No. 08-763

In the Supreme Court of the United States

JAMES MABRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the broad waiver in petitioner's plea agreement of his right to seek appellate and collateral review bars his collateral challenge seeking relief on the ground that his attorney provided him with ineffective assistance of counsel by disregarding his asserted direction to file an appeal from his judgment of conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 536 F.3d 231. The opinion of the district court (Pet. App. 25a-31a) is not published in the Federal Supplement but is available at 2006 WL 1330115.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2008. A petition for rehearing was denied on October 1, 2008. The petition for a writ of certiorari was filed on December 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possession with intent to distrib-

ute more than five grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 210 months of imprisonment, to be followed by four years of supervised release. Thereafter, petitioner filed a motion under 28 U.S.C. 2255 collaterally attacking his conviction. Pet. App. 2a-6a. The district court denied the motion, *id.* at 25a-31a, and the court of appeals affirmed, *id.* at 1a-24a.

1. On March 12, 2004, petitioner sold 2.7 grams of crack cocaine to a confidential informant in Williamsport, Pennsylvania. On March 19, 2004, he sold another 2.7 grams of crack to the same confidential informant in petitioner's hotel room in Williamsport. Petitioner was arrested immediately after the second sale. A search of petitioner produced the $175 that the confidential informant had paid him for the crack cocaine. In petitioner's hotel room, searched pursuant to a warrant, officers found an additional 4.1 grams of crack, 32.3 grams of powder cocaine, $1660 in cash, and a 9mm handgun and two loaded magazines. Gov't C.A. Br. 7.

On March 25, 2004, a federal grand jury in the Middle District of Pennsylvania returned a four-count indictment against petitioner, charging him with three counts of possessing with intent to distribute and distributing cocaine base, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm during and in relation to and in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). C.A. App. 23a-25a. A six-count superseding indictment charged petitioner with four counts of possessing with intent to distribute and distributing cocaine and crack cocaine (Counts 1, 2, 3, and 4), one count of possessing a firearm during and in relation to and in furtherance of a drug trafficking crime (Count 5), and one count of possessing a firearm

as a convicted felon, in violation of 18 U.S.C. 922(g) (Count 6). C.A. App. 27a-30a.

On May 3, 2005, petitioner entered into a written plea agreement and entered a guilty plea to Count 3 of the superseding indictment (possession with intent to distribute more than five grams of cocaine base), in return for the government's dismissal of the remaining counts. C.A. App. 49a-66a. The plea agreement included the following provision:

> 35. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the conviction and sentence imposed. Acknowledging all of this, the defendant knowingly waives the right to appeal any conviction and sentence, including a sentence imposed within the statutory maximum, on any and all grounds set forth in title 18, United States Code, Section 3742 or any other grounds, constitutional or non-constitutional, including the manner in which that sentence was determined in light of *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004), and *United States v. Booker and FanFan*, 12[5] S. Ct. 738 (2005). The defendant also waives the defendant's right to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255.

C.A. App. 63a.

At the change of plea hearing on May 3, 2005, counsel for the government read portions of the plea agreement, including the entire waiver provision, to petitioner. C.A. App. 189a-190a. At the conclusion of the government's

recitation, the district court asked petitioner if he understood the plea agreement, and petitioner said he did. *Id.* at 192a. The court further confirmed that no threats or promises had been made to induce petitioner to plead guilty, that petitioner had discussed the Sentencing Guidelines with his counsel, and that he understood the maximum penalty. *Id.* at 193a-195a. After the probation officer informed the court, with the agreement of government and defense counsel, that the tentative calculation of the advisory Guidelines range was 210 to 262 months of imprisonment, the court explained—and petitioner confirmed that he understood—that the court would not be bound by the Guidelines range calculated in the presentence report (PSR), nor would it be bound by the advisory Guidelines range once determined. *Id.* at 195a-197a.

The court then discussed the waiver of appellate and collateral-attack rights in detail, making sure that petitioner understood that "unless there is an error which results in a miscarriage of justice, [petitioner would] have no right to challenge in any appeal or collateral proceeding an incorrect or allegedly incorrect determination of the advisory sentencing guidelines." C.A. App. 198a. The court and defense counsel explained the waiver of collateral challenge rights, making sure that petitioner understood what a collateral challenge was and that he was waiving any right to bring either an appeal or a collateral challenge, including any issue concerning his sentence and a claim that his counsel was ineffective. *Id.* at 198a-200a. The court found that petitioner was acting voluntarily and fully understood the consequences of the waiver. *Id.* at 200a-201a. After a further colloquy about petitioner's understanding of the rights he was surrendering with his guilty plea and the

factual basis for the plea, the court accepted petitioner's guilty plea. *Id.* at 201a-213a.

The PSR determined, as the probation officer had tentatively indicated at the change-of-plea colloquy, that petitioner's advisory Guidelines range was 210 to 262 months. Pet. App. 26a. On January 17, 2006, the district court overruled petitioner's objections to the PSR and adopted its proposed analysis of the Guidelines. *Id.* at 30a. On March 3, 2006, the district court sentenced petitioner to 210 months of imprisonment, the bottom of the advisory Guidelines range, to be followed by four years of supervised release. C.A. App. 111a-114a, 227a, 260a.

2. On May 11, 2006, petitioner, proceeding pro se, filed a motion under 28 U.S.C. 2255, seeking to vacate his sentence. C.A. App. 117a-122a. In an accompanying affidavit, petitioner stated that he had instructed his counsel to file a notice of appeal and that counsel had failed to do so. *Id.* at 124a-126a. In a memorandum of law, petitioner claimed that his counsel had provided ineffective assistance by failing to file the requested notice of appeal, *id.* at 130a-134a, and identified four issues that he would have raised in an appeal, all related to the calculation of his sentence under the Sentencing Guidelines, *id.* at 135a-138a.

On May 15, 2006, the district court denied the motion, finding that it was barred by the waiver in petitioner's plea agreement. Pet. App. 25a-31a. The court reasoned that petitioner "waived his right to challenge his sentence in a collateral proceeding, including by way of a section 2255 motion." *Id.* at 31a. The court determined that the four issues petitioner claimed that he would have raised on appeal were without merit and there were no errors that would "rise to the level of a

miscarriage of justice" that would permit petitioner to avoid enforcement of the collateral-challenge waiver. *Ibid.* The court therefore denied the Section 2255 motion. *Ibid.*

3. After granting a certificate of appealability, the court of appeals affirmed. Pet. App. 1a-24a. On appeal, petitioner argued for the first time that his appeal and collateral challenge waiver was not knowing and voluntary because the district court failed to define the term "miscarriage of justice" or explain that the exception was very narrow. He also claimed that the court of appeals must presume prejudice, rising to the level of a miscarriage of justice, and remand for an evidentiary hearing based on petitioner's allegations that counsel disregarded his request to file a notice of appeal. *Id.* at 10a-11a; Pet. C.A. Br. 12-18.

The court of appeals determined that the "threshold issue" was whether petitioner's waiver of his right to bring a collateral challenge was knowing and voluntary and that the district court had erred in failing to consider that issue. Pet. App. 11a, 13a. Noting that petitioner did not contend that he was misled but made only a facial challenge, the court reviewed the plea agreement and change-of-plea colloquy, and determined that "the waiver was knowing and voluntary." *Id.* at 13a-15a.[1]

The court of appeals then considered whether it should nevertheless refuse to enforce the waiver because of this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which stated, in a case not involving a waiver, that counsel's failure to file a requested appeal

[1] Petitioner does not seek review in this Court of the court of appeals' determination that the waiver of his appeal and collateral-review rights was knowing and voluntary. See Pet. 4.

would constitute per se ineffective assistance, *id.* at 477. The court noted that some courts of appeals have extended the *Flores-Ortega* presumption of prejudice to defendants who have waived their right to appeal. Pet. App. 16a-17a. The court explained, however, that the analysis of *Flores-Ortega* does not apply when a "defendant has effectively waived his right to habeas" because then "he cannot even bring [his ineffective-assistance] claim unless the waiver fails to pass muster under an entirely different test: one that examines its knowing and voluntary nature and asks whether its enforcement would work a miscarriage of justice." *Id.* at 19a. Because the court had determined that petitioner's waiver was knowing and voluntary, it concluded that the waiver should be enforced unless it "would work a miscarriage of justice." *Id.* at 21a. The court noted that petitioner did not seek to raise issues that were preserved in the plea agreement, nor to challenge counsel's conduct concerning "the very plea agreement that contained the waiver." *Id.* at 22a. Therefore, the court concluded, it was appropriate to "enforce the collateral waiver provision of the plea agreement," and it affirmed the district court's order on that ground. *Id.* at 24a.

ARGUMENT

Petitioner seeks review (Pet. i) of the question whether a criminal defendant's knowing and voluntary waiver, as part of a plea agreement, of the right to appeal or collaterally challenge his conviction or sentence can be enforced to bar a motion for collateral relief on the ground that defense counsel rendered ineffective assistance by failing to file a requested notice of appeal. The judgment of the court of appeals is correct and does not

conflict with any decision of this Court or of any other circuit. Further review is therefore unwarranted.

Petitioner contends (Pet. 6-7) that the decision below conflicts with decisions of other courts of appeals holding that, notwithstanding any appeal waiver provision in a plea agreement, counsel provides ineffective assistance when he disregards a defendant's direction to file an appeal. That issue is not presented in this case because the court of appeals relied instead on petitioner's additional waiver of his right to bring a collateral proceeding—a waiver that the court determined was knowing and voluntary and therefore constituted a "threshold" bar to petitioner's ineffective-assistance claim. Pet. App. 20a-21a, 24a.

Although petitioner further contends (Pet. 8-9) that the courts of appeals are also divided on the question whether a collateral-challenge waiver can be enforced with respect to a claim based on counsel's failure to file a requested notice of appeal, none of the decisions cited by petitioner involved plea agreements with waivers of appeal and collateral-attack rights as broad as the one agreed to by petitioner. Petitioner waived his right to collateral review, including of a claim that his counsel was ineffective in failing to file a notice of appeal, and the court of appeals correctly enforced that waiver. Because the other courts of appeals relied upon by petitioner have not specifically addressed the effect of a broad waiver of all collateral-review rights on such a claim, there is no conflict among the circuits for this Court to resolve.

1. In *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that a lawyer who disregards a criminal defendant's specific instructions to file an appeal acts in a professionally unreasonable manner. *Id.* at 477; see

Rodriquez v. *United States*, 395 U.S. 327 (1969). With respect to the prejudice prong of the inquiry under *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), the defendant who makes such an ineffectiveness claim need not show that the appeal would have had merit; it is enough to show that, but for counsel's error, the defendant would have timely appealed. *Flores-Ortega*, 528 U.S. at 484.

Flores-Ortega did not involve, and the Court did not address, the question whether it amounts to ineffective assistance for an attorney to disregard a defendant's direction to file an appeal even where the defendant has explicitly waived his right to appeal in a plea agreement or whether a presumption of prejudice would be appropriate where the appeal would have been barred by an enforceable appellate waiver.[2] In the wake of *Flores-*

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[2] In discussing whether counsel has "a constitutionally imposed duty to consult with the defendant about an appeal" in a plea-based conviction, the Court mentioned as a relevant factor "whether the defendant received the sentence bargained for as part of the plea and *whether the plea expressly reserved or waived some or all appeal rights.*" *Flores-Ortega*, 528 U.S. at 480 (emphasis added). But the Court had no occasion to consider in *Flores-Ortega* whether an appeal waiver could limit an attorney's otherwise-absolute duty to file an appeal upon request because the defendant in that case "ha[d] not clearly conveyed his wishes one way or the other," *id.* at 477, and because the defendant had not waived his right to appeal, *id.* at 474.

Nor did *Flores-Ortega* address whether the presumption of prejudice from the failure to notice an appeal should apply where the defendant had waived his appellate rights. The Court held that a presumption of prejudice is appropriate for failure-to-appeal claims because the defendant has been denied an "entire judicial proceeding * * * to which he had a right." 528 U.S. at 483. That reasoning does not apply to a defendant who has waived his right to appeal, because he has no unqualified right to appeal in the face of that waiver. Indeed, the courts of appeals have uniformly recognized that where an appeal is barred by the terms

Ortega, some courts of appeals have held that, notwithstanding any appeal-waiver provision in a plea agreement, counsel provides ineffective assistance when he disregards a defendant's direction to file an appeal. See *United States* v. *Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *United States* v. *Tapp*, 491 F.3d 263, 265-266 (5th Cir. 2007); *Campusano* v. *United States*, 442 F.3d 770, 772-777 (2d Cir. 2006); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193, 1195-1199 (9th Cir. 2005). Other courts have held that a lawyer's failure to comply with a defendant's direction to file an appeal constitutes ineffective assistance notwithstanding the fact that the defendant's plea agreement contains an appeal waiver so long as the defendant has not waived all of his appellate rights. See *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Gomez-Diaz* v. *United States*, 433 F.3d 788, 793-794 (11th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262, 1266-1267 (10th Cir. 2005).

According to petitioner, those decisions are in conflict with the decision of the court of appeals in this case

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of a waiver that the government seeks to enforce, the appropriate course is to *dismiss* the appeal without reaching the merits. See, *e.g.*, *United States* v. *Johnson*, 541 F.3d 1064, 1065 (11th Cir. 2008), petition for cert. pending, No. 08-9185 (filed Mar. 11, 2009); *United States* v. *Chandler*, 534 F.3d 45, 51 (1st Cir. 2008); *United States* v. *Linder*, 530 F.3d 556, 565 (7th Cir. 2008); *United States* v. *Washington*, 515 F.3d 861, 864 (8th Cir.), cert. denied, 128 S. Ct. 2493 (2008); *United States* v. *Cohen*, 459 F.3d 490 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *United States* v. *Sharp*, 442 F.3d 946, 952-953 (6th Cir. 2006); *United States* v. *Rodriguez*, 416 F.3d 123, 128-129 (2d Cir. 2005); *United States* v. *Bond*, 414 F.3d 542, 546 (5th Cir. 2005); *United States* v. *Lopez-Armenta*, 400 F.3d 1173, 1174 (9th Cir.), cert. denied, 546 US. 891 (2005); *United States* v. *Hahn*, 359 F.3d 1315, 1329-1330 (10th Cir. 2004) (en banc) (per curiam); *United States* v. *Khattak*, 273 F.3d 557, 563 (3d Cir. 2001).

as well as with the Seventh Circuit's decision in *Nunez* v. *United States*, 546 F.3d 450 (2008). This case provides no opportunity, however, for the Court to examine the question whether a defendant's appeal waiver makes *Flores-Ortega* inapplicable. Here, the court of appeals' decision does not rely merely on petitioner's waiver of his right to appeal, but more centrally on petitioner's separate "waiver of collateral review rights." Pet. App. 20a. As the court explained, petitioner's case presented "the threshold issue of whether the waiver of collateral review rights should preclude a petitioner from asserting a *Flores-Ortega* claim for a reinstated appeal in the first place." *Ibid.* In other words, the court of appeals did not resolve the merits of petitioner's ineffective-assistance claim because, as a "threshold" matter, his collateral-review waiver precluded petitioner from asserting that claim "in the first place." *Ibid.*

2. Petitioner maintains that there is also a circuit conflict "on the interplay between *Flores-Ortega* and a waiver of collateral-review rights." Pet. 8. The court of appeals also believed that the circuits are in conflict because several courts have "disregard[ed] the existence of a [collateral review] waiver." Pet. App. 18a n.10. If such a conflict existed, it might warrant this Court's review. But none of the decisions upon which petitioner relies as evidence of the claimed circuit split is in fact in conflict with the court of appeals' decision in this case. None of those cases involved a broad collateral-review waiver that would, by its terms, have barred the very ineffective-assistance claim the defendant sought to assert.

Petitioner cites four cases in which the courts permitted defendants to assert similar ineffective-assistance-of-counsel claims on collateral review notwith-

standing the defendant's waiver of certain collateral-review rights as part of his plea agreement. See Pet. 8; *Tapp*, 491 F.3d at 264, 265-266; *Campusano*, 442 F.3d at 772 & n.1; *Gomez-Diaz*, 433 F.3d at 790; *Garrett*, 402 F.3d at 1266-1267 & n.5. In each of those cases, the collateral-review waiver was limited in scope and would not have precluded the defendant, as a threshold matter, "from asserting a *Flores-Ortega* claim for a reinstated appeal in the first place." Pet. App. 20a. The waivers at issue in *Tapp*, *Campusano*, and *Gomez-Diaz* did not broadly waive, as petitioner did, the "right to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding," C.A. App. 63a, but were instead expressly limited to certain types of collateral attack against the defendant's "sentence," *Tapp*, 491 F.3d at 264; *Campusano*, 442 F.3d at 772 n.1; *Gomez-Diaz*, 433 F.3d at 790. In *Garrett*, moreover, the court noted that "[t]he government has not argued that this [collateral-attack] waiver bars a § 2255 motion based on counsel's failure to file a requested appeal," and it went on to explain that "the plain language of the waiver does not address the type of claim he has raised." 402 F.3d at 1266 n.5. By negative implication, *Garrett* suggests that a collateral-attack waiver that *does* waive post-plea ineffectiveness claims would present a different question.[3]

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[3] In *United States* v. *Guerrero*, 488 F.3d 1313 (2007), the Tenth Circuit did apply *Garrett* in a case in which the plea agreement waived the defendant's right to "collaterally attack any matter connected to his prosecution, conviction, or sentence, so long as the sentence did not depart upward from the Sentencing Guidelines range." *Id.* at 1314. Significantly, however, the government had "concede[d]" that relief would be required if the defendant had "directed counsel to file a notice of appeal and counsel failed to do so," and the Tenth Circuit was there-

The court of appeals' decision is, in any event, correct. The court held, based on the undisputed record, that petitioner's waiver of his collateral-review rights was knowing and voluntary. Pet. App. 11a-15a. Petitioner "does not seek review of that determination." Pet. 4. Nor does petitioner dispute the court of appeals' conclusion that "the broader waiver in this case," Pet. App. 18a, encompasses a claim based on *Flores-Ortega*, *id.* at 22a n.16 (noting that petitioner did not question "whether the waiver is indeed broad enough to cover this type of alleged attorney ineffectiveness"). Petitioner urges, in effect, that no collateral-attack waiver, no matter how broadly written, can in fact waive the right to challenge such post-sentencing ineffective assistance of counsel. No court of appeals has so held.

Nor is such a categorical limitation on collateral-attack waivers warranted. As the court of appeals noted (Pet. App. 9a & n.3), this Court has repeatedly recognized that criminal defendants may waive "many of the most fundamental protections afforded by the Constitution," *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), including the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). There is no reason, therefore, why a defendant cannot waive his statutory right to ap-

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fore not required to resolve the issue. *Id.* at 1315. More recently, the Tenth Circuit has indicated in an unpublished decision that the question whether a broad collateral-attack waiver could bar a Section 2255 motion based on *Flores-Ortega* was an open one in that Circuit. See *United States* v. *Shaw*, 292 Fed. Appx. 728, 731 n.4 (2008) (noting that, in *Garrett*, "[t]he government did not argue the waiver of collateral attack barred the defendant's § 2255 motion"), cert. denied, 129 S. Ct. 1686 (2009); *id.* at 733 & n.4 (stating that the defendant's waiver of collateral attack was enforceable against a failure-to-appeal claim and that "*Garrett* is not to the contrary").

peal or to bring a collateral attack alleging post-sentencing ineffective assistance of counsel.

Petitioner observes (Pet. 3 n.1) that appellate waivers can be overcome under Third Circuit precedent if the defendant can demonstrate a "miscarriage of justice." See *United States* v. *Gwinnett*, 483 F.3d 200, 203 (2007). But that fact provides no basis to impute a categorical exception to collateral-attack waivers for all *Flores-Ortega* claims. Notably, the court of appeals stated that it would not have enforced petitioner's collateral-attack waiver if "a miscarriage of justice would occur if the waiver were enforced," Pet. App. 21a. For example, the court stressed that petitioner did not contend "that counsel was ineffective or coercive in negotiating the very plea agreement that contained the waiver," nor would enforcement of the waiver "result in barring an appeal expressly preserved in the plea agreement." *Id.* at 22a. To the contrary, even with the assistance of counsel, the only issues petitioner identified to "raise on appeal are insubstantial and clearly encompassed by the broad waiver" of petitioner's appellate rights. *Id.* at 23a. In such circumstances, "[e]nforcing the waiver is in line with justice, not a miscarriage of it." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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