No. 15-1417

In the Supreme Court of the United States

ISHMAEL AVIVE SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in claiming ineffective assistance of counsel in a motion under 28 U.S.C. 2255, petitioner demonstrated prejudice from his counsel's failure to argue on direct appeal that the district court had violated Fed. R. Crim. P. 11(b)(1)(I) by misstating the statutory sentencing range for one of his offenses during his plea colloquy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is reprinted at 632 Fed. Appx. 769. The order of the district court (Pet. App. 18a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2015. On March 14, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 20, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of conspiracy to interfere

with interstate commerce by robbery, in violation of 18 U.S.C. 1951; and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. C.A. App. 46. He was sentenced to a total of 135 months of imprisonment, to be followed by five years of supervised release. *Id.* at 47-48. The court of appeals affirmed. 498 Fed. Appx. at 222. Petitioner then filed a motion under 28 U.S.C. 2255 to set aside his Section 924(c) conviction. The district court dismissed the motion, Pet. App. 18a-24a, and the court of appeals affirmed, *id.* at 1a-13a.

1. Petitioner and his cousin robbed a drug store. Presentence Investigation Report ¶ 8. They concealed the lower portions of their faces with bandanas and approached the cashier, who was stocking merchandise. *Ibid.* Petitioner's cousin then pointed an assault rifle directly at the cashier and demanded that she open the register. *Ibid.* When the cashier did not respond quickly enough, petitioner's cousin struck her in the back of her head with the rifle. *Ibid.* After the cashier was forced to open the register, the two men left with $463.15. *Id.* ¶¶ 8, 12.

The robbery was captured on video surveillance. Pet. App. 4a n.2. Several days after the robbery, petitioner turned himself in and confessed to the crime. *Id.* at 4a. He admitted, among other things, that he and his cousin had mutually agreed (along with an unnamed juvenile) to purchase a rifle and commit an armed robbery. *Id.* at 3a n.1. Authorities also recovered a cellphone containing pictures of petitioner and his cousin posing with the rifle and the money after the robbery. *Id.* at 4a.

2. A grand jury indicted petitioner on one count of conspiracy to interfere with interstate commerce by

robbery, in violation of 18 U.S.C. 1951; one count of interfering with interstate commerce by robbery, and aiding and abetting such an offense, in violation of 18 U.S.C. 1951 and 2; and one count of using and carrying a firearm during and in relation to a crime of violence, and aiding and abetting such an offense, in violation of 18 U.S.C. 924(c) and 2. C.A. App. 19-21.

Section 924(c) prohibits "us[ing] or carr[ying]" a firearm "during and in relation to any crime of violence," or "possess[ing] a firearm" "in furtherance of any such crime." 18 U.S.C. 924(c)(1)(A). It prescribes a prison term of five years to life, consecutive to the sentence for the underlying substantive crime, for that independent firearm offense. 18 U.S.C. 924(c)(1)(A)(i). The mandatory-minimum term of imprisonment increases to seven years "if the firearm is brandished." 18 U.S.C. 924(c)(1)(A)(ii). At the time of petitioner's prosecution, the determination of whether a firearm had been brandished was made by the district court at sentencing. See *Harris* v. *United States*, 536 U.S. 545, 568 (2002), overruled by *Alleyne* v. *United States*, 133 S. Ct. 2151, 2155 (2013). The inclusion of the accomplice-liability statute, 18 U.S.C. 2, in the firearm count rendered petitioner "punishable as a principal" if he "aid[ed], abet[ted], counsel[ed], command[ed], induce[d] or procure[d]" a violation of Section 924(c).

3. Petitioner decided to plead guilty to the conspiracy and firearm counts, in exchange for dismissal of the robbery count. Pet. App. 4a. The written plea agreement explained that, for the firearm count, petitioner "faced a maximum term of imprisonment of 'life, consecutive to any other term of imprisonment,' and a minimum term of imprisonment of 'five years,

consecutive to any other term of imprisonment.'" *Ibid.* (citation and brackets omitted). In signing the agreement, petitioner acknowledged that "the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, [petitioner] may not withdraw the plea of guilty." *Id.* at 4a-5a (citation omitted).

At petitioner's change of plea hearing, the district court incorrectly stated that the firearm count "carrie[d] *up to* five years in prison . . . consecutive to any other prison time." Pet. App. 5a (quoting C.A. App. 27-28). The district court did not inform petitioner that he might receive an enhanced mandatory minimum under Section 924(c)(1)(A)(ii), if the court found that the firearm was brandished. C.A. App. 27-28. Neither the prosecutor nor defense counsel objected. *Ibid.* After the district court's misstatement, petitioner confirmed that he had read the plea agreement and that his counsel had explained it to him. *Id.* at 27-29. Petitioner also represented, *inter alia*, that he understood "what [he] agreed to," and the district court, in confirming what petitioner had "agreed to," specifically pointed out that the "punishment" for the firearm count was "set out" in the plea agreement. *Id.* at 28-30.

4. A presentence investigation report (PSR) prepared by the Probation Office concluded that petitioner faced a mandatory consecutive sentence of seven years of imprisonment on the firearm count because the assault rifle "was brandished during the robbery." Pet. App. 5a; see PSR 1 (sentencing range on firearm count "[n]ot less than 7 years or more than life im-

prisonment"); PSR ¶ 10 (describing brandishing); PSR ¶ 50 (minimum term of imprisonment required by statute is "84 months"). Petitioner neither objected to that conclusion nor moved to withdraw his plea. Pet. App. 6a.

At sentencing, petitioner confirmed both his receipt of the PSR and his opportunity to review it before the hearing. Pet. App. 6a, 32a. When offered the opportunity to comment on the PSR or his sentence, petitioner deferred to his counsel. *Ibid.* Although his counsel objected to a Sentencing Guidelines enhancement relating to the conspiracy offense, she made no mention of the seven-year mandatory minimum on the firearm offense, which the district court then imposed. *Id.* at 6a; C.A. App. 35-39, 44.

5. The court of appeals affirmed in part and dismissed in part in an unpublished per curiam opinion. 498 Fed. Appx. at 222. It noted that petitioner's counsel had filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), that identified no meritorious issues for appeal but nonetheless asked the court to review the disputed Sentencing Guidelines enhancement on the conspiracy count. 498 Fed. Appx. at 223. The court found that issue to be barred by the waiver, in petitioner's plea agreement, of his right to appeal his sentence. *Ibid.* Following the procedure prescribed by *Anders*, the court then proceeded to conduct its own review of petitioner's conviction, and in particular his plea colloquy. *Id.* at 223-224. It concluded that the district court had "substantially complied" with the requirements that Federal Rule of Criminal Procedure 11 imposes on plea colloquies, and it found "no error warranting correction on plain error review." 498 Fed. Appx. at 224.

6. After the judgment became final, petitioner moved pursuant to 28 U.S.C. 2255 to vacate his Section 924(c) conviction. Pet. App. 7a; see C.A. App. 60-71. Petitioner claimed that his attorney had provided ineffective assistance in failing to challenge in the district court or on appeal the district court's description at the plea colloquy of the sentencing range for the firearm offense. C.A. App. 66. Petitioner pointed to Federal Rule of Criminal Procedure 11, which requires a district court, as part of a plea colloquy, to "inform the defendant of, and determine that the defendant understands," *inter alia*, "any mandatory minimum penalty." Fed. R. Crim. P. 11(b)(1)(I); see C.A. App. 67. Petitioner alleged in his Section 2255 motion and in an accompanying affidavit that, had he known he faced a potential seven-year sentence on the firearm count, he would have insisted on going to trial on that count, because his cousin had been the one who carried the gun during the robbery. C.A. App. 67, 74; see Pet. App. 35a-37a (reproducing affidavit).

The district court dismissed petitioner's motion. Pet. App. 18a-24a. The government conceded, and the court agreed, that the court's description of the sentencing range for the firearm count at the plea hearing had been inaccurate. *Id.* at 20a-21a. The court explained, however, that under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), petitioner bore the burden of showing both deficient performance by counsel and resulting prejudice to the defense in order to prevail on his ineffective-assistance claim. Pet. App. 20a. And it determined that the error here had been "harmless," because "the plea agreement correctly listed the statutory minimum and maximum punishments for [the firearm

count], and * * * petitioner, under oath, affirmed that he understood the contents of the plea agreement." *Id.* at 21a (footnote omitted). The court reasoned that "it is not objectively unreasonable," and thus not deficient performance under the *Strickland* standard, "to refuse to object to harmless error or pursue such a claim on appeal." *Ibid.*

7. The court of appeals granted a certificate of appealability and affirmed in an unpublished per curiam opinion. Pet. App. 1a-13a. The court acknowledged that petitioner's counsel should have noticed and tried to correct the district court's errors, including the district court's failure to mention the seven-year mandatory minimum in a case involving brandishing. *Id.* at 10a-11a & n.5. It determined, however, that even if counsel's performance had been constitutionally deficient—an issue it did not directly address—petitioner had not shown prejudice. *Id.* at 10a-11a.

The court of appeals explained that, in the context of a guilty plea, a showing of prejudice requires a "reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Pet. App. 9a (quoting *Premo* v. *Moore*, 562 U.S. 115, 129 (2011)). "Importantly," the court continued, "[petitioner] must show both subjectively that he would have gone to trial and that it would have been *objectively reasonable* to do so." *Id.* at 9a-10a (citing *United States* v. *Fugit*, 703 F.3d 248, 260 (4th Cir. 2012), cert. denied, 134 S. Ct. 999 (2014)). Specifically, he "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 10a (quoting *Christian* v. *Ballard*, 792 F.3d 427,

452 (4th Cir.), cert. denied, 136 S. Ct. 342 (2015) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010))).

The court of appeals determined that, on the facts of this case, "it would not have been rational for [petitioner] to go to trial." Pet. App. 11a. The court emphasized the "overwhelming evidence of [petitioner's] guilt," including petitioner's confession, the videotape of the robbery, and photos of petitioner posing with the assault rifle and the money after the robbery. *Id.* at 12a. The court also observed that petitioner's proposed theory of the case—that "his cousin * * * had actual possession of the gun"—did not provide a "rational defense" to the charge of aiding and abetting a Section 924(c) offense. *Ibid.* (citation omitted).

The court of appeals additionally found "no record evidence from [petitioner's] plea or sentencing hearings suggesting that [he] would have moved to withdraw his plea if the correct information was provided." Pet. App. 12a. The court observed that the plea agreement had provided notice of a five-year minimum sentence and that petitioner had taken no action after learning that the Probation Office had recommended a seven-year mandatory-minimum sentence. *Ibid.* Finally, the court reasoned that petitioner could not show prejudice from his decision to plead guilty when the "only consequence" of that decision was that he received a shorter sentence on the conspiracy count. *Id.* at 12a-13a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 14-27) that he was prejudiced by his counsel's failure to challenge the district court's Rule 11 error on direct appeal. The court of appeals correctly rejected that fact-bound contention, and its decision does not conflict with any decision of

this Court or any other court of appeals. Further review is not warranted.

1. a. Federal Rule of Criminal Procedure 11(b)(1)(I) instructs a district court, before accepting a guilty plea, to "inform the defendant of, and determine that the defendant understands," *inter alia*, "any mandatory minimum penalty." The court of appeals below has interpreted that instruction to "require district courts to inform defendants of all potentially applicable statutory minimum and maximum sentences." *United States* v. *Hairston*, 522 F.3d 336, 340 (4th Cir. 2008) (emphasis omitted). The district court in this case failed to comply with that requirement when it erroneously stated that petitioner faced a consecutive term of imprisonment of "up to five years" for the firearm offense, C.A. App. 27, which actually provides for a minimum consecutive term of five years, 18 U.S.C. 924(c)(1)(A)(i), or seven years if the firearm was brandished, 18 U.S.C. 924(c)(1)(A)(ii).

No objection or challenge to the Rule 11 error was raised until petitioner collaterally attacked his conviction on the firearm count by filing a motion under 28 U.S.C. 2255. This Court has held that a conviction should not be disturbed on collateral review "when all that is shown is a failure to comply with the formal requirements" of Rule 11. *United States* v. *Timmreck*, 441 U.S. 780, 785 (1979) (citation omitted). Petitioner, however, does not bring a Rule 11 claim as such, but instead argues that his firearm conviction should be overturned on the ground that his counsel provided ineffective assistance by failing to raise a Rule 11 claim on direct appeal. See Pet. 14 ("This petition focuses on counsel's failure to raise the Rule 11 errors on direct appeal."); Pet. 19 (same). To prevail on that

argument, petitioner must show (1) "objectively unreasonable" performance by his attorney and (2) a "reasonable probability that * * * he would have prevailed on his appeal" had the Rule 11 issue been raised. *Smith* v. *Robbins*, 528 U.S. 259, 285 (2000); see *Strickland* v. *Washington*, 466 U.S. 668, 687-694 (1984).

b. Petitioner cannot make the required showing. Even assuming (contrary to the district court's determination, see Pet. App. 20a-21a) that petitioner's counsel was constitutionally deficient in not raising the forfeited Rule 11 issue on appeal, petitioner cannot establish a reasonable probability that his appeal would have been successful had counsel done so.

In *United States* v. *Vonn*, 535 U.S. 55 (2002), this Court "considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 80 (2004); see *Vonn*, 535 U.S. at 62-74. The Court expanded on *Vonn* in *United States* v. *Dominguez Benitez*, explaining that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. To do so, the defendant "must * * * satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Ibid.* (internal quotation marks and citation omitted). The Court has recognized that "relief on direct appeal, given the plain-

error standard that will apply in many cases, will be difficult to get, as it should be." *Id.* at 83 n.9.

Petitioner's argument that he would have obtained such relief relies almost entirely on the affidavit that he submitted as an attachment to his Section 2255 motion. See Pet. 23-25. But that affidavit could not have been considered on direct appeal. Not only did the affidavit not yet exist at that time, but even if it had, it could not properly have formed part of the appellate record. Recognizing that an "object" of Rule 11 is to "eliminate wasteful *post hoc* probes into a defendant's psyche," this Court in *Vonn* found "no question" that the Rules Advisory Committee "intended the effect of error [under Rule 11] to be assessed on an existing record," unadorned by additional factfinding. 535 U.S. at 74. Although the Committee "did not mean to limit that record strictly to the plea proceedings," the prejudice inquiry under Rule 11 "must be resolved solely on the basis of the [plea hearing] transcript and the other portions (*e. g.*, sentencing hearing) of the limited record made in such cases." *Ibid.* (quoting Fed. R. Crim. P. 11 advisory committee's note (1983) (Amendment)) (internal quotation marks and citation omitted).

Here, petitioner identifies little or no evidence in the actual record of the district-court proceedings to support his claim that a proper Rule 11 colloquy would have caused him to abandon his plan to plead guilty. Indeed, as the decision below explains, the then-existing record is to the contrary: the evidence of petitioner's guilt was "overwhelming"; his putative defense (that his cousin carried the gun) was not "rational" in light of accomplice-liability principles; petitioner said nothing about changing his plea even after

the PSR informed him that he faced a potential seven-year mandatory-minimum consecutive sentence on the firearm count; and he benefited from the guilty plea by receiving a lower Sentencing Guidelines range for the conspiracy offense. Pet. App. 12a-13a (citation omitted).

2. Petitioner identifies no sound basis for further review of the court of appeals' decision.

a. Petitioner errs in suggesting that the decision below conflicts with *Dominguez Benitez*. First, nothing in *Dominguez Benitez* supports petitioner's contention (Pet. 23-24) that the court of appeals was required to consider his affidavit. As discussed above, even if the affidavit had existed at the time of his direct appeal, it would have been outside the "limited record" of district-court proceedings that *Vonn* recognized to be relevant under Rule 11. 535 U.S. at 74 (citation omitted). In a portion of the *Dominguez Benitez* decision quoted in the petition (Pet. 23), the Court described *Vonn* as having held that "in assessing the effect of Rule 11 error, a reviewing court must look to the entire record, not to the plea proceedings alone." *Dominguez-Benitez*, 542 U.S. at 80 (citing *Vonn*, 535 U.S. at 74-75). But the Court's use of the term "entire record," as distinguished from "the plea proceedings alone," to describe the scope of review under *Vonn* cannot be understood to expand that review to include materials that *Vonn* recognized to be out of bounds.

Second, petitioner is wrong to suggest (Pet. 21-23) that *Dominguez Benitez* foreclosed the court of appeals from requiring petitioner, as a prerequisite to relief, to establish that it would have been rational to walk away from his plea agreement. Although

Dominguez Benitez did not itself impose or apply such a requirement, the procedural posture of that case was critically different from the procedural posture of this one. Unlike in this case, the Rule 11 claim at issue in *Dominguez Benitez* arose on direct review and was not filtered through the lens of an ineffective-assistance argument. See 542 U.S. at 79. The Court in *Dominguez Benitez* thus had no occasion to apply the requirement "that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010), to an ineffective-assistance claim involving the failure to challenge a Rule 11 violation. Cf. *Timmreck*, 441 U.S. at 784 (recognizing, in Rule 11 case, that "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas") (footnote omitted).

In any event, this case would be an unsuitable vehicle for reviewing the court of appeals' analysis of prejudice. In the proceedings below, petitioner explicitly accepted that he was required to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances" in order to prevail. Pet. C.A. Br. 30 (quoting *United States* v. *Jackson*, 554 Fed. Appx. 156, 160 (4th Cir. 2014) (per curiam) (quoting *Padilla*, 559 U.S. at 372)); see Pet. C.A. Reply Br. 19 (same). Furthermore, that requirement was not outcome-determinative, as the court of appeals also found "no record evidence from [petitioner's] plea or sentencing hearings suggesting that [he] would have moved to withdraw his plea if the correct information was provided." Pet. App. 12a. The absence of evidence that petitioner would have insisted on going to trial, "no matter that the choice

may have been foolish," *Dominguez Benitez*, 542 U.S. at 85, independently undermines petitioner's prejudice argument. And that argument is further undermined by other considerations—such as "the overall strength of the Government's case and any possible defenses that appear from the record," *ibid.*—that *Dominguez Benitez* identifies as relevant to the analysis. See Pet. App. 11a-12a.

b. Petitioner's assertion (Pet. 27-28) of a conflict between the decision below and *United States* v. *Ortiz-García*, 665 F.3d 279 (1st Cir. 2011), is similarly misplaced. In that case, the First Circuit granted relief on direct appeal under the plain-error standard, where the district court had failed to inform the defendant that his Section 924(c) offense had a statutory maximum of life imprisonment and had imposed a sentence far in excess what the plea agreement contemplated. *Id.* at 282-283. *Ortiz-García*, like *Dominguez Benitez* but unlike this case, did not involve an ineffective-assistance claim. See pp. 12-13, *supra*. Beyond that, *Ortiz-García* is factually distinguishable. As petitioner points out (Pet. 27-28), in assessing Rule 11 prejudice, *Ortiz-García* declined to consider the government's argument that a co-defendant's guilty verdict illustrated the weakness of the defendant's proposed trial strategy. See 665 F.3d at 286. But petitioner's defense in this case was not only factually weak, but also legally invalid. Furthermore, the court in *Ortiz-García* recognized that "[i]f the record clearly established that [the defendant] had reviewed the PSR with his attorney prior to the sentencing hearing, that might indeed negate [his] claim that the Rule 11 error affected his substantial rights, given [his] failure to object to the PSR." *Id.* at 287. The record in peti-

tioner's case establishes that petitioner had the opportunity to review the PSR with his attorney, see Pet. App. 6a, 32a, and the First Circuit accordingly would have denied relief, just as the court below did.

c. Petitioner's other allegations of circuit conflicts (Pet. 28-30) likewise fail to provide any basis for further review. First, petitioner contends (Pet. 28) that one circuit will find a Rule 11 violation involving sentencing ranges to be prejudicial only if notice of the correct sentencing range in the PSR led the defendant to try to withdraw his plea. But any such rule would not benefit petitioner, who failed to show prejudice even under the more defendant-favorable rule he recognizes the court below to apply. See Pet. 28-29. Second, petitioner contends (Pet. 29) that some circuits differ in how they weigh a defendant's failure to object to his PSR in determining whether a Rule 11 error was prejudicial. Again, however, that claim has no bearing on the result here, as petitioner describes the court below as taking the approach most favorable to defendants. See *ibid.*

Finally, petitioner suggests (Pet. 30) that the Eleventh and D.C. Circuits "consider a specific set of factors" in analyzing prejudice from Rule 11 errors, while other circuits "apply ad hoc factors." But neither decision on which he relies purports to set forth an exclusive or exhaustive set of considerations. Rather, in each case, the court drew guidance from the considerations that it had deemed relevant in an analogous earlier decision involving a similar Rule 11 error. See *In re Sealed Case*, 488 F.3d 1011, 1016 (D.C. Cir. 2007) (looking to "strikingly similar" earlier case); see also *United States* v. *Davila*, 749 F.3d 982, 994 (11th Cir. 2014) (per curiam) (drawing "guid[ance]" from previ-

ous case denying relief "under circumstances that arguably presented a closer question on prejudice" from violation of same requirement of Rule 11) (internal quotation marks and citation omitted); *id.* at 998 (evaluating additional arguments beyond factors identified in previous case). In any event, petitioner fails to show, or even to suggest, that the choice between "specific" and "ad hoc" factors made a difference in his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2016