

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-10063
Non-Argument Calendar

ENODE JUNIOR DUVERCY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:24-cv-62189-RNS

Before JORDAN, KIDD, and ANDERSON, Circuit Judges.

PER CURIAM:

Enode Duvercy, a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion for failure to state a cognizable claim, in which he argued that his appellate counsel

failed to advise him on his right to initiate further review of his conviction through a writ of certiorari with the U.S. Supreme Court. We granted a certificate of appealability (“COA”) on the issue of whether the district court erred in finding that failing to advise a defendant of his right to petition the Supreme Court for a writ of certiorari was not a cognizable claim for ineffective assistance of counsel.

When reviewing a denial of a § 2255 motion, we review “questions of law de novo and findings of fact for clear error.” *Buckner v. United States*, 160 F.4th 1209, 1211 (11th Cir. 2025). “Ineffective assistance of counsel is a mixed question of law and fact that we review de novo.” *Id.* Appellate review is limited to the issues specified in the COA. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011).

The Sixth Amendment gives criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel’s performance was deficient, and (2) counsel’s deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687.

This test applies to claims that counsel was constitutionally ineffective for failing to file a notice of direct appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Counsel has a constitutionally imposed duty to consult with a defendant regarding an appeal “when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably

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demonstrated to counsel that he was interested in appealing.” *Id.* at 480.

To show prejudice in this context, a defendant “must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Id.* at 484. “[W]hen counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Id.*

Defendants do not have a constitutional right to counsel when seeking discretionary appellate review, such as when petitioning the U.S. Supreme Court for a writ of certiorari. *Wainwright v. Torna*, 455 U.S. 586, 587 (1982). Therefore, there is no cognizable ineffective assistance of counsel claim when counsel does not file a petition for writ of certiorari. *Id.*

In *Carruth v. Comm’r, Ala. Dept. of Corr.*, a state prisoner filed a 28 U.S.C. § 2254 petition, and the district court granted COA on whether appellate counsel was ineffective for failing to notify the petitioner that the state court had denied his application for rehearing and for failing to advise him of the availability of further appellate proceedings, as well as whether this claim was procedurally barred. 93 F.4th 1338, 1347 (11th Cir. 2024). There, we noted that there is no federal constitutional right to counsel for discretionary appeals, and that many of our sister circuits have held that “the constitutional right to appellate counsel ends upon the first appeal

as of right and, therefore, does not extend to discretionary appeals.” *Id.* at 1355, n.7.

We ultimately held that the petitioner’s claims of ineffective assistance of counsel for failure to file a certiorari petition, and failure to advise, were unexhausted and procedurally barred. *Id.* at 1356. In a footnote, we held, in an alternative holding: “Even if these claims were not procedurally barred or unexhausted, Carruth would still lose on the substantive ineffectiveness claims under de novo review for (1) failing to file a certiorari petition and (2) failing to inform Carruth about the rehearing denial and counsel him about future appeals because there is no right to counsel for discretionary appeals.” *Id.* at n.10. “It is well established in this Circuit that alternative holdings ‘are as binding as solitary holdings.’” *United States v. Files*, 63 F.4th 920, 926 (11th Cir. 2023) (quoting *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008)).

The district court did not err in dismissing Duvercy’s § 2255 motion because, under our precedent, the constitutional right to appellate counsel does not extend to discretionary appeals, and therefore, appellate counsel’s failure to inform Duvercy regarding his right to seek discretionary review from the U.S. Supreme Court is not a cognizable claim for ineffective assistance of counsel.

Moreover, Duvercy’s claim of ineffective assistance of counsel fails on the merits in any event. Duvercy’s appellate counsel did timely inform Duvercy that his direct appeal had been denied. And Duvercy’s September 4, 2024, letter to counsel reveals that he already knew of the right to file a petition for writ of certiorari to the

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Supreme Court, asking counsel for “your thoughts as I would like to pursue that avenue if you believe we have an opportunity of success.” Dist. Ct. Doc. 1-2 at 11. Counsel’s reply by letter dated September 11, 2024, answered that “the Supreme Court is not likely to address” a petition for writ of certiorari in Duvercy’s case. The deadline for filing a writ of certiorari did not expire until October 14, 2024. Accordingly, Duvercy’s claim—i.e. that counsel’s failure to advise him of his right to file a petition for writ of certiorari deprived him of the opportunity to do so—fails on the facts in addition to being a noncognizable ineffective assistance of counsel claim.

AFFIRMED.