No. 08-763

IN THE

Supreme Court of the United States

JAMES MABRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

In its opposition, the government relies on a false distinction to suggest, incorrectly, that there is no conflict among the circuits.

In this case, the Third Circuit held that the rule of *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000) – that criminal trial counsel is *per se* ineffective if he fails to heed a client's instruction to file a notice of appeal – is inapplicable where the defendant has waived his right to collateral review. (Appx. A at 19a-20a)

In his petition, James Mabry demonstrated that the Third Circuit's holding was in conflict with holdings of a number of other courts of appeals. The Third Circuit itself recognized the division of authority. (Appx. A at 22a) ("We, therefore, will part ways with the approach taken by the majority of courts of appeals.") Other courts of appeals have, in precedential opinions, set out a rule of law directly contrary to the one the Third Circuit established in this case. *See, e.g., United States* v. *Tapp,* 491 F.3d 263, 266 (5th Cir. 2007) ("Today, we join our sister circuits in holding that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal and collateral review.").

Faced with such plain indications of a circuit conflict, the government responds that "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." BIO at 8. "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." *Id.*

The government rests its opposition on an immaterial point.

First, there is without question a conflict among the *holdings* of the courts of appeals. *See* Appx. A at 22a (Third Circuit); *Tapp*, 491 F.3d at 266 (Fifth Circuit). In different parts of the country, there are different rules of law binding the district courts. The Court should resolve that lack of uniformity in federal *habeas* law.

Second, the government incorrectly suggests that, in each of the cases Mr. Mabry cited to demonstrate the circuit split, "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.'" BIO at 12. That is not so. While each of the cases involved a collateral-review waiver that, unlike the one in this case, included express exceptions, none of the claims asserted by the defendants in those cases implicated an exception to the waiver. For analytical purposes, the exceptions might just as well not have been included in the waivers at all as the scope of the waivers simply was not an issue. The government proffers a false distinction.

In *Tapp*, for example, the defendant entered into a plea agreement that waived the right to appeal or collaterally challenge his sentence except if the sentence was "in excess of the statutory maximum" or "an upward departure from the applicable guidelines range." 491 F.3d at 264. The Fifth Circuit's opinion does not indicate whether Mr. Tapp's Section-2255 motion asserted claims that fell within the two exceptions in the waiver provision, but the court of appeals' opinion makes plain that its holding would have been the same in any event. *See Tapp*, 491 F.3d at 266 n.2 (rejecting the government's request for a limited remand for an evidentiary hearing to determine if the defendant's sought-after appeal was on an issue not precluded by the waiver). Moreover, since the court analyzed the issue as though, but for *Flores-Ortega*, the claim

would have been barred by the collateral-review waiver, one can assume by negative implication that the Fifth Circuit did not understand the defendant's claim to fall within any exception to the collateral-review waiver.

The government's point is no more meaningful with respect to *Campusano* v. *United States,* 442 F.3d 770 (2d Cir. 2006). There, the defendant waived any right to appeal or to collaterally challenge his sentence "provided the sentence fell within a stipulated range of 108 to 135 months." 442 F.3d at 772. The district court in *Campusano* imposed a sentence within that stipulated range, and so the only express exception in the waiver was not implicated. Thus, the waiver was, in effect, just as broad as the one in this case, and the holding in that case is in direct conflict with the holding in this case.

In *Gomez-Diaz* v. *United States,* 433 F.3d 788 (11th Cir. 2005), the waiver provision included the following:

> The defendant ... expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground, including the applicability of the "safety value" provisions contained in 18 U.S.C. § 3553(f) and USSG § 5C1.2, except for an upward departure by the sentencing judge, a sentence above the statutory maximum, or a sentence in violation of the law apart from the sentencing guidelines.

433 F.3d at 790. The defendant filed a Section-2255 motion, but the district court denied it in part because the defendant did not specify any claims that fell within the exceptions in the plea agreement's waiver provision. *Id.* at 793. The Eleventh Circuit disagreed, holding that the defendant's *Flores-Ortega* right did not depend upon his claims falling within an exception to the waiver provision. Thus, as with *Campusano,* the limitation

in the waiver provision in *Gomez-Diaz* was immaterial to the holding, and there is every indication that the Eleventh Circuit would have applied *Flores-Ortega* even if the waiver had no express exceptions like the one in this case.[1]

The government thus bases its opposition on a distinction that is immaterial with respect to the issue presented. Since the express waiver exceptions in *Tapp, Campusano* and *Gomez-Diaz* did not and could not have played any part in the analyses by the Fifth, Second and Eleventh Circuits, the presence of express waiver exceptions in those cases distinguishes those cases not at all from this one. The only meaningful difference between *Tapp, Campusano, Gomez-Diaz* and this case is that, in those cases, the Fifth, Second and Eleventh Circuits applied a rule of law in conflict with the rule of law the Third Circuit established in this case (which the Seventh Circuit also applied in *Nunez* v. *United States*, 546 F.3d 450 (7th Cir. 2008)). There is now a well-entrenched conflict among the circuits.[2]

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[1] The courts of appeals that have applied the rule of *Flores-Ortega* notwithstanding a waiver of the right to collaterally challenge the conviction or sentence have not retreated from their holdings. *See, e.g., United States* v. *Chavez*, 271 Fed. Appx. 391 (5th Cir. 2008) ("the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal and collateral review").

[2] The government's discussion of the state of the law in the Tenth Circuit is at odds with that circuit's own understanding of its jurisprudence. The government contends that *United States* v. *Garrett*, 402 F.3d 1262 (10th Cir. 2005), does not apply the *Flores-Ortega* rule to a case in which the defendant waived his collateral-review rights. *See* BIO at 12. The Tenth Circuit has described that case otherwise:

> In *Garrett*, this court applied *Flores-Ortega* and [*United States* v. *Snitz*, 342 F.3d 1154 (10th Cir. 2003)] to a case in which the district court dismissed a § 2255 motion asserting ineffective assistance of counsel for failure to file an appeal, on the ground that the defendant had waived his right to appeal or collaterally attack his sentence in his plea agreement. *Garrett*, 402 F.3d at 1265-66. This court recognized that the defendant's

Mr. Mabry notes that the government does not question the appropriateness of this case as a vehicle for the Court to address the question presented.

Similarly, the government does not and cannot challenge the importance of this issue of federal *habeas* law. The government does not and cannot challenge the frequency with which this issue arises. A majority of the federal courts of appeals have, in the last five years, addressed the very issue for which Mr. Mabry seeks review – most of them on several occasions. There is every reason to believe the Department of Justice will continue to include appellate and collateral-review waivers in plea agreements, so the frequency with which the issue arises will increase and the schism among the courts of appeals – which shows no sign of abating – will only become more entrenched.

This case provides an ideal vehicle to address the interplay between *Flores-Ortega* and waivers of

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> 'appellate rights have been significantly limited by his waiver, but [that] the waiver does not foreclose all appellate review of his [conviction and] sentence.' *Id.* at 1266-67. We held that if the defendant 'actually asked counsel to perfect an appeal, and counsel ignored the request, he will be entitled to a delayed appeal.' *Id.* at 1267. This is true 'regardless of whether, from the limited perspective of collateral review, it appears that the appeal will not have any merit.' *Id.* (citations omitted).

United States v. *Guerrero,* 488 F.3d 1313, 1315 (10th Cir. 2007). In *Guerrero,* the court also noted that "[t]he government concedes that this legal authority requires remand for an evidentiary hearing when a defendant claims in a sworn § 2255 motion that he directed counsel to file a notice of appeal and counsel failed to do so." *Id.* Thus, at least when it litigated *Guerrero,* the government read *Garrett* the same way Mr. Mabry does. The government also asserts that, in *United States* v. *Shaw,* 292 Fed. Appx. 728 (10th Cir. 2008), the Tenth Circuit indicated that the question presented in Mr. Mabry's petition "was an open one in that Circuit." BIO at 13 n.3. The court made no such statement in the non-precedential opinion in *Shaw.* In any event, in the precedential opinion in *Guerrero,* the Tenth Circuit plainly indicated its understanding that the issue was not an open one.

appellate and collateral-review rights. The Court should take this opportunity to bring uniformity where none now exists.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

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