wanted, file a Notice of Appeal." JA303. But trial counsel's offer to be available to Mr. Hayman is insufficient under this Court's precedent. In *In re Sealed Case,* the defendant's lawyer testified that during a brief post-sentencing discussion, the lawyer told the defendant to contact him if he wanted to appeal. 527 F.3d at 175. This Court held that counsel's invitation to contact him later if interested, when followed by "no additional attempt 'to discover the defendant's wishes,'" was a failure to consult. *Id.* at 176 (quoting *Flores-Ortega*, 528 U.S. at 478). The same deficiency happened here. Trial counsel did not make any additional attempt to discover Mr. Hayman's wishes following his offer to be available in the future.

The only mentions of appeal by trial counsel following this discussion—two cursory reminders of the fourteen-day deadline to file—

did not amount to an additional attempt to discover Mr. Hayman's wishes. Briefly reminding Mr. Hayman about a filing deadline in the midst of a meeting about unrelated topics does not "shed any glimmer of light" about Mr. Hayman's interest in appealing. *Rojas-Medina v. United States*, 924 F.3d 9, 17 (1st Cir. 2019).

Because none of counsel's subsequent meetings with Mr. Hayman constituted an "additional attempt to discover [Mr. Hayman's] wishes," this was not consultation within the meaning of *Flores-Ortega*. *See In re Sealed Case*, 527 F.3d at 175. For all of these reasons, trial counsel did not consult with Mr. Hayman.

II. Trial Counsel Had a Duty to Consult About Appeal Because Mr. Hayman Communicated Dissatisfaction with His Sentence and a Desire for Further Judicial Relief.

This is not the rare case in which a defense attorney had no duty to consult about appeal. *See Flores-Ortega*, 528 U.S. at 481. The district court's ruling to the contrary was wrong for two reasons. First, the district court relied on the fact that Mr. Hayman did not instruct counsel to "appeal" or ask about "appeal." JA381, 394. This misapplied *Flores-Ortega*, which does not require defendants to use any magic words—

including "appeal"—to reasonably demonstrate an interest in appeal. Second, the district court erred by not considering everything trial counsel knew. Trial counsel knew that Mr. Hayman was never satisfied with the sentence in the plea agreement—even after he entered his plea—and wanted counsel to do something about it. There was a duty to consult about appeal here, as there is in the "vast majority of cases." *Flores-Ortega*, 528 U.S. at 481.

In its oral ruling, the district court provided two reasons for concluding that Mr. Hayman did not reasonably demonstrate an interest in appeal: (1) Mr. Hayman did not "direct" counsel to appeal or "inquire" about appeal; and (2) Mr. Hayman only expressed his concerns about the gun charge before he pleaded guilty. JA381. But the district court later acknowledged, when granting the Certificate of Appealability, that the second reason was factually incorrect. JA394 n.2 ("The court cannot recall whether it misspoke or simply made a mistake . . . ."). The court's holding that there was no duty to consult therefore rested only on its first ground: "Defendant at no point said or implied that he wished to file an appeal." JA394 n.2.

The district court erred because Mr. Hayman was not required to do either. In *Flores-Ortega*, the Court distinguished between cases where a defendant *tells* counsel to file a notice of appeal and cases where a defendant gives no express instructions about "appeal." In the former category, counsel has an absolute duty to file a notice of appeal; in the latter—where the client says nothing about "appeal"—counsel still has a duty to *consult* in the "vast majority of cases." *Flores-Ortega*, 528 U.S. at 480, 481. By emphasizing that Mr. Hayman did not "direct" trial counsel to appeal or "inquire" about appeal, the district court mistakenly analyzed a *failure-to-consult* question through a *failure-to-appeal* lens.

So long as Mr. Hayman communicated substantial dissatisfaction, he need not have used the word "appeal," or implied interest in "appeal." *See United States v. Cong Van Pham*, 722 F.3d 320, 325 (5th Cir. 2013); *Frazer v. South Carolina*, 430 F.3d 696, 712 (4th Cir. 2005) (noting that a defendant can "demonstrate an *interest* in appealing" by "indicat[ing] his unhappiness with his consecutive sentences"). *Cong Van Pham* is illustrative. There, the court held that counsel had a duty to consult, even where the client never used the word "appeal," because the client

put his lawyer on notice by asking him if he could "get less time." *See* 722 F.3d at 325. The Fifth Circuit's reasoning makes sense: A non-lawyer like Mr. Hayman should not be expected to know and incant some precise words because trial counsel was better-positioned "to recognize [that] however inartfully or inarticulately, his client [had] demonstrate[d] an interest in appeal." *Id.*

In determining whether Mr. Hayman reasonably demonstrated an interest in appeal, this Court must instead look at *everything* trial counsel "knew or should have known." *Taylor*, 339 F.3d at 980 (citing *Flores-Ortega*, 528 U.S. at 480). Factors relevant to the inquiry include the defendant's apparent "satisf[action] with his sentence" or lack thereof, and whether the defendant pleaded guilty, received the sentence he bargained for, or "sa[id] anything . . . suggest[ing]" interest in appeal. *Id.* at 980–82. This Court has not had an opportunity to perform this inquiry since it first outlined the factors in *Taylor*.[5] But other circuits

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[5] This Court addressed the duty to consult in *In re Sealed Case*, but its analysis centered on whether there were nonfrivolous grounds for appeal

have concluded that a defendant reasonably demonstrates interest in appeal when his lawyer is aware of his displeasure with the outcome and interest in further judicial proceedings. *See, e.g.*, *Rojas-Medina*, 924 F.3d at 17; *Cong Van Pham*, 722 F.3d at 325; *Thompson*, 504 F.3d at 1208.

Trial counsel was aware that "this particular defendant" was never "satisfied with his sentence." *Taylor*, 339 F.3d at 980–81. Mr. Hayman repeatedly told counsel that he considered fifteen years too long to spend away from his family, and that he was skeptical about the government's ability to prove the gun charge to which he pleaded guilty. JA268, 300, 302, 334, 335 (trial counsel's testimony: "I know [Mr. Hayman] wasn't really happy about [the gun charge]."). Importantly, Mr. Hayman continued telling counsel about his dissatisfaction with the government's case against him for months, even after he entered his plea.

Mr. Hayman's expressions that he wanted to "get less of the time" and "work [his] way down from the fifteen years" reasonably indicated an

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rather than whether, as relevant here, the defendant reasonably demonstrated an interest in appeal. *See* 527 F.3d at 176.

interest in appeal. JA265, 285; *see Frazer*, 430 F.3d at 702, 712 (holding defendant sufficiently demonstrated an interest in appeal by asking counsel if his consecutive sentences could instead "run together"); *Palacios v. United States*, 453 F. App'x 887, 889 (11th Cir. 2011) (holding client reasonably demonstrated interest in appeal when he asked, "[W]hat's next? What can we do now?" and responded with silence when counsel told him nothing could be done). Trial counsel's awareness of Mr. Hayman's dissatisfaction weighs strongly in favor of a duty to consult. *See Thompson*, 504 F.3d at 1208 (holding that a defendant reasonably demonstrated interest in appeal where his trial counsel testified that the defendant was "unhappy" with the length of his sentence).

Trial counsel's knowledge of Mr. Hayman's *continuing* dissatisfaction sets this case apart from *Taylor*. *See* 339 F.3d at 981. Taylor's initial dissatisfaction with his sentence stemmed from his disagreement about the applicability of a Sentencing Guidelines enhancement. *See id.* Although Taylor's attorney initially told him he could expect a sentence of ten to sixteen months, the enhancement resulted in a longer range. *See id.* at 975–76. But by sentencing, Taylor's

lawyer had assuaged Taylor's displeasure: Taylor "agreed to rescind" his objection to the enhancement. *Id.* As this Court recognized, if Taylor remained dissatisfied, his lawyer did not know that.

By contrast, Mr. Hayman's trial counsel testified that he knew the source of Mr. Hayman's dissatisfaction "never" subsided. JA334 ("[H]e was never happy with that."). Because the court accepted Mr. Hayman's Rule 11(c)(1)(C) plea, Mr. Hayman got the sentence everyone knew he would: fifteen years, the same sentence about which he had consistently expressed dissatisfaction. Yet even on the day Mr. Hayman received that expected sentence, trial counsel advised him about post-conviction relief. JA305.

At sentencing, trial counsel knew Mr. Hayman had recently—and reluctantly—decided to maintain his guilty plea. Trial counsel had advised Mr. Hayman about potentially withdrawing his guilty plea in January 2018, the same month as sentencing and more than four months after the plea hearing. JA305. These discussions sharpened trial counsel's awareness of his client's dissatisfaction: Mr. Hayman's post-plea opposition to the gun charge and the resulting sentence was so

serious that he advised Mr. Hayman about when to move to withdraw his plea. JA301. Even when asked about "Mr. Hayman's final decision" not to withdraw his plea, trial counsel testified that Mr. Hayman remained "dissatisf[ied] with the 15-year number." JA301–02. These discussions about plea withdrawal weigh in favor of a duty to consult. *See Rojas-Medina*, 924 F.3d at 17 (holding that defendant had reasonably demonstrated interest in appeal where counsel and client "discussed the possibility of filing a motion for reconsideration," even though that relief "did not actually exist").

Trial counsel knew that Mr. Hayman was interested in pursuing further judicial proceedings notwithstanding his guilty plea, bolstering the duty to consult. *See id.* (holding that defendant reasonably demonstrated interest in appeal because he "made it luminously clear that he was dissatisfied with the sentence imposed and interested in *whatever* relief might be available" (emphasis added)). Trial counsel gave Mr. Hayman advice about § 2255 relief on multiple occasions, including moments before his sentencing hearing. JA304, 305. Trial counsel did not advise all his clients about § 2255. He testified: "I don't think

[discussing § 2255] is necessarily standard. I know that it was discussed in this particular case because of the particular facts and conversations that I had with Mr. Hayman a number of times." JA293; *see also* JA326; 359 (trial counsel's email explaining that post-plea, as Mr. Hayman's sentencing hearing drew nearer, trial counsel was still looking into his client's "possible recourse"). *Flores-Ortega* and its progeny require this Court to ask whether counsel knew that "this particular" client was interested in further judicial proceedings. 528 U.S. at 480. Trial counsel's testimony shows that this particular defendant—Mr. Hayman—demonstrated such an interest.

Trial counsel's advice about § 2255 reveals that he was on notice that Mr. Hayman wanted to seek further relief. *See Harrington v. Gillis*, 456 F.3d 118, 129 (3d Cir. 2006). In *Harrington*, the Third Circuit found a duty to consult in part because the attorney had sent his client a letter that included the phrase, "[W]e will have to speak about what options are available." *Id.* at 129. As in *Harrington*, trial counsel's acknowledgement of Mr. Hayman's post-sentencing "options" weighs strongly in favor of a conclusion that trial counsel was on notice of Mr. Hayman's interest in

appeal. *See id.* (describing this letter as the "[m]ost notabl[e]" piece of evidence supporting a duty to consult).

The circumstances of this case demonstrate that trial counsel had a duty to do more. *See Strickland*, 466 U.S. at 688 (requiring an objective determination about counsel's performance). Trial counsel appears to have recognized his duty to consult generally about post-conviction proceedings but emphasized § 2255 relief instead of direct appeal. Mr. Hayman consistently told trial counsel that he wanted to avoid the five-year sentence associated with the § 924(c) charge. His lawyer was obliged to identify and explain the ways to accomplish that objective. *Cf. Garza*, 139 S. Ct. at 748. There was a duty to consult about appeal, and counsel fell short. Mr. Hayman is thus entitled to relief as long as he would have pursued an appeal if properly advised, satisfying *Strickland*'s prejudice prong.

III. Trial Counsel's Failure to Consult with Mr. Hayman About Appeal Prejudiced Mr. Hayman.

Because it is reasonably probable that Mr. Hayman would have timely appealed given adequate consultation, he suffered prejudice warranting reversal. *See Flores-Ortega*, 528 U.S. at 476-77 (citing

Strickland, 466 U.S. at 694) (noting that objectively unreasonable representation offends the Sixth Amendment when that representation leads to actual prejudice). Prejudice is presumed because trial counsel's failure to file a notice of appeal deprived Mr. Hayman of a judicial proceeding altogether. *See id.* at 483 ("[C]ounsel's alleged deficient performance led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself."); *see also Cong Van Pham*, 722 F.3d at 327 (concluding that defendant "established prejudice" because of "the absence of any self-evident reason why [he] would not have filed a direct appeal"); *Thompson*, 504 F.3d at 1208 (concluding that there was a "reasonable probability" that the defendant "would have exercised his right to appeal" because "there [was] no basis on [the] record to conclude otherwise").

The fact that Mr. Hayman sought assistance from the Federal Public Defender about appeal, JA287, and timely petitioned for § 2255 relief exemplifies his "tenacity" in pursuing relief and shows that his inclination to appeal was "unwavering and ongoing." *Frazer*, 430 F.3d at 712; *accord Rojas-Medina*, 924 F.3d at 18. In the *Flores-Ortega* context,

a litigant need only demonstrate that, had he received adequate consultation about appeal, "there is a reasonable probability that . . . he would have timely appealed." 528 U.S. at 484. Mr. Hayman meets that standard.

CONCLUSION

For the foregoing reasons, Mr. Hayman requests that this Court reverse the district court's denial of his § 2255 motion and remand with instructions to grant habeas relief.

Respectfully Submitted,

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March 29, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6977 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on March 29, 2022, this brief was served on counsel for Appellee via the Court's ECF system

Respectfully Submitted,

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