No. 22-6795

IN THE

SUPREME COURT OF THE UNITED STATES

JACOBO ROZO POSSO-PETITIONER

VS.

UNITED STATES OF AMERICA-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACOBO ROZO POSSO
REG. NO. 34312-057
FEDERAL CORRECTIONAL
INSTITUTION 2
P.O. BOX 1500
BUTNER, NC 27509

QUESTION PRESENTED

Posso seeks a writ of certiorari on the following issue:

1. WHETHER COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FILE THE NOTICE OF APPEAL WHEN REQUESTED.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES

RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at United States v. Jacobo Rozo Posso, 2022 u.s. app. lexis 33784, No. 22-6162(4th Cir. 2022).

The opinion of the United States District Court for the Middle District of North Carolina appears at Appendix B to the petition and is reported at Jacobo Rozo Posso v. United States, 2021 u.s., 2021 u.s. dist. lexis 126094, (M.D.N.C., July 7, 2021).

The opinion of the Magistrate's Judge findings and Recommendations appears at Appendix C to the petition and is reported at Jacobo Rozo Posso v. United States, 2021 u.s. dist. lexis 127106, (M.D.N.C., March 23 2021).

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided Petitioner's case was December 8, 2022. No petition for rehearing was filed in Petitioner's case. A petition to the Supreme Court must be filed within 90 days of the appellate court's judgment, or by March 8, 2023. Accordingly, the jurisdiction of this court is invoked under 28 u.s.c. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT-RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defence.

STATEMENT OF THE CASE

On June 13, 2018, Posso appeared before the district court and pled guilty to Counts 3, 6, and 8 of the Second Superseding Indictment pursuant to a plea agreement. (Plea Agreement, DCD[1] 23). On October 18, 2018, the district court sentenced Posso to a term of 204 months imprisonment, to be followed by a term of 20 years of supervised release. (Judgment, DCD 34). Posso did not file an appeal.

On October 3, 2019, Posso filed a timely, pro se motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (2255 Motion, DCD 44). Among the grounds raised in his initial § 2255 motion, Posso alleged that counsel was ineffective for failing to file a timely notice of appeal. Id. at 4, 22). Shortly thereafter, Posso submitted an affidavit from his mother, Erika Posso, recounting Ms. Posso's conversation with counsel regarding the filing of a notice of appeal. (Aff'd of Erika Posso, DCD 46).

Posso subsequently filed four supplements to his § 2255 motion (DCD 38, 39, 50, and 52), an amended §2255 motion (DCD 44), and memorandum in support (DCD 45). In turn, the Government filed a response and an amended response to Posso's § 2255 pleadings. (DCD 68 and 76). Appended to the Government's amended response was an affidavit from former counsel. (Aff'd of Michael S. Petty, DCD 76-1). In counsel's affidavit, attorney Petty stated he obtained recordings of the jail phone calls with Posso related to Posso's inquiry into filing an appeal shortly after sentencing. Id. at 2. The audio recordings and transcripts were submitted to the court. (Jail Audio Recordings and Tr. of Jail Calls, DCD 79 and 81). Posso filed a reply and affidavit. (DCD 77 and 78).

On March 23, 2021, U.S. Magistrate Judge Joe L. Webster issued a Report and Recommendation ("R&R") that all of Posso's §2255 claims should be denied.[2](R&R, DCD 85).

---

1 "DCD" refers to the District Court Docket Entry.

2 The Report and Recommendation concluded that Posso's amended § 2255 claims were time-barred and should be dismissed.

With respect to Posso's claim that counsel was ineffective for failing to file a notice of appeal, the R&R concluded that counsel adequately advised Posso of the advantages and disadvantages of an appeal, and that Posso never explicitly requested counsel file a notice of appeal. Id. at 14-17. Posso filed objections to the R&R and specifically objected to the magistrate's findings regarding counsel's failure to consult regarding an appeal. (Obj. to R&R, DCD 89 at 4-6).

On July 7, 2021, the district court entered an order overruling Posso's objections, adopting the Magistrate's Recommendation, and denying Posso's § 2255 motion. (Order Denying § 2255, DCD 90). Thereafter, Posso filed a motion pursuant to Fed. R. Civ. P. 59(e). (Rule 59(e) Motion, DCD 92). The district court denied Posso's Rule 59(e) motion on January 19, 2022. (Order Denying R. 59(e) Motion, DCD 94). Posso filed a timely notice of appeal on February 4, 2022. (Notice of Appeal, DCD 95).

On April 19, 2022, Posso represented by counsel, filed an application for a certificate of appealability (COA) with the Fourth Circuit Court of Appeals. (Application for COA, ACD[3] 12). The sole argument raised was whether Reasonable Jurists Could Debate that Counsel was Ineffective for Failing to Adequately Consult with Posso Regarding the Filing of a Notice of Appeal. On December 8, 2022, the court of appeals entered an order denying the COA and dismissing the appeal on the grounds it had independently review the record, and concluded that Posso had not made the requisite showing for a COA. (Order Denying COA, ACD 15, See APPENDIX A). This application for a writ of certiorari follows.

3 "ACD" refers to the Appeals Court Docket Entry.

SUMMARY OF REASONS FOR GRANTING THE PETITION

While the time to appeal was still running, Posso's mother reached out to counsel to explain that Posso wanted to initiate the appeal procedure. Ms. Posso was told an appeal is not viable. Shortly thereafter, Posso and counsel held a conversation on a recorded jail call. Posso told counsel that he changed his mind and wanted to appeal. In response, Posso was told (1) no, an appeal will not work, (2) an appeal would be dismissed under the plea waiver, (3) counsel would not do Posso's appeal; (4) Posso would have to pay for an appeal; and (5) counsel did not want to spend time or effort on Posso's appeal.

The district court determined that Posso had not explicitly requested counsel file a notice of appeal, and that counsel discharged his duty to adequately consult with Posso regarding the advantages and disadvantages of an appeal during this phone call. The court of appeals for the fourth circuit without even mentioning the sole issue raised by Posso in his application for a COA stated in its order, that it had reviewed the record and concluded that Posso had not made the requisite showing. The court of appeals decision is both vague and ambigious, failing to set forth its basis on its determination.

This court has held in Chavez-Meza that a district court has an obligation to explain its basis at arriving at its decision. This legal standard of law should equally apply to courts of appeals deciding a COA.

The court of appeals erred in its decision when the record supports Posso's mother message to counsel that Posso wanted to start the process to appeal, Posso's statement that he changed his mind and wanted to appeal, and counsel failed to file the notice of appeal. Under Roe vs. Flores-Ortega, when counsel failed to fulfill his obligation to file the notice of appeal, it is automatic reversible error. A writ of certiorari should issue.

REASONS FOR GRANTING THE PETITION

I. WHETHER COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FILE THE NOTICE OF APPEAL WHEN REQUESTED.

Posso was sentenced on October 16, 2018. Written judgment of conviction was entered by the district court on October 29, 2018. (Judgment, DCD 34). Posso had 14 days, or until November 12, 2018, to file his notice of appeal. Fed. R. App. P. 4 (b)(1)(A). After sentencing, but before the aformentioned jail call, Posso's mother reached out to counsel on October 21, 2018, via text message. (Aff'd of Erika Posso, DCD 46 at 6). On Posso's behalf, Ms. Erika Posso wrote:

> Good evening mr Petty, i just talked to jacobo, he was just moved to virginia (piedmont jail), he wants to start the process to appeal., he is going to call you as soon as he can, i am worried but is his decision.

Id. In response, counsel simply stated, "appeal is not feasible." Id.

On October 24, 2018, Posso did call Mr. Petty from the Piedmont Virginia Regional Security Center. Mr. Petty filed a transcript of the phone call with the district court. (Tr. of Jail Call, DCD 81-1). Near the beginning of the call, Posso and Mr. Petty had the following exchange:

> MR. POSSO: Yeah. Yeah. Listen, I was, you know, I have been hearing a lot of people here. I haven't really talked about my case at all but I have heard a few cases similar to mine. I have heard a lot of cases and I keep hearing that appealing, that I should appeal my case. They tell me, I mean, I understand what it means to appeal and it doesn't seem like it's going to affect anything.
>
> Basically, I think that the sentence, you know, after thinking it through, thinking of several things, I changed my mind. I think that there are some things that could be justified to bring the sentence much lower.
>
> MR. PETTY: No, there's no way to get your sentence lower. It won't work.

Id. at 3. Mr. Petty then went on to explain that Posso waived his right to appeal as part of his plea agreement and that he did not believe there were any grounds for an appeal. While doing so, Mr. Petty stated:

> MR. PETTY:...So I just don't think there's any grounds for an appeal and, you know, I'm not going to do your appeal. I wasn't paid to do an appeal, I don't think it's valid, I don't think it's legally justified.

Id. at 4. Mr. Posso responded:

> MR. POSSO: But so you said in the plea agreement it says I can not appeal but during the court, the judge said that I had 14 days to appeal.
>
> MR. PETTY: Yeah, you can -- yeah, you can appeal but it's going to be dismissed. But the judge has to tell you that just to protect -- you know, that's something they just say. That doesn't mean you actually have an appeal.

Id. at 4-5. As the conversation continued, Posso asked Mr. Petty:

> MR. POSSO: Yeah, okay. I don't know. So you said you are not going to do the appeal?
>
> MR. PETTY: I mean, you need to pay me to do it and I don't want to do the appeal. You need to pay -- if you want me to file the notice of appeal, I guess I have to do it. I don't want to do it, I don't want to spend anymore time on it. I already lost a lot of time, you know, money on this case. I didn't charge you really what I charge people to do these cases because of, you know, (unintelligible) and I felt sorry for you. But I don't want to have to go drive to Greensboro and file an appeal for you. It's not going to go anywhere. I really don't want to do it.

Id. at 9.

The district court ultimately concluded that Posso did not explicitly request counsel file a notice of appeal, and that counsel adequately consulted with Posso regarding the advantages and disadvantages of filing a notice of appeal. Specifically, the R&R concluded:

> The record reveals that counsel consulted with Petitioner about the advantages and disadvantages of taking an appeal. The record also reveals that Petitioner did not request that counsel file an appeal. And given that Petitioner did not mention an appeal in his last phone call with counsel, and given that there were no viable claims to be raised on appeal, there was no reason for counsel to believe that Petitioner sought one.

(R&R, DCD 85 at 17).

Notably absent from the court's analysis of whether counsel adequately

consulted with Posso regarding an appeal were counsel's explicit statements that Posso could not appeal because of the plea waiver, that the appeal would be dismissed, that counsel would not file an appeal, Posso would have to pay counsel in order for counsel to file the appeal, that counsel repeatedly stated he did not want to file the appeal, and counsel did not want to "drive to Greensboro and file an appeal."

It has long been held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). "[F]iling a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." Id. Further, the fourth circuit has held that counsel's failure to file a notice of appeal when instructed by his client to do so is ineffective assistance of counsel, "even if doing so would be contrary to the plea agreement and harmful to the client's interests." United States v. Poindexter, 492 F. 3d 263, 273 (4th Cir. 2007).

In a situation where the client has not definitively instructed counsel to file a notice of appeal, the Supreme Court has held that counsel has a constitutional duty to consult with the client regarding the advantages and disadvantages of an appeal where either (1) a rational defendant would want to appeal, or (2) this particular defendant reasonably demonstrated an interest in appealing. Flores-Ortega, 528 U.S. at 480. However, providing erroneous information on the possible outcome of an appeal does not meet the standard of adequately advising a client of the advantages and disadvantages of an appeal. See United States v. Malone, 442 Fed. Appx. 864, 867 (4th Cir. 2011).

Here, however, counsel was required to file a notice of appeal as soon as Posso made apparent his desire to appeal. After sentencing, and within the time frame to appeal, Posso's mother advised counsel that Posso "wants to start the process

to appeal." (Aff'd of Erika Posso, DCD 46 at 6). In return, Ms. Posso was simply told that an "[a]ppeal is not feasible." Id. A few days later, when Posso was finally able to telephone counsel, Posso made clear that he "changed [his] mind" about not filing an appeal. (Tr. of Jail Call, DCD 81-1 at 3).

Between Ms. Posso's statement that Posso wanted to start the appeal process, and Posso's unequivocal statement that he changed his mind and wanted to appeal, counsel was under a constitutionally imposed duty to file a notice of appeal. At this point, counsel was not required to consult with Posso about the advantages and disadvantages of an appeal- Posso had made clear his intention to appeal. All counsel was required to do was the ministerial task of filing the notice of appeal. But that is not what happened. Instead, counsel told Posso, "No, there's no way to get your sentence lower. It won't work." Id. Simply put, Posso told counsel he wanted to appeal and counsel told Posso no. This was a blatant violation of Posso's right to effective assistance of counsel because his deficient performance not only deprived Posso of the notice of appeal, but also the appeals proceeding altogether. To the extent that the district court alleged Posso did not specifically tell counsel, "I want you to file a notice of appeal," a reasonable attorney should know that Posso's statement was a request for counsel to file a notice of appeal. The transcripts of the jail recordings provided by counsel support this fact when Posso stated to counsel:

> MR. POSSO: But so you said in the plea agreement it says I can not appeal but during the court, the judge said that I had 14 days to appeal

(Tr. of Jail Call, DCD 81-1 at 4). Thus, Posso was clearly referring to the filing of the notice of appeal.

Assuming, arguendo, that Posso and his mother's statements were not unequivocal expressions of a request for counsel to file a notice of appeal, Posso at the very least triggered counsel's constitutionally-imposed duty to adequately consult with Posso regarding the advantages and disadvantages of an appeal under

Flores-Ortega. But counsel's "consultation" was far from being meaningful or adequate.

First, counsel unequivocally told Posso an appeal "won't work," and the appeal would be dismissed based on the plea agreement. (Tr. of Jail Call, DCD 81-1 at 3-4). But this was not an accurate representation of Posso's appeal waiver. To be sure, Posso did waive his right to an appeal as part of his plea agreement, but expressly reserved the right to appeal based upon grounds of: (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) a sentence in excess of the statutory maximum, and (4) a sentence based on an unconstitutional factor. (Plea Agreement, DCD 21 at 8-9). At no time during their conversation did counsel discuss these appellate waiver exceptions. All Posso was told was his appeal would be dismissed.

Second, counsel told Posso that in order to appeal, Posso would have to pay him. (Tr. of Jail Call, DCD 81-1 at 9). This statement alone should be sufficient to render counsel's "consultation" inadequate. Mr. Petty was counsel of record during the time when an appeal could have been filed, and counsel was constitutionally obligated to perform the ministerial task of filing a notice of appeal if Posso so requested.

Third, counsel made abundantly clear that he did not want to go through the trouble that such a ministerial task would present. Counsel acknowledge-immediately after telling Posso he would have to pay-that counsel would have to file a notice of appeal if Posso wanted, but continued by telling Posso:

> I don't want to do it. I don't want to spend anymore time on it. I already lost a lot of time, you know, money on this case. I didn't charge you really what I charge people to do these cases because of you know, (unintelligible) and I felt sorry for you. But I don't want to have to drive to Greensboro and file an appeal for you. It's not going to go anywhere. I really don't want to do it.

Id. Counsel's self-interested concern for time and money in appealing Posso's

case is a far cry from what the Supreme Court intended by the term "consult." Flores-Ortega, at 471.

Assuming Posso did not unequivocally request an appeal, thus requiring counsel to file a notice of appeal with no further questions, counsel undoubtedly had a constitutional duty to consult with Posso, advise Posso of the advantages and disadvantages of an appeal, and make a resonable effort to discover Posso's wishes. It is clear from the recording between Posso and counsel that Mr. Petty utterly failed to meet his burden. By advising Posso that an appeal would not work, the appeal would be dismissed, Posso would have to pay to have the appeal filed, and that counsel did not want to spend any more time or money on Posso's case, counsel failed to adequately consult with Posso within the meaning of the term in Flores-Ortega.

Moreover, counsel's immediate refusal to file a notice of appeal in response to both Posso and his mother's indication of initiating the appeal process "rendered the remainder of his consultation suspect." Malone, 442 Fed. Appx. at 868. Just as in Malone, Posso "would not likely make an explicit request for an appeal given his attorney's statement that he would not file one." Id. And also just as in Malone, counsel erroneous advice regarding the plea waiver did not make for an adequate consultation. And just as in Malone, counsel made no effort in the last phone call to determine whether Posso had actually received his advice or whether Posso had made a decision.

At the minimum, Posso demonstrated a strong interest in appealing his sentence. In return, Posso was met with erroneous advice, demand for payment, and a clear indication that counsel did not want to perform the simple, ministerial task of filing a notice of appeal. The district court concluded that counsel consulted with Posso regarding an appeal and met his constitutional obligation.

The court of appeals concluded that Posso had not made the requisite showing for a certificate of appealability. The court of appeals decision which

is confined to one sentence, is voided of any explanation. The court of appeals decision is:

> We have independently reviewed the record and conclude that Posso has not made the requisite showing.

(Court of App. D., ADC 15, at 2, SEE APPENDIX A).

In Chavez-Meza, 138 S. Ct. 1959 (2018), this court decided the standard of law that district courts have an obligation to explain its basis at arriving at its decisions."At bottom, the sentencing judge need only 'set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." (Id., 1964). In United States v. Hargrove, 30 F.4th 189 (4th Cir. 2022), the fourth circuit court of appeals implementing the standard of law as set in Chavez-meza held, "the touchstone in assessing the sufficiency of the district court's explanation 'must be whether the district court set forth enough to satisfy our court that it has considered the parties' arguments and has a reasoned basis for exercising its own legal decision making authority', so as to 'allow for meaningful appellate review."...(quoting Chavez-Meza v. United States, 138 S. Ct. 1959, at 1965). This standard of law should also apply for appellate courts deciding a COA. Here, the court of appeals decision is far from being one of reasoned basis.

The court of appeals in its decision does not explain which part of the record it relied on to base its determination that Posso had not made the requisite showing. And, contrary to the court of appeals decision, the record supports that (1) Posso's mother reached out to counsel and expressed Posso's desire to start the process to appeal, (2) Posso's statement that he changed his mind and wanted to appeal, and (3) counsel Petty's statements that an appeal will not work, an appeal would be dismissed under the plea, he would not do Posso's appeal, Posso would have to pay him for the appeal, and counsel did not want to spend time or effort on Posso's appeal. Conclusively, counsel failed to file the notice of appeal

when requested to do so.

Therefore, the court of appeals for the fourth circuit erred for failing to state its basis for the denial under Chavez-Meza. And under Roe v. Flores-Ortega, counsel rendered ineffective assistance of counsel when he failed to perform the ministerial task of filing the notice of appeal, and adequately consult with Posso and this is deemed automatic reversible error.

CONCLUSION

Posso received ineffective assistance of counsel when counsel failed to file the notice of appeal when requested in violation of the Sixth Amendment. Based on the foregoing, this court should grant this writ of certiorari.

Respectfully Submitted,

Jacobo Rozo Posso

Jacobo Rozo Posso

Date: February 3 ,2023