

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

**TOMAS JARAMILLO, PETITIONER**

**V.**

**UNITED STATES OF AMERICA**

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**PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**QUESTION PRESENTED FOR REVIEW**

Whether, when a criminal defendant expresses interest in an appeal and concern over the length of his sentence, an attorney who fails to hold a follow-up discussion as he promised has failed to consult within the meaning of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) .

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Tomas Jaramillo asks that a writ of certiorari issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 22, 2023.

**PARTIES TO THE PROCEEDING**

The caption of the case names all parties to the proceedings in the courts below.

## RELATED PROCEEDINGS

*United States v. Jaramillo*, U.S. District Court for the Western District of Texas, Number 1:19 CR 00318-LY-8, Judgment entered January 27, 2021.

*United States v. Jaramillo*, U.S. District Court for the Western District of Texas, Numbers 1:19 CR 00318-LY-8 and 1:21 CV 902-LY, Judgment entered September 19, 2022.

*United States v. Jaramillo*, U.S. Court of Appeals for the Fifth Circuit, Number 22-50932, Judgment entered February 22, 2023.

## OPINION BELOW

The unreported order of the court of appeals is attached to this petition as Appendix A.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on February 22, 2023. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1). *See also Hohn v. United States*, 524 U.S. 236 (1998).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense.”

## STATEMENT

Petitioner Tomas Jaramillo pleaded guilty to conspiring to possess more than 500 grams of methamphetamine with the intent to distribute it. *See* 21 U.S.C. §§ 841, 846. He was sentenced to 240 months’ imprisonment. No notice of appeal was filed.

Jaramillo later moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his counsel had rendered ineffective assistance by failing to consult with him about an appeal and failing to file a notice of appeal. Jaramillo also contended that

counsel had rendered ineffective assistance by failing to object to the amount and purity of the methamphetamine attributed to him for purposes of determining the sentencing range under the U.S. Sentencing Guidelines.

A U.S. magistrate judge ordered a hearing on the notice-of-appeal issues raised by Jaramillo's § 2255 motion and appointed counsel to represent Jaramillo. Catalina Sanchez testified that she had watched her husband's Covid-era, Zoom-video sentencing from the office of attorney Kevin Boyd. Sanchez, who speaks only Spanish, expressed her concern to Boyd's Spanish-speaking assistant, Maria Alvarado, that the 240-month sentence "was a lot of years." Sanchez asked what could be done to get a lesser number of years. She explained that she was asking the assistant so she could tell the attorney and he would help reduce the sentence. A couple of minutes after Sanchez spoke with Alvarado, she received a call on her cell phone from Jaramillo. Sanchez assured him she was working to figure out how he could receive "less years."

Sanchez handed her cell phone to Alvarado, who told Jaramillo that "the attorney was going to go see him or call him or via video[.]" That never happened. The attorney neither called Jaramillo nor set up a videoconference with him. Nor did the attorney come to see Jaramillo at the jail. Sanchez said that Jaramillo was being moved between facilities during this time and could not himself call out to Boyd.

On cross-examination, the prosecutor worked to get Sanchez to say that she had directly asked for an appeal. Sanchez said she had called legal assistant Alvarado



and asked for help with the sentence. Sanchez testified that Alvarado would call her back, but they did not.

On redirect, Sanchez reiterated “that I wanted [the assistant] to help me reduce the number of years because that sentence was too much.” Having heard nothing, Sanchez went back to attorney Boyd’s office a few days after the sentencing hearing. Sanchez told the magistrate judge that she had not used the term appeal, but had repeatedly expressed her concern over the number of years Jaramillo had received and had asked repeatedly for help. She also testified that she had asked the attorney to “file a motion” to have “the number of years reduced.”

Tomas Jaramillo testified that he remembered that, at the end of the sentencing hearing, the judge had stated that, in normal, non-Covid, times he would hand a defendant a paper explaining the nature of the right to appeal. Within five minutes after the sentencing concluded, Jaramillo called his wife from the jail. He spoke to his wife and then to Alvarado, who he told he wanted to talk about an appeal. Jaramillo remembered being told that the attorney would call him in the next week or so, but neither the attorney nor anyone from his office did so. If the attorney had contacted him, Jaramillo intended to ask him to file a notice of appeal from the sentence. In response to the prosecutor’s question about why he did not call the attorney again, Jaramillo explained that Boyd knew that Sanchez was authorized to speak for Jaramillo and that it was easier for her to reach Boyd. Jaramillo had to chance into calling at a time when the attorney was available.

Jaramillo believed that in his conversation with the legal assistant he had conveyed to her his wish to appeal the sentence. In response to questioning by the magistrate judge, Jaramillo related that he was despairing after his sentencing because of the long term he had received. But despite his quick call after the sentencing and his wish to challenge the sentence, Jaramillo never was contacted by his attorney after the sentencing. Jaramillo's understanding from his conversation with the legal assistant was that the attorney would be in touch with him. Jaramillo's understanding was that he had 14 days to appeal. He asked his wife to get back in touch with the attorney because he feared the time would pass.

Attorney Boyd remembered Sanchez being surprised at the length of the sentence Jaramillo had received. Boyd confirmed that Jaramillo had telephoned after the sentencing and had spoken to his legal assistant Maria Alvarado. Through Alvarado, the two men discussed the sentence. Boyd recalled that Jaramillo was "not happy" about the sentence. Boyd told Jaramillo that he had 14 days in which to appeal and that he should consider the advice of counsel when deciding to appeal. The attorney believed that Jaramillo had not expressly requested an appeal during that conversation and that Sanchez had not done so either that day.

The attorney did remember, however, that Sanchez was confused and concerned about the sentence. He also said Maria Alvarado never had said to him that Sanchez had requested an appeal be filed. He admitted that Sanchez had come to the office days after the sentencing and that he had tried to put a call through to

Jaramillo. The attempt did not succeed. The attorney ever spoke to Jaramillo after the Maria Alvarado conversation on the day of sentencing.

The attorney admitted that in the affidavit he had submitted in response to Jaramillo's 2255 filing he had said only that he had discussed appeal before Jaramillo was sentenced. He claimed at the evidentiary hearing that he had simply left matters out of his affidavit. Still, he admitted that he understood that Jaramillo was not satisfied with the sentence he had received and that the district court's letter about appeal rights was never forwarded to Jaramillo.

The magistrate recommended that Jaramillo's § 2255 motion be denied. Appendix. C. Jaramillo objected to the recommendation, but his objections were overruled, and the district court adopted the magistrate judge's report and denied the motion to vacate. Appendix B. The court also denied Jaramillo a certificate of appealability. Jaramillo sought a certificate of appealability from the Fifth Circuit arguing that the circumstances of the case would have alerted a reasonable attorney that he wished to appeal. The Fifth Circuit summarily denied that request. Appendix A.

## REASONS FOR GRANTING THE WRIT

To render effective assistance, trial counsel must adequately consult with a defendant about an appeal whenever there is reason to think that the defendant has demonstrated interest in an appeal. Petitioner Jaramillo, through his own statements and his wife's, demonstrated his interest in appealing the sentence he received. Despite hearing repeated statements of dissatisfaction about the sentence Jaramillo received and despite receiving repeated questions as to what could be done about the sentence, counsel did not speak to Jaramillo again after the day of sentencing, though he had said that he would. The lack of consultation led to the appeal time passing without an appeal being filed.

The two-prong test for whether counsel rendered ineffective assistance is well established. The first question is whether counsel's performance fell below a reasonable, objective standard of professional competence. If it did, a court then examines the record to determine whether counsel's failure prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984). In the context of consulting about an appeal, reasonable professional competence requires counsel "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 nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Failure to consult adequately in either of these circumstances can constitute ineffective assistance. *See id.* at 478, 480.

In the context of protecting the right to appeal, “consult” means “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.” *Roe*, 528 U.S. at 478; *see also United States v. Pham*, 722 F.3d 320, 323 (5th Cir. 2013). The existence of a duty to consult attaches when “the defendant said something to his counsel indicating that he had an interest in appealing.” *United States v. Cooper*, 617 F.3d 307, 313 (4th Cir. 2010); *see also Palacios v. United States*, 453 F. App’x 887, 889 (11th Cir. 2011) (duty to consult was triggered when defendant “asked ‘what’s next? What can we do now?’ Something along those lines”).

In this case, Jaramillo reasonably and repeatedly demonstrated to his attorney that he was interested in appealing. Though knowing of this interest, the attorney did not get back to Jaramillo, never directly asked whether Jaramillo wished a notice of appeal filed, and let the period for filing notice of appeal pass without conferring with Jaramillo about whether to file an appeal. Reasonable counsel would have understood that the words and actions of Jaramillo and his wife indicated an interest in appealing. Indeed, the district court correctly recognized that the expressions of concern about the sentence made by Jaramillo and his wife triggered the duty to consult about a possible appeal. Appendix B. It incorrectly concluded that counsel had engaged in an adequate consultation by his brief conversation with Jaramillo during the call Jaramillo made immediately after the sentencing. The court of appeals agreed. Appendix A.

The district court apparently concluded that trial counsel's brief telephone discussion with Jaramillo shortly after the sentencing hearing ended was sufficient consultation about an appeal. At most, that discussion covered the attorney covered only the timeframe for filing a notice of appeal and the fact that Jaramillo should consider the attorney's advice in deciding whether to appeal. But the attorney did not give advice and he did not ask whether Jaramillo wished to appeal. Under *Roe*, that discussion was insufficient.

*Roe* requires a reasonable effort to discover whether the client wishes to appeal. 528 U.S. at 478. And it requires that an attorney meaningfully consult with his client about appeal, 528 U.S. at 480-81, not that he simply tell a defendant about the deadline for filing a notice of appeal. Jaramillo's attorney did not testify that he advised Jaramillo how a notice of appeal was filed, or by whom. He did not testify that he asked Jaramillo whether he wished to appeal. The call in this case did not end with the attorney making an effort to ascertain whether Jaramillo wished to appeal. That none of these things occurred meant that counsel's duty under *Roe* remained open.

The facts bear out that counsel did not do what he needed to follow up with Jaramillo. Both Jaramillo and Sanchez testified that they believed further discussion would be held. That further consultation was clearly contemplated by the parties is shown through testimony about what happened after the day of sentencing. Catalina Sanchez, who the attorney knew was authorized to speak for her husband, testified that, after calling the attorney's office a couple of times following sentencing, she went

to office for a follow-up Zoom conference call at which the attorney was to discuss with Jaramillo the possible ways to challenge the sentence Jaramillo had received. Sanchez testified that she waited at the attorney's office for hours and no call took place. Counsel conceded that no call took place that day; he thought, however, that he only kept Sanchez waiting for an hour before nothing happened. These circumstances—the scheduling of a followup call and repeated requests for assistance from the client's wife—would have alerted a reasonable attorney to the fact that his client was still wishing to consult about an appeal and that counsel had not discharged his duty. *Roe*, 528 U.S. at 478; *Cf. United States v. Casarez*, 304 Fed. Appx. 325 (5th Cir. 2008) (lack of subsequent indicators of wish to appeal excused lack of later consultation).

The testimony of Sanchez, Jaramillo, and trial counsel shows that in the circumstances of this case adequate consultation was not made. That Sanchez came to trial counsel's office expecting a Zoom meeting about her husband's request to challenge his sentence with trial counsel and her husband and that no meeting occurred shows that adequate consultation about an appeal was not made. It may not have been the attorney's fault the call did not go through. It was the attorney's duty under *Roe* to continue to try again to fulfill his duties to consult and to discover his client's wishes. *Roe*, 528 U.S. at 478.

The district court also concluded that, even if the attorney had not consulted adequately with Jaramillo, that failure had not prejudiced Jaramillo. Appendix B. This conclusion comported neither with the testimony nor with *Roe*. Jaramillo

testified that, if counsel had adequately consulted with him, he would have requested that a notice of appeal be filed. The already discussed circumstances—Jaramillo’s call after sentencing, Sanchez’s calls, Sanchez going to the office, the testimony of Jaramillo and his wife about wanting to do something about the sentence—also show that, had counsel adequately consulted with Jaramillo, Jaramillo would have appealed. When counsel fails in his duty of adequately consulting with his client about his right to appeal and the defendant has shown a reasonable probability that that failure caused the right to appeal to be lost, counsel’s deficient performance is prejudicial. *Roe*, 528 U.S. at 484; *cf. Pham*, 722 F.3d at 327 (no self-evident reason why defendant who had indicated interest in challenging sentence would not file notice of appeal if properly consulted)

Trial counsel’s deficient performance “deprive[d] [Jaramillo] of an appeal that he otherwise would have taken[.]” *Roe*, 528 U.S. at 484. The ruling of the Fifth Circuit that counsel was not prejudicially ineffective conflicts with *Strickland* and *Roe*. Because of that conflict, certiorari should be granted. Alternatively, the Court should grant certiorari, vacate the judgment below and remand the case for further consideration in the light of *Roe*



### Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari.

/s/ PHILIP J. LYNCH  
*Counsel of Record for Petitioner*

DATED: April 24, 2023.