IN THE SUPREME COURT OF THE UNITED STATES

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LEON PAUL KAVIS, Jr.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

==========

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

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QUESTIONS PRESENTED FOR REVIEW

1 Could reasonable jurists debate that trial counsel's duty to consult with a defendant on whether to file an appeal pursuant *Rose v. Flores-Ortega*, 528 U.S. 470 (2000), is not satisfied by simply sending a letter by mail to an incarcerated defendant explaining the appeal process and advising against an appeal, without a direct consultation on the subject, and if such question is debatable, did the Ninth Circuit error in denying petitioner's motion for a certificate of appealability on the district court's denial of his motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255?

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

Petitioner, LEON PAUL KAVIS, Jr. (hereinafter Kavis) respectfully prays that a writ of certiorari issue to review the Ninth Circuit's order denying a certificate of appealability for an appeal pursuant to 28 U.S.C. § 2253 from an order entered by the United States District Court for the District of Montana denying his motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255.

OPINION BELOW

On September 12, 2024, the Ninth Circuit entered an order denying a motion for certificate of appealability for an appeal from the district court's order denying Kavis's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Ninth Circuit's order is in

the Appendix (App.) at page 1. The district court's order denying Kavis's 2255 motion on the merits after an evidentiary hearing is in the Appendix at 2-15.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and 28 U.S.C. 2253.

STATUTORY PROVISIONS

Section 924 of United States Code, Title 18, states in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years....

18 U.S.C. § 924(c)(1)(A)(i).

Section 841 of United States Code, Title 21, states in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance....

21 U.S.C. § 841(a)(1).

Section 846 of Title 21, United States Code, states:

> Any person who attempts or conspires to commit any offense defined in

this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846.

Section 2253 of United States Code, Title 28 states the following:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

Section 2255 of United States Code, Title 28 states the following in pertinent part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the

> Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) 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. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> (c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> (d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C. § 2255.

STATEMENT OF THE CASE

a. **Introduction.**

On December 12, 2020, the government obtained a three-count indictment charging Kavis with conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 in Count I, and possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) in Count II. Count III charged Kavis with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). App. 17-18. The proceedings took

place in the Missoula division of the District of Montana. App. 16.

On March 3, 2021, Kavis pleaded guilty to Counts I and III pursuant to a plea agreement. App. 21-22, 44. On July 20, 2021, the district court sentenced Kavis to a term of 15 years in prison on Count I and to a consecutive 5 years in prison on Count III. (Doc. 52, DC No. 9:20-cr-53-DLC). A direct appeal was not filed on behalf of Kavis by trial counsel.

On December 20, 2021, Kavis filed a letter seeking information from the district court about the identity of his counsel on appeal. App. 45. The district court entered an order in response . App. 46-48. The district court set a deadline for Kavis to inform the court if he wished "to proceed with a motion under 28 U.S.C. § 2255...." *Id.* at 47.

On March 21, 2022, Kavis filed a pro se motion pursuant to § 2255. (Doc. 62, DC No. 9:20-cr-53-DLC). On September 27, 2022, the district court entered an order requiring appointment of counsel to file an amended § 2255 motion. (Doc. 64, DC No. 9:20-cr-53-DLC). On March 30, 2023, appointed counsel filed an amended § 2255 motion. App. 49-61. Of the five claims alleged, only Claim 2 and Claim 5 are the subject of this petition. App. 52-55, 59-60, 92.

The district court held an evidentiary hearing on January 30, 2024. App. 89. The district denied the § 2255 motion and denied issuance of a certificate of appealability. App. 1-15.

Kavis appealed to the Ninth Circuit Court of Appeals and filed a motion requesting a certificate of appealability on two grounds as follows:

> 1. Whether trial counsel's letter sent to the defendant after the sentencing hearing about the defendant's option to file an appeal satisfies the duty to consult with the defendant about an appeal as set out in *Roe v. Flores-Ortega*. 528 U.S. 470, 480 (2000)?

> 2. Whether a guilty plea for possessing a firearm in furtherance of a drug trafficking crime pursuant to 18 U.S.C. § 924(c)(1), based on a conspiracy to distribute methamphetamine, was involuntarily, where the elements of the offense in the plea agreement, the elements in the offer of proof, and the elements stated during the Rule 11 guilty plea colloquy failed to set out the correct the elements of the crime underlying the § 924(c)(1) offense.

App. 173-74,

The Ninth Circuit entered an order denying Kavis's motion for issuance of a certificate of appealability. The order simply stated:

> The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

App. 1.

b. **The Facts.**

Before the district court, Kavis claimed that he conveyed to trial counsel his desire to file an appeal after his sentencing hearing and an appeal was never filed. App. 59-60, 63. Kavis clarified his claim, stating in a reply declaration the he asked trial counsel, "we're going to appeal, right?" just after the district court imposed sentence. App. 65. At the evidentiary hearing, Kavis clarified his claim further, testifying that after the district court imposed a 15 year sentence on the conspiracy in Count I, he asked trial counsel, "we can appeal that, right?" App. 138.

In a declaration in response to Kavis's § 2255 motion, trial counsel stated that "Kavis was not happy with the sentence imposed ... [and] [w]e hoped that the Court would sentence him to the mandatory minimum of 15years with a longer supervised release." App. 85. Counsel did not recall speaking to Kavis "after the U.S. Marshals took him away following the imposition of

sentence...." *Id.*

Trial counsel did "not recall Kavis asking [him] to file an appeal at any time." App. 86. Trial counsel said that had Kavis asked him "to file an appeal, [trial counsel] would have filed the notice of appeal and then asked to withdraw as his counsel for reasons stated in [trial counsel's] letter of July 21, 2021." *Id.*

On July 21, 2021, following the July 20 sentencing hearing, trial counsel drafted a detailed "closing letter" and sent that letter to Kavis at the Missoula County Jail, in Missoula, Montana. App. 83,103. The letter primarily focused on whether or not Kavis should file an appeal. App. 83-85, 104.

The "closing letter" advised Kavis against filing an appeal. *Id.* The letter instructed that Kavis that he had waived appeal in his plea agreement. App. 83-84.[1] The letter advised Kavis that he did "not have a right to appeal or collaterally attack the sentence ... [and] the Government ... retain[ed] the right to appeal the sentence because it was less than the advisory guideline range." App. 84.

The letter informed that Kavis the he "may still choose to file an appeal"" but trial counsel would "not be able to represent [Kavis] on such appeal...." *Id.* The letter reasoned that "there is no legal basis to [appeal] ...,[,] there is no chance of receiving a better result after an appeal than the current sentence[,] ... [and] an appeal could result in a more severe sentence." *Id.*

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[1] This petition does not involve *Garza v. Idaho*, 586 U.S. 232, 237 (2019) where the Court held that prejudice is presumed if defense counsel fails to file an appeal after a direct request by the defendant to do so, even if a plea agreement contains a waiver of appeal. Although Kavis's plea agreement contains a waiver of appeal, Kavis maintains that trial counsel had a duty to consult with him on his desire to appeal due to the circumstances outlined in this petition. *See, infra.*

The letter stated,

> Nonetheless, if you choose to appeal, you must do so within fourteen days of July 20, 2021, the date the written and oral judgment was entered. This means if you choose to file an appeal, you must file a Notice of Appeal with the U.S. District Court for the District of Montana by Tuesday August 3, 2021 at the latest. Please contact me immediately if you have any questions about this, or anything else.

Id..

Kavis testified that he did not remember if he received the closing letter at the Missoula County Jail. App. 141. He was transported from that jail to Cascade County Jail on July 26 2021. App. 107.

Trial counsel did not visit nor attempt to visit Kavis while he was housed at the Missoula County Jail. He did not speak to Kavis about whether he wanted to file an appeal after the sentencing hearing. App. 105-06.

At the evidentiary hearing, Kavis argued that under *Flores-Ortega*, trial counsel had a constitutionally imposed duty to consult with Kavis about an appeal. App. 162-63 (citing *Flores-Ortega*, at 480). Kavis argued, "a letter does not fulfill that duty and require[s] ... a direct .... consultation with the person." App.164. Kavis also argued the claim that his plea was involuntary for failure to advise him of the correct elements of possessing a firearm in furtherance of a drug trafficking crime under § 924(c) was a nonfrivolous ground for direct appeal that supported his *Flores-Ortega* claim. App. 163.

The district court's order denying the § 2255 motion noted that Kavis gave three differing accounts of when he mentioned an appeal to trial counsel. App. 11-12. Kavis first said he told counsel he wanted to appeal directly after the sentencing hearing in his first declaration, (App.

63); in Kavis's second declaration, Kavis stated he asked trial counsel, "we're going to appeal, right?" just after the sentencing hearing, (App. 65). During the evidentiary hearing, Kavis testified that he asked trial counsel, "we can appeal that, right?" just after the district court pronounced the 15 year sentence on Count I, the conspiracy. App. 138.

The district court concluded "that Kavis did not clearly express his desire to appeal, nor did [trial counsel] have reason to believe that Kavis would want to appeal." App. 14. The district court concluded that trial counsel "did not violate his unconditional duty to file a notice of appeal when instructed to do so by the client." The district court denied the Flores-Ortega claim and denied issuance of a certificate of appealability. App. 14-15.

c. **The issue of whether Kavis's guilty plea to possession of a firearm in furtherance of a drug trafficking crime was involuntary due to advising him of the incorrect elements of the offense is a nonfrivolous issue.**

Count III of the Indictment alleged that Kaivis "did knowingly possess a firearm in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, namely conspiracy to possess with intent to distribute controlled substances and possession with intent to distribute controlled substances, as alleged in Counts I and II above, in violation of 19 U.S.C. § 924(c)(1)(A)(i)." App. 18. Kavis agreed to plead guilty to Counts I and III of the indictment. App. 23.

The elements set out in the plea agreement for Count III were as follows:

> First, the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine;
>
> Second, the defendant knowingly possessed firearms;
>
> Third, the defendant possessed the firearm in furtherance of possession with intent to distribute.

Id. The elements set out in Offer of Proof in Support of Guilty Plea were identical to those set out in the plea agreement. App. 33.

At the change of plea hearing, the prosecutor recited the same elements for Count III as set out in both the plea agreement and the offer of proof. App. 38-39. After the prosecutor read the elements, the magistrate asked trial counsel if "that's the correct statement of the legal elements," to which trial counsel replied, "Yes, Your Honor." App.39.

The magistrate did not ask Kavis if he understood the elements and evidence contained in the offer of proof. *Id.* The magistrate asked Kavis if he reviewed the offer of proof including the elements and evidence with his attorney. Kavis replied, he had. *Id.* The magistrate did not ask Kavis if he understood the elements in relation to the facts. *Id.*

The magistrate asked Kavis to say in his "own words why he is pleading guilty to Counts 1 and 3." App. 43. In relation to the firearm charge Kavis said, "I went and bought a gun - - multiples because it's a hobby - - and I had one with me at all times while I was distributing meth." *Id.* Kavis did not admit he had a "gun" at all times during a conspiracy to possess with intent to distribute methamphetamine, nor did he admit possessing a gun at all times when he was in possession of methamphetamine with intent to distribute it. *Id.*

Instead, Kavis said, "[a]nd I had other people that were involved with me in the distribution of meth." *Id.* This fulfills the elements for conspiracy, but not for the elements of the § 924(c)(1) offense as charged in Count III that incorrectly rested on both a conspiracy element and a substantive offense element.

Kavis claimed that trial counsel was ineffective for allowing him to plead guilty to Count III on insufficient elements of the offense for Count III. App. 52. The plea agreement, the offer of

proof and the plea colloquy establish that the elements set out to support Kavis's guilty plea included the crime of conspiracy to distribute methamphetamine in this first element, and included the crime of possession with intent to distribute methamphetamine in the third element of the § 924(c)(1)(A)(i) offense charged in Count III. The elements did not reference a single offense, but referenced two separate offenses. Furthermore, the record established that Kavis admitted facts to possessing a firearm when he distributed methamphetamine, not to a conspiracy nor during any possession with intent to distribute methamphetamine. Therefore, Kavis claimed that he did not enter a voluntary plea to all necessary elements of an offense. App. 54.

At the January 30, 2024, evidentiary hearing, Kavis maintained that the involuntariness of his guilty plea, without having to claim ineffective assistance of counsel, is a "nonfrivolous ground for appeal...." as contemplated under *Flores-Ortega*. App. 162-63. "[A] direct appeal [would be] based on the voluntariness of his guilty plea, whether [Kavis] entered a knowing, intelligent and voluntary plea in relation to the elements of the crime[]" as charged in Count III. App. 163.

REASONS FOR GRANTING THE WRIT

1. The question of whether reasonable jurists could debate that trial counsel's constitutional duty to consult with a defendant on whether to file an appeal pursuant *Rose v. Flores-Ortega*, 528 U.S. 470 (2000) is not satisfied by counsel simply sending a letter by mail to an incarcerated defendant explaining the appeal process and advising against an appeal, without a face-to-face consultation , and if such question is debatable, whether the Ninth Circuit error in denying petitioners certificate of appealability on the district court's denial of his motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 is an important constitutional question, wherein

the Ninth Circuit's order denying a certificate of appealability (COA) conflicts with prior decisions of the Court and resolution of the question is necessary for a uniform application of law under the Antiterrorism Effective Death Penalty Act of 1996 (AEDPA) .

An appeal from a denial of a motion for relief file under § 2255 may not proceed unless the district court or court of appeals "issues a certificate of appealability." 28 U.S.C. § 2253(c)(1); *Gonzalez v. Thaler*, 565 U.S. 134, 143, n. 5 (2012). To obtain a COA, an applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v,Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). "[A] 'substantial showing of the denial of a constitutional right ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)).

This does not "require [applicants] to prove, before the issuance of a COA, that some jurists would grant the [§ 2255 motion]." Instead, the sole question is whether the "claim is reasonably debatable." *Buck v. Davis*, 580 U.S. 100, 117 (2017).

A "COA determination under § 2253(c)" rests on "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. Appellate courts must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* This "inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." "In fact, the statute forbids it." *Id.* "When a court of appeals sidesteps this process by

first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. *Id.* at 336-37.

To obtain COA, the petitioner is not required to show that the appeal will succeed on the merits. *Id.* at 337. A court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.*; *see also, Welch v. United States*, 578 U.S. 120, 127 (2016).

The Court's decisions on the subject "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-Eli,* U.S. at 337. Therefore, "a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* "After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Id.* (quoting *Barefoot*, 463 U.S. at 893 n. 4) (internal quotations omitted). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*, 537 U.S. at 338 (quoting *Barefoot*, 463 U.S. at 893) (internal quotations omitted).

"[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* Thus, "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). Here, the district court

denied Kavis's claims on the *Flores-Ortega* claim on the merits. App.2-15.

a. **Whether trial counsel's letter to Kavis violates the constitutional duty to consult with a defendant on whether an appeal should be filed under *Flores-Ortega* is a debatable issue worthy of issuance of a certificate of appealability.**

In *Flores-Orega*, the Court "held that criminal defendants have a Sixth Amendment right to 'reasonably effective' legal assistance[.]" *Flores-Ortega*, 528 U.S. at 476 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness, ... ; and (2) that counsel's deficient performance prejudiced the defendant....'" *Flores-Ortega*, 528 at 476-77 (quoting *Srickland*, 466 U.S. at 688, 694). The *Strickland* "test applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal." *Flores-Ortega*, 528 U.S. at 477.

The district court denied Kavis's claim that trial counsel failed to consult with him about filing an appeal under *Flores-Ortega* because "Kavis did not clearly express his desire to appeal, nor did [trial counsel] have reason to believe Kavis would want to appeal." App. 14. *Flores-Ortega* does not require a defendant to clearly express a desire to appeal.

Flores-Ortega places the onus on trial counsel to consult with a client about the client's desire to appeal under two circumstances. First, "where there is reason to think (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous ground for appeal). *Flores-Ortega*, 528 U.S. at 480. Second, where the "particular defendant reasonably demonstrated to counsel he was interested in appealing." *Id.*

Here, trial counsel did not recall Kavis discussing an appeal after the sentencing hearing. App. 86. Kavis testified that, after the 15 year prison sentence was handed down, he asked trial

counsel if "we can appeal that [sentence], right?" App. 138. The next day, trial counsel drafted his "closing letter" that detailed his advice against an appeal. App. 83-85. Trial counsel instructed Kavis the if he wished to file an appeal, he had to file his appeal with the district court clerk. App. 84. The letter demonstrates that Kavis did or said something that lead trial counsel to believe that Kavis may want to appeal his sentence. Yet, counsel did not personally speak to, nor consult with, Kavis either by face-to-face communication or by phone about whether he wanted to file an appeal.

Kavis has made the "substantial showing of the denial of a constitutional right[,]'" a violation of the Sixth Amendment right to effective assistant of counsel under *Strickland*. The issue presented to the Ninth Circuit would be debatable among jurists. The issue presents this Court with the query of whether a closing letter is sufficient to fulfill the *Flores-Ortega* constitutional duty to consult with a defendant about an appeal, where there is no direct attorney/client communication for the attorney to determine the client's desire to file an appeal.

The record also demonstrates that Kavis believed trial counsel filed an appeal. In December 2021, Kavis inquired of the district court about counsel on appeal. App. 164. Moreover, there is a nonfrivolous ground for a direct appeal.

b. **The issue of whether Kavis's guilty plea to possession of a firearm in furtherance of a drug trafficking crime was involuntary due to advising him of the incorrect elements of the offense is a non-frivolous issue.**

The Court previously explained:

> A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Brady v. United States*, 397 U.S. 742, 748 ... (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most

> universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 ... (1941). Amicus contends that petitioner's plea was intelligently made because, prior to pleading guilty, he was provided with a copy of his indictment, which charged him with "using" a firearm. Such circumstances, standing alone, give rise to a presumption that the defendant was informed of the nature of the charge against him. *Henderson v. Morgan*, 426 U.S. 637, 647 ... (1976); *id.*, at 650 (White, J., concurring). Petitioner nonetheless maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a § 924(c)(1) offense. In other words, *petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime* with which he was charged. Were this contention proved, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid.

Bousley v. United States, 523 U.S. 614, 618-19 (1998) (emphasis added). "It is well established that a plea of guilty cannot be voluntary in the sense that it constitutes an intelligent admission that the accused committed the offense unless the accused has received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (quoting *O'Grady*, 312 U.S. at 334, as quoted in *Henderson*, 426 U.S. at 645).

Here, the plea agreement informed Kavis that the three elements of the crime of possession of a firearm in furtherance of a drug trafficking crime pursuant to § 924(c)(1) were: (1) "the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine;" (2) "the defendant knowingly possessed firearms;" and (3) "the defendant possessed the firearm in furtherance of possession with intent to distribute." App. 23. The offer of proof in support to the guilty plea contained the identical elements set out in the plea agreement. App. 33. At the change of plea hearing, the prosecutor recited the identical elements

as set out in both the plea agreement and in the offer of proof. App. 38-39.

During the change of plea hearing, the magistrate asked trial counsel if the offer of proof for Counts 1 and 3 include the "correct statement of the legal elements." App.39. "Counsel responded "yes" as to both counts. *Id.*

The magistrate then explained to Kavis - "there's been an offer of proof filed in this case, and an offer of proof is simply a document that the United States files. It contains the legal elements of the offenses, and this it also contains the evidence the United States believes it could prove if it had to go to trial in this matter." App. 39. The magistrate then asked, "[h]ave you had a chance to review this document with you attorney?" Kavis responded, "[y]es, Your Honor." *Id.*

In explaining the firearm offense, Kavis said, "I went and bought a gun -- multiples because it's a hobby -- and I had one with me at all times while I was distributing meth." App. 43. Kavis's explanation was not tailored to possession of a firearm in furtherance of a conspiracy under 21 U.S.C. § 846 as set out in the first element in the plea agreement, the offer of proof, and at the plea hearing. *Id.* His explanation was not tailored to the crime of possession with intent to distribute methamphetamine under 21 U.S.C. § 841(a)(1). Instead, his statement seemed tailored to possession of a firearm during distribution of methamphetamine, a separate crime under § 841(a)(1).

The Court has held that the government is not required to prove that a conspirator committed an overt act in furtherance of a conspiracy under 21 U.S.C. § 846. *United States v. Shabani*, 513 U.S. 10, 11 (1994). Moreover, the substantive crime underlying a conspiracy allegation under § 846 is a separate and distinct offense from the conspiracy to commit the underlying crime. *United States v. Felix*, 503 U.S. 378, 391 (1992) ("a conspiracy to commit a

crime is a separate offense from the crime itself."); *see also*, *Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes.").

In this case, the elements recited in the court documents and at the change of plea hearing on Kavis's guilty plea to the firearm charge contain a conspiracy element under § 846 and a completed substantive offense element under § 841. The elements do not present a comprehensive and accurate statement of the elements and it cannot be determined from the record whether the plea agreement for the firearm offense centered on the conspiracy charged in Count I or centered on the substantive crime of possession with intent to distribute in Count II.

The record does not support a conclusion that Kavis understood "the true nature of the charge against him." *O'Grady*, 312 U.S. at 334. The record establishes that none of the participants in the change of plea hearing, including Kavis, understood the § 924(c) charge he was supposed to enter a guilty plea - that is, the magistrate, trial counsel nor the prosecutor noticed the deficiency. *Bousley*, 523 U.S. at 618-19 (if "the record reveals that neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime ... petitioner's plea would be ... constitutionally invalid." Thus, his guilty plea to Count III cannot be said to be voluntarily, or intelligently, entered. *Id.* This is critical.

The Court in *Flores-Ortega* announced that "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." 528 U.S. at 485. Therefore, the Court held,

> 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 nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Id. at 480.

Here, trial counsel knew that "Kavis was not happy with the sentence imposed." App. 86. Although trial counsel did not recall speaking to Kavis after the Marshals took him from the courtroom at sentencing, the next day, trial counsel wrote a detailed letter advising Kavis against an appeal and informed him how Kavis could file an appeal in the district court if he elected to appeal. App.83-83. These circumstances establish that trial counsel, at a minimum, should have know Kavis was interested in pursuing an appeal, and should have directly consulted with him in order the fulfill the constitutional duty to consult with a defendant about appeal. *Id.*

In addition, Kavis demonstrated a non-frivolous ground to appeal based on the due process right to intelligently plead guilty to a crime, knowing and understanding the true nature of the crime. *O'Grady*, 312 U.S. at 334. In his request for a certificate of appealability, Kavis made "a 'substantial showing of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2), including "'a showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. at 893 n. 4.

c. **This case presents an ideal vehicle for the Court to resolve the question of whether the Ninth Circuit should have issued a certificate of appealability where reasonable jurists could debate an important constitutional issue relating to *Flores-Ortega*.**

Flores-Ortega establishes that defense counsel has a constitutional duty to consult with defendants to determine whether a defendant has a desire to file an appeal. This constitutional duty arises under two circumstances: "(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." 518 U.S. at 480. This case involves both components.

Kavis was not happy about his sentence, and his trial counsel knew that Kavis was unhappy. App. 85. A day later, counsel drafted a lengthy letter focusing primarily on explaining to Kavis his right to appeal, how Kavis could file and appeal, and advising Kavis against filing an appeal. App.83-85. In addition, Kavis has demonstrated a nonfrivolous ground to appeal based on whether due process was violated when he pleaded guilty without having been informed of the true nature of the crime he was pleading too.

The question is whether trial counsel fulfilled his constitutional duty to consult with Kavis about his appeal by sending the "closing letter" to Kavis at the Missoula County Jail. Counsel made no effort to meet and consult with Kavis directly to determine his desire to file an appeal. The appeal raised substantial issues of the violation of the constitutional rights to include the right to effective assistance of counsel under the Sixth Amendment, and the due process right to know the true nature of the crime which is the subject of a defendant's guilty plea.

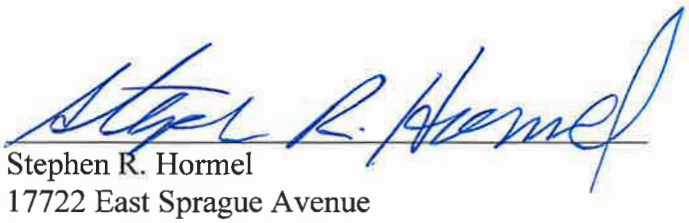
This case presents the Court with an ideal vehicle to resolve the question presented. Kavis brought before the Ninth Circuit an important question that reasonable jurists could debate relating to a substantial violation of his constitutional right to effective assistance of counsel under *Flores-Ortega* such that a certificate of appealability should have issued pursuant to 28 U.S.C. § 2253(c)(2).

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 10th day of December, 2024.

Respectfully submitted,



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