No.

# IN THE SUPREME COURT OF THE UNITED STATES

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FREDRICK MACKIE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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August, 2021

## THE QUESTION PRESENTED

Petitioner was convicted of escape from a halfway house and was sentenced in 2019 to 41 months in prison. He personally signed a *pro se* notice of appeal, and his form request to the Court of Appeals to proceed *in forma pauperis* contained the standard language, "I believe my appeal has merit."

Shortly after appointed counsel filed an opening brief, the Court of Appeals received a letter from petitioner, stating, "I do not wish to appeal my case!" Thereafter petitioner refused all mail from the court and from counsel, and refused to come out of his cell for a pre-arranged telephone call with counsel.

The Court of Appeals dismissed the appeal.

These circumstances present the question: Is it proper for an appellate court to dismiss an appeal in a criminal case without first ascertaining whether the defendant-appellant understands the advantages of his appeal and the disadvantages of dismissing it, and without first ascertaining that his decision to abandon the appeal—if that is what his letter intended—is knowing and intelligent?

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES CITED

### CASES



### FEDERAL STATUTES



### FEDERAL SENTENCING GUIDELINES

**RULES OF COURT**



**CONSTITUTIONAL PROVISIONS**

**IN THE UNITED STATES SUPREME COURT**

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FREDRICK MACKIE,

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## PETITION FOR WRIT OF CERTIORARI

Appointed counsel, on behalf of Petitioner Fredrick Mackie, petitions this court for a writ of certiorari to the Court of Appeals for the Ninth Circuit, which dismissed his appeal. He asks that the Court vacate the dismissal, and remand the case with directions to determine whether petitioner sufficiently understands the advantages and disadvantages of his appeal to be able to make a rational choice with respect to continuing or abandoning further litigation, and if so, whether his letter to the court saying he did not want to appeal evidenced a knowing and intelligent choice. In the absence of a competent, knowing and intelligent choice to abandon the appeal, the Court of Appeals should determine the appeal on the merits.

## THE ORDERS BELOW

The order of the Court of Appeals dismissing the appeal appears at App. A-1, and is unreported. The order denying a motion for reconsideration appears at App. A-2, and is unreported.

## JURISDICTION

The district court had jurisdiction of Petitioner's criminal case, in which he was convicted of escape, 18 U.S.C. § 751(a), pursuant to 28 U.S.C. § 3231 as an offense against the laws of the United States.

The Court of Appeals had jurisdiction of the appeal from a final judgment of a district court pursuant to 28 U.S.C. § 1291.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) as a petition to review a decision by a court of appeals.

The Court of Appeals ordered the appeal dismissed by order entered March 17, 2021. Appendix p. A-1. A petition for rehearing, which the Court of Appeals construed as a motion for reconsideration,[1] was denied on July 1, 2021. Appendix p. A-2. This petition is filed within 150 days after the date of an order denying a timely petition for rehearing, and is timely pursuant to the Court's COVID-19 Order Regarding Filing Deadlines (March 19, 2020).

## CONSTITUTIONAL PROVISIONS INVOLVED

**The Fifth Amendment to the United States Constitution provides, in pertinent part:**

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

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[1] The Court of Appeals treated our petition for rehearing a motion for reconsideration, citing Circuit Rule 27-10, which says a party seeking "further consideration" of an order (as opposed to a memorandum decision) that terminates a case must comply with the time limits for petitions for rehearing.

The precise nomenclature of the petition is not of consequence. See *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991) [a motion seeking an "alteration of the rights adjudicated" is sufficient to render a decision of the lower court nonfinal until the motion is decided], citing *United States v. Dieter*, 429 U.S. 6, 8-9 (1976) [motion to set aside dismissal was not captioned "petition for rehearing" but "in purpose and effect it was precisely that"].

**The Sixth Amendment to the United States Constitution provides, in pertinent part:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

## STATEMENT OF THE CASE

The issue is whether it was error to dismiss the appeal without first determining if that was petitioner's knowing and voluntary choice. However, the underlying facts of the case will assist the reader in placing the issue in context, including whether there exist adverse consequences of the appeal, which could be a consideration in determining the issue.

### A.
### Proceedings in the Trial Court

Petitioner represented himself at trial, aided by advisory counsel. He was represented by counsel at the sentencing hearing.

The evidence showed that petitioner had been convicted of violating 18 U.S.C. 922(g)(1) [being a Felon in Possession of a Firearm], 2 ER 77,[2] and was serving a sentence of 41 months. 2 ER 78. His projected release date was December 11, 2018. 2 ER 72.

In June 2018 he was transferred to a residential reentry center, which is a halfway house to help inmates reintegrate into society, where they are allowed to leave and get a job, but with the obligation to report back to the halfway house. 2 ER 72-73. A resident is still considered to be in the custody of the Bureau of Prisons. 2 ER 97.

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[2] Reference is to the volume and page number of the Excerpts of Record filed in the Court of Appeals.

On August 11th or 13th, 2018 the Facility Director had a discussion with petitioner about his having provided a urine specimen that was not consistent with human urine. 2 ER 230. The Director told petitioner she was going to allow him to go to work and work only. 2 ER 231. On August 18th, staff reported they saw in petitioner's groin area a "Whizzinator" [a synthetic urine device], and he refused to hand it over to them. 2 ER 232.

On August 18, 2018 petitioner was placed on "lockdown, work only," which means he could sign out of the halfway house only to go to work. On August 19, 2018 he was placed on "complete lockdown," which means he could not leave the facility for any reason. 2 ER 224.

On August 20th the Director was notified that a head count showed petitioner was not at the facility. 2 ER 112. She reviewed camera footage and notified the Bureau of Prisons that petitioner had left the facility without permission. 2 ER 113. The camera footage showed he came down the stairs and walked out the front door. 2 ER 114.

Petitioner was arrested on August 23rd. 2 ER 186. Deputy Marshal Sellards interviewed petitioner on August 28th at the Marshal's office at the courthouse. 2 ER 188-189. Petitioner gave a full confession concerning his escape. He said he knew he was on lockdown, and he left the facility because he was afraid he would lose his job and return to prison. He said he was planning on turning himself in, but he needed more time because of family issues. He apologized and said he wanted to be there for his family. 2 ER 189.

The jury found him guilty. 2 ER 265 (Docket No. 38).

At the sentencing hearing petitioner contended that his offense level should be reduced by two levels for accepting responsibility with his full

confession shortly after he was arrested. Section 3E1.1(a) of the Sentencing Guidelines provides, when computing the offense level, "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."

The district court denied the adjustment. 1 ER 4. The court noted that petitioner contended "he should be given credit for acceptance of responsibility in light of the statements he made, notwithstanding the fact that he went to trial." 1 ER 4. One factor the court considered was "the fact that he didn't plead guilty." 1 ER 5. The court thought it was an interesting issue that would go up on appeal, and stated:

> THE COURT: Yeah. If a person admits all the elements: I did this. I did that. I did that. Then he goes to trial and says: Not guilty, and I want the Government to prove each element.
>
> Now, it may be easier by virtue of the fact they have his admission, but is that acceptance of responsibility? And I don't believe it is. 1 ER 10.

When defense counsel suggested that the court might consider that petitioner had an impaired ability to make decisions, the court stated:

> I -- I want to make sure this is teed up properly for you. So I am going to find that there is not evidence that his impairment was such that he could not make the decision as to whether or not to accept responsibility and plead guilty.
>
> Now, there it is. You have your record. I've got my record. The Government has my record. And I think it's made in that regard. If an appellate court disagrees with me then, of course, they would. 1 ER 12.

The Presentence Investigation Report showed a Guideline sentencing range of 41 to 51 months, and the district court imposed a sentence of 41 months. 1 ER 1, 4, 22.

Had the court granted the adjustment for acceptance of responsibility, we calculate a sentencing range of 33 to 41 months.

**B.**
**The Appeal**

Petitioner appealed. He personally signed the notice of appeal. 1 ER 29.

**1.**
**Petitioner's Contentions on Appeal**

In his opening brief in the Ninth Circuit Court of Appeals, petitioner framed the issue thusly:

> The question on appeal is whether the fact that appellant elected to exercise his constitutional right to proceed to trial made him ineligible for a two-level downward adjustment for acceptance of responsibility, as provided in § 3E1.1(a) of the Sentencing Guidelines.

Appellant's Brief, p. 5.

Petitioner cited Ninth Circuit precedent, which has consistently held that a sentencing court cannot deny eligibility for the 2-level decrease of the offense level based on the defendant's exercise of a constitutional right. *United States v. McKinney*, 15 F.3d 849, 852 (9th Cir. 1994) ["Where a defendant manifests a genuine acceptance of responsibility for his actions, he is entitled to the reduction even if he does not plead guilty"]; *United States v. Hill*, 953 F.2d 452, 461 (9th Cir. 1991) [upholding downward adjustment even though defendant did not express contrition until his sentencing hearing]**;** *United States v. Ochoa-Gaytan*, 265 F.3d 837, 842 (9th Cir. 2001) [prosecution for illegal reentry by alien; defendant admitted the elements of his offense when questioned by Border Patrol, but filed motion to suppress and went to trial; "a judge cannot rely upon

the fact that a defendant refuses to plead guilty and insists on his right to trial as the basis for denying an acceptance of responsibility adjustment"]. Appellant's Brief, p. 5.

**2.**
**The Government's Contentions**

The Government argued in the Appellee's Brief there was no error, because notwithstanding petitioner's full confession and even an apology to Deputy Sellards shortly after his arrest, Mackie had not actually accepted responsibility for his offense, because:

1. He went to trial.
2. He cross-examined the witnesses against him.
3. He put on a defense case.
3. He presented evidence on his own behalf.
4. He submitted exhibits.
5. He called two witnesses in his defense.
6. He argued to the jury that the case "was never proven beyond a reasonable doubt."

The Government believed this meant that petitioner "never expressed acceptance or contrition for his offense conduct even through allocution at sentencing." Appellee's Brief, p. 13.

**3.**
**Petitioner's Reply**

Petitioner replied that the Government's reasons all had one thing in common: They each describe the exercise of a constitutional right—the right under the Sixth Amendment to a trial, the right under the Due Process Clause to proof beyond a reasonable doubt, the right under the Sixth Amendment to cross-examine witnesses, the right under the Due Process Clause to present a defense, the right under the Sixth Amendment

to call witnesses, and the right under the Sixth Amendment to present argument to the jury. A defendant cannot be penalized for exercising a constitutional right. Appellant's Reply Brief, p. 5-9.

### C.
### The Appellate Court Receives a Letter From Petitioner

Shortly before the reply brief was filed, petitioner, who was incarcerated at the Federal Correctional Institute at Herlong (Calif.), wrote a letter to the court (Docket No. 31) that stated, "I don't wish to appeal my case!" Appellate Commissioner Shaw declined to entertain this *pro se* submission, stating that appellant is represented by counsel, and only counsel may file motions. Commissioner Shaw directed counsel to file a response to Mr. Mackie's *pro se* submission. (Docket No. 39.)

#### 1.
#### Counsel's First Response to the Court

Counsel's first response (Appellate Docket No. 41) informed the court that counsel's last two letters to petitioner were returned because the inmate "refused to sign—does not want mail." Counsel noted that the copy of the court's order the court clerk had mailed directly to petitioner was likewise returned to the court with the notation "inmate refused mail." Counsel suggested that the court grant counsel further time to respond, to allow time to make further inquires. The court did so.

#### 2.
#### Counsel's Second Response to the Court

Counsel's second response (Appellate Docket No. 46) informed the court that after several communications directed to the prison, counsel had arranged for an attorney-client telephone call, but petitioner's prison

counselor informed appellate counsel that when it came time for the call, petitioner refused to leave his cell to talk to counsel, so there was no telephone call.

Counsel expressed to the court his position that a decision to forgo or abandon an appeal is a decision for the defendant, but it must be a knowing and intelligent decision, with knowledge of the consequences. Here a dismissal could have an adverse effect on appellant's liberty interests with no corresponding benefit to appellant. Counsel pointed out that an attorney has an obligation to a client to see that the client is aware of the dangers and disadvantages of dismissing an appeal, and when a defendant relinquishes benefits that may affect his liberty he must "knowingly and intelligently" forgo those relinquished benefits, citing *Faretta v. California*, 422 U.S. 806, 835 (1975), and that when it is "not improbable" that the defendant "did not intelligently and voluntarily abandon the appeal" that a court "cannot infer or presume, under the circumstances, that the abandonment was intelligent and voluntary," citing *Kirk v. United States*, 447 F.2d 749, 751 (7th Cir. 1971).

Counsel concluded by saying, "In counsel's opinion, there is insufficient evidence that any decision by appellant to abandon his appeal would be knowing, voluntary or intelligent, or that he understands the nature and object of the appellate proceedings. The record does not show this, and the court should not presume otherwise."

**3.**

**The Court of Appeals Dismisses the Appeal Without Addressing Whether Petitioner's Decision to Abandon His Appeal Was Knowing and Intelligent**

However, the Court of Appeals dismissed the appeal (Docket No. 47), stating only that counsel's response and the record as a whole "indicate that appellant does not want to proceed with this appeal."

**4.**

**Counsel's Request for Reconsideration to Consider the Issue Is Denied**

Counsel filed a Petition for Rehearing and Rehearing En Banc (Docket No. 48), pointing out that the appellate court had not addressed whether appellant's perceived decision to abandon his appeal was knowing and intelligent, or address whether he was aware of the benefits of the appeal and the disadvantages of abandoning the appeal.

The Court of Appeals treated the Petition as a motion for reconsideration and motion for reconsideration en banc, and denied the motion for reconsideration and denied the motion for reconsideration en banc on behalf of the full court. (Docket No. 49.)

## REASONS FOR GRANTING THE PETITION

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## COURTS MUST BE SURE THAT A DEFENDANT'S DECISION TO ABANDON AN APPEAL IS KNOWING AND INTELLIGENT. THE NINTH CIRCUIT'S DISMISSAL OF THE APPEAL WITHOUT ADDRESSING THE ISSUE CONFLICTS WITH OTHER CIRCUIT DECISIONS AND WITH THE DECISIONS OF THIS COURT.

Federal courts have a responsibility to make decisions such "as justice may require." *Ashcroft v. Tennessee*, 322 U.S. 143, 156 (1944). We submit that justice requires that the courts protect a defendant's rights

from unknowing waiver. For example, if nonfrivolous grounds for an appeal exist, defense counsel has a constitutional duty "to consult with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). "Consult" in this context means "advising the defendant about the advantages and disadvantages of taking an appeal." *Id*. at 478.

On appeal, counsel plays the role of an advocate. *Ellis v. United States*, 356 U.S. 674, 675 (1958). As an advocate, counsel's role "requires that he support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. 738, 744 (1967).

The Ninth Circuit's order of dismissal and the denial of reconsideration here did not address an important question of federal law, namely whether the record should affirmatively reflect that petitioner, with knowledge of the consequences of his decision, made a knowing and intelligent choice to abandon the appeal.

The court's decision is in conflict with the decision by the Seventh Circuit in *Kirk v. United States*, *supra*, 447 F.2d 749, where the court held that when it is "not improbable" that the defendant "did not intelligently and voluntarily abandon the appeal" that a court "cannot infer or presume, under the circumstances, that the abandonment was intelligent and voluntary." The conflicting *Kirk* decision warrants consideration by this Court in deciding whether to grant the petition. See Supreme Court Rule 10 (a).

The decision of the Ninth Circuit was also decided in a way that conflicts with the decision by this Court in *Rees v. Payton*, 384 U.S. 312, 313-314 (1966), where the defendant in a capital case directed his attorney to withdraw his petition for certiorari and forgo further proceedings. The Court ordered the district court to make a judicial determination, through

a psychiatric examination, if necessary, whether Rees "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation," because until that was done the Court was not in a position to determine what disposition to make of the petition. See also *Garza v. Idaho*, 139 S.Ct. 738, 745, 203 L Ed 2d 77 (2019) [observing that all jurisdictions appear to agree that defendants retain the right to challenge a waiver of appeal if it was unknowing or involuntary]; *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ["Presuming waiver from a silent record is impermissible"]. Such decisions by this Court warrant consideration by the Court in deciding whether to grant the petition. See Supreme Court Rule 10 (c).

Indeed, we suggest that the conflict between the decision in this case and decisions (including decisions of this court) recognizing the importance of protecting a defendant's liberty interests when he takes an appeal is sufficiently patent to justify summary reversal on the merits. See Supreme Court Rule 16.1; *Marvel v. United States*, 380 U.S. 262 (1965); *Allison v. United States*, 386 U.S. 13 (1967).

## CONCLUSION

Counsel for petitioner believes that his duty to act as an advocate on appeal for his client includes preserving the client's rights from an unknowing waiver, and ensuring that any relinquishment of important benefits that may affect his client's liberty is a knowing and informed choice.

Counsel twice pointed out to the Court of Appeals the importance of ensuring that a defendant' uncounseled decision to give up his appellate rights is made knowingly and intelligently and with knowledge of the consequences: Initially in Counsel's Second Report to the Court of

Appeals (Docket No. 46), and then in the petition for rehearing (Docket No. 48). But the Court of Appeals never addressed the issue.

The record is barren of any evidence that petitioner was aware that abandoning the appeal would forfeit a reasonable chance of a reduced sentence—up to eight months, as we calculate the Guidelines—or even that he was aware that his letter to the court would result in such an outcome. Petitioner demonstrated an interest in appealing, because the appellate proceedings were initiated by a notice of appeal signed personally by petitioner, and the most reasonable interpretation of his statement to Deputy Sellards about why he left the halfway house and went to work was that he was afraid he would lose his job and have to return to prison. 2 ER 196. Both those actions are inconsistent with a knowing decision to forgo the appeal that might result in a lower sentence.

It was error for the Court of Appeals to presume from a silent record that petitioner was aware of the advantages of his appeal and the disadvantages of abandoning it, and that his letter to the court (Docket No. 31) manifested a knowing and intelligent decision to abandon the appeal. This Court should vacate the dismissal and remand the case with directions.

We suggest it would be appropriate to direct the Court of Appeals to first make a determination whether petitioner is aware that his appeal, if successful, may result in a reduction of his sentence. If the court determines he is aware of that possibility, the court should determine, in light of that knowledge, whether petitioner wants to abandon the appeal. If he does, the court should determine whether his decision to abandon the appeal is a knowing and intelligent one. If it is, the court should dismiss the appeal.

If the Court of Appeals cannot make one or more of these determinations, then the court should decide the appeal on the merits.

Respectfully submitted,

*/s/Walter K. Pyle*

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# Appendix

# Order of the Court of Appeals Dismissing the Appeal

**March 17, 2021**

FILED

MAR 17 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>FREDERICK MACKIE,<br><br>Defendant-Appellant. | No. 19-10239<br><br>D.C. No. 3:18-cr-00410-CRB-1<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: GRABER, R. NELSON, and HUNSAKER, Circuit Judges.

The response (Docket Entry No. 46) of appellant's appointed counsel, Walter K. Pyle, Esq., to the court's December 3, 2020, order, and the record as a whole, indicate that appellant does not want to proceed with this appeal. Accordingly, the appeal is dismissed. *See* Fed. R. App. P. 42(b); 9th Cir. R. 27-9.1.

The Clerk will serve this order on counsel Pyle, and on appellant individually at Reg. No. 23435-111, FCI Herlong, Federal Correctional Institution, P.O. Box 800, Herlong, CA 96113.

**DISMISSED.**

# Appendix

# Order
# of the Court of Appeals
# Denying Rehearing

**July 1, 2021**

FILED

JUL 1 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>FREDERICK MACKIE,<br><br>Defendant-Appellant. | No. 19-10239<br><br>D.C. No. 3:18-cr-00410-CRB-1<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: GRABER, R. NELSON, and FORREST,* Circuit Judges.

We treat appellant's "petition for rehearing and rehearing en banc" (Docket Entry No. 48) as a motion for reconsideration and motion for reconsideration en banc. So treated, the motion for reconsideration is denied, and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

* Formerly known as Danielle J. Hunsaker.