No. 20-

SUPREME COURT OF THE UNITED STATES

JOSEPH MICHAEL DIAZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

SHERICK & BLEIER, PLLC
Adam N. Bleier
Counsel of Record
Steven P. Sherick
2 E. Congress, Suite 1000
Tucson, Arizona 85701
Phone: (520) 318-3939
Fax: (520) 318-0201
adam@sherickbleier.com
steve@sherickbleier.com

Counsel for Petitioner Diaz

QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals erred in holding that counsel was not ineffective assistance for failing to object to the application of a USSG Guideline provision for "sexual contact" where the counts of conviction and relevant conduct as defined by the United States Sentencing Guidelines did not involve "sexual contact," and where the error effectively turned a 30 year sentence of imprisonment into a 60 year sentence of imprisonment.

Whether the Eleventh Circuit Court of Appeals erred in denying the Petitioner an evidentiary hearing on his claim of ineffective assistance of counsel where counsel failed to file a notice of appeal and failed to provide meaningful consultation regarding an appeal, and where all of the attendant circumstances indicated that the Petitioner wished to appeal his sentence.

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court and the lower courts are the same as those named in the caption to this pleading.

LIST OF DIRECLTY RELATED CASES

There are no directly related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

UNITED STATES SENTENCING GUIDELINES

OTHER AUTHORITIES

OPINIONS BELOW

Following his conviction and sentencing after a plea of guilty, the Petitioner filed a timely Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255 in the Northern District of Florida. After the denial of the Motion to Vacate, the Petitioner applied to and received from the Eleventh Circuit Court of Appeals a Certificate of Appealability on the two questions presented in this Petition. App. 70. The Eleventh Circuit Court of Appeals issued its Opinion, *United States v. Diaz,* 799 Fed. Appx. 685*,* denying relief on January 13, 2020. App. 1. The Petitioner filed a timely Petition for Rehearing which was denied on March 4, 2020. App. 67. The Petitioner now asks the Court to grant a writ of certiorari to review the judgement of the Eleventh Circuit Court of Appeals.

JURISDICTION

The Eleventh Circuit Court of Appeals denied the Petition for Rehearing on March 4, 2020. App. 67. Pursuant to this Court's order regarding filing deadlines issued on March 19, 2020, this Petition is timely and the Court has jurisdiction pursuant to 28 U.S. Code § 1254(1).

UNITED STATES SENTENCING GUIDELINE PROVISIONS

Below are the United States Sentencing Guideline Manual (2014) provisions at issue before the Court. They are reproduced in full and the relevant sections for purposes of this Petition are underlined and in bold.

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, **2G2.1**;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§2G2.1 Sexually Exploiting A Minor By Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production.

(a) Base Offense Level: **32**

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

(3) If the offense involved distribution, increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

Excerpted from the Application Notes:

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

"*Sexual contact*" has the meaning given that term in 18 U.S.C. § 2246(3).

18 U.S.C. § 2246(3).: "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

STATEMENT OF THE CASE

The two compelling questions presented in the Petition involve sentencing counsel's failure to object to the scope of "relevant conduct" as applied in child pornography cases which resulted in what is effectively a sentence of life imprisonment and sentencing counsel's failure to meaningfully consult regarding an appeal and file a notice of appeal, along with the lower court's error in failing to order an evidentiary hearing, where unrebutted evidence was clearly presented that the Petitioner sought to file an appeal following the imposition of his 720 month sentence.

As background, Mr. Diaz pled guilty to two counts of producing child pornography in violation of 18 U.S.C. § 2251(a). The pleas followed an investigation involving allegations that the Petitioner, who was a swim coach, used his position to have boys whom he coached who were between the ages 12 and 16 take sexually explicit photos and videos of themselves. It was also alleged that child pornography was found on various electronic devices in the Petitioner's possession.

Mr. Diaz was indicted on six counts of production of child pornography and in 2014 pled guilty to two counts thereof. As part of the plea agreement, he retained his right to appeal his sentence. The questions presented to this Court arise out of a motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255.

REASONS WHY THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI

I. This case involves a compelling legal question regarding the scope of the application of "relevant conduct" in child pornography sentencings and the case law from the circuits is unsettled.

In this case, sentencing counsel failed to object to an enhancement which radically changed the Petitioner's sentence. Petitioner was convicted of two counts of violating 18 U.S.C. § 2251(a). With respect to these counts, the Statement of Facts section of the plea sets forth the Petitioner's conduct in two paragraphs. Dkt. 25. As to Count 1, it referenced John Doe #1, born 9-18-97, who was photographed "standing holding his erect penis" and as to Count 2 it referenced a John Doe #2 and #3, born on 11-19-98, who are "standing together holding their erect penis." Dkt. 25 at 2-3. The crimes occurred, respectively, on February 5, 2011, and May 25, 2013. *Id.* Both counts carried a minimum sentence of 15 years and a maximum sentence of 30 years. Pursuant to USSG § 2G2.1, the base offense level of Count 1 was calculated at 32. Dkt. 40 at ¶ 33. Pursuant to (b)(1) of that section a two-level enhancement was added due to the fact that the minors involved in the offense were between the age of 12 and 15. *Id.* at ¶ 34. This raised the offense level to 34.

Pursuant to § 2G2.1(b)(2), an additional 2 levels were added because the offense involved "the commission of a sexual act or sexual contact." Id. at ¶ 35. To support this enhancement, the PSI set forth: "The defendant masturbated in front of the victims and at times would have the victims masturbate themselves and/or each other while he watched." *Id.* This raised the offense level to 36. Additional offense characteristics were added, none of which are before this Court, which led to an offense level of 45 which was reduced to 42 pursuant to USSG Section 3E1.1. *Id.* at ¶55-56. Given the Petitioner's lack of criminal history, the PSI calculated the resulting sentencing range as 360 months to life. *Id.* at ¶ 99. Without the 2 levels for a sexual act or sexual contact, the resulting total offense level would have been a 40, or 292 to 365 months.

At issue before the Court is whether the District Court properly used "relevant conduct" principles to raise the offense level for "the commission of a sexual act or sexual contact."

A. "Relevant Conduct" As Defined in Child Pornography Cases

Relevant conduct for guideline sentencing purposes as defined in USSG §1B1.3, which is set forth in its entirety above, applies to the determination of the base offense level and all specific offense characteristics of a case. USSG §1B1.3(a). When jointly undertaken criminal activity is not charged, which is the case here, it includes:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;

…

> *that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;*

(Emphasis supplied).

For those cases in which the applicable base offense guideline also requires grouping pursuant to §3D1.2(d), "relevant conduct" *also* includes:

> all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the *same course of conduct or common scheme or plan as the offense of conviction;*

(Emphasis supplied).

Thus, the Guideline at issue sets up two competing concepts of relevant conduct. The first, applicable in this case, defines relevant conduct as actions close in proximity in time, whether in preparation for, during, or in covering up the acts underlying the counts of conviction. The second type of relevant conduct is much broader in its definition and extends beyond the immediate course of conduct of the conviction into actions which encompass a "common scheme or plan". In this case, the sentencing court was therefore prohibited, in deciding whether the specific offense characteristic applied for the commission of a sexual act or sexual contact, from considering all of the information it did in determining the total offense level.

But that is exactly what happened here – the court based a guideline enhancement on a concept of relevant conduct broader than what is permissible and sentencing counsel failed to object to this legal error. Certainly, the uncharged misconduct was admissible at sentencing and usable by the Court to determine a

sentence. However, this information – be it described in the Presentence Report, presented at sentencing by the Government, and even admitted to by the Petitioner in the Statement of Facts section of the plea colloquy – was not "relevant conduct" under the United States Sentencing Guidelines because none of those facts related to the counts of conviction as required by the definition of relevant conduct. This is because there is nothing in the factual record to support the notion that any sexual contact or act occurred in the lead up to, during course of, or immediately after in order to avoid detection for the criminal acts which occurred on February 5, 2011, and May 25, 2013, receptively. Dkt. 25 at 2-3. Thus, the specific offense characteristic for sexual contact or a sexual act, which added an additional 2 levels to the Petitioner's guideline calculation, was unlawful.

B. Sentencing Counsel was Ineffective For Failing to Object to the Illegal Specific Offense Characteristic

However, sentencing counsel did not object to its application, which was inexplicable given the massive sentence of imprisonment the Petitioner faced and the fact that the two level increase moved him from a sentencing range of 292 to 365 to 365 to Life. This was not a strategic move but a clear legal error on the part of sentencing counsel. *See, e,g. Hinton v. Alabama*, 571 U.S. 263 (2014) (error of law to believe trial counsel could not request additional funding); *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) (error of law to advise client he could not be convicted at trial); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (error of law to think State would provide discovery without request); *Griffith v. United States*, 871 F.3d 1321, 1335 (11th Cir. 2017) (failing to research law that is critically important to

defendant's case constitutes deficient performance); *Brewster v. Hazel*, 913 F.3d 1042, 1059 (11th Cir. 2019) ("Trial counsel's ignorance of a point of law "that is fundamental to [their] case combined with [their] failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland."); *Hollis v. Davis*, 941 F.2d 1471, 1478 (11th Cir. 1991) ("If [trial counsel] did not assert this right because [they] w[ere] unaware of it, [their] representation was not within the range of competence demanded of attorneys in criminal cases."); *Sullivan v. Secretary, Fla. Department of Corrections*, 837 F.3d 1195, 1205 (11th Cir. 2016); *Marshall v. Secretary, Fla. Department of Corrections***,** 828 F.3d 1277, 1295 (11th Cir. 2016).

Furthermore, this error resulted in prejudice to Mr. Diaz. *Glover v. United States*, 531 U.S. 198, 205 (2001) (increase in sentence constitutes prejudice for establishing ineffective assistance of counsel). To make out prejudice, Mr. Diaz needed to show only a reasonable probability that, but for counsel's deficient performance, there is a "reasonable probability" he would have received a lower sentence. *Griffith v. United States*, 871 F.3d 1321, 1336 (11th Cir. 2017).

There is without a doubt a reasonable probability that this massive difference in the guideline range impacted the sentencing decision in this case. In preparing for sentencing, the District Court made clear at the pre-sentencing status conference how critical the guideline range would be to the court in imposing a sentence. When discussing relevant conduct with respect to a different possible 2-

level enhancement to the guideline range, as a result of an objection which counsel did raise as to the age of the alleged victim, the District Court noted:

> Well, this doubles the sentence, so it is not something we want to gloss over and not have a firm record on as to what we are doing and everyone has had a chance to address it.
>
> Dkt. 34. at 11.
> …
> If we had it as relevant conduct, that's the conduct, and they get enhanced pretty good. And I would rather it be spelled out on a piece of paper and let them specifically pick it apart and give you and the government a chance to respond to it. We are talking about a difference in 30 to 40 years to 60 years to something like that. This is big-time sentencing.
>
> *Id.* at 12-14.

Simply put, the guidelines mattered here and therefore any missed guideline issue would have been prejudicial to the Petitioner. The sentence received by Mr. Diaz in this case is at least more than double the actual sentence he would have received had it been correctly calculated and assuming he received a sentence at the high end of the correctly calculated guideline range. *United States v. Corbett,* 921 F.3d 1032, 1041 (11th Cir. 2019) (a reasonable probability that the guideline error affected the defendant's substantial rights because trial court's decision remained tethered to what it believed to be the correct range under the U.S.S.G).

Clearly, the failure to object to the enhancement resulted in prejudice to the Petitioner.

C. The Eleventh Circuit Decision is Based on a Misunderstanding of the Plain Language of the Guidelines and Guidance from this Court Is Necessary Because the Case Law Has Not Clarified the Issue.

This Court has not addressed the issue concerning the scope of relevant conduct in child pornography cases and should grant certiorari to provide guidance to the lower courts on this important issue and to reinforce the importance of defense counsel objecting to incorrect guideline calculations. The issue is one of nationwide importance because in these types of cases the sentences which arise out of the United States Sentencing Guidelines are some of the longest in the country, such that a one or two level elevation in the Guideline range can lead to a sentence decades longer. While this Court has not yet addressed the issue, the Fifth Circuit addressed the different concepts of relevant conduct in *United States v. Schock*, 862 F.3d 563 (6th Cir. 2017). In *Schock*, the Sixth Circuit clearly distinguished these two concepts:

> Schock concedes that if § 1B1.3(a)(2) applies, it is broad enough to capture his exploitation of Victim 1. But, as he rightly notes, § 1B1.3(a)(2)'s definition of relevant conduct does not apply in this case. Section 2G2.1 offenses involving the sexual exploitation of minors are explicitly excluded from § 3D1.2(d)'s multiple-count grouping rule, meaning that Schock's offense is not one "for which § 3D1.2(d) would require grouping of multiple counts." § 1B1.3(a)(2); … Thus, we must look to the narrower definition of relevant conduct in § 1B1.3(a)(1) and ask whether Schock's exploitation of Victim 1 occurred during the commission of, preparation for, or course of attempting to avoid detection or responsibility for Count 3, his offense of conviction. There is no evidence that the exploitation of Victim 1 was "in preparation for" or "in the course of attempting to avoid detection or responsibility for" his exploitation of Victim 2. Instead, the government argues that the exploitation of Victim 1 "occurred during the commission of" the crime charged in Count 3 because it was "close in time and similar in nature to the offense in the count of conviction." We disagree. On this record, the government has not met its burden to show that Schock's

> exploitation of Victim 1 was conduct relevant to Count 3, his offense of conviction.

862 F.3d at 567. The facts of this case are squarely within the facts and reasoning of the *Schock* decision. Consistent with U.S.S.G. § 1B1.3(a)(1)(A), *Schock* required the sentencing court to establish a direct factual and temporal nexus between the crime of conviction and the alleged relevant conduct in order to apply a guideline specific offense characteristic. Here, as in *Schock,* the sentencing court reached far beyond the specific offenses of conviction and into other alleged acts to support the sexual contact/sexual act enhancement.

The *Schock* decision simply applied the plain language of USSG § 1B1.3(a)(1)(A) that a sentencing court must look at the offense of conviction and then ascertain whether the conduct at issue occurred in preparation for the offense, during, or after in order to avoid detection or responsibility. *See also United States v. Wernick,* 691 F.3d 108 (2d Cir. 2012) (where the defendant was convicted of engaging in sexual conduct with teenage boys, court of appeals remanded for resentencing because the sentencing court incorrectly included as relevant conduct defendant's sexual molestation of three young children that did not occur during the commission of or in preparation for the crimes against them despite some temporal proximity). Furthermore, the United State Sentencing Commission has also highlighted in an annual training session and a podcast the distinctions between the two types of relevant conduct.[1]

[1] See https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Sex_Offenses.pdf(Slides24-30);

The Eleventh Circuit Court of Appeals in this case held that Petitioner's counsel's performance was not deficient because there was unsettled case law from the circuits on the Guideline issue. App. at 5-9 (*citing Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004)). "In our view, these cases demonstrate that the interpretation of relevant conduct under § 1B1.3(a)(1) is unsettled across the circuits; they are a mixed bag of conflicting and non-binding law that would not have provided Diaz's trial counsel with a clear definition of relevant conduct." App. at 9.

However, where the Eleventh Circuit clearly erred, and the reason why this Court's intervention is warranted, is in failing to recognize that the plain language of §1B1.3(a)(1) guides the analysis, not the interpretative gloss of the circuit courts which have only muddied the waters. The Eleventh Circuit relied on the unsettled nature of the case law in finding that sentencing counsel had no duty to object. Specifically, the court cited the case of *United States v. Ahders,* 622 F.3d 115, 117 (2nd Cir. 2010), which the Government also cited in the lower courts, to suggest that there are differing interpretations of this relevant conduct guideline. App. at 8. However, *Ahders* is entirely consistent with the Petitioner's reading of the plain language of the relevant conduct definition. *Ahders* involved a guideline enhancement for two other victims whom were otherwise uncharged. 622 F.3d at 119-20. In that case, however, the victims were incontrovertibly abused on the same weekend as the victim involved in the offense of conviction – i.e. during the

---

https://www.ussc.gov/education/training-resources/sentencing-practice-talk?utm_medium=email&utm_source=govdelivery#NaN (Episode 3).

commission of the offense. This case is factually distinct because there is no support in the record that the uncharged sexual contact occurred at the time of conviction, or leading up to or after in order to avoid detection for the commission of the offenses in this case.

Thus, *Ahders* does not support the Eleventh Circuit holding that the meaning of "relevant conduct" is unsettled and therefore there was no deficient performance. Counsel's error was not for failing to identify that a particular case should have applied to the situation but for failing to recognize even what section of the relevant conduct guideline, §1B1.3(a)(1) governed.

For these reasons, this Court should grant the petition for writ of certiorari in order to clarify to the lower courts that the plain language of the definition of relevant conduct must be applied in child pornography sentencings when determining the total offense level.

II. The failure of the Eleventh Circuit Court of Appeals to grant an evidentiary hearing on the issue of ineffective assistance of counsel for failure to file an appeal is directly contrary to law from this Court and 28 U.S.C. § 2255(b), and is a compelling issue in light of extraordinarily long sentence received by the Petitioner.

Sentencing counsel also provided ineffective assistance of counsel by failing to meaningfully consult with his client regarding an appeal and then file a notice of appeal. The plea agreement in this case contained two benefits to Mr. Diaz. The first benefit was that the Government would dismiss four of the six counts. Dkt. 24 at 1. The other benefit of the plea agreement accorded by the Government to Mr.

Diaz was that he retained the right to appeal his sentence in the case. *Id.* at 5. Any rational defendant would appeal a 60 year prison sentence – there was absolutely nothing to lose.

Following the sentencing, counsel only advised Mr. Diaz there were no grounds to appeal but provided no other meaningful consultation regarding the appeals process. App. 68.

"Simply asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense." *Thompson v. United States,* 504 F.3d 1203, 1207 (11th Cir. 2007). As this Court held in *Roe v. Flores-Ortega,* 528 U.S. 470, 480 (2000), counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. The *Flores* court further held:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ 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.

Furthermore, the fact that the case involved a guilty plea does not absolve counsel of an ineffective assistance claim with respect to filing a notice of appeal. *Id.* at 480. *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019), recently reaffirmed the principles set forth in *Flores-Ortega*, and held prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *citing Flores-Ortega,* 528 U.S. at 484, 120 S.Ct. 1029.

Here, the affidavit of the Petitioner which was unrebutted by the Government, demonstrated that there was no meaningful consultation regarding the right to appeal, and the failure to meaningfully consult with the Petitioner as that consultation is defined in *Flores-Ortega* and *Garza* deprived him of his right to effective assistance of counsel. The failure to consult in any meaningful way regarding the appeal resulted in a waiver of the Appellant's right to appeal that was not voluntary, knowing or intelligent. App. at 68. ("I was never advised by my previous attorneys as to the nature of the appeals process and what claims could be raised in either a direct appeal or motion to vacate sentence." The prejudice in this case is presumed as held in *Garza,* supra.

The Government argued below, and the Eleventh Circuit Court of Appeals concurred, that the Petitioner had not alleged sufficiently specific facts before the District Court to merit an evidentiary hearing. App. at 11. However, the Eleventh Circuit failed to consider the entirety of the affidavit and how the affidavit dovetails into the record as a whole and all of the attendant circumstances of the case.

Petitioner negotiated a deal which had only a couple of benefits, one of which was the right to appeal. Given that his counsel negotiated a plea agreement which retained the right to appeal, it therefore makes sense to conclude that appealing would be a rational decision. Secondly, the decision to appeal would certainly be a rational decision where the sentence received was the statutory maximum sentence of 60 years. Any reasonably competent attorney would have advised Mr. Diaz to appeal given that, first and foremost, he had just received what was effectively a sentence of life imprisonment. Any rational counsel would file a notice of appeal as a matter of course. Mr. Diaz got the statutory maximum sentence, the most he could have received under the plea agreement, which was twice what his attorney recommended, and there was no appeal waiver. In other words, an appeal had no downside, and having an appellate attorney at least review the record after a notice of appeal had been filed would have been what any licensed attorney should have advised and done.

The record also supports the fact sentencing counsel was contemplating an appeal prior to sentencing. Even though, as argued in this Petition, guilty plea counsel was deficient in failing to object on the relevant conduct issue, he was clearly making a record on other issues. He objected to the restitution calculation contained in the PSI. Dkt. at 49. He also objected to the district court's order that any sentence received by the defendant run consecutive to any state sentence. *Id.* at 93. Therefore, a rational defendant whose counsel was in fact making an appeal

record up to the time that sentence was imposed would in fact follow through and appeal his sentence, as was his right.

Therefore, the Eleventh Circuit Court of Appeals erred in denying relief on this claim and, at the very least, denying him an evidentiary hearing on this issue. Section 28 U.S.C. § 2255(b) specifically states:

> Unless the motion and the files and records of the case *conclusively show that the prisoner is entitled to no relief*, the court shall cause notice thereof to be served upon the United States attorney, *grant a prompt hearing thereon*, determine the issues and make findings of fact and conclusions of law with respect thereto…
>
> (Emphasis supplied).

The Petitioner has proffered reasonably specific facts which are supported by the record as a whole and support his assertion that he was not provided a meaningful consultation regarding his right to appeal and that he therefore did not appeal. In short, record does not "conclusively show" that the Petitioner is "entitled to no relief." *Id.* The Petitioner's assertions, if taken as true, would have established deficient performance in a case where prejudice is presumed. Accordingly, the Eleventh Circuit's holding which failed to order an evidentiary hearing runs directly counter to *Flores-Ortega* and 28 U.S.C. § 2255(b).

In light of the clear misapplication of this Court's precedent and the extraordinary length of the Petitioner's sentence, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 31st day of July, 2020.

Adam N. Bleier
Counsel of Record
Steven P. Sherick
Sherick & Bleier, PLLC
2 E. Congress, Ste 1000
Tucson, Arizona 85701
(520) 403-5482
adam@sherickbleier.com
steve@sherickbleier.com

Counsel for Petitioner