No. 19-6363

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PEARSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a certificate of appealability (COA) on his claim that his counsel was ineffective for failing to file a motion to suppress certain evidence.

2. Whether petitioner was entitled to a COA on his claim that his counsel was ineffective for failing to argue at sentencing that petitioner's prior Florida drug convictions did not qualify as "serious drug offense[s]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

3. Whether petitioner was entitled to a COA on his claim that his counsel was ineffective for failing properly to advise petitioner about his appeal rights.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Pearson, No. 14-cr-60099 (Jan. 9, 2015)

Pearson v. United States, No. 15-cv-62725 (Feb. 1, 2018) (judgment denying motion under 28 U.S.C. 2255, and order denying certificate of appealability)

United States Court of Appeals (11th Cir.):

Pearson v. United States, No. 18-10497 (Mar. 28, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-6363

DAVID PEARSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals denying a certificate of appealability (Pet. App. 1-3) and denying reconsideration (Pet. App. 4-5) are unreported. The orders of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 6-7) and denying a certificate of appealability (15-cv-62725 D. Ct. Doc. 42 (Feb. 1, 2018)) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2019. A motion for reconsideration was denied on July 19, 2019 (Pet. App. 4-5). The petition for a writ of certiorari was filed

on October 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 33. The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 34-35. Petitioner did not appeal his conviction or sentence. Petitioner subsequently filed a motion for collateral relief under 28 U.S.C. 2255. 15-cv-62725 D. Ct. Doc. 1 (Dec. 31, 2015). The district court denied his motion, Pet. App. 6-7, and denied a certificate of appealability (COA), 15-cv-62725 D. Ct. Doc. 42 (Feb. 1, 2018). The court of appeals likewise denied a COA. Pet. App. 1-3.

1. On April 25, 2014, police officers in Hollywood, Florida, stopped a car driven by petitioner to arrest petitioner for two felony offenses: aggravated battery and kidnapping. Presentence Investigation Report (PSR) ¶ 5. A second person (Wayne Wade) was sitting in the front passenger seat. Ibid.

When officers removed petitioner and Wade from the car, they saw a partially opened gun pouch underneath the front driver's seat. PSR ¶ 5. The butt of a gun was visible. Ibid. During an inventory search of the car, law enforcement removed a .40-caliber

pistol, a magazine loaded with 15 rounds of ammunition, and one loose round of ammunition. Ibid.

Officers placed petitioner and Wade into their patrol car. PSR ¶ 6. A recording device captured a conversation in which petitioner admitted to Wade that he owned and possessed the pistol that the officers had found. Ibid. After subsequently being advised of his Miranda rights, petitioner admitted that he had purchased the gun for $250 from someone named "Shawn." PSR ¶ 7.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). 14-cr-60099 D. Ct. Doc. 8, at 1 (May 8, 2014). Petitioner's first appointed counsel was permitted to withdraw because petitioner "insisted that [counsel] file a motion for a probable cause hearing and a motion to suppress," which in counsel's view were "'without merit and frivolous.'" Pet. App. 9.

Following the appointment of new counsel, petitioner and the government entered a written plea agreement in which petitioner agreed to plead guilty to the felon-in-possession charge. 14-cr-60099 D. Ct. Doc. 34, ¶ 1 (Oct. 6, 2014). The plea agreement also addressed petitioner's sentence. The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term

of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "serious drug offense" as either

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A). The plea agreement stated that petitioner "understood and acknowledged that the [district court] must impose a minimum term of imprisonment of fifteen (15) years and may impose a statutory maximum term of life imprisonment." 14-cr-60099 D. Ct. Doc. 34, ¶ 3. In an accompanying factual proffer, petitioner specifically admitted that he had previously been convicted of four felony drug offenses. 14-cr-60099 D. Ct. Doc. 34-1, ¶ 4. The government agreed to recommend that petitioner receive the statutory-minimum term of 15 years. 14-cr-60099 D. Ct. Doc. 34 ¶ 6.

After a hearing, the district court accepted petitioner's guilty plea, 14-cr-60099 D. Ct. Doc. 33, at 1 (Oct. 6, 2014), finding that petitioner had knowingly and voluntarily entered his guilty plea and that a factual basis existed for it, Pet. App. 10.

3. Before sentencing, the Probation Office reported that petitioner had two prior convictions under Florida law for selling or delivering cocaine; one prior conviction for possessing cocaine with intent to deliver or sell; and one prior conviction for possessing oxycodone with intent to deliver or sell. PSR ¶¶ 28, 29, 40, 41. It determined that those convictions were for "serious drug offense[s]," 18 U.S.C. 924(e)(1), qualifying petitioner for sentencing under the ACCA and calculated petitioner's advisory Sentencing Guidelines range to be 180 to 210 months. PSR ¶¶ 19, 110-111.

Petitioner's new counsel then moved to withdraw, stating that petitioner had indicated that he wished to withdraw his guilty plea based on "his attorneys[']s (both current and previous) failure to pursue a probable cause hearing and motion to suppress and 'intelligently' advise [petitioner] on said motions." 14-cr-60099 D. Ct. Doc. 41, at 1 (Dec. 11, 2014). Petitioner also submitted a pro se letter requesting to withdraw his plea, which he stated was involuntary and lacked a factual basis. Pet. App. 11-12.

At an ex parte hearing before a magistrate judge, petitioner's counsel related that the government had agreed to forgo more serious criminal charges against petitioner involving sex trafficking and armed drug trafficking if petitioner accepted a guilty plea with a 15-year sentence. Pet. App. 12. Counsel also informed the magistrate judge that he had investigated the traffic stop and concluded that a suppression motion would not have been

meritorious. Ibid. The magistrate judge then explained to petitioner that the issue of probable cause for the charge was addressed before the grand jury in the issuance of the indictment. 12/18/14 Tr. 16. The magistrate judge also explained that, even if petitioner succeeded in suppressing the gun, the government could pursue other charges not associated with the gun, id. at 20, and that filing a motion to suppress "would have opened up an enormous and very dangerous can of worms," id. at 24 (capitalization omitted). The magistrate judge further noted that, if petitioner withdrew his guilty plea, he would proceed to trial and likely face additional serious charges. Id. at 25. The magistrate judge then asked petitioner how he wanted to proceed. Id. at 29. After conferring with his attorney, petitioner stated that he wished to continue with the guilty plea and to continue to be represented by his counsel. Id. at 30-31; see Pet. App. 13.

At sentencing in January 2015, petitioner confirmed to the district court that he had withdrawn his challenge to the guilty plea, that he had reviewed the Probation Office's report, and that he had no objections to that report. Sent. Tr. 3-4. Defense counsel and the government requested that the court impose the 15-year statutory minimum sentence. Id. at 5-7. The court adopted the Probation Office's calculations and sentenced petitioner to 180 months. Id. at 7. The court also informed petitioner that he "ha[d] 14 days from today within which to appeal the sentence imposed." Id. at 9.

Petitioner did not appeal his conviction or sentence.

4. In December 2015, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 15-cv-62725 D. Ct. Doc. 1. He argued that his counsel had been ineffective for failing to move to suppress evidence obtained from the traffic stop, failing to challenge petitioner's ACCA sentence, and failing to file a notice of appeal. See id. at 4-10; Pet. App. 8-9.

The magistrate judge held an evidentiary hearing at which both petitioner and his counsel testified. Pet. App. 18-23. Counsel testified that he had discussed the plea offer with petitioner, had explained that petitioner's prior Florida convictions qualified as ACCA predicates, and had advised petitioner that the government would forgo prosecuting him for other crimes if he accepted the plea offer. Id. at 21. Counsel further testified that petitioner never asked him to challenge the ACCA enhancement. Ibid. Counsel stated that, before sentencing, he explained petitioner's appellate rights and the circumstances under which an appeal would be appropriate. Id. at 21-22. Counsel stated that, at that time, petitioner did not express a desire to object, and petitioner understood that no appeal would be taken if the district court imposed a sentence within the parties' joint recommendation. Id. at 22. Finally, counsel testified that petitioner had never asked him to file a notice of appeal, and that counsel would have done so if petitioner had requested. Ibid.

The magistrate judge credited counsel's testimony, Pet. App. 23, and recommended that petitioner's motion be denied and that no COA issue, id. at 31. The magistrate judge found that counsel was not ineffective for failing to file a motion to suppress evidence from the traffic stop. Id. at 25-28. The magistrate judge observed that, "[w]here a criminal defendant enters a knowing, voluntary, and intelligent plea of guilty to an offense or offenses, he waives, or more accurately, forfeits all non-jurisdictional defects and defenses." Id. at 25. After reviewing petitioner's plea colloquy, the magistrate judge concluded that petitioner entered a "knowing and voluntary" plea that "waived all non-jurisdictional defects and defenses." Id. at 28. The magistrate judge additionally found that petitioner's "plea was entered with a full understanding of counsel's strategic decisions," including "that the [suppression] motion was not meritorious and pursuing it risked losing a favorable plea offer." Ibid. The magistrate judge determined that, because petitioner "expressly entered the plea with full knowledge that the motion would not be filed," he was "not entitled to review." Ibid.

The magistrate judge also found that counsel was not ineffective for failing to challenge petitioner's ACCA sentence. Pet. App. 29-30. The magistrate judge observed that petitioner's "prior Florida drug convictions all qualify as serious drug offenses under the ACCA" under Eleventh Circuit precedent. Ibid. (citing United States v. Smith, 775 F.3d 1262, 1268 (11th Cir.

2014), cert. denied, 135 S. Ct. 2827 (2015)). The magistrate judge additionally found that petitioner "made a conscious decision to not challenge the priors in exchange for the government foregoing additional serious charges." Id. at 29.

Finally, the magistrate judge found that counsel was not ineffective for failing to file a notice of appeal of petitioner's conviction and sentence or failing to consult with petitioner about a direct appeal. Pet. App. 23-25. The magistrate judge acknowledged that "counsel's failure to file a direct appeal after being requested to do so by his client results in a per se constitutional violation of the [defendant's] Sixth Amendment right to counsel." Id. at 16. But the magistrate judge credited counsel's testimony that petitioner "did not ask [counsel] to challenge the ACCA enhancement at sentencing or to file an appeal of the sentence," and that petitioner "agreed not to challenge the enhancement in order to avoid being charged with more serious offenses in a superseding indictment." Id. at 24. The magistrate judge additionally found that counsel had "explained the options of challenging the ACCA enhancement and the possibility of appealing an adverse ruling," and had further advised petitioner that any effort to challenge the ACCA enhancement "risked the [government's] filing of additional serious charges." Ibid. The magistrate judge determined that, after these "lengthy discussions," petitioner "decided not to file an appeal." Id. at 25. The magistrate judge accordingly recommended denial of

petitioner's "claim that counsel failed to consult with him regarding an appeal." Ibid.

The district court adopted the magistrate judge's report and recommendation and denied petitioner's motion. Pet. App. 6-7. It declined to issue a COA. 15-cv-62725 D. Ct. Doc. 42.

5. The court of appeals likewise declined to issue a COA. Pet. App. 1-3. The court found that petitioner "ha[d] not shown that reasonable jurists would find debatable the denial of his [Section] 2255 motion" on his ineffective-assistance-of-counsel claims. Id. at 3.

The court of appeals explained that an ineffective-assistance claim requires "a defendant [to] show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense." Pet. App. 2 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The court observed that "claims of ineffective assistance of counsel that do not implicate the validity of the plea are waived by a guilty plea," and "a defendant who enters a guilty plea can attack only 'the voluntary and knowing nature of the plea.'" Ibid. (quoting Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992) (per curiam)). In this case, the court of appeals determined that counsel's failure to contest petitioner's traffic stop or to file a motion to suppress "did not implicate the validity of the plea." Ibid. As a result, the court found that "[r]easonable jurists would not debate that these two claims were procedurally barred." Ibid.

The court of appeals additionally found that "counsel was not deficient for failing to challenge [petitioner's] ACCA enhancement." Pet. App. 3; see id. at 2-3. The court explained that petitioner's prior Florida drug convictions qualified as ACCA predicates under Eleventh Circuit precedent. Id. at 2-3 (citing Smith, 775 F.3d at 1268).

Finally, the court of appeals determined that petitioner's "attorney was not ineffective for failing to file a direct appeal." Pet. App. 3. Crediting the magistrate judge's findings, the court of appeals noted that petitioner "did not directly ask his attorney to file an appeal on his behalf," that petitioner's "attorney had no reason to believe that anything worth appealing had occurred," and that petitioner "gave no indication that he was unhappy with the sentence." Ibid.

6. The court of appeals denied petitioner's motion for reconsideration. Pet. App. 4-5. The court explained that, even if petitioner's guilty plea had not relinquished his ineffective-assistance claim challenging his counsel's failure to file a suppression motion, petitioner "failed to demonstrate prejudice." Ibid. The court reasoned that petitioner "entered his plea, knowing that he was forgoing a motion to suppress, with the tacit agreement that, in exchange for agreeing to the 15-year sentence, the government would refrain from charging him with much more serious drug and sex trafficking crimes that could have resulted in a life sentence." Id. at 5. The court accordingly determined

that petitioner had "made no showing that he would not have entered the plea but for counsel's failure to pursue a motion to suppress, and, in fact, he expressly entered the plea with full knowledge that the motion would not be filed." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-21) that the court of appeals erred in denying a COA on his claim that his counsel was ineffective. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under 28 U.S.C. 2255 must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues presented in the motion "were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). The court of appeals correctly denied a COA here; its decision does not conflict with any decision of this Court or another court of appeals; and no pending case in this Court will have a bearing on the resolution of his ineffective-assistance claims. No further review is warranted.

1. Petitioner first contends (Pet. 8-14) that he was entitled to a COA on his claim that his counsel was ineffective for failing to argue that his prior Florida drug convictions did not qualify as "serious drug offense[s]" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). This Court has granted certiorari, in the

context of a direct appeal from a sentence, to address the question whether a conviction under Fla. Stat. § 893.13(1) (2012) is a "serious drug offense." Shular v. United States, No. 18-6662 (argued Jan. 21, 2020). The petition in this case, however, need not be held pending the Court's decision in Shular because, regardless of the Court's ultimate decision in Shular, petitioner's counsel's performance was not deficient.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant making a Sixth Amendment claim of ineffective assistance of counsel must show both: (1) that counsel's performance was deficient, meaning that "counsel's representation fell below an objective standard of reasonableness," id. at 688, and (2) that the deficient performance prejudiced the defendant, id. at 694. In this case, the district court correctly rejected petitioner's ineffective-assistance claim based on counsel's failure to challenge the imposition of an ACCA-enhanced sentence, and petitioner did not make "a substantial showing of the denial of a constitutional right" that would warrant issuance of a COA, 28 U.S.C. 2253(c)(2).

Petitioner contends that his counsel rendered ineffective assistance by "failing to challenge his armed career criminal sentence" under the ACCA based on his previous Florida drug convictions. Pet. i; see Pet. 8-14. But in December 2014, prior to petitioner's January 2015 sentencing, the Eleventh Circuit had

determined in a published decision that petitioner's argument lacks merit. See United States v. Smith, 775 F.3d 1262, 1266-1268 (2014), cert. denied, 135 S. Ct. 2827 (2015). And even before Smith, the Eleventh Circuit had repeatedly held in unpublished decisions that an offense under Section 893.13 qualified as a "serious drug offense" under the ACCA. See United States v. Samuel, 580 Fed. Appx. 836, 842-843 (2014) (per curiam), cert. denied, 135 S. Ct. 1168 (2015); United States v. Johnson, 570 Fed. Appx. 852, 856-857 (2014) (per curiam), cert. denied, 574 U.S. 1098 (2015); United States v. Bailey, 522 Fed. Appx. 497, 498-499 (2013) (per curiam); see also Pet. App. 30 (magistrate judge observing that Smith "merely continued the Eleventh Circuit's prior holdings that sale, manufacture, or delivery of cocaine constitutes a serious drug offense for purposes of the ACCA"). And at least seven other circuits had adopted similar constructions of the ACCA's "serious drug offense" definition.[1] Petitioner's counsel did not render inadequate performance by failing to raise

---

[1] See United States v. McKenney, 450 F.3d 39, 42-43 (1st Cir.), cert. denied, 549 U.S. 1011 (2006); United States v. King, 325 F.3d 110, 113-114 (2d Cir.), cert. denied, 540 U.S. 920 (2003); United States v. Gibbs, 656 F.3d 180, 185-186 (3d Cir. 2011), cert. denied, 565 U.S. 1170 (2012); United States v. Brandon, 247 F.3d 186, 190-191 (4th Cir. 2001); United States v. Winbush, 407 F.3d 703, 707-708 (5th Cir. 2005); United States v. Bynum, 669 F.3d 880, 886 (8th Cir.), cert. denied, 568 U.S. 857 (2012); United States v. Williams, 488 F.3d 1004, 1009 (D.C. Cir.), cert. denied, 552 U.S. 939 (2007).

an objection that the Eleventh Circuit, like many other courts of appeals, had previously rejected. See, e.g., United States v. Fields, 565 F.3d 290, 294 (5th Cir.), cert. denied, 558 U.S. 914 (2009).

As the government has previously acknowledged, the Ninth Circuit -- in a decision issued well after petitioner was sentenced and the time for appealing had expired -- has taken a different approach in interpreting the ACCA, United States v. Franklin, 904 F.3d 793, 800-802 (2018), cert. dismissed, 139 S. Ct. 2690 (2019); see Gov't Cert. Br. at 10-13, Shular, supra (No. 18-6662). This Court granted certiorari in Shular to consider the ACCA question underlying that conflict. But regardless of the outcome of Shular, petitioner cannot demonstrate that his counsel rendered ineffective assistance by not objecting to the Probation Office's determination that the ACCA applied to him, given the Eleventh Circuit's precedent rejecting that position.

Moreover, the magistrate judge in this case found that petitioner entered a guilty plea "with the knowledge that his priors could be challenged" and "made a conscious decision to not challenge the priors in exchange for the government foregoing additional serious charges." Pet. App. 29. Such a "strategic choice[]," when made by counsel in consultation with his client, is "virtually unchallengeable" under Strickland. 466 U.S. at 690; see, e.g., Premo v. Moore, 562 U.S. 115, 127 (2011) ("[W]ith a

potential capital charge lurking, [the defendant's] counsel made a reasonable choice to opt for a quick plea bargain."). A fortiori, petitioner's own strategic choice not to challenge the use of his prior convictions to enhance his ACCA sentence in exchange for the government's forgoing additional charges does not render his counsel ineffective. Although the court of appeals did not specifically address this aspect of the district court's judgment when denying petitioner's request for a COA, the magistrate judge's factual determination further supports the court of appeals' determination that reasonable jurists would not find petitioner's claim of ineffective assistance of counsel to be debatable.[2]

---

[2] Petitioner relatedly contends (Pet. 10) that "reasonable jurists could disagree as to whether [his] prior convictions were for the Florida statutory offenses identified by the court of appeals" as the basis for his ACCA sentence. That factbound contention lacks merit. Petitioner's factual proffer admitted that he had prior convictions for "Sale of Cocaine," "Possession/Sale/Deliver Cocaine," "Possession of Cocaine with the intent to distribute," and "Possession of Oxycodone with the intent to sell and deliver." 14-cr-60099 D. Ct. Doc. 34-1, ¶ 4. The court of appeals correctly identified those offenses as violations of Florida's drug law, Fla. Stat. § 893.13(1)(a) (1999). Pet. App. 2. Petitioner argues (Pet. 10) that the record "lacks any documentary showing of [his] prior convictions." But he fails to identify any other offense to which his factual proffer might have referred. He suggests (ibid.) that one of the convictions might have involved "simple possession." That speculation contradicts petitioner's factual proffer, which refers to the sale or delivery of cocaine and to possession with intent to engage in such conduct. 14-cr-60099 D. Ct. Doc. 34-1, ¶ 4.

2. Petitioner separately renews (Pet. 14-21) his contentions that his counsel was ineffective for failing to move to suppress evidence from the traffic stop and failing to consult with petitioner about his appellate rights. The court of appeals correctly determined that no COA was warranted on those claims, and its factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

a. Petitioner contends (Pet. 14-17) that defense counsel rendered ineffective assistance in failing to file a motion to suppress the evidence obtained from the traffic stop of his car. The court of appeals correctly determined that reasonable jurists would not find that claim to be reasonably debatable. Pet. App. 2, 4-5.

Petitioner did not make a substantial showing that his counsel's performance was deficient. The magistrate judge credited counsel's testimony that he discussed with petitioner the possibility of filing a motion to suppress and "advised [petitioner] that the motion was not meritorious and pursuing it risked losing a favorable plea offer that did not include the other serious charges." Pet. App. 28. The magistrate judge found that petitioner "expressly entered the plea with full knowledge that the motion would not be filed." Ibid. That "strategic choice[]," Strickland, 466 U.S. at 690, to forgo a suppression motion, made

in consultation with petitioner, was not deficient under Strickland.

Petitioner also did not make a substantial showing of prejudice. In the context of a guilty plea, a showing of prejudice requires "a reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial." Moore, 562 U.S. at 129 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)); see also Lee v. United States, 137 S. Ct. 1958, 1965 (2017) (same). After petitioner indicated his desire to withdraw his guilty plea, the magistrate judge discussed the matter with petitioner at length and afforded petitioner the option to withdraw that plea, to obtain new appointed counsel, and to file a motion to suppress. 12/18/14 Tr. 29. Petitioner stated that he wished to continue with his guilty plea. Id. at 30-31. In these circumstances, the court of appeals correctly determined that petitioner "made no showing that he would not have entered the plea but for counsel's failure to pursue a motion to suppress." Pet. App. 5. Rather, petitioner opted to plead guilty "knowing that he was forgoing a motion to suppress." Ibid. Although petitioner disputes that factual finding, see Pet.

17, his disagreement does not constitute a "substantial showing" of prejudice required for a COA, 28 U.S.C. 2253(c)(2).[3]

b. Petitioner's factbound contention (Pet. 17-21) that counsel rendered ineffective assistance when advising him about his appellate rights likewise did not warrant a COA.

This Court has explained that, when a defendant "neither instructs counsel to file an appeal nor asks that an appeal not be taken," a court must first determine whether counsel "consulted with the defendant about an appeal," meaning that counsel has "advis[ed] the defendant about the advantages and disadvantages of taking an appeal, and ma[de] a reasonable effort to discover the defendant's wishes." Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Ibid. "If counsel has not consulted with the defendant," then the court

---

[3] Petitioner errs in contending (Pet. 17) that the court of appeals' decision warrants review because it adopted a "per se rule that by accepting a plea bargain petitioner waived violations of his right to effective pre-plea representation." Although the court of appeals determined that petitioner had relinquished his ineffective-assistance claim, Pet. App. 2, the court also addressed petitioner's claim on its merits, applying the proper standard for prejudice in cases where counsel's performance allegedly deprived the defendant of a trial by causing him to accept a guilty plea, id. at 4-5.

must determine whether that "failure to consult * * * itself constitutes deficient performance." Ibid.

In this case, the magistrate judge determined that counsel did consult with petitioner about an appeal, among other strategic issues. Pet. App. 24-25. The magistrate judge found that counsel had explained to petitioner "the possibility of appealing an adverse ruling" and "engaged in lengthy discussions about the advantages and disadvantages of pursuing an appeal" and about "the uncertainties" pursuing an appeal would present. Ibid. The magistrate judge noted that counsel had "explained that under the law, as it stood leading up to sentencing, [petitioner's] prior convictions qualified as serious drug offenses supporting the ACCA enhancement." Id. at 24. The magistrate judge determined that, "[a]fter these discussions, [petitioner] decided not to file an appeal" and that petitioner "did not ask [counsel] * * * to file an appeal of the sentence." Id. at 24-25. Because counsel consulted with petitioner about his appellate rights, and petitioner "gave no indication that he was unhappy with the sentence," the court of appeals correctly determined that counsel "was not ineffective for failing to file a direct appeal." Id. at 3.

Petitioner no longer contends that counsel failed to advise him regarding his appellate rights, or that he expressly instructed his counsel to appeal. Instead, he now contends (Pet. 18) only

that counsel's consultation was deficient because counsel "misadvis[ed] petitioner that the government would retaliate against him by filing additional charges if petitioner appealed." He asserts (ibid.) that counsel's advice "was factually wrong," "contradicted express or implied terms of the plea agreement," and "was unfounded because any such retaliatory action by the government would likely have constituted a due process violation." Even if petitioner properly preserved that argument below, reasonable jurists would not find that it debatable.

Counsel's advice was accurate and reasonable under the circumstances. The magistrate judge found that the government had offered to forgo charging petitioner with additional crimes if petitioner pleaded guilty to the present charge with a 15-year statutory-minimum sentence. Pet. App. 21, 23-24. In light of the government's representation, counsel fairly cautioned petitioner that "he risked the filing of additional serious charges" if he "challeng[ed] the enhancement." Id. at 24. The plea agreement did not preclude the government from filing additional charges against petitioner. See generally 14-cr-60099 D. Ct. Doc. No. 34.

A decision by the government to bring additional charges also would not have offended due process. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), this Court held that no due-process violation occurs where a prosecutor informs a defendant during plea bargaining that, if the defendant does not plead guilty to the

pending charge, the government will seek an indictment on an offense that carries a significantly longer term of imprisonment, and where the prosecutor then does so after the defendant fails to plead guilty. Id. at 364-365. For similar reasons, no due-process violation occurs where the government elects to file additional charges against a defendant who, in the government's assessment, obtained an unduly lenient sentence in an earlier criminal proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

FEBRUARY 2020