No. _____

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Third Circuit concluded that the holding of *Roe* v. *Flores-Ortega,* 528 U.S. 470 (2000) – that a criminal defense lawyer is constitutionally ineffective if he does not file a notice of appeal when his client instructs him to do so – does not apply when the client has entered into a plea agreement with a waiver of the right to appeal and to collaterally attack the sentence. The Third Circuit expressly rejected the contrary holdings of the Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits and announced that it "will part ways with the approach taken by the majority of the courts of appeals." The Seventh Circuit has now agreed with the Third Circuit.

The question presented is whether the holding in *Roe* v. *Flores-Ortega* is applicable in a *habeas* case where the defendant has entered into a plea agreement that includes a waiver of the right to take an appeal or to collaterally attack the sentence.

LIST OF PARTIES

Petitioner James Mabry is an inmate incarcerated in a federal institution in New Jersey pursuant to a sentence of the United States District Court for the Middle District of Pennsylvania. Respondent is the United States of America.

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Petitioner James Mabry respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals regarding both issues presented for review.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *United States* v. *Mabry,* 536 F.3d 231 (3d Cir. 2008). The opinion of the district court (Appendix B) is unreported but available at *United States* v. *Mabry,* No. 04-120, 2006 U.S. Dist. LEXIS 29389 (M.D. Pa. May 15, 2006).

JURISDICTION

The court of appeals entered its judgment on July 28, 2008. Mr. Mabry filed a timely petition for *en banc* rehearing, which the court of appeals denied by order of October 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2255.

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28, United States Code, is excerpted in relevant part in Appendix C.

STATEMENT OF THE CASE

Factual Background

On March 25, 2004, a federal grand jury returned a four-count indictment against Petitioner James Mabry charging him with possession with intent to distribute controlled substances (three counts) and possessing a firearm in furtherance of a drug-trafficking offense. *See United States* v. *Mabry,*

No. 04-120, 2006 U.S. Dist. LEXIS 29389 (M.D. Pa. May 15, 2006) (Appx. B at 25a-26a). Eight months later, the grand jury filed a superseding indictment that added an additional possession-with-intent-to-deliver count and a count for possession of a firearm by a person convicted of three felony crimes. *Id.*

Trial began with jury selection on May 3, 2005. Before testimony began, Mr. Mabry agreed to plead guilty to Count 3 of the superseding indictment (a claim for possession with intent to deliver a controlled substance). *Id.* The written plea agreement included the following language:

> 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). 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. The defendant further acknowledges that this appeal waiver is binding only upon the defendant, and that the United States retains the right to appeal in this case.

On March 3, 2006, the district court sentenced Mr. Mabry to 17 years and six months' incarceration.

Proceedings Below

On May 11, 2006, Mr. Mabry filed a motion to vacate, set aside or correct sentence. 28 U.S.C. § 2255. He claimed that his trial counsel gave him ineffective assistance in a number of respects. Most important for purposes of this petition, Mr. Mabry asserted that he expressly instructed his trial counsel to file a notice of appeal, and that Mr. Mabry learned after the appeal deadline that his trial counsel had not done so. Specifically, Mr. Mabry asserted in his Section-2255 motion that he instructed his trial counsel on March 3, 2006, and again on March 10, 2006, to file a notice of appeal and that his trial counsel repeatedly assured Mr. Mabry that he would make the filing but did not.[1]

By order of May 15, 2006, the district court denied Mr. Mabry's Section-2255 motion. (Appx. B at 31a) The district judge described the history of the case and then considered the four arguments Mr. Mabry raised in his Section-2255 motion. The district court asserted that the first two issues had not been raised before sentencing.[2] With respect to the third and fourth issues, the district judge held that he had

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[1] In *Campusano* v. *United States,* 442 F.3d 770, 775-76 (2d Cir. 2006), the Second Circuit properly noted that the merit of a *habeas* movant's appellate issues should not matter to the *Flores-Ortega* analysis. However, it is worth noting that Mr. Mabry intended to raise at least one issue on appeal that he believes would have demonstrated a "miscarriage of justice" sufficient under Third-Circuit precedent to overcome the appellate waiver. In sentencing Mr. Mabry, the district judge applied a two-level enhancement for possession of a dangerous weapon. *See* Section 2D1.1(b)(1) of the of the United States Sentencing Guidelines. However, a review of the record in the district court reveals that the government *never* offered competent evidence about a weapon.

[2] One of the two issues that allegedly had not been raised prior to sentencing was the sentencing enhancement related to the presence of a firearm during or in relation to a drug-trafficking offense. In fact, on August 3, 2005, Mr. Mabry filed a *pro se* list of objections to the presentence report. One of those objections was with respect to the presentence report's suggestion that there be a firearm enhancement.

already found them to be without merit. The district judge then pointed to the appeal and collateral-attack waiver, cited *United States* v. *Khattak,* 273 F.3d 557 (3d Cir. 2001), and held that there was no miscarriage of justice.[3]

Mr. Mabry took an appeal to the Third Circuit, which entered a certificate of appealability and appointed the undersigned as *pro bono* counsel.

Mr. Mabry argued first that the waiver was not knowing and voluntary. The Third Circuit rejected that argument based on its review of the agreement and the plea colloquy, and this petition does not seek review of that determination.

Mr. Mabry then argued that the waiver did not relieve his trial counsel of the duty to file a notice of appeal when instructed to do so and that the waiver did not preclude Mr. Mabry's raising his counsel's ineffective assistance in a Section-2255 motion. Mr. Mabry contended that *Roe* v. *Flores-Ortega,* 528 U.S. 470 (2000), required his trial counsel to file the notice of appeal regardless of his opinion on the merits of the appeal in part because *Khattak,* the extant Third Circuit authority on waivers, always allows an exception to a waiver for a miscarriage of justice. *See also, Anders* v. *California,* 386 U.S. 738 (1967) (requiring counsel to file appeal and submit lack-of-merit brief). The Third Circuit rejected that argument as well.[4]

The court of appeals began its analysis by reiterating its holding in *Khattak* that waivers of the

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[3] In *Khattak,* the Third Circuit held that waivers of appellate rights are enforceable so long as they are knowing and voluntary but that there is an inherent exception to such waivers in the event of a miscarriage of justice.

[4] Mr. Mabry raised a third issue regarding the proper procedure for the appeals court to follow if it agreed with Mr. Mabry's position on the merits of the waiver issue. Because the court of appeals rejected Mr. Mabry's position on that point, it did not reach the third issue.

right to appeal included in plea agreements are enforceable if knowing and voluntary and there is no miscarriage of justice. (Appx. A at 9a-10a)

The Third Circuit then recited the holding of the Second Circuit in *Campusano* v. *United States,* 442 F.3d 770 (2d Cir. 2006), and noted that the Fifth, Ninth, Tenth and Eleventh Circuits had followed *Campusano.* The Third Circuit held, however, that "we believe that the other courts of appeals that have considered this issue have applied *Flores-Ortega* to a situation in which it simply does not 'fit.'" (Appx. A at 19a) Thus, it concluded that "we reject the approach taken in the *Campusano* line of cases as not well-reasoned." (Appx. A at 20a)

The Third Circuit then applied the miscarriage-of-justice test to the collateral-review waiver. It held that there were no non-frivolous grounds for appeal and, so, determined that the collateral-review waiver was enforceable. (Appx. A at 22a-23a)

Accordingly, the Third Circuit affirmed in a precedential opinion entered on July 28, 2008.

On August 11, 2008, Mr. Mabry filed a timely petition for rehearing before the panel or the *en banc* Third Circuit. The appeals court denied the petition on October 1, 2008.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now deeply divided on the issue presented in this case. This Court should step in to bring uniformity to this recurrent and increasingly prevalent issue in federal *habeas corpus* law.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ABOUT WHETHER THE *FLORES-ORTEGA* RULE APPLIES IN CASES IN WHICH THE PLEA AGREEMENT INCLUDES A WAIVER OF THE RIGHT TO APPEAL.

When a lawyer fails to follow a defendant's instruction to file an appeal, that lawyer's performance is ineffective and counsel has acted in a professionally unreasonable manner. *Flores-Ortega,* 528 U.S. at 477.

In this case, the Third Circuit held that it would "part ways with the approach taken by the majority of courts of appeals" and refuse to apply the *Flores-Ortega* rule in a case in which a defendant entered into a plea agreement that included a waiver of the right to take an appeal and to collaterally attack the sentence imposed.

Seven of the federal courts of appeals apply the rule of *Flores-Ortega* notwithstanding the fact that the *habeas* movant entered into a plea agreement that includes an appeal waiver. *See, e.g., Campusano* (2d Cir.); *United States* v. *Poindexter,* 492 F.3d 263 (4th Cir. 2007); *Watson* v. *United States,* 493 F.3d 960 (8th Cir. 2007); *United States* v. *Sandoval-Lopez,* 409 F.3d 1193 (9th Cir. 2005); *United States* v. *Garrett,* 402 F.3d 1262 (10th Cir. 2005); *Gomez-Diaz* v. *United States,* 433 F.3d 788 (11th Cir. 2005). In *United States* v. *Tapp,* 491 F.3d 263 (5th Cir. 2007), the Fifth Circuit canvassed the holdings of its sister circuits, agreed with their reasoning and held that "[t]oday, 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." 491 F.3d at 266.

The only court of appeals that has substantially agreed with the Third Circuit's approach is the Seventh Circuit. In *Nunez* v. *United States,* 546 F.3d 450 (7th Cir. 2008), the Seventh Circuit expressly rejected the holdings of the seven courts of appeals listed above and essentially concurred with the Third

Circuit's result in this case. *See Nunez,* 546 F.3d at 454 ("In saying this, we recognize that seven courts of appeals have held that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on a client's request.").[5]

Thus, the courts of appeals are divided seven to two on the legal issue of whether the rule of *Flores-Ortega* applies in cases in which there has been a waiver of appeal. None of those courts has given any indication that they will retreat from their positions.[6] Moreover, the Third and Seventh Circuits have essentially carved out an exception to *Flores-Ortega* that this Court has not recognized.

As the citations in this petition demonstrate, the issue frequently arises (a majority of the courts of appeals have addressed the issue in just the last three years). The government continues to include appeal and collateral-review waivers in plea agreements and,

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[5] In *Nunez,* the Seventh Circuit upheld the waiver in a 2007 opinion. *See Nunez* v. *United States,* 495 F.3d 544 (7th Cir. 2007). The movant filed a petition for a writ of *certiorari* in this Court. The Court granted the petition (over the dissents of the Chief Justice, Justice Scalia and Justice Thomas) and remanded the case for reconsideration by the Seventh Circuit in light of the position taken by the Solicitor General in his response to the *certiorari* petition. *See Nunez* v. *United States,* 128 S. Ct. 2990 (2008). On remand, the United States Attorney conceded error by the district court and urged the court of appeals to consider the merits of the appeal. *See Nunez,* 546 F.3d at 456 ("The United States Attorney asserts that the waiver in the plea bargain does not cover the sort of argument that Nunez seeks to present and adds that a defendant has a constitutional right to have a lawyer file a notice of appeal on his behalf even after formally waiving that right."). After asserting that "[w]e accept the first part of the United States Attorney's current position but not the second," the Seventh Circuit went on to examine the application of *Flores-Ortega* and to decide that its holding does not apply in cases of appellate waiver.

[6] For example, the Fifth Circuit this year reiterated the holding in *Tapp. See United States* v. *Taylor,* 270 Fed. Appx. 363 (5th Cir. 2008). In 2007, the Tenth Circuit reaffirmed its 2005 holding in *Garrett. See United States* v. *Golden,* 255 Fed. Appx. (10th Cir. 2007).

so, the issue will arise with even greater frequency in the future. This Court should grant review on this issue to bring national uniformity to the question of whether the *Flores-Ortega* holding applies in cases in which there has been an appeal waiver.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER A DEFENDANT WHO HAS PUTATIVELY WAIVED HIS RIGHT TO COLLATERAL REVIEW MAY ASSERT A *HABEAS* CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL RELATED TO COUNSEL'S FAILURE TO FILE A REQUESTED NOTICE OF APPEAL.

There is likewise a split among the circuits on the interplay between *Flores-Ortega* and a waiver of collateral-review rights, a question essentially subsumed within the question presented in this petition.

Several of the courts of appeals have applied *Flores-Ortega* in cases in which there were waivers both of appellate rights and of collateral-review rights. In *Campusano,* for example, the Second Circuit applied the *Flores-Ortega* holding notwithstanding the existence of a plea agreement that included both appellate and *habeas* waivers. In *Tapp*, the Fifth Circuit held that "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*." 491 F.3d at 266 (emphasis added). Other courts of appeals have likewise applied *Flores-Ortega* notwithstanding the presence of a collateral-review waiver. *See, e.g., Campusano* (2d Cir.); *Garrett* (10th Cir.); *Gomez-Diaz* (11th Cir.).

In this case, however, the Third Circuit explicitly held that Mr. Mabry's waiver of his collateral-review rights compounded his waiver of his appellate rights and deprived him of any vehicle to raise his counsel's ineffectiveness. (Appx. A at 19a) In

reaching that holding, the Third Circuit rejected the holdings shared by almost all of the other courts of appeals to reach the question: "[W]e reject the approach taken in the *Campusano* line of cases as not well-reasoned." (Appx. A at 20a) The Seventh Circuit reached essentially the same holding in *Nunez. See Nunez,* 546 F.3d at 454.

There is an additional reason this Court should review the issue and sub-issue presented in this petition. As the cases cited in this petition demonstrate, most waivers include both appellate and collateral-review rights. Moreover, essentially all cases presenting the issue of the effect of an appellate waiver on the rule of *Flores-Ortega* arise through the vehicle of *habeas* applications because, by definition, in each case no direct appeal was taken. Thus, in order for the Court to review meaningfully the issue presented in this petition – the application of *Flores-Ortega* when there has been an appellate waiver – it must at the same time review the subsidiary issue regarding collateral review.

CONCLUSION

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

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December 2008