ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3044

UNITED STATES OF AMERICA, Appellee,

v.

DWIGHT HAYMAN, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. No. 16-169-02 (APM)

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee states as follows:

Parties and Amici

The parties to this appeal are appellant, Dwight Hayman, and appellee, the United States of America.

Ruling Under Review

This is an appeal from an order by the Honorable Amit P. Mehta denying Dwight Hayman's motion to vacate his conviction pursuant to 28 U.S.C. § 2255 (see JA362-84). Hayman contends that his trial counsel provided ineffective assistance by failing to file an appeal.

Related Cases

Appellee is unaware of any related cases.

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee states that all pertinent statutes and regulations are reproduced in Hayman's brief (at 2-8).

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Statutes and Rules

ISSUE PRESENTED

Whether the district court properly denied Hayman's motion to vacate his conviction pursuant to 28 U.S.C. § 2255.

UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Pursuant to an agreement with the United States, appellant, Dwight Hayman, pleaded guilty to: conspiring to distribute and possess with intent to distribute at least five kilograms of cocaine and 280 grams of cocaine base, see 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), (iii), 846; and carrying and possessing a firearm during a drug-trafficking offense, see

18 U.S.C. § 924(c)(1)(A)(i) (JA124-37; see Fed. R. Crim. P. 11(c)(1)(C)).[1] In exchange for certain concessions made by the government – including its withdrawal of a prior-narcotics-convictions information that subjected Hayman to a mandatory sentence of life imprisonment, see 18 U.S.C. § 851 – Hayman also agreed to waive his right to appeal his sentence unless it was above the statutory maximum or the sentencing guidelines range determined by the district court, or unless he claimed ineffective assistance of counsel (JA132). Consistent with this waiver, Hayman did not appeal after the district court, in late January 2018, accepted the parties' agreement and sentenced him to the agreed-upon 180 months' incarceration. Almost a year later, however, Hayman filed a motion pursuant to 28 U.S.C. § 2255, alleging his counsel provided ineffective assistance by *not* filing an appeal (JA141). Following an evidentiary hearing where Hayman and his counsel testified, the Honorable Amit P. Mehta denied Hayman's motion, and Hayman timely appealed that ruling on June 18, 2021 (JA360-85, 391).[2]

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[1] "JA" refers to the appendix Hayman filed with his brief. "ECF #" refers to documents available on the district court's electronic docket.

[2] The district court subsequently granted Hayman a certificate of appealability (JA392-94).

Background

Hayman's Drug-Trafficking Activity and Guilty Plea

In a nearly year-long investigation involving wiretaps, GPS cellphone tracking, physical surveillance, traffic stops, and search warrants, the FBI uncovered an extensive drug-trafficking organization involving at least 14 individuals, including Hayman (ECF #261, at 4).[3] In particular, the electronic surveillance "produced a clear picture of a structured drug distribution network that operated primarily in Southeast, Washington, D.C. and Maryland" (*id.*). Hayman participated in the conspiracy by obtaining kilograms of powder cocaine from two of his coconspirators and manufacturing it into cocaine base (*i.e.*, crack) (*id.* at 6). Hayman also supplied "multiple types of narcotics," including cocaine, to mid-level distributors in D.C. and Maryland (*id.*). For example, in June 2016, as he had done on "prior occasions," Hayman sold a kilogram of cocaine to one coconspirator after obtaining it from another coconspirator (*id.* at 7). "On many occasions, Hayman transported his

[3] The government detailed Hayman's participation in this conspiracy in a nine-page "Statement of Offense in Support of Guilty Plea," which Hayman agreed was true and accurate and, additionally, adopted at his plea hearing (ECF #261, at 9; JA176-77).

narcotics in a backpack that he carried on his shoulders, and then transported the narcotics in one of the many vehicles that he used" (*id.* at 6).

The evidence against Hayman was voluminous. "During intercepted activations on Hayman's cellphone, Hayman would discuss prices for narcotics and arrange meetings for the sale of narcotics with coconspirators" (ECF #261, at 7). Further, when law enforcement officers executed a search warrant at Hayman's residence in late-September 2016, they recovered: 28 grams of cocaine base, over $70,000 in cash, a money-counting machine, a digital scale, ammunition, a marijuana grow house, and a loaded Smith & Wesson 9mm pistol, which had Hayman's DNA on it (*id.* at 5). Additionally, when officers executed another search warrant at the Maryland residence Hayman used to convert cocaine into cocaine base, they found drug-manufacturing wares (including several scales, a blender, and microwave, all of which had cocaine residue), a semiautomatic AR-15 rifle, a Glock handgun, various ammunition, and a

Springfield .45-caliber handgun that had Hayman's DNA on it (*id.* at 5-6; see JA214).[4]

Based on his participation in the drug conspiracy, in late August 2017, Hayman entered into a Rule 11(c)(1)(C) agreement with the government in which he agreed to plead guilty to conspiring to distribute cocaine and possessing a firearm during that drug-trafficking offense (JA124).[5] Additionally, the parties agreed to a proposed sentence of 180 months' incarceration followed by five years' supervised release (JA126).[6] In return for Hayman's guilty plea, the government agreed to withdraw its notice of Hayman's prior felony narcotics convictions (which otherwise subjected him to life imprisonment) and not further prosecute him for the

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[4] In the "Statement of Offense" that Hayman signed, he acknowledged that the firearms containing his DNA were possessed "in furtherance and in aid of his possession and distribution of the narcotics sold pursuant to his participation" in the drug-trafficking conspiracy (ECF #261, at 8).

[5] These two offenses were Counts One and Six of the second superseding indictment returned by a federal grand jury on June 27, 2017 (ECF #189; see JA124).

[6] In his plea agreement, Hayman also agreed that his Sentencing Guidelines range was 211-248 months (151-188 months for the drugs plus a mandatory minimum 60 months for the gun) (JA129). Further, he agreed, that range could be enhanced to 262-327 months because he was career-offender eligible (JA129).

conduct set forth in the "Statement of Offense" (JA125). For his part, Hayman agreed that, although federal law affords defendants "the right to appeal their sentences," he would waive that right unless the court sentenced him to an illegal or above-guidelines sentence or he sought to raise a claim of ineffective assistance of counsel (JA132). Hayman similarly agreed to waive any collateral attack except for one based on newly discovered evidence or ineffective assistance (JA132).

At Hayman's September 2017 plea hearing, the government detailed the significant evidence against him, emphasizing: of the 14 conspirators charged, the police had tapped Hayman's phone for the "longest period"; Hayman's DNA "matched" the DNA found on the loaded 9mm pistol found at his home and the .45-caliber firearm found at the house where he manufactured crack; and, at these two houses, law enforcement agents found "all the trappings" one would expect of "somebody who's engaged in a widespread conspiracy to traffic narcotics," including cocaine base, substantial cash, ammunition, and multiple firearms (JA153-54). The district court agreed that the evidence against Hayman was "overwhelming" (JA154).

At his plea hearing, Hayman acknowledged he was satisfied with the services of his counsel, Howard Katzoff (JA158-59). Hayman also acknowledged he understood that, if the court accepted the parties' Rule 11(c)(1)(C) agreement, it would sentence him to 180 months, which equaled the consecutive mandatory minimums applicable to the drug and gun charges (10 and 5 years, respectively) (JA162-66). Hayman additionally acknowledged that, if he went to trial, he would have the right to appeal following his conviction and, indeed, the right to an appointed lawyer for such an appeal (JA179-80). But, Hayman recognized, by pleading guilty he was "giving up" these rights save a "couple of exceptions": Hayman could appeal any sentence "above the statutory maximum, as well as any sentence that is above the Guideline range" (JA180).[7] Finally, Hayman indicated, he had no questions about the rights he was giving up by pleading guilty or, for that matter, "any question about anything in connection with this guilty plea" (JA182).[8]

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[7] Though the district court did not also expressly identify the ineffective-assistance-of-counsel exception to Hayman's appeal waiver (see JA132), Hayman acknowledged that he had read and understood his plea agreement, which detailed that single additional exception (JA159-60).

[8] At the time of his plea, Hayman had graduated from high school and completed one year of college (JA157).

Hayman's Sentencing

At Hayman's January 2018 sentencing, the government asked the court to accept the parties' recommended 15-year sentence, emphasizing that Hayman was "the heart" of the charged narcotics-distribution conspiracy (JA210). As the government explained, "everything flowed through" Hayman: of the 14 indicted conspirators and "one additional defendant" intercepted on Hayman's phone, Hayman "either sold drugs to or bought drugs from, and sometimes both, 14 of those 15 individuals" (JA211). Thus, save for a single coconspirator who was "above" him, Hayman was the "most culpable in this conspiracy" (JA213).

The district court did not question the government's evidence or its description of Hayman's participation in the conspiracy. To the contrary, the only thing the court questioned was why – given Hayman's expansive conspiratorial role, his three narcotics convictions, and the "truly frightening" items recovered from Hayman's residence and the stash house (including three handguns and a semiautomatic rifle) – the parties' Rule 11(c)(1)(C) agreement proposed a sentence of "just 15" years, as opposed to "send[ing]" Hayman "away for 20 or 25" years:

> I mean, this is not some small-time operation or small-time operative. . . .

> I mean, it's just – you know, at some point, when do we come to a point where we say, [']you know what, we've had enough – you've had enough opportunities.[']
>
> This is [Hayman's] third drug conviction, third, and this one is more serious than the preceding two. At what point do we send a message to people like Mr. Hayman that this is no longer acceptable, this kind of behavior is not acceptable in a civil society?
>
> You know, he's going to get out when he's 53 – 52, 53 years old. He'll still be young enough to go back out on the street and do what he's been doing for the last 20 years.
>
> So why? Why just 15? You know, why not send him away for 20 or 25? (JA213-14.)

In response, the government emphasized that, although many of Hayman's coconspirators were reluctant to incriminate others for fear of being "labeled a snitch," Hayman "and his counsel [Mr. Katzoff] worked hard to get the word out that it was okay to accept responsibility" (JA211-12). Mr. Katzoff similarly emphasized that "Hayman played a significant role" in assuring his coconspirators that pleading guilty was the "proper thing to do" (JA223). Moreover, Katzoff explained, "a great deal of thought" went into the Rule 11(c)(1)(C) agreement, which was "vetted pretty thoroughly" by the parties (JA218). Katzoff also explained that Hayman was a "very caring, supportive family person" and thus "strongly

urge[d]" the court to accept the parties' negotiated 15-year sentence: "I think it's the proper balance; I think it's proportionate" (JA219, 224).[9]

Based on these representations, the district court accepted the proposed 15-year sentence "notwithstanding" its "substantial variance" from the recommended guidelines range of – approximately – 26 to 32 years (JA233). Indeed, as the court emphasized to Hayman immediately after accepting the parties' plea agreement, by "taking responsibility" for his crimes he had avoided a mandatory life sentence because, as part of the plea bargain, the government had withdrawn its § 851 information (JA233).[10]

The § 2255 Proceeding

Nearly a full year after his January 26, 2018, sentencing, Hayman filed a motion pursuant to 28 U.S.C. § 2255, alleging that, although he had instructed Katzoff to file an appeal, Katzoff had not done so (JA138-

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[9] In his subsequent remarks to the court, Hayman apologized for his "actions" and "vow[ed]" that, following his incarceration, he would "return to the community a changed person" (JA225-26).

[10] Before adjourning, the court reminded Hayman that he could appeal his sentence if it exceeded the statutory maximum or was above the guidelines range and, if he chose to appeal, a notice of appeal had to be filed "within 14 days after the Court enters judgment" (JA237-38).

48 (file date: January 23, 2019)).[11] For his part, in a declaration attached to the government's opposition, Katzoff swore that Hayman had never directed him to file an appeal (ECF #471-1).[12] After the district court appointed counsel for Hayman (Robert Becker, Esq.), it held an evidentiary hearing where Hayman and Katzoff testified.

1. Hayman's testimony

Hayman said Katzoff advised him to accept the government's 15-year plea offer because he was "looking at a possible life imprisonment term" (JA264-65; see JA284). Hayman, however, thought 15 years was "excessive," which he "addressed" to Katzoff "several times" (JA265).

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[11] Before Hayman filed his § 2255 motion, he contacted the D.C. Federal Public Defender's Office on "about January 3, 2019," and asked for assistance with his motion (ECF #550, at 2; JA310-11, 322-23). Though FPD could not assist Hayman, one of its attorneys contacted Katzoff and asked him to "make sure" Hayman knew about the one-year deadline for such a motion, which Katzoff did (JA322; see pp. 21-22 infra).

[12] Alternatively, the government later argued, Hayman had failed to show "prejudice from plea counsel's purported deficiency" (ECF #557, at 28-32; *see generally Strickland v. Washington*, 466 U.S. 668, 692, 700 (1984) ("any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution," and a defendant's "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim")).

Though Katzoff told Hayman that the government wouldn't "budge" on 15 years, Hayman maintained Katzoff also told him he might be able to "work" that "number" down by "possibly be[ing] able to appeal" or by providing the government with information about a murder "they were trying to solve" (JA265-66).[13]

Hayman admitted that, at the time of his plea, he understood he was "giving up [his] right to an appeal with only a few exceptions" but, he asserted, Katzoff did not explain the difference between an appeal and a § 2255 motion (JA271-72, 282). Nor did Katzoff discuss with Hayman "how [Hayman] would get a lawyer to help [him] with one or the other of those" (JA272). Moreover, Hayman claimed, Katzoff told him that he had "a year to appeal" (JA272).

Following his plea, Hayman again spoke with Katzoff about the 15-year sentence, which Hayman considered "an extremely large amount of time for [him] to be away from [his] family" (JA268). In particular,

[13] Hayman, who was friends with both the murder victim and the suspect, twice spoke with the government about this crime, once upon his arrest and again after his sentencing (JA266-67). Hayman believed the government was "bias[ed]" toward him because, although he provided the government with all the information he had, the government pressed him for more (JA267-68).

Hayman "focus[ed]" on the § 924(c) gun charge, which he thought he "shouldn't have" (JA268). Hayman maintained that, after his guilty plea, Katzoff announced he "wouldn't be able to help [Hayman] because [Hayman] would have to file a 2255 for ineffective counsel" and Katzoff would thus "pass all the pertinent information to the next lawyer" (JA270-71; see also JA285-86 ("[A]fter I took the plea, it was almost like a change of heart. And then I was advised that he wouldn't be able to help me as much. He could give my information to the next attorney that helped me.")).

Hayman insisted that he had wanted to appeal his "sentence" and maintained that, in the "period before [his] sentencing hearing," he had "asked [Katzoff] how would we go about filing the appeal, as far as on my sentencing, as far as me having the problem with initially the 924(c)" (JA274, 275-76). "In response, [Katzoff] said that with the way the plea agreement was set up, that it would be hard for [Hayman] to appeal on [his] case and the government only . . . wrote up what they wanted, so it wouldn't be possible for [Hayman] to appeal certain aspects of the case"

(JA276). But, Hayman asserted, Katzoff told him that he would file an appeal (JA276).[14]

2. Katzoff's testimony

Katzoff, who specializes in criminal defense, has handled "more than 300" criminal cases and filed "between 30 and 50" appeals in those cases (JA289-91). Early in his career, Katzoff once failed to timely file a notice of appeal; that oversight had a "lasting impact" on him, and he thus "focus[es] a lot" on the appeal deadline when discussing appeals with his clients (JA293-94).

In late-spring or early-summer 2017, the government extended a plea offer to Hayman (JA294-95). Hayman was interested in pleading guilty because he was "facing life without parole" if he went to trial (JA294-95). Katzoff advised Hayman to accept the government's offer, explaining that Hayman faced a "significant risk of conviction" if he went to trial because the government had "a significant amount of evidence"

[14] Following his January 2018 sentencing, Hayman was transferred in March 2018 from the D.C. Jail to the Piedmont Regional Jail, where he remained until July 2019 (JA273-74). During his time at Piedmont, Hayman claimed that he tried to access the law library but was only put on a "waiting list" (JA273).

(including wiretaps and the testimony of at least one cooperating witness who had personally "obtained a kilogram" of narcotics from Hayman) (JA295-97).[15]

Hayman, however, wasn't "satisfied" with the government's 15-year offer (JA297). "[S]everal times" he asked Katzoff to "try to get the gun charge out of the plea" (JA298).[16] Hayman even told Katzoff that he'd agree to a 15-year sentence on the "drugs without the gun charge," but

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[15] Katzoff also discussed with Hayman the appeal and collateral-attack waivers contained in the government's proposed Rule 11(c)(1)(C) agreement (JA284, 328; see JA137 ("I have read every page of this Agreement and have discussed it with my attorney, Howard Katzoff")). Specifically, Katzoff explained the "differences" between an appeal and a § 2255 motion, including that an appeal must be filed "within 14 days" and "would go to the Court of Appeals" whereas "the other was a post-conviction motion that went back to the District Court" and must be filed within one year (JA328).

[16] Katzoff agreed that "one of [Hayman's] main concerns about the plea was the gun charge" – "Yeah, he was never happy with that" (JA334). Hayman had "read a lot of cases that had to do with possession in furtherance of a drug trafficking crime that suggested . . . constructive possession at a stash house or constructive possession in a car that was being driven to and from a narcotics transaction was not legally sufficient . . . for a conviction for the 924(c)" (JA334). Katzoff and Hayman spent "a lot of time" discussing these cases; Katzoff explained to Hayman, "legally, it wasn't as clear as [Hayman] thought it was" (JA334). Nonetheless, Katzoff "did everything possible to get the government" to drop the § 924(c) charge (JA334). The government, however, wouldn't drop it: "the only offer that he had for the 15 years not to expose himself to life without parole was one that included the 924(c)" (JA334-35).

the government "said absolutely no with regard to the gun coming out" (JA298). Ultimately, although Hayman "wanted a better deal, if possible," he accepted the government's plea offer and pled guilty at a September 7, 2017, hearing (JA297-98).[17]

Katzoff spoke with Hayman several times before his January 2018 sentencing (JA300-01). Hayman, for example, wanted to meet with the government in order "to convince them" that his "deal wasn't really fair"; Katzoff told Hayman he would schedule such a meeting closer to the sentencing (JA300). Further, as the sentencing approached, Hayman expressed his "discontent with the plea numbers" and he talked about "possibly withdrawing his plea" (JA300-01). Katzoff advised against this but said, if Hayman was going to do it, he should do so before sentencing to glean the benefit of the "more favorable" withdrawal standard (JA301).

[17] Katzoff explained that the plea almost didn't happen because the day before the hearing the government told him it was withdrawing its offer and, indeed, "tr[ied] to take [the hearing] off the calendar" (JA298-99). The government only agreed to proceed with the plea following several conversations between Katzoff and government counsel (JA299).

"Ultimately, [Hayman] decided to go forward with sentencing and not seek to withdraw his plea" (JA301-02).[18]

Just prior to Hayman's sentencing hearing, Katzoff met with him for "about 15 minutes" (JA302).[19] Katzoff discussed with Hayman "his right to appeal" and the need to file a notice of appeal "within 14 days, if that's what he wanted to do" (JA303).[20] Additionally, Katzoff "reminded"

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[18] During the period when Hayman was pondering withdrawal, Katzoff also reminded Hayman that, pursuant to the ineffective-assistance exceptions to his appeal and collateral-attack waivers, he "always had ineffective assistance of counsel as a basis to pursue relief and that the 2255 period would be a lot longer than the appeal period," *viz.*, a "year" (JA305). "It certainly seemed" to Katzoff that Hayman "understood that they [a direct appeal and a § 2255 motion] were two separate ways to proceed" with such an ineffectiveness claim (JA328-29; see JA305). But, Katzoff further explained, "other than filing a Notice of Appeal," Katzoff "would not be able to pursue . . . an ineffective assistance claim against [him]self, and . . . another lawyer would have to evaluate that and discuss it and pursue it with [Hayman]" (JA330).

[19] Katzoff had a "vivid[]" memory of this meeting "because of all the circumstances in this particular case," including that the government had "tried to withdraw" from the Rule 11(c)(1)(C) agreement the day before the plea hearing (JA321).

[20] "[U]nless it was an 11(c)(1)(C) plea," where the parties knew the agreed-upon sentence, Katzoff would "rarely" discuss appeal rights with his clients *before* a sentencing – "Almost always, I would endeavor to have that conversation after sentencing" (JA321; see also JA337 ("So what the Judge said in this case [at the end of the sentencing about appeal rights], I had talked to Mr. Hayman about at considerable length before that sentencing hearing because it was an 11(c)(1)(C).")).

Hayman of his appeal waiver and the "very limited bases for appeal": an above-guidelines sentence, a sentence that exceeded the statutory maximum, and "claims of ineffective assistance of counsel" (JA303). Katzoff emphasized that the 14-day deadline was "important" and admonished Hayman that, "if for any reason," he wanted to discuss "any of that" further, "all he had to do was call" and Katzoff "would come and speak to him and, if he wanted, file a Notice of Appeal" (JA303). Katzoff "never told [Hayman] that he had one year for a Notice of Appeal" (JA311).

Katzoff also offered his opinion about the viability of an appeal, explaining that, in light of Hayman's appeal waiver, he "didn't really see any meritorious issues" (JA304; see JA332 ("I told him that I didn't see any merit in it.")). Specifically, Katzoff told Hayman that he did not believe his representation had been ineffective (JA304). Further, Katzoff explained to Hayman, if the district court accepted the parties' Rule 11(c)(1)(C) agreement, Hayman would not be sentenced above either the guidelines range or the applicable statutory maximums (JA304).

In this pre-sentencing meeting, Katzoff also cautioned Hayman about the potential disadvantages of an appeal. Katzoff explained to

Hayman, "even if" an appeal was successful, "the result would potentially expose [Hayman] to the issues, the life without parole and other harsher sentencing issues that he did not want to deal with before" (JA333). Katzoff also told Hayman that "it's possible the government might even try to treat [an appeal] as a breach" of the parties' agreement (JA304; see also JA326 (Katzoff "'was concerned that the government would try to treat an appeal as a breach'" (citation omitted))).

Thus, Katzoff summarized, he "advised" Hayman that he "didn't see any merit to an appeal, that [he] wasn't going to automatically file an appeal if that was [Hayman's] expectation, and that . . . if [Hayman] wants to pursue an appeal, just within that 14 days, get in touch with [Katzoff]," who would "file it" or "come talk to [Hayman], whatever he wanted" (JA304; see JA312 ("I told him that very specifically . . . that if you want to talk about this, just call me")). Hayman "acknowledged that he understood" what Katzoff had said, but never indicated he wanted to appeal – "No, absolutely not" (JA304, 305-06). Indeed, Hayman never said "anything" that Katzoff "interpreted" as expressing an interest in an appeal (JA306).

Immediately following Hayman's sentencing,[21] he and Katzoff met with government counsel, who were interested in information they believed Hayman had about a homicide (JA307, 316, 319-20). At the end of this meeting, after government counsel had left, Katzoff and Hayman discussed another case he had, in Maryland, and Hayman instructed Katzoff to call his Maryland lawyer and inform him that Hayman's D.C. case "was over" (JA307-08). During this post-sentencing conversation, Katzoff also again admonished Hayman "not to lose sight" of the 14-day appeal deadline (JA307). And, again, Hayman did not indicate he wished to appeal (JA307).

Katzoff had "[a]t least" two other conversations with Hayman in the 14-day period following his sentencing (JA308). Katzoff met with Hayman once at the D.C. Jail in advance of a follow-up meeting with the government (JA308). Katzoff also met with Hayman when he was brought to the courthouse on February 1 for the follow-up meeting itself (JA308, 319). The government and Hayman had "different approaches"

[21] At the conclusion of Hayman's sentencing, Katzoff recalled, the court reminded Hayman of his appeal right and, more particularly, the 14-day time limit (JA306-07; see JA237).

to this meeting (JA319-20). For its part, the government believed Hayman "could help himself with regard to [his] case, if he provided information" (JA319-20). Hayman, though, had a "desire to somehow get a reduced sentence" by "convincing" government counsel that "he didn't have information" and "they were treating him too harshly" (JA316, 320). Katzoff couldn't recall if he reminded Hayman about the 14-day appeal deadline at the D.C. Jail meeting, but he was "pretty certain" he did at the courthouse meeting (JA309; see JA340 ("reasonably certain")). At neither of these post-sentencing meetings did Hayman indicate he wanted to discuss the possibility of filing an appeal (JA308).

Katzoff spoke to Hayman a "couple of months" later when Hayman wanted to know why he had not yet been moved out of the D.C. Jail (JA309). "And, again, in that conversation, there was no discussion of an appeal or what was going on with the appeal, or, you know, no request to file an appeal" (JA309).

Katzoff last spoke with Hayman in January 2019 (JA310). By then, Hayman had contacted the Federal Public Defender's office, telling an attorney there that he "had asked [Katzoff] to file a notice of appeal" (JA310; see note 11 supra). Katzoff informed Hayman that, if he wanted

to pursue a collateral attack based on this purported omission, Hayman would need to meet the one-year statutory deadline, which was approaching (JA311). Katzoff also advised Hayman that he could not pursue such a collateral attack for Hayman, and Hayman should thus ask the district court to appoint counsel (JA311-12).

The District Court's Ruling

"[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). But when a defendant has not so instructed his lawyer, that lawyer is constitutionally obligated to consult with him about an appeal – that is, advise him about "the advantages and disadvantages of taking an appeal" and make "a reasonable effort to discover [his] wishes" – 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." *Id.* at 477-80.

Discrediting Hayman, the district court found that he never instructed Katzoff to file an appeal (JA373). "It seems implausible," the

court reasoned, that Hayman would "remain silent" – never asking Katzoff if he "had filed the notice of appeal" – at all of their post-sentencing meetings if Hayman had, in fact, told Katzoff to file an appeal (JA373-74). Moreover, the court credited Katzoff's testimony that, had Hayman directed him to file an appeal, he would have done so (JA374). Katzoff, the court explained, is a "veteran defense lawyer" who understands his obligations and, "as importantly," he "convincingly testified" that the "requirement to advise a client" about the 14-day appeal deadline was "se[a]red into his practice" because of his early-career failure to once meet that deadline (JA374).

Further, the district court concluded, Katzoff did not have a constitutional duty to consult with Hayman about an appeal. For several reasons, the court explained, a rational defendant in Hayman's circumstances would not have wanted to appeal: Hayman pleaded guilty, thus signaling a "desire to end the case"; he received the "exact sentence" he bargained for; and he waived "nearly all of his appeal rights" (JA379). Hayman also "struggled" to identify any nonfrivolous issues for appeal

(JA379-80).[22] And, even had Hayman succeeded on appeal, he would have been "right back where he started," facing "a maximum sentence of life without parole" and a "possible career-offender guideline" (JA380-81). "In view of that stark risk, no rational defendant would've wanted to appeal" (JA381). Additionally, the court determined, Hayman "did not reasonably demonstrate to counsel that *he* was interested in appealing" (JA381 (emphasis added)). Though Katzoff thrice told Hayman of the 14-day appeal deadline, Hayman neither directed Katzoff to file an appeal nor even "inquired how 'we go about filing the appeal'" (JA381). Hayman thus "at no point said or implied that he wished to file an appeal" (JA394; see JA381).

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[22] Citing *Winstead v. United States*, 890 F.3d 1082 (D.C. Cir. 2018), which held that inchoate narcotics offenses do not count as crimes of violence, Hayman had "suggest[ed]" that "he could have appealed on the ground that his counsel was ineffective for not challenging some of his prior drug convictions as qualifying him for career-offender status" (JA380; see ECF #550, at 16-17). But, the district court explained, *Winstead* was decided after Hayman's sentencing and thus Katzoff's "failure to raise the inchoate-crime requirement could not have been a basis for an ineffectiveness claim" (JA380). Hayman also "allude[d]" to Katzoff's possible ineffectiveness for failing to challenge Hayman's prior marijuana-distribution conviction, but Hayman "did not develop that argument beyond merely stating it" (JA380; see ECF #550, at 17).

Finally, even if Katzoff had had a duty to consult with Hayman, the court found that he had done so (JA374-78). Crediting Katzoff's "testimony about what he told Mr. Hayman immediately before sentencing,"[23] the court concluded Katzoff had "adequately advised Mr. Hayman of the advantages and disadvantages of an appeal" (JA374-75. 376). Moreover, Katzoff "made reasonable efforts to discover Mr. Hayman's wishes" (JA376-77). In addition to telling Hayman to contact him if he wanted to file an appeal, Katzoff reminded Hayman about the 14-day appeal deadline "no less than three times" – before sentencing, after sentencing, and a week later (JA377). "[W]here defense counsel three times reminds his client of the appeal deadline and not once does the client contact him about filing a notice of appeal, the lawyer has fulfilled his constitutional duty" (JA377).[24]

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[23] As the court noted, this discussion was "particularly at the forefront of [Katzoff's] memory" because it was "unusual" for him to consult with a client about an appeal *before* sentencing, but he did so in this case because it was a Rule 11(c)(1)(C) plea (JA375). Further, Katzoff had a specific memory of Hayman's case because of the government's "threat[] to pull out [of the] plea deal" (JA375).

[24] Though Hayman testified (at JA272) that he understood he had a year to file an appeal, the court was "dubious" of this claim, finding that Katzoff "made clear on multiple occasions that the appeals deadline was

(continued . . .)

Based on these findings, the district court denied Hayman's § 2255 motion (JA382).[25]

SUMMARY OF ARGUMENT

Hayman has not demonstrated that Katzoff's failure to file a notice of appeal rendered his assistance constitutionally deficient. As the district court found, Hayman never asked Katzoff to file a notice of appeal. Further, Hayman did not reasonably demonstrate to Katzoff that he was interested in appealing, which meant Katzoff had no

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14 days" (JA378). Similarly, the court rejected Hayman's claim (at JA265-66) that Katzoff told him he could "'work[ ]'" down his sentence *on appeal* if he accepted the plea deal (JA382). Instead, it was likely Katzoff had told Hayman he could try to reduce his sentence by "cooperating with the government, which was in the mix at the time" (JA382). Hayman may have "confused these two avenues," but the court rejected Hayman's suggestion that Katzoff was responsible for his confusion: "what does make sense . . . is that Mr. Katzoff would have told him that he could have 'worked the time down' by cooperating with the government . . ." (JA382).

[25] The court later granted Hayman a certificate of appealability, concluding that reasonable jurists could debate whether Katzoff had a duty to inform Hayman of his right to appointed counsel on appeal (JA392-94). The court also concluded that reasonable jurists could debate whether Hayman's "focus on a legal issue concerning a charge that carried a five-year, consecutive term of imprisonment reasonably signaled an interest in filing an appeal" (JA394).

constitutional duty to consult with him. In any event, Katzoff did consult with Hayman about an appeal. Katzoff both explained the advantages and disadvantages of an appeal and made a reasonable effort to ascertain Hayman's wishes. Moreover, Hayman has not demonstrated prejudice: he has not established that had he received reasonable advice from counsel about an appeal, he would have instructed his counsel to file one.

ARGUMENT

Hayman Failed to Show His Counsel Provided Ineffective Assistance by Not Filing an Appeal.

Hayman does not challenge the district court's finding that he never instructed Katzoff to file an appeal. Instead, Hayman asserts that Katzoff nonetheless had a duty to consult with him about an appeal, which, Hayman further claims, he did not do. Contrary to Hayman's contentions, Katzoff did not perform deficiently by failing to file a notice of appeal. Alternatively, Hayman has not shown he was prejudiced by any purported deficiency. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

A. Standard of Review

"Deficient performance and prejudice, the two prerequisites for a successful Sixth Amendment claim, are often mixed questions of law and fact." *United States v. Mathis*, 503 F.3d 150, 151 (D.C. Cir. 2007); *see Strickland,* 466 U.S. at 687, 698. This Court "review[s] *de novo* a denial of an ineffective assistance of counsel claim," *United States v. Abney*, 812 F.3d 1079, 1087 (D.C. Cir. 2016), but "the district court's factual findings made in the course of judging an ineffective assistance of counsel claim may be set aside only if clearly erroneous[.]" *Mathis*, 503 F.3d at 151.

B. Katzoff Had No Duty to Consult with Hayman About an Appeal.

As "*Flores-Ortega* makes clear," a consultation about the possibility of appeal "is not constitutionally required in all cases." *United States v. Taylor*, 339 F.3d 973, 982 (D.C. Cir. 2003). Though certainly the "better practice," a constitutionally imposed duty to consult arises in "only" two situations, including if the client "'reasonably demonstrated to counsel that he was interested in appealing.'" *Id.* at 978, 982 (quoting *Flores-*

Ortega, 528 U.S. at 480).[26] As the district court rightly determined, "'tak[ing] into account all the information [Katzoff] knew or should have known,'" *id.* at 980, Hayman did not reasonably demonstrate that he was interested in appealing (JA381).

One thing Katzoff knew was that Hayman had pled guilty, which significantly reduced the scope of potentially appealable issues, *see United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004) (guilty plea waives all antecedent claims of error). Katzoff also knew that Hayman had further reduced the scope of potentially appealable issues by waiving his right to appeal "except to the extent" the court sentenced him "above the statutory maximum or guidelines range," or if Hayman claimed he had received ineffective assistance of counsel (JA132). Because Hayman "received the sentence bargained for as part of the plea," *Flores-Ortega*, 528 U.S. at 480, by the end of his sentencing Katzoff

[26] A duty to consult will also arise if "there is reason to think . . . a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)." *Flores-Ortega*, 528 U.S. at 480. Hayman has not argued that a rational defendant would have wanted to appeal, and he has abandoned his claim below that his case raises a nonfrivolous ground for appeal (see ECF #550, at 16-17 (arguing case presented a "potentially meritorious appellate issue beyond the scope of [his] appeal waiver"); see also note 22 supra).

thus additionally knew that Hayman's only potential ground for appeal was a claim of ineffectiveness.[27]

But as the district court made clear, it believed the parties' Rule 11(c)(1)(C) agreement – *i.e.*, the end product of Katzoff's negotiations with the government – was exceedingly generous. At Hayman's sentencing, the court aggressively questioned the adequacy of the proposed 15-year term. Hayman's conspiracy, the court observed, was not "some small-time operation" and the contraband recovered by law enforcement – including a semiautomatic rifle, three handguns, and ammunition – was "truly frightening" (JA214). As the court thus opined, the trajectory of Hayman's criminal activity was becoming "more serious" (JA214). Accordingly, the court demanded, why "just 15" years' imprisonment, as opposed to "20 or 25" years (JA214). Moreover, after the court ultimately accepted the parties' explanations for the 15-year term, it ended Hayman's sentencing by reminding him that he had avoided a potential life term only by pleading guilty pursuant to the Rule 11(c)(1)(C)

[27] Hayman has never contended that his appeal waiver left any other types of "claims unwaived." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). Nor has he ever posited an "unwaiveable" claim, such as that the appeal waiver itself was "unknowing or involuntary." *Id.* at 745.

agreement. In short, by the end of Hayman's sentencing – where the court sentenced him to the agreed-upon 15 years but strongly suggested that that term did not fully account for his culpability – there was no reason for Katzoff to believe that Hayman would want to raise a claim of ineffectiveness on appeal. To the contrary, Hayman had repeatedly affirmed that he was satisfied with Katzoff's services and had had adequate time to discuss the Rule 11(c)(1)(C) agreement with him (JA137 (plea agreement); JA158-59 (plea hearing)).

Thereafter, Hayman's post-sentencing silence confirmed for Katzoff that he was not at all interested in appealing, let alone on an ineffectiveness ground. Though Katzoff assured Hayman that he would file an appeal if Hayman wanted and Katzoff repeatedly – three times in a week – reminded Hayman of the 14-day appeal deadline, Hayman never breathed a word to Katzoff about an appeal. Indeed, in their initial post-sentencing meeting Hayman instructed Katzoff to tell his Maryland lawyer that "this case was over" (JA307). As the district court thus correctly determined, Hayman did not reasonably demonstrate an interest in appealing and Katzoff had no constitutionally imposed duty to consult with him. *See Devine v. United States*, 520 F.3d 1286, 1288-89

(11th Cir. 2008) (defendant did not reasonably demonstrate to counsel he was interested in appealing where: immediately after sentencing defendant and counsel "discuss[ed] the question of an appeal"; at this meeting, counsel correctly told defendant that, in light of his plea and appeal waiver, "the only issue to appeal would be an illegal sentence, but that he had received a legal sentence"; the record was "clear" that defendant "understood his attorney's opinion that any appeal would be futile"; "[n]evertheless, [defendant] did not at that time say anything to suggest that he was interested in appealing anyway"; and, when defendant later talked to counsel's secretary "about a related matter, he did not mention an appeal"); *Taylor*, 339 F.3d at 980-82 (defendant did not reasonably demonstrate to counsel he was interested in appealing where: defendant had pled guilty, thus indicating "he sought 'an end to judicial proceedings'"; defendant's sentence was "indisputably within the sentencing range that [he] and his counsel had anticipated from the outset of the hearing"; and defendant did not "say anything at the sentencing hearing to suggest that he was interested in appealing, despite the several opportunities the court gave him to say whatever he wished").

Hayman contends (at 39-40) that to reasonably demonstrate interest in appealing, a non-lawyer such as himself cannot "be expected to know and incant some precise words." And, Hayman further asserts (at 41-43), he demonstrated such an interest because, as Katzoff knew, even after Hayman had declined to withdraw his plea he "remained 'dissatisf[ied]'" with his "'15-year number'" (quoting JA301-02).

It is certainly true that "the *Flores-Ortega* standard allows for situations in which the defendant did not directly inquire about an appeal, but nevertheless demonstrated a desire to appeal through other communications with counsel." *Jackson v. Attorney General of Nevada*, 268 F. App'x 615, 619 (9th Cir. 2008); *see also Sarroca v. United States*, 250 F.3d 785, 787 (2d Cir. 2001) ("a more basic demonstration of interest in appealing meets the test"). A defendant "should not be required to use magic words in order to trigger his counsel's duty to advise him about his right to appeal"; what "counts is the substance and thrust of what the defendant says to counsel." *Rojas-Medina v. United States*, 924 F.3d 9, 17 (1st Cir. 2019). Nonetheless, it also remains true that "the defendant must have '*said something* to his counsel indicating that he had an

interest in appealing.'" *Id.* (quoting *United States v. Van Pham*, 722 F.3d 320, 325 (5th Cir. 2013) (emphasis in original)).

Here, in the face of Katzoff's repeated reminders about the 14-day appeal deadline, Hayman said nothing to Katzoff indicating an interest in appealing. And, though Katzoff undoubtedly understood that Hayman remained "'dissatisf[ied] with the 15-year number,'" this did not suggest a desire to challenge its legality through an appeal. See *Rojas-Medina*, 924 F.3d at 17 ("We agree with the weight of authority, . . . that a defendant must have done more than merely express his displeasure at sentencing[.]"). Instead, Katzoff understood that *Hayman* knew any remedy for his dissatisfaction lay with the government, not an appeal. During the plea negotiations, for example, Hayman "asked [Katzoff] several times to try to get the gun charge out of the plea" (JA298; see also JA334-35 (based on Hayman's erroneous belief that the gun charge was "not legally sufficient," Katzoff "did everything possible to get the government to change that")). Further, after Hayman had pleaded guilty and subsequently raised the possibility of withdrawing his plea, he was "really trying hard to give . . . [Katzoff] reasons to go back to the government to try to get better numbers and to express his dissatisfaction

with the 15-year number" (JA302; see also JA299-300 ("after his plea hearing and before his sentencing," Hayman "wanted to meet with [government counsel] to try to convince" them he "was being asked to take too much time")). And, finally, during the critical 14-day appeal window following Hayman's sentencing, Hayman did not say a word to Katzoff about an appeal. Instead, when Hayman and Katzoff met with government counsel a week after sentencing, Hayman's "interest was in convincing them that he didn't have information, that they were treating him too harshly and he wanted a lesser sentence" (JA319-20). Thus, far from communicating an interest in appealing, the "substance and thrust" of what Hayman said to Katzoff evinced Hayman's understanding that the government – not the court of appeals – controlled his fate. *Rojas-Medina*, 924 F.3d at 17.[28]

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[28] Hayman's post-sentencing silence about an appeal and his simultaneous effort to pursue an alternative – non-judicial – remedy distinguish his case from the authorities he cites (at 38-41), all of which involve defendants who, following their sentencings, either expressly asked about appeal or indirectly communicated such an interest. *See Rojas-Medina*, 924 F.3d at 14-17 (after sentencing, defendant "'asked the attorney why they had given me so much time,'" and it was "undisputed that the petitioner and trial counsel discussed the possibility of filing a motion for reconsideration"); *Van Pham*, 722 F.3d at 323 ("immediately after sentencing," defendant told counsel "'he was concerned about (continued . . .)

Finally, Hayman is doubly mistaken when he suggests (at 42-44) that his purported "interest[ ] in pursuing" a collateral attack (*i.e.*, "further judicial proceedings") reasonably demonstrated his interest in appealing. First, though Hayman asserts (at 43) that Katzoff "gave [him] advice about § 2255 relief on multiple occasions," Hayman identifies no evidence demonstrating that, in response, he expressed an interest in pursuing such § 2255 relief. Instead, the record only suggests that, at least twice during Katzoff's representation, he properly explained to Hayman the ineffective-assistance exceptions to his collateral-attack and appeal waivers (see JA304-05, 328-29). And, indeed, when Katzoff last discussed these exceptions at the time Hayman was contemplating plea withdrawal, Hayman had "no response" – "It wasn't like he said, 'I'm

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getting 60 months and wanted to do something to get less time'"); *Palacios v. United States*, 453 F. App'x 887, 889 (11th Cir. 2011) ("[A]fter the court announced Palacios's sentence, Palacios asked [his counsel] 'what's next? What can we do now? Something along those lines.'"); *Thompson v. United States*, 504 F.3d 1203, 1208 (11th Cir. 2007) ("[A]ccording to Counsel's own testimony, Thompson was 'unhappy' with his sentence as compared to his co-defendants, and asked about the right to appeal at sentencing."); *Frazer v. South Carolina*, 430 F.3d 696, 712 (4th Cir. 2005) ("It is uncontested that, immediately following sentencing, Frazer indicated his unhappiness with his consecutive sentences and asked [counsel] to see about 'having [them] run together.'").

going to do it' or 'I'm not going to do it'" (JA305).[29] Second, even if Hayman had expressed an interest in ultimately pursuing a § 2255 motion, this would not have reasonably demonstrated that he then had an interest in appealing. To the contrary, as a consequence of Katzoff's explanation of the "differences" between an appeal and a § 2255 motion, he had the "sense at the time that [Hayman] understood they were two *different* mechanisms" (JA328-29 (emphasis added); see also JA329 ("it seemed that he understood that they were two separate ways to proceed")).

C. Even If Katzoff Had a Duty to Consult with Hayman About an Appeal, He Did So.

As explained, Katzoff had no constitutionally imposed duty to consult with Hayman about a possible appeal. In any event, he *did*

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[29] Hayman repeatedly asserts (at 17, 42, 43) that Katzoff gave him § 2255 "advice" just "moments before his sentencing" (citing JA304-05). But that portion of Katzoff's testimony is ambiguous and, as the district court's detailed factual findings imply, does not necessarily suggest that Katzoff discussed Hayman's collateral-attack option in their final pre-sentencing meeting. See JA374-75 (court's findings about "what [Katzoff] told Mr. Hayman immediately before sentencing" omit any finding about collateral-attack advice). Instead, Katzoff's testimony appears to address a different time period, when Hayman "first . . . was questioning whether he wanted to withdraw the plea" (JA305; see pp. 38-39 infra). At any rate, even if Hayman is correct about the timing of this discussion, he still didn't indicate that he wanted to pursue a § 2255 motion.

consult with Hayman. The term "consult" has "a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478; *see also Van Pham*, 722 F.3d at 323 ("'[c]onsulting' is a term of art"); *In re Sealed Case*, 527 F.3d 174, 175 (D.C. Cir. 2008) ("'consult' has a particular meaning"). "If counsel has consulted with the defendant," she "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Flores-Ortega*, 528 U.S. at 478. As the district court correctly concluded, Katzoff consulted with Hayman by "adequately advis[ing him] of the advantages and disadvantages of an appeal" and making "good-faith efforts" to determine his wishes (JA376-77).

Because Hayman agreed to an appeal waiver as part of his plea, Katzoff's consultations with Hayman about his appeal rights began before Hayman pleaded guilty. As Hayman affirmed at his plea hearing, he had spoken with Katzoff about his Rule 11(c)(1)(C) agreement, which included a detailed description of his appeal rights and his appeal waiver. Further, when specifically discussing the appeal waiver, Katzoff

explained to Hayman the "differences" between an appeal and a § 2255 motion, including their different deadlines (14 days vs. one year) and adjudicating authorities (court of appeals vs. district court) (JA327-28). Thereafter, when Hayman was debating whether to withdraw his plea, Katzoff reiterated that, pursuant to the plea agreement's waiver provisions, Hayman "always had ineffective assistance of counsel as a basis to pursue relief" (JA305).

Additionally, in the 15-minute meeting that preceded Hayman's sentencing,[30] Katzoff explained that Hayman had a right to appeal but would "need to file a Notice of Appeal within 14 days," a deadline, Katzoff emphasized, that was "important" (JA303). Katzoff also "reminded" Hayman of his appeal waiver, reiterating that he had "very limited bases for appeal" – an illegal sentence, an above-guidelines sentence, or ineffective-assistance claims (JA303). As Katzoff correctly explained to

[30] Katzoff and Hayman discussed two topics at this meeting: the upcoming meeting with the government and Hayman's appeal rights (JA302-03). The former discussion "was pretty quick" and Katzoff devoted the "rest of the time" to consulting with Hayman about a possible appeal (JA303).

Hayman, he had thus "waived, in the agreement, most of his appeal rights" (JA304).

At this pre-sentencing meeting, Katzoff also advised Hayman that, given his appeal waiver, Katzoff didn't believe there were "any meritorious issues" to appeal (JA304). If the district court accepted the parties' Rule 11(c)(1)(C) agreement, the bargained-for sentence would not exceed the statutory maximum or the guidelines range. Moreover, Katzoff offered, he didn't believe his representation had been ineffective. Conversely, Katzoff opined, there were potential disadvantages to an appeal: first, "even if" Hayman successfully appealed, he would again be exposed to the life sentence that the government had only agreed to forgo because of Hayman's plea; and, second, it was "possible" the government "might even try to treat" an appeal as a breach of Hayman's plea agreement (JA304, 332-33).[31] Thus, Katzoff "advised" Hayman, he "didn't

[31] Hayman errs in claiming (at 30-31) that Katzoff thus "misled" him by "emphasiz[ing] a strategic risk to Mr. Hayman in filing a notice of appeal – breach of his plea agreement – that did not exist." Katzoff did not say that "simply filing a notice of appeal" would "necessarily" constitute a breach, *Garza*, 139 S. Ct. at 746. Instead, given the government's eve-of-hearing threat to withdraw from the Rule 11(c)(1)(C) agreement, and its attempt to follow through on that threat by trying to "take [the hearing] off the calendar," Katzoff smartly warned Hayman there was a (continued . . .)

see any merit to an appeal" and wouldn't "automatically" file one (JA304). But, Katzoff added, Hayman should simply contact Katzoff "within th[e] 14 days" if Hayman wanted to file an appeal (JA304).

Immediately following Hayman's sentencing – where he received the precise sentence he had bargained for – Katzoff "reminded" Hayman "not to lose sight" of the 14-day appeal deadline (JA307). Just a week later, Katzoff again personally "reminded [Hayman] of the 14 days" (JA309).

As this chronology shows, Katzoff adequately explained to Hayman "what claims – if any – [Hayman] [wa]s entitled to appeal and the strength and weakness of those arguments." *United States v. Herring*, 935 F.3d 1102, 1110 (10th Cir. 2019). Katzoff repeatedly informed Hayman of the three exceptions to his appeal waiver. But, Katzoff further explained, Hayman would be limited to an ineffectiveness claim if the district court accepted the parties' agreement, which it did. And, though Katzoff did not believe he had provided ineffective representation, he said he would file an appeal if Hayman desired. As Katzoff simultaneously

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"possib[ility]" the government "might even try to treat" an appeal as a breach (JA298-99, 304; see also JA326).

cautioned, however, there were potential negative consequences to an appeal, including that, if Hayman succeeded, he would again be facing life imprisonment.

Additionally, Katzoff made a reasonable effort to ascertain Hayman's desire. After explaining to Hayman at their pre-sentencing meeting why he didn't see any meritorious issues and he thus wouldn't automatically file an appeal, Katzoff nonetheless made clear that Hayman only had to contact him if Hayman wanted him to file one. And, although Katzoff saw Hayman in person three times before the 14-day deadline expired (and twice additionally reminded Hayman of that deadline), Hayman never raised the topic of an appeal. As the district court correctly concluded, "where defense counsel three times reminds his client of the appeal deadline and not once does the client contact him about filing a notice of appeal, the lawyer has fulfilled his constitutional duty" (JA377).

In sum, the "'advice [Katzoff] provided his client throughout his representation was sufficient to fulfill his obligations to his client under *Flores-Ortega*.'" *Bednarski v. United States*, 481 F.3d 530, 536 (7th Cir. 2007) (citation omitted); *see Walking Eagle v. United States*, 742 F.3d

1079, 1080-81, 1083 (8th Cir. 2014) (counsel adequately consulted with defendant where: "prior to sentencing, she discussed with Walking Eagle his right to appeal under the plea agreement, answered his questions with regard to those rights, and explained his chances of a successful appeal"; and, "after sentencing," counsel "revisited the topic of appeal with Walking Eagle and again discussed his chances of successfully appealing" the one potential jurisdictional claim not waived by his plea agreement's "general waiver of appeal"); *Bednarski*, 481 F.3d at 533-34, 535-36 (counsel adequately consulted with defendant about appeal where, *inter alia*, counsel informed defendant on drive to sentencing hearing that, "if he wanted to appeal then he would file the notice of appeal, but he would not handle the actual appeal" and, after his sentencing defendant did not ask counsel to appeal, though defendant "was surprised by the harshness of the sentence").

Hayman, however, contends (at 28-30) Katzoff did not adequately consult with him because Katzoff "failed to advise [him] about the right to counsel on appeal," thus "depriv[ing] [him] of critical knowledge about the benefits of raising [ineffective assistance of counsel] on direct appeal." Even assuming such advice is necessary (but see infra), the district court

had already provided it. At Hayman's plea hearing, the court explained that he was waiving his right to "an appeal" and his right to "appoint[ed]" counsel for "purposes of appeal" (JA179-80). But, the court simultaneously explained, those waivers themselves were subject to the "exceptions" outlined in Hayman's plea agreement:

> THE COURT: But by pleading guilty this afternoon, Mr. Hayman, you are giving up your right to an appeal, *with a couple of exceptions*, as well as your right to have the Court of Appeals appoint a lawyer for you. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: The only exceptions are – and you're still preserving the right to appeal any sentence that is above the statutory maximum, as well any sentence that is above the Guidelines Range. Do you understand that?
>
> THE DEFENDANT: Yes. (JA180 (emphasis added).)

The clear import of this colloquy is that, if Hayman exercised one of the appeal rights he had preserved in his plea agreement (*i.e.*, the "couple of exceptions"), he would be appointed counsel.[32] Accordingly, even assuming Katzoff had a duty to spell out Hayman's right to appointed

[32] Though the district court did not expressly identify the third "exception[ ]" to Hayman's appeal waiver (an ineffectiveness claim), the court's reference to a "couple of exceptions" implicated the appeal waiver in the plea agreement, which, Hayman affirmed, he had read "every page of" and "fully" understood, after having discussed it with Katzoff (JA137).

counsel, the district court had already done so. *Cf. Flores-Ortega*, 528 U.S. at 479-80 (in some cases, "sentencing court's instructions to a defendant about his appeal rights" might be "so clear and informative" as to altogether "substitute for counsel's duty to consult").

In any event, "'detailed rules for counsel's conduct'" – such as Hayman's suggestion (at 29-30) that, "in order to provide the defendant sufficient information to make a decision, a defendant should 'be told of his . . . right to appointed counsel'" (quoting *Keys v. United States*, 545 F.3d 644, 648 (8th Cir. 2008)) – "have no place in a *Strickland* inquiry." *Flores-Ortega*, 528 U.S. at 480 (citation omitted). There are "countless ways to provide effective assistance," and reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Strickland*, 466 U.S. at 689. Though Hayman criticizes (at 30) Katzoff's "failure" to inform him of his right to appointed counsel and Katzoff's concomitant "fail[ure]" to inform him that such counsel could have developed "a record" for "use in any later § 2255 motion," he has not shown that these omissions were unreasonable in the context of his case.

Hayman's case presented a very simple appeal decision. In light of Hayman's prior – informed and voluntary – decisions to plead guilty and waive virtually all his appeal rights, his post-sentencing choices were extremely limited. Indeed, by the end of Hayman's sentencing, he really only had one decision to make: should he file an appeal alleging ineffective assistance on Katzoff's part. But, as explained at pp. 30-31 supra, Hayman knew that the district court itself believed Katzoff had negotiated an exceedingly favorable plea agreement for him. Hayman apparently now agrees, having abandoned his claim below that Katzoff performed deficiently in pursuing the Rule 11(c)(1)(C) agreement, see note 26 supra. Moreover, as Katzoff correctly explained to Hayman, if he appealed and won, he would lose the benefit of that bargain and be subject to a mandatory term of life imprisonment. And as discussed supra, Katzoff, aware of the government's last-minute attempt to cancel the plea hearing and withdraw the offer, noted the possibility that the government "might even try to treat" an appeal as a breach of the plea agreement (JA304). In these circumstances, Hayman has not shown that it was unreasonable for Katzoff to forgo a detailed explication of the hypothetical advantages of a direct appeal as compared to a collateral

attack. *Cf. Flores-Ortega*, 528 U.S. at 489 (Souter, J., dissenting) ("If the crime is minor, the issues simple, and the defendant sophisticated, a 5-minute conversation with the lawyer may well suffice.").

Paradoxically, Hayman also suggests that Katzoff provided him *too* much information about his collateral-attack option. Hayman asserts (at 31-32) that Katzoff's discussion of "specific details about a § 2255 motion" – *e.g.*, Hayman could "'always'" "'pursue a claim of ineffective assistance'" via a § 2255 motion and "'would have a year'" to file it – "led to Mr. Hayman's confusion about direct appeal," namely, he thought "'he had a year to appeal'" (quoting JA304-05, 367). But the district court discredited Hayman's testimony on this precise point. Though Hayman testified that he was "confused" about "the timing for an appeal," the court was "dubious" of this claim because "Katzoff made clear on multiple occasions that the appeals deadline was 14 days" (JA378). The district court's finding thus belies Hayman's claim (at 31) that Katzoff's advice "cloud[ed]" his understanding of his post-sentencing rights.

Finally, Hayman alleges (at 34-36), even if Katzoff adequately advised him about the advantages and disadvantages of appeal, he did not "make a reasonable effort to determine Mr. Hayman's wishes."

Specifically, Hayman asserts (at 35), "under this Court's precedent," Katzoff's mere "offer to be available to Mr. Hayman" was "insufficient" (citing *In re Sealed Case*, 527 F.3d 174 (D.C. Cir. 2008) (per curiam)). But Hayman's case is nothing like *In re Sealed Case.* In the latter, after the defendant pled guilty, the court sentenced him to a within-guidelines term of 262 months' imprisonment. 527 F.3d at 224. Immediately following sentencing, defense counsel met with the defendant for "'two to three minutes.'" *Id.* "According to the credited testimony, [the defendant] was distraught over the sentence and essentially nonresponsive." *Id.* Nonetheless, at their "'really fast'" meeting, counsel told the defendant he did not see "'any issues'" for appeal and, "'at that point,' the lawyer recalled, 'I told him to contact me if he wanted to appeal and I left.'" *Id.* Counsel thereafter "made no additional attempt 'to discover the defendant's wishes'" within the then-applicable 10-day appeal window. *Id.* at 224-25. "On these facts," this Court held, counsel "failed to consult under *Flores-Ortega*." *Id.* at 225.

In contrast to the nonresponsive defendant in *In re Sealed Case*, at the end of his 15-minute meeting with Katzoff, Hayman "acknowledged that he understood" what Katzoff had just told him about his appeal

rights, including that, "if [Hayman] want[ed] to pursue an appeal," he simply had to "get in touch" with Katzoff (JA304). Moreover, though the defendant in *In re Sealed Case* "made no contact with counsel" following his sentencing, 527 F.3d at 224, Hayman personally met with Katzoff three times in the week after sentencing and, despite participating fully in those discussions, never told Katzoff that he wanted to pursue an appeal. Finally, in contrast to the defendant in *In re Sealed Case* who, immediately following his sentencing was "'really disappointed at that point because of the substantial sentence that he received,'" *id.*, in the immediate aftermath of his sentencing Hayman "focused" on Katzoff "contacting" his Maryland lawyer – who was handling Hayman's then-pending Maryland case – and, in fact, "instructed" Katzoff to call that "lawyer and let him know that this case was over" (JA307-08).

D. Even if Katzoff Performed Deficiently, Hayman Has Not Shown Prejudice.

"If [a] defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." *Flores-Ortega*, 528 U.S. at 484. "Accordingly," to show prejudice "a defendant must demonstrate that there is a reasonable probability

that, but for counsel's deficient performance to consult with him about an appeal, he would have timely appealed." *Id.* "[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." *Id.* at 485-86. However, "where there are other substantial reasons to believe that [a defendant] would have appealed," his "inability to 'specify the points he would raise were his right to appeal reinstated' will not foreclose the possibility that he can satisfy the prejudice requirement" *Id.* at 486 (citation omitted); *see Neill v. United States*, 937 F.3d 671, 677-78 (6th Cir. 2019) (identifying three factors to consider when determining whether a defendant has shown he would have appealed but for counsel's deficient performance: the "likelihood of success in the appeal"; the "potential consequences the defendant would have faced had he pursued the appeal"; and "any underlying evidence of the defendant's state of mind at the time he decided not to appeal").

Rather than attempting to demonstrate prejudice, Hayman summarily declares (at 46) that "[p]rejudice is presumed *because* [Katzoff's] failure to file a notice of appeal deprived [him] of a judicial

proceeding altogether" (emphasis added). But, as explained, prejudice is presumed only if Hayman first satisfies the "critical" causation "requirement" by "demonstrat[ing] that, but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 484, 486.[33] And, other than noting (at 46) that – almost a year after his sentencing – he contacted FPD "about appeal" and ultimately "petitioned for § 2255 relief," Hayman makes no effort to demonstrate the requisite but-for causation. Hayman's silence is understandable because all the relevant factors weigh against him.

First, Hayman has failed to identify any nonfrivolous ground for appeal. In the district court, Hayman "struggled to articulate a viable argument" for appeal (JA379-80), and, in this Court, he has abandoned that effort altogether, see note 26 supra. This retreat is unsurprising; Hayman waived his right to appeal anything other than an illegal

[33] Hayman appears to recognize this prerequisite. See Br. at 45 ("*Because* it is reasonably probable that Mr. Hayman would have timely appealed given adequate consultation, he suffered prejudice warranting reversal." (emphasis added)); *id.* at 46-47 ("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.' *Mr. Hayman meets that standard*." (emphasis added; citation omitted)).

sentence or an ineffectiveness claim. Hayman's sentence is not illegal, and, by virtually any measure, Katzoff's work on Hayman's behalf was superlative. Though Hayman was a supervisory figure in a dangerous drug-trafficking conspiracy and had an extensive narcotics criminal history, Katzoff secured for him a 15-year sentence, which, as the district court noted, was a "substantial variance" from the applicable guideline range (JA233).

Second, the adverse consequences of a successful appeal could be profound. Thanks to the Rule 11(c)(1)(C) agreement that Katzoff negotiated, the government agreed, among other things, to withdraw its § 851 information, which would have subjected Hayman to a mandatory term of life imprisonment. If Hayman prevailed on appeal, of course, the government would no longer be bound by that agreement and Hayman – if convicted – would be imprisoned for life. And the likelihood of conviction was high. As the district court recognized, the evidence of Hayman's guilt was "overwhelming" (JA154), consisting of a cooperator's testimony about Hayman's sale of a kilogram of narcotics, wiretapped phone messages, and the voluminous evidence seized from the conspiracy's stash house and Hayman's own residence. Thus, "the record

shows that there is a strong chance [Hayman] would receive a lengthier – not shorter – sentence on remand." *Neill*, 937 F.3d at 678.

Third, though Hayman claims (at 46-47) "his inclination to appeal was 'unwavering and ongoing,'" the record is devoid of any such evidence. The district court discredited both "Hayman's contention that he directed [Katzoff] to file an appeal" and his "lesser contention that he inquired how 'we go about filing the appeal'" (JA381). Hayman makes no attempt to show clear error in that credibility finding. Indeed, not only is there "no evidence in the record that [Hayman] promptly expressed a desire to appeal," there is "evidence to the contrary." *Bednarski*, 481 F.3d at 537. Specifically, the district court credited Katzoff's testimony that, had Hayman directed him to file an appeal, he would have done so. In addition, Hayman "made no attempt to contact attorney [Katzoff] regarding his alleged desire to file an appeal after they returned from the sentencing hearing, and [Hayman] waited [23] days short of an entire year" to contact FPD about a § 2255 motion. *Id.*; *see also United States v. Bejarano*, 751 F.3d 280, 287 (5th Cir. 2014) ("Moreover, Appellants waited 'almost a full year after sentencing' to file their petitions, post-sentencing actions that some courts have concluded 'indicate [the

defendant] was unlikely to have' timely appealed." (quoting *Johnson v. United States*, 364 F. App'x 972, 977 (6th Cir. 2010)).

Finally, even if Hayman could show that he expressed some interest in appealing, "such evidence alone is insufficient to establish that, had [he] received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Flores-Ortega*, 528 U.S. at 486. And as explained, Hayman has pointed to nothing else. The prejudice portion of his brief is less than two pages long and is comprised of: four caselaw parentheticals, three conclusory statements about his purported prejudice (see pp. 50-51 & note 33 supra), and two facts he claims show his "'unwavering'" desire to appeal (*e.g.*, he "sought assistance" from FPD "about appeal" and he "timely petitioned for § 2255 relief").

In sum, while Hayman has "categorically claimed prejudice, he has provided no fact nor posited any scenario to 'demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about appeal, he would have timely appealed.'" *United States v. Cooper*, 617 F.3d 307, 315 (4th Cir. 2010) (quoting *Flores-Ortega*, 528 U.S. at 484).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this brief contains 11,269 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Erica Hashimoto, Esq., eh502@georgetown.edu, on this 31st day of May, 2022.

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