Case No. 04-11105-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRANCISCO GOMEZ-DIAZ,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ADDITIONAL BRIEF OF APPELLANT
FRANCISCO GOMEZ-DIAZ

MILLS & CARLIN, P.A.

Rebecca Bowen Creed
Florida Bar No. 0975109
865 May Street
Jacksonville, Florida 32204
(904) 350-0075 telephone
(904) 350-0086 facsimile

Attorneys for Appellant

Francisco Gomez-Diaz v. United States
Appeal No. 04-11105-AA

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal:

1. Rebecca Bowen Creed, Mills & Carlin, P.A., counsel for Appellant;

2. Francisco Gomez-Diaz, Appellant;

3. Todd B. Grandy, Assistant United States Attorney, Appellate Division;

4. Karin B. Hoppmann, Assistant United States Attorney, Appellate Division;

5. Mills & Carlin, P.A., counsel for Appellant;

6. James A. Muench, Assistant United States Attorney, district court counsel for the United States;

7. R. Fletcher Peacock, Federal Public Defender;

8. Paul I. Perez, United States Attorney;

9. Tamra Phipps, Assistant United State Attorney, Chief, Appellate Division;

10. Honorable Mary S. Scriven, United States Magistrate Judge;

11. Honorable James D. Whittemore, United States District Judge; and

12. Frank Zaremba, Assistant Federal Public Defender, district court counsel for Appellant in the underlying criminal case.

By: Rebecca Bowen Creed
Rebecca Bowen Creed

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests oral argument. This appeal addresses three questions: first, whether the Petitioner's attorney failed to provide effective assistance of counsel when he failed to file a notice of appeal, as specifically requested by the Petitioner; second, whether the district court erred as a matter of law in requiring this *pro se* Petitioner, in his motion for relief under 28 U.S.C. § 2255, to identify the appellate issues that he would have raised on direct appeal or to show why his appeal would not have been futile; and third, whether the district court, at a minimum, should have granted an evidentiary hearing. As demonstrated in this brief, prejudice must be presumed once the attorney fails to follow his client's instruction to file a notice of appeal, without otherwise requiring the Petitioner to identify issues for appeal or otherwise establish the validity of grounds for appeal. Oral argument will likely assist the Court in its analysis of the district court's ruling.

TABLE OF CONTENTS

Certificate of Interested Persons and Corporate Disclosure Statement C-1

Statement Regarding Oral Argument i

Table of Contents ii

Table of Citations v

Statement of Jurisdiction vii

Statement of the Issues 1

Statement of the Case 1

Facts Relevant to the Proceedings in the Criminal Case 2

The Section 2255 Proceedings 5

Standard of Review 9

Summary of the Argument 9

Argument and Citations of Authority 12

I. Because the Petitioner's attorney disregarded specific instructions from his client to file a notice of appeal, his unprofessional performance resulted in prejudice to the Petitioner – regardless of whether the Petitioner could show that his appeal would have been successful. 13

II. The district court erred in presuming, as a matter of law, that the Petitioner necessarily could not show that the performance

of his counsel was deficient or that he had been prejudiced by that deficient performance 20

A. The district court mistakenly concluded that the Petitioner could not establish the deficient performance of his counsel. 21

1. The district court failed to consider whether, under the totality of the circumstances, the Petitioner's attorney had a constitutional duty to consult with his client about an appeal. 21

2. The failure of the Petitioner's attorney to "consult" with his client, within the meaning of *Flores-Ortega*, rendered his performance deficient....................23

B. The district court erroneously ruled that the Petitioner necessarily could not show any prejudice from his counsel's deficient performance. 24

III. Alternatively, the district court should have granted the Petitioner's request for an evidentiary hearing on his Section 2255 Motion. 27

Conclusion 28

Certificate of Compliance 29

Certificate of Service 29

TABLE OF CITATIONS

CASES

Birt v. Montgomery, 725 F.2d 587 (11th Cir.),

reh'g denied, 729 F.2d 1468 (11th Cir. 1984) 27, 28

Lynn v. United States, 365 F.3d 1225 (11th Cir. 2004) 9

**Martin v. United States*, 81 F.3d 1083 (11th Cir. 1996) 9, 14, 15, 16, 17

Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989) 9

Regaldo v. United States, 334 F.3d 520 (6th Cir.),

cert. denied, 540 U.S. 1024 (2003) 18, 19, 20, 28

**Rodriquez v. United States*, 395 U.S. 327 (1969) 13, 15, 16, 18, 28

**Roe v. Flores-Ortega*, 528 U.S. 470 (2000) .... *passim*

Sarroca v. United States, 250 F.3d 785 (2d Cir. 2001) 18

Strickland v. Washington, 466 U.S. 668 (1984) 12, 13

United States v. Arvizu, 270 F.3d 605 (8th Cir. 2001) 18

United States v. Brown, 117 F.3d 471 (11th Cir. 1997) viii

United States v. Cronic, 466 U.S. 648, 659 (1984) 13, 20

United States v. Weaver, 275 F.3d 1320 (11th Cir. 2001),

cert. denied, 536 U.S. 961 (2002) 14-15, 26, 28

STATUTES AND RULES

28 U.S.C. § 1291 viii

28 U.S.C. § 1331 viii

28 U.S.C. § 2253 viii

28 U.S.C. § 2255 ..... vii, viii

Federal Rule of Appellate Procedure 4 viii

Federal Rule of Appellate Procedure 22 viii

STATEMENT OF JURISDICTION

This is an appeal of the district court's Order denying the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (the "Section 2255 Motion") filed by the Petitioner/Appellant, Francisco Gomez-Diaz (the "Petitioner"). (R-1; R-6; R-7.)[1] The Petitioner's judgment of conviction and sentence became final on November 14, 2002. (*See* Cr. Doc. 49; Cr. Doc. 52; *see also* R-6-1.) The Petitioner timely filed his Section 2255 Motion on November 3, 2003 (R-1-1), within one year after his judgment of conviction became final. (R-6-1.) Thus, the district court had jurisdiction under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(1) (requiring that a collateral motion filed by a prisoner in custody must be filed within one year from the date on which the judgment of conviction becomes final).

On February 19, 2004, the district court entered its Order denying the Section 2255 Motion without an evidentiary hearing. (R-6-5.) On March 5, 2004, the Petitioner filed his notice of appeal of the district court's Order. (R-7.) Thereafter, the district court directed the clerk to enter judgment against the Petitioner (R-11), which judgment was rendered for the United States, and against

[1] References to the record in this 28 U.S.C. § 2255 appeal appear as the letter "R," followed by the appropriate docket and page numbers (*i.e.*, R-6-5). References to the record in the underlying criminal case, Case No. 8:02-CR-179-T-27MSS, will appear as "Cr. Doc.," followed by the appropriate docket and page numbers (*i.e.*, Cr. Doc. 32, at 13.)

the Petitioner, on April 12, 2004 (the "Judgment"). (R-12.) The Petitioner's notice of appeal is timely. *See* Fed. R. App. P. 4(a)(1)(A), (a)(2); *see also United States v. Brown*, 117 F.3d 471, 474 (noting that Federal Rule of Appellate Procedure 4(a) allows sixty days to appeal the denial of a § 2255 motion).

The district court declined to issue the Petitioner a certificate of appealability. (R-10.) On June 23, 2004, this Court granted a certificate of appealability as to one issue:

> Whether appellant was denied effective assistance of counsel when counsel failed to file a timely notice of appeal after appellant allegedly requested counsel to do so.

(R-13.) Thus, this Court has jurisdiction to review the district court's Judgment and Order denying the Section 2255 Motion. *See* 28 U.S.C. § 1291 (granting right to review final decisions of district courts on appeal); 28 U.S.C. § 2253(a), (c)(1)(B) (allowing appeal of a final order in a section 2255 proceeding pursuant to a certificate of appealability); *see also* 28 U.S.C. § 2255 (providing that "[a]n appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus"); Fed. R. App. P. 22(b) (allowing an appeal of an order in a section 2255 proceeding pursuant only to a certificate of appealability under section 2253).

STATEMENT OF THE ISSUES

I. Whether the district court erred in denying the Petitioner's claim for ineffective assistance of counsel when the failure of the Petitioner's counsel to file the requested notice of appeal prejudiced the Petitioner – regardless of whether the Petitioner could show that his appeal would have been successful.

II. Whether the district court erred as a matter of law in relying on the waiver of the Petitioner's appeal rights to presume that the Petitioner could not show that the performance of his counsel was deficient or that he had been prejudiced by that deficient performance.

III. Alternatively, whether the district court erred in denying an evidentiary hearing upon finding that the Petitioner's allegations, even if true, did not establish his entitlement to relief under 28 U.S.C. § 2255.

STATEMENT OF THE CASE

The Petitioner is an illegal alien, originally from Mexico. (*See* R-2-2; Cr. Doc. 1, at 3; *see also* Cr. Doc. 53 (seeking defendant's transfer to his home country).) Although he speaks Spanish, he understands approximately eighty percent of spoken English. (*See* Cr. Doc. 59, at 7-8.) At his plea colloquy before the magistrate judge, he testified that he had spoken English for "about six years," which he learned "[i]n the street." (*Id.* at 8.) He was assisted by an interpreter at

both his plea colloquy and his sentencing hearing in the underlying criminal case. (*See* Cr. Doc. No. 59, at 8; Cr. Doc. No. 60, at 2-8.)

Facts Relevant to the Proceedings in the Criminal Case

On May 2, 2002, Respondent, United States of America (the "Government"), indicted the Petitioner on four counts: Count One, for conspiracy to distribute 500 grams or more of cocaine; Count Two, for distribution of cocaine; Count Three, for possession with the intent to distribute 500 grams or more of cocaine; and Count Four, for residing illegally in the United States after having previously been deported as an alien convicted of an aggravated felony. (Cr. Doc. 1, at 1-3.) Counsel was appointed to represent the Petitioner. (*See* Cr. Doc. 10; Cr. Doc. 11.)

Pursuant to a plea agreement, filed July 30, 2002 (Cr. Doc. 32), Petitioner pled guilty to Counts One and Four. (Cr. Doc. 59, at 29-30; *see also* Cr. Doc. 42; Cr. Doc. 44.) The Government dismissed the remaining two counts of the indictment. (*See* Cr. Doc. 52, at 1; Cr. Doc. 60, at 16.)

As part of his plea agreement, the Petitioner agreed to waive the right to appeal his sentence,

> directly or collaterally, on any ground, including the applicability of the "safety valve" 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 . . . .

(Cr. Doc. 32, at 13.)[2] Under the plea agreement, the Petitioner could appeal his sentence if the Government chose to appeal the sentence imposed. (*Id.*)

At his plea colloquy, held August 12, 2002, the magistrate judge explained the appeal waiver to the Petitioner:

> If you'll turn over to page 13 you'll see a provision called the Appeal of Sentence, Waiver. In a typical case, Mr. Gomez-Diaz, when a defendant is convicted after jury trial and sentenced, that defendant has almost as of [a] matter of right the ability to take an appeal to a higher court . In our case that appeal would go to the Eleventh Circuit Court of Appeals.
>
> By signing this plea agreement containing such provision, you are waiving your right to file any such appeal except in the very limited circumstances that are set forth in the plea agreement.
>
> The only three limited circumstances that permit you to file an appeal are the following: First, if the Government for some reason were to appeal your sentence, you could file a cross appeal.
>
> Second, if the Court were to impose a sentence that exceeded the statutory maximum period of incarceration, then you could challenge that sentence as illegal.
>
> The third circumstance is if the Court were to impose a sentence that were somehow illegal in some way other than in the calculation of the guideline range, then you could file an appeal of that sentence that you felt was illegal.
>
> But only in those three limited circumstances can you take an appeal. If you attempt to take an appeal in any other circumstances, in all likelihood the Appeals Court will not even look at your appeal to see whether it has any merit. It will reject your appeal out of hand because you have no right to file an appeal based on your signature on this plea agreement.

---

[2] Excerpts from the plea agreement are attached to the Record Excerpts of the Appellant. (Cr. Doc. 32.)

(Cr. Doc. 59, at 16-17.) When asked by the magistrate judge (through an interpreter) whether he understood, the Petitioner responded that he did. (*Id.* at 17.)

At the sentencing hearing, held November 4, 2002, the district court granted a three-level downward departure based on the Petitioner's acceptance of responsibility. (Cr. Doc. 60, at 14-15; *see also* Cr. Doc. 32, at 3.) Counsel for the Petitioner also moved for a downward departure based on overrepresentation of his criminal history. (Cr. Doc. 60, at 12-13; *see also* Cr. Doc. 48.)[3] The district court denied this motion and instead sentenced the Petitioner to one hundred eighty-eight months' imprisonment as a career offender. (Cr. Doc. 60, at 14-16; *see also* Cr. Doc. 52, at 1-2.) Consistent with the plea agreement (Cr. Doc. 32), the district court imposed a sentence at the low end of the sentencing guidelines range, as calculated by the district court at sentencing. (*See* Cr. Doc. 52, at 1-2; *see also* Cr. Doc. 59, at 14-15; Cr. Doc. 60, at 14-16.)

At the conclusion of the sentencing hearing, the district court informed the Petitioner, again through his interpreter, that he had the right to the extent permitted by the plea agreement to appeal his judgment of conviction and sentence within ten days; if he failed to appeal within the ten-day period he would be

[3] At sentencing, the Petitioner sought a criminal history category of II, rather than the criminal history category (VI) requested by the Government. (*See* Cr. Doc. No. 60, at 11-12; *see also* Cr. Doc. 48.)

deemed to have waived his right to appeal; if he chose to appeal, he would be entitled to the assistance of an attorney; and if he could not afford an attorney, one would be appointed for him and the clerk would be directed to accept the notice of appeal without payment of the filing fee. (Cr. Doc. 60, at 17.) When asked by the district court whether he had any questions, the Petitioner responded that he did not. (*Id.*)

On November 5, 2002, the district court entered its written judgment in a criminal case against the Petitioner and remanded the Petitioner to the custody of the United States Marshal. (Cr. Doc. 52, at 1-2.) The Petitioner did not appeal his judgment of conviction and sentence. (R-1.) The Petitioner remains confined in a federal prison in Texas. (R-1.)

The Section 2255 Proceedings

On November 3, 2003, the *pro se* Petitioner filed his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct Sentence by a Person in Federal Custody, together with his Memorandum in Support of 28 U.S.C. § 2255 Motion (collectively, the "Section 2255 Motion"). (R-1; Cr. Doc. 61; R-2.)[4] The Petitioner signed the Section 2255 Motion under penalty of perjury. (R-1-7.)

---

[4] In his Section 2255 Motion, the Petitioner specifically referenced the Memorandum for the statement of the grounds for relief and supporting facts. (R-1-4-5; R-2-3-5.)

In his Section 2255 Motion, the Petitioner sought relief for ineffective assistance of counsel. (R-1-4-5; R-2-7-8.) Specifically, the Petitioner asserted that

> Counsel deprived Petitioner of his Fifth and Sixth Amendment Constitutional Rights to Appeal, Effective Assistance of Counsel, and Due Process of Law, when failing to file a timely notice of appeal, and failing to perfect the requested appeal.

(R-1-4-5; R-2-7.)

As support for his argument, the Petitioner alleged that after sentencing "he [had] informed Counsel that he wished to appeal his sentence." (R-2-4.) According to the Petitioner, the district court had informed him that if he wished to appeal, he had ten days in which to do so, and that if he could not afford an attorney for the appeal, one would be appointed for him. (*Id.* at 5.) Petitioner alleged that "counsel told Petitioner that he didn't feel an appeal was the best course, but that, its [sic] not over, and he would file a 28 U.S.C. §2255 motion." (*Id.*) Petitioner further stated, however, that because he "urged his appeal, he assumed that Counsel was going to file the ten (10) day timely notice of appeal," and that he intended "to ask the court to appoint counsel for appeal." (*Id.*) Counsel did not file the notice of appeal or a timely motion to withdraw. (*Id.*; *see*

also id. at 2.) Counsel for the Petitioner also did not file, on his behalf, a motion under 28 U.S.C. § 2255. (*See* R-1-3.)[5]

This *pro se* Petitioner filed his Section 2255 Motion, which referenced the facts set forth in his attached memorandum of law, under penalty of perjury. (*See* R-1-5-7; R-2-4-5.) Although the Government responded in opposition to the Section 2255 Motion (R-3; R-5), the Government did not file any affidavits to contradict the Petitioner's allegations. (*See* R-5-1-14.)

On February 18, 2004, the district court denied the Section 2255 Motion without an evidentiary hearing. (R-6-1; *id.* at 5-6.) The district court found that the Petitioner had "waived his right to challenge his sentence either through direct appeal or collateral attack" in his plea agreement. (R-6-5 (citing Cr. Doc. 32, at 13).) Upon noting that "appeal waivers such as that included in Petitioner's written plea agreement are enforceable" in this Circuit, the district court concluded that Petitioner's counsel

> did not, therefore, render deficient performance if, as Petitioner alleges, he recommended against a direct appeal and suggested that Petitioner consider a § 2255 motion.

(R-1-5.) The district court continued:

---

[5] Once the judgment of conviction and sentence became final, the Petitioner's counsel filed a motion for the defendant's transfer to his home country, pursuant to 18 U.S.C. § 4102. (Cr. Doc. 53.) The district court denied this motion. (Cr. Doc. 56.)

> Furthermore, any appeal would have been futile, given the law of this circuit and Petitioner's express waiver of his right to challenge his conviction on direct appeal.

(*Id.*) In a footnote, the district court added that the Government had correctly pointed out that the Petitioner had not "identified the appellate issues he wished to have been raised on direct appeal" or "identified any aspects of an appeal which would fit within the exception to his express waiver in his plea agreement." (*Id.* n.5.)

The district court found an evidentiary hearing on the Section 2255 Motion "unnecessary." (*Id.*) According to the district court:

> [The Petitioner] has not established that he would be entitled to an evidentiary hearing as he has not established that his allegations, if true, would establish entitlement to collateral relief. . . . [T]his cause is summarily dismissed as it plainly appears from the face of the motion, the referenced exhibits and the prior proceedings in this case that Petitioner is not entitled to relief.

(*Id.* (citations omitted).)

Petitioner timely filed his notice of appeal from the district court's Order on March 5, 2004. (R-7; *see also* R-12 (Judgment in a Civil Case).) Once the *pro se* Petitioner served his initial brief, and the Government responded with the appellee's brief, this Court appointed counsel for the Petitioner on appeal. (*See* Appellant's Initial Brief ("Appellant's *Pro Se* Initial Brief"), filed July 20, 2004; Brief of United States of America, Civil Case (28 U.S.C. § 2255) ("Appellee's Brief"), filed August 25, 2004.)

Standard of Review

This Court reviews the findings of fact in a section 2255 proceeding for clear error. Legal issues are reviewed *de novo*. *Martin v. United States*, 81 F.3d 1083, 1084 (11th Cir. 1996); *accord Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). The question of whether counsel for the Petitioner rendered ineffective assistance is a mixed question of law and fact, which is subject to this Court's *de novo* review. *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989).

SUMMARY OF THE ARGUMENT

The Petitioner was denied effective assistance when his counsel failed to follow the Petitioner's specific instructions to file a notice of appeal from the judgment of conviction and sentence. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Because the failure of the Petitioner's counsel to file the requested notice of appeal deprived the Petitioner of his right to an appeal altogether, the district court should have presumed that counsel's professionally unreasonable performance prejudiced the Petitioner, *id.* at 484, without requiring the Petitioner to identify the grounds for appeal, to prove that his appeal would "fit within the exception to his express waiver in the plea agreement," or otherwise to show that his appeal would *not* have been "futile." (*See* R-6-5 & n.5.)

Alternatively, if this Court finds insufficient evidence that the Petitioner specifically instructed his attorney to file the notice of appeal, the question

becomes whether, under *Flores-Ortega*, the Petitioner's attorney failed to fulfill a constitutionally-imposed duty to consult with his client, and whether the Petitioner can show a reasonable probability that, but for the deficient performance of his attorney, he would have timely appealed. 528 U.S. at 478, 486.

The district court failed to conduct the inquiry required by the supreme court in *Flores-Ortega*. The district court mistakenly assumed that because the Petitioner had waived the right to appeal his conviction and sentence, his attorney necessarily could not have rendered deficient performance – even if, as the Petitioner alleged, his attorney failed to follow his instructions. (R-6-5.) Yet under *Flores-Ortega*, the question is not simply whether the Petitioner could prove that his appeal had merit, but instead whether, under all the circumstances, the Petitioner showed that his counsel had a constitutionally-imposed duty to consult with him about an appeal. Because the record shows that such a duty existed – and that the Petitioner's counsel failed to fulfill that duty within the meaning of *Flores-Ortega* – the district court erred in ruling that the performance of the Petitioner's counsel necessarily could not have been deficient as a matter of law.

The district court also mistakenly concluded that the Petitioner could not show any prejudice that resulted from his counsel's failure to file the notice of appeal. (R-6-5.) The district court reasoned that an appeal "would have been futile" (*id.*) noting that the Petitioner had failed to specify the "appellate issues he

wished to have been raised on direct appeal" or to identify "any aspects of an appeal which would fit within the exception to his express waiver in his plea agreement." (*Id.* at 5, n.5.) Again, in emphasizing only that the Petitioner had waived his right to appeal, the district court failed to consider whether, under *Flores-Ortega*, the Petitioner could show a reasonable probability that, but for his counsel's deficient performance, he would have appealed. (*Id.*)

Therefore, because the district court did not follow the inquiry established in *Flores-Ortega*, its Order denying the Petitioner's Section 2255 claim for ineffective assistance of counsel must be reversed and remanded for further proceedings.

In any event, the district court's Order denying the Petitioner an evidentiary hearing on his Section 2255 Motion must be reversed. The district court reasoned that the Petitioner's allegations, if true, did not establish his entitlement to collateral relief. (R-6-5.) Yet even if the Petitioner's attorney could be found to have adequately informed the Petitioner about the advantages and disadvantages of an appeal (and made a reasonable effort to determine his client's wishes), as required by *Flores-Ortega*, the Petitioner alleged in his Section 2255 Motion that his attorney failed to follow his instruction to file a timely notice of appeal. This allegation, if true, does entitle the Petitioner to collateral relief under 28 U.S.C. § 2255 – regardless of the "waiver of his right to challenge his conviction on direct

appeal." (R-6-5.) *See Flores-Ortega*, 528 U.S. at 478. The district court at least should have granted the Petitioner's request for an evidentiary hearing "to determine whether counsel was ineffective in failing to file a timely notice of appeal, and when failing to perfect the appeal, as requested by Petitioner." (R-2-8-9.)

ARGUMENT AND CITATIONS OF AUTHORITY

Under the Sixth Amendment, a criminal defendant has a right to "reasonably effective" legal assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on his claim that his counsel was constitutionally ineffective for failing to file a notice of appeal, the Petitioner must satisfy the familiar two-prong test established by *Strickland*. *See Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000). First, the Petitioner must show that his counsel's representation "fell below an objective standard of reasonableness"; second, the Petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id.* (citing *Strickland*, 466 U.S. at 688, 694).

Petitioner satisfied both elements of the *Strickland* test and, in any event, was entitled to an evidentiary hearing on his Section 2255 Motion. For the reasons set forth below, the district court erred in summarily denying relief to the Petitioner on his ineffective assistance of counsel claim.

I. BECAUSE THE PETITIONER'S ATTORNEY DISREGARDED SPECIFIC INSTRUCTIONS FROM HIS CLIENT TO FILE A NOTICE OF APPEAL, HIS UNPROFESSIONAL PERFORMANCE RESULTED IN PREJUDICE TO THE PETITIONER – REGARDLESS OF WHETHER THE PETITIONER COULD SHOW THAT HIS APPEAL WOULD HAVE BEEN SUCCESSFUL.

Typically, under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that his counsel performed deficiently and that the defendant actually suffered prejudice as a result of his counsel's deficient performance. 466 U.S. at 688, 694. Yet the Supreme Court of the United States, in *Roe v. Flores-Ortega*, recently reiterated the long-standing presumption that an attorney who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." 528 U.S. 470, 477 (2000) (citing *Rodriquez v. United States*, 395 U.S. 327 (1969)). Because the failure of the defendant's attorney to file the requested notice of appeal forfeits the defendant's right to an appellate proceeding altogether, "[n]o specific showing of prejudice [is] required." 528 U.S. at 483 (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). Thus, when the violation of the defendant's right to counsel has "rendered the proceeding presumptively reliable or entirely nonexistent," prejudice may be presumed "with no further showing from the defendant of the merits of his underlying claims." *Id.* at 484.

In the case now before this Court, the failure of counsel to file the requested notice of appeal deprived the Petitioner of his right to an appeal altogether. The record evidence is undisputed: the *pro se* Petitioner alleged, in his Section 2255 Motion, that after sentencing "he informed Counsel that he wished to appeal his sentence." (R-2-4.) The Petitioner continued to "urge[] his appeal," even after his counsel informed him that "he didn't feel an appeal was the best course," and assumed that because he had "urged his appeal," his attorney would file a timely notice of appeal within the ten days after his judgment of conviction and sentence became final. (R-2-4-5.) Yet the Petitioner's attorney disregarded his client's specific instructions to file a notice of appeal (*id.*), which necessarily prejudiced the Petitioner by depriving him of any right to appeal the sentence. *See Flores-Ortega*, 528 U.S. at 477, 484; *see also Martin v. United States*, 81 F.3d 1083, 1084 (11th Cir. 1996) (noting that a defendant cannot attack his guidelines sentence in a collateral proceeding under section 2255, but has the right to a direct appeal of that sentence, even after a guilty plea).

Under these circumstances, the district court erred as a matter of law when it relied on the presumed validity of the appeal waiver to deny the Petitioner's claim for ineffective assistance of counsel. (R-6-5.) Any question as to the enforceability of the appeal waiver found in the Petitioner's plea agreement could have been raised by the Petitioner on direct appeal. *See, e.g., United States v.*

Weaver, 275 F.3d 1320, 1333 & n.21 (11th Cir. 2001) (considering the enforceability and validity of an appeal-of-sentence waiver, which is subject to this Court's *de novo* review). Nonetheless, the district court essentially required the Petitioner to prove that his appeal would have had merit, without regard for his counsel's failure to file the requested notice of appeal. (R-6-5 & n.5.)

The district court erred in imposing this requirement. The rationale relied upon by the district court has been rejected, both by the Supreme Court of the United States and this Circuit. *See Rodriquez v. United States*, 395 U.S. 327, 329-30 (1969); *accord Flores-Ortega*, 528 U.S. at 484-86; *see also Martin v. United States*, 81 F.3d 1083, 1084 (11th Cir. 1996) (finding that an attorney's failure to file a timely appeal, as requested by his client, necessarily entitles a criminal defendant to an out-of-time appeal, regardless of whether the defendant could show viable grounds for the appeal).

In *Rodriquez*, for example, the supreme court rejected any requirement that a defendant seeking relief under section 2255 (particularly a *pro se* defendant like this Petitioner) must identify the potential errors to be raised in showing prejudice from the denial of his right to appeal. 395 U.S. at 329-30. As the *Rodriquez* Court explained:

> Applicants for relief under s. 2255 must, if indigent, prepare their petitions without the assistance of counsel. Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a

> summary statement of points to be raised on appeal. Moreover, they might not even be aware of errors which occurred at trial.

Id. at 330. To require applicants for section 2255 relief to disclose what errors they would raise on appeal, the *Rodriquez* Court reasoned, would "deprive [them] of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one." *Id.* Thus, the Court ruled:

> Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings.

Id.; *accord Flores-Ortega*, 528 U.S. at 484-85.

Similarly, in *Martin*, this Circuit considered the effect of a defendant's guilty plea on his section 2255 claim for ineffective assistance of counsel. 81 F.3d at 1083-84. The defendant in *Martin* pled guilty and was sentenced under the sentencing guidelines. *Id.* Under the guidelines, he had the right to directly appeal his sentence, notwithstanding his guilty plea. *Id.* at 1084. Although the defendant in *Martin* advised his attorney that he wanted to appeal the sentence, the attorney refused to accept his client's collect telephone calls after sentencing and did not pursue the appeal. *Id.* at 1083-84. The defendant later filed a *pro se* appeal, which the appellate court rejected as untimely. *Id.* at 1084.

Based on these facts, the defendant in *Martin* sought relief under section 2255. The district court found the performance of the defendant's attorney

deficient but nonetheless denied the section 2255 motion, finding instead that because the defendant had pled guilty, he had suffered no prejudice from the denial of his right to appeal. *Id.*

On appeal, this Court reversed. *Id.* The *Martin* court reasoned that the defendant had the right to a direct appeal of his sentence, even if that right may have been limited by the plea agreement. *Id.* This right to a direct appeal, however, prohibited any attempt by the defendant to attack his guidelines sentence in a section 2255 proceeding. *Id.* As a result, the *Martin* court concluded that the defendant had been "prejudiced by the failure of his attorney to file an appeal after being requested to do so, even after the defendant pled guilty." *Id.* The court thus reversed the order denying relief under section 2255 and remanded "with instructions to grant relief allowing a direct appeal." *Id.*

Here, as in *Martin* and *Rodriquez*, the unrefuted allegations of the Petitioner's Section 2255 Motion demonstrate that he had specifically instructed his attorney to file a notice of appeal. (R-2-4-5.) Upon this showing, the district court should have found that the attorney's failure to file the notice of appeal prejudiced the Petitioner – without requiring this *pro se* Petitioner to identify the issues for appeal or otherwise show that his hypothetical appeal might have had merit. *See Rodriquez*, 395 U.S. at 330; *Martin*, 81 F.3d at 1084.

The facts of this case are distinct from the decisions of the Second, Sixth, and Eighth Circuits upon which the Government relies. (*See* Appellee's Brief, at 8 (citing *Regaldo v. United States*, 334 F.3d 520 (6th Cir. 2003); *United States v. Arvizu*, 270 F.3d 605 (8th Cir. 2001); *Sarroca v. United States*, 250 F.3d 785 (2d Cir. 2001).) Unlike the facts of *Arvizu* and *Sarroca*, the record before this Court shows that, notwithstanding any "consultation" that the Petitioner's counsel may have undertaken (*see* R-6-5), the Petitioner did instruct his attorney to file a notice of appeal. (*Compare* R-2-4-5 (allegations of the Petitioner's Section 2255 Motion) with *Arvizu*, 270 F.3d at 606 (considering affidavit from defendant's trial counsel, who stated that he had consulted with his client about the right to file an appeal but never received express instructions about the appeal from his client, and finding that the defendant had not made out an ineffective assistance claim), and *Sarroca*, 250 F.3d at 788 (concluding that "counsel's failure to file an appeal was not unreasonable"; not only did the defendant fail to indicate any interest in appealing, his attorney filed an affidavit stating that the defendant never requested an appeal, and there was "nothing in the record" indicating that the defendant "requested or authorized his attorney to file a notice of appeal").

Nor is this case like the facts of *Regaldo*. In *Regaldo* the United States Court of Appeals for the Sixth Circuit considered whether the performance of the defendant's counsel could be considered deficient merely because "he knew that

[the defendant] wanted to appeal but he nonetheless decided that pursuit of Rule 35(b) relief was the best alternative." 334 F.3d at 525. Even on appeal, the defendant in *Regaldo* did not contend that she specifically directed her attorney to file an appeal. *Id.*

In comparison to the facts of *Regaldo*, the Petitioner alleged that he informed his counsel that he wished to appeal and understood that his attorney had informed him that he did not believe an appeal was "the best course," but assumed that because he had "urged his appeal," his attorney would file a timely notice of appeal. (R-2-4-5.) Consistent with the allegations of the Petitioner's Section 2255 Motion, the Petitioner argues on appeal that he "clearly informed his counsel that he wished to appeal the sentence, and was under the assumption that counsel, at the very minimum, would file the timely notice of appeal, to protect Appellant's appeal right." (Appellant's *Pro Se* Initial Brief, at 7.) Unlike *Regaldo*, then, this is not a case in which the Petitioner has criticized his attorney for pursuing relief other than a direct appeal. 334 F.3d at 525.[6]

Therefore, because the Petitioner "informed Counsel that he wished to appeal his sentence" – and "urged his appeal" even after his attorney informed him

[6] Notably, although the Petitioner alleges that his attorney apparently had indicated that "its [sic] not over, and he would file a 28 U.S.C. §2255 motion" (R-2-5), the record does not reveal that such a motion was ever filed on the Petitioner's behalf. (*See generally* Criminal Docket (Record Excerpts of Appellant).)

that he did not feel an appeal was in the best course (R-2-4-5) – the district court should have found the performance of Petitioner's counsel deficient. Counsel for the Petitioner acted in a professionally unreasonable manner when he disregarded his client's specific instructions to file the notice of appeal. *Flores-Ortega*, 528 U.S. at 477, 478. And because the failure of the Petitioner's attorney to file the notice of appeal deprived him of his right to an appellate proceeding altogether, the district court should have granted relief to the Petitioner under 28 U.S.C. § 2255. *Id.* at 484; *accord Cronic,* 466 U.S. at 658-59. Petitioner respectfully requests that this Court reverse the district court's Order.

II. THE DISTRICT COURT ERRED IN PRESUMING, AS A MATTER OF LAW, THAT THE PETITIONER NECESSARILY COULD NOT SHOW THAT THE PERFORMANCE OF HIS COUNSEL WAS DEFICIENT OR THAT HE HAD BEEN PREJUDICED BY THAT DEFICIENT PERFORMANCE.

If, however, this Court is unable to conclude from the record that the Petitioner specifically instructed his attorney to file an appeal, the question becomes whether, under *Flores-Ortega*, the Petitioner's attorney failed to fulfill his constitutional obligation to consult with his client and, if so, whether the Petitioner suffered prejudice as a result of his counsel's deficient performance. *See Flores-Ortega*, 529 U.S. at 478. Because the district court failed as a matter of law to follow the inquiry required under *Flores-Ortega*, its Order denying relief under section 2255 must be reversed and remanded for further proceedings.

A. The district court mistakenly concluded that the Petitioner could not establish the deficient performance of his counsel.

First, the district court mistakenly presumed that the Petitioner could not demonstrate that his attorney's performance was deficient. (R-6-5.) In its Order, the district court relied on the enforceability of the appeal waiver to find that

> Petitioner's counsel did not, therefore, render deficient performance if, as Petitioner alleges, he recommended against a direct appeal and suggested that Petitioner consider a § 2255 motion.

(*Id.*) Rather than summarily ruling against the Petitioner on the question of his counsel's deficient performance, the district court should have considered the totality of the circumstances in deciding whether the Petitioner's attorney had a constitutionally-imposed duty to consult with his client about an appeal and whether he satisfied that duty.

1. The district court failed to consider whether, under the totality of the circumstances, the Petitioner's attorney had a constitutional duty to consult with his client about an appeal.

First, the district court erred in relying solely on the appeal waiver to conclude that the Petititioner's attorney necessarily could not have rendered deficient performance. (R-6-5.) Under *Flores-Ortega* the district court should have considered the totality of the circumstances – including all information that the Petitioner's counsel knew or should have known – in deciding whether counsel had a duty to "consult" with his client. 528 U.S. at 478, 480 (citing *Strickland*, 466 U.S. at 690). "Only by considering all relevant factors in a given case can a court

properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.* at 480.

The appeal waiver found in the Petitioner's written plea agreement is only one factor. *See id.* Although the waiver may be "highly relevant" to the question of whether "a rational defendant would want to appeal," *id.*, the analysis does not end there. Instead, an attorney also has a constitutionally-imposed duty to consult with his client when "there is reason to think," as there must be here, that "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.*

Based on the record before this Court, the Petitioner's attorney had a constitutionally-imposed duty to consult with his client. (*See* R-2-4-5.) The Petitioner alleged in his Section 2255 Motion that he "informed Counsel that he wished to appeal his sentence." (R-2-4.) This allegation, which was not rebutted by the Government, should have been more than sufficient to establish the Petitioner's interest in appealing – notwithstanding his prior waiver of certain appeal rights. *See Flores-Ortega*, 528 U.S. at 480.

2. The failure of the Petitioner's attorney to "consult" with his client, within the meaning of *Flores-Ortega*, rendered his performance deficient.

Next, even if this Court finds that the district court implicitly concluded that the Petitioner's counsel had a duty to consult with his client, the district court erred in summarily rejecting the Petitioner's claim. (*See* R-6-5.) The *Flores-Ortega* court relied on the term "consult" to "convey 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." 528 U.S. at 478. Yet the district court, in denying the Petitioner's claim, again relied only on the waiver of appeal to find that Petitioner's counsel necessarily could *not* have rendered deficient performance. (R-6-5.) Nowhere in its Order did the district court consider whether the Petitioner's counsel in fact "consulted" with him about an appeal within the meaning of *Flores-Ortega*. (*See id.*)

The record before this Court in fact demonstrates that the Petitioner's attorney made no real effort to "consult" with his client. The Petitioner asserted in his Section 2255 Motion that his attorney simply "told Petitioner that he didn't feel an appeal was the best course, but that, its [sic] not over, and he would file a 28 U.S.C. §2255 motion." (R-2-5.) Again, the Government did not rebut the sworn allegations of the Section 2255 Motion. (*See* R-5-1-14.) Nowhere in the record, then, does it appear that the Petitioner's attorney sufficiently "advis[ed] the

defendant about the advantages and disadvantages of taking an appeal" and made a "reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478. Presumably, had the Petitioner's attorney made a "reasonable effort to discover the defendant's wishes," he would have filed the notice of appeal at his client's urging. (*See* R-2-4-5.)

For these reasons, the district court erred as a matter of law when it failed to follow the inquiry outlined in *Flores-Ortega* and instead ruled that the performance of the Petitioner's counsel necessarily could not have been deficient.[7]

B. The district court erroneously ruled that the Petitioner necessarily could not show any prejudice from his counsel's deficient performance.

The district court also erred in presuming that the Petitioner could not show the second prong of the *Strickland* test outlined in *Flores-Ortega*: specifically, whether he had been prejudiced by his counsel's deficient performance. (R-6-5.) *See Flores-Ortega*, 528 U.S. at 484, 486.

In *Flores-Ortega* the supreme court considered whether counsel can be deficient "for not filing a notice of appeal when the defendant has not clearly

---

[7] Alternatively, the district court should have granted an evidentiary hearing to inquire into the Petitioner's conversations with his counsel. 528 U.S. at 487 (citing *Strickland*, 466 U.S. at 691). Otherwise, it may be impossible from the record to determine whether the Petitioner's attorney in fact satisfied his constitutional obligations to inform his client about the advantages and disadvantages of an appeal and to make a reasonable effort to determine his client's wishes. *See id.* at 478, 487; *see also infra*, at Section III.

conveyed his wishes one way or the other." 528 U.S. at 477. Under these circumstances, the supreme court required the defendant to show that his counsel's deficient performance actually caused the forfeiture of the appeal. *Id.* at 484.

Despite its rejection of any *per se* presumption of prejudice on these facts, the supreme court, consistent with its earlier decision in *Rodriquez*, refused to require a *pro se* defendant to prove that his appeal would have had merit. *Id.* at 485-86. Although evidence of non-frivolous grounds for appeal may be "highly relevant," *id.* at 485, the *Flores-Ortega* Court reasoned that

> it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.

Id. at 486. Instead, the *Flores-Ortega* Court instructed the district court to consider all relevant facts (including evidence that the defendant "promptly expressed a desire to appeal," *id.* at 484) in determining whether the defendant has shown "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 486.

In the case now before this Court, the district court failed to consider whether the Petitioner sufficiently demonstrated that, but for his counsel's deficient conduct, he would have appealed. (*See* R-6-5.) The district court did not address the Petitioner's allegations that he informed his attorney that he wished to appeal, that he assumed his attorney would file a timely notice of appeal because he had

"urged" him to do so, and that he intended to ask the district court to appoint a lawyer to represent him on appeal, consistent with the district court's instructions (R-2-4-5): all of which demonstrate that the Petitioner had "promptly expressed a desire to appeal." *Flores-Ortega*, 528 U.S. at 484. These facts – together with the Petitioner's ability to question the validity of the waiver on appeal[8] – demonstrate that the Petitioner showed "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 486.

Yet the district court refused to find that the Petitioner could have been prejudiced by his counsel's deficient performance. Instead, the district court emphasized that the plea agreement's waiver rendered any appeal by the Petitioner "futile," and agreed with the Government that the Petitioner had not otherwise identified the issues for appeal or stated how his appeal would fit within the plea agreement's waiver. (R-6-5 & n.5.) The district court mistakenly presumed that, absent a showing that the hypothetical appeal might have had merit, the Petitioner necessarily could not show that he had been prejudiced by his counsel's allegedly deficient performance. (*See id.*) Not only did the district court ignore the relevant facts, its ruling again contradicts *Flores-Ortega*. *See* 528 U.S. at 486 (emphasizing

[8] *See, e.g.*, *Weaver v. United States*, 275 F.3d 1320, 1333 (11th Cir. 2001) (noting that a defendant has the right to challenge the validity of an appeal-of-sentence waiver on appeal, subject to the court's *de novo* review).

that a showing of meritorious grounds for appeal, while relevant, is not required to demonstrate that a defendant shows a reasonable probability that, but for his counsel's deficient performance, he would have appealed).

III. ALTERNATIVELY, THE DISTRICT COURT SHOULD HAVE GRANTED THE PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS SECTION 2255 MOTION.

In any event, the district court's Order must be reversed. At a minimum, the district court erred in denying the Petitioner's request for an evidentiary hearing. (R-6-5-6; R-2-8-9.) *See Flores-Ortega*, 528 U.S. at 487.

The district court reasoned that the Petitioner's allegations, if true, did not establish his entitlement to collateral relief. (R-6-5 (citing *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984).) Yet even if the Petitioner's attorney could be found to have adequately informed the Petitioner about the advantages and disadvantages of an appeal (and made a reasonable effort to determine his client's wishes),[9] the Petitioner alleged in his Section 2255 Motion that his attorney failed to follow his instruction to file a timely notice of appeal. This allegation, if true, does entitle the Petitioner to collateral relief under 28 U.S.C. § 2255 – regardless of the "waiver of his right to challenge his conviction on direct appeal." (R-6-5.) *See Flores-Ortega*, 528 U.S. at 478 (finding that, once counsel has "consulted" with the defendant, counsel can be found to have performed in a "professionally

[9] *See Flores-Ortega*, 528 U.S. at 478 (defining the term "consult").

unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal"); *accord Regaldo v. United States*, 334 F.3d 520, 525 (6th Cir. 2003); *see also Rodriquez*, 395 U.S. at 330 (rejecting any requirement that a defendant, who has objectively shown his intent to appeal, must identify the issues for appeal or otherwise establish that his appeal would have had merit); *Weaver*, 275 F.3d at 1333 (noting that a defendant has the right to challenge the validity of an appeal-of-sentence waiver on appeal, subject to the court's *de novo* review).

Therefore, the district court erred in refusing to grant the Petitioner's request for an evidentiary hearing on his Section 2255 Motion. (R-6-6.) Contrary to the district court's conclusion, the section 2255 proceedings should *not* have been summarily dismissed: the Petitioner's Section 2255 Motion, together with the prior proceedings in the case, plainly demonstrate that the allegations of the Petitioner, if true, entitle the Petitioner to an evidentiary hearing. *See Birt*, 725 F.2d at 591.

CONCLUSION

For all the foregoing reasons, the district court's Order should be reversed and remanded with instructions to grant relief to the Petitioner under 28 U.S.C. § 2255 on his ineffective assistance of counsel claim. Alternatively, the district court's Order should be reversed and remanded with instructions to the district court to conduct an evidentiary hearing on the Petitioner's Section 2255 Motion.

Respectfully Submitted,
MILLS & CARLIN, P.A.

Rebecca Bowen Creed

Rebecca Bowen Creed
Florida Bar No. 0975109
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains 7,992 words (including words in footnotes) according to Microsoft Word 2002, the word-processing system used to prepare this brief.

Rebecca Bowen Creed
Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by United States Mail to Todd B. Grandy, Assistant United States Attorney, Karin B. Hoppmann, Assistant United States Attorney, and Paul I. Perez, United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 (Attorneys for Appellee United States of America), this 1st day of February, 2005.

Rebecca Bowen Creed
Attorney