No. 18-9011

IN THE

Supreme Court of the United States

ANTHWAUN JORDAN,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court held that counsel performs deficiently when a criminal defendant asks to file a notice of appeal but counsel fails to do so. This case presents an important question that has split the lower courts ever since: Does the Sixth Amendment demand relief when (1) the defendant testifies under oath that he instructed his lawyer to file an appeal; (2) no notice of appeal was timely filed; and (3) the lawyer cannot now remember whether the defendant asked to file an appeal?

This question arises frequently in the lower courts. Yet it continues to evade this Court's review because pro se inmates are almost always the ones raising it. As a result, the lower courts remain hopelessly divided on what to do. Some courts say that, under these circumstances, the defendant's testimony must be treated as unrebutted and they grant appropriate relief—usually an out-of-time appeal. Others say, like the court below did, that a lawyer's failing memory is enough to deprive a defendant of an appeal he swears he would have taken but for counsel's error. This Court's intervention is necessary to resolve the split.

It is also necessary because the decision of the court below is contrary to *Flores-Ortega*, which this Court recently reaffirmed in *Garza v. Idaho*, 139 S. Ct. 738 (2019). Petitioner presented sworn, unrebutted testimony that he directed trial counsel to file a notice of appeal, and there is no dispute that counsel failed to do so. Under *Flores-Ortega* and *Garza*, counsel's performance was constitutionally deficient.

The State's chief argument in opposition to certiorari is that the court below did nothing more than resolve facts "in dispute." BIO 2. But the court's stated reason for denying relief is a fact no one disputes: "that trial counsel did not remember whether [petitioner] asked him to file an appeal." *Id.* at 8-9. Regardless, even assuming the facts were as the State says they are, and petitioner did not "clearly convey[] his wishes" to appeal, the court below still failed to determine, as *Flores-Ortega* requires, whether trial counsel had satisfied his constitutional duty to consult with petitioner about filing an appeal. 528 U.S. at 477. That failure, alone, warrants at least a remand from this Court.

I. The Decision Below Deepens a Conflict Among State Courts of Last Resort.

The State asserts that the petition "presents no question or conflict of law." BIO 10. Not so. The Texas Court of Criminal Appeals' decision squarely conflicts with decisions from the high courts of at least one other state and exacerbates the split among them.

In *People v. Ross*, 891 N.E.2d 865 (Ill. 2008), for example, the Illinois Supreme Court addressed a factual scenario nearly identical to the one presented here. There, as here, the defendant "testified that he told defense counsel" after being convicted at trial "that he wished to appeal." *Id.* at 870. There, as here, the defendant's "attorney failed to file a notice of appeal." *Id.* at 869. And there, as here, the attorney "could not recall" whether the defendant had asked to file an appeal. *Id.* at 870.

Yet on those same facts, the Illinois Supreme Court reached the opposite conclusion: "The record thus reveals that the petitioner communicated his desire for a direct appeal to defense counsel." *Id.* Because "filing of a notice of appeal is a ministerial task," the court held that "defense counsel's performance in failing to file that notice was substandard." *Id.* (citing *Flores-Ortega*, 528 U.S. at 477); *see also People v. Jose-Nicolas*, 2019 IL App (3d) 160414-U, ¶ 25 (May 29, 2019) (finding counsel constitutionally ineffective because petitioner's "testimony that he wanted an appeal stands unrebutted" where "[c]ounsel testified that he could not remember if [petitioner] asked him to appeal").

A chorus of other courts have joined Illinois' in concluding that counsel's inability to remember is insufficient to deprive a defendant of an appeal he swears he would have pursued. *See, e.g.*, *State ex rel. Lopez-Quintero v. Dittmann*, 928 N.W.2d 480, 484, 487-89 & n.8 (Wis. 2019) (allowing ineffectiveness claim to proceed where defendant "alleges that he communicated his desire to seek postconviction relief" after sentencing, "no notice of intent was ever filed," and trial counsel could not remember what had transpired); *In re J.P.*, No. A149202, 2017 WL 6629378, at *3-4 (Cal. Ct. App. Dec. 29, 2017) (finding trial counsel constitutionally ineffective and granting out-of-time appeal where defendant claimed "he would have appealed had he been properly advised" and counsel "did not remember discussing a possible appeal"), *review denied*, (Mar. 28, 2018); *In re Pineda*, No. E056433, 2014 WL 3533005, at *2 (Cal. Ct. App. July 17, 2014) (finding trial counsel constitutionally

ineffective "based on the principle that any doubts as to the[] veracity [of petitioner's allegations] are to be resolved in petitioner's favor in order to protect the right of appeal"), *review denied*, (Oct. 22, 2014); *Gill v. United States*, No. CIV.A. 10-4622 (PGS), 2014 WL 2050116, at *4 (D.N.J. May 19, 2014) (finding trial counsel constitutionally ineffective and granting out-of-time appeal where counsel "cannot recall whether Petitioner and his family requested" him to file an appeal).

There are courts, however, that agree with the Texas Court of Criminal Appeals. New York's high court, for instance, has denied relief where counsel failed to timely perfect an appeal and "did not remember" whether he had spoken to his client about doing so. *People v. Arjune*, 30 N.Y.3d 347, 351 (2017), *cert denied*, 139 S. Ct. 67 (2018).

Other courts have followed suit. *See, e.g.*, *Adkins v. Comm'r of Corr.*, 196 A.3d 1149, 1165 (Conn. App. Ct. 2018) (denying ineffectiveness claim where defendant asserted that "his actions at the sentencing hearing reasonably demonstrated that he would be interested in pursuing an appeal," no appeal was filed, and counsel "could not recall whether he spoke with [defendant] following the sentencing hearing" (quotation marks omitted)), *review denied*, 196 A.3d 326 (Conn. 2018); *United States v. Bell*, 65 F. Supp. 3d 229, 234 (D.D.C. 2014) (denying relief even though "there is unrebutted testimony that [defendant] asked [counsel] to file a notice of appeal" and counsel "testified that he had no recollection of the conversation").

Only this Court can resolve the entrenched split that continues to divide courts across the country.

II. The Decision Below Conflicts with *Flores-Ortega*.

Contrary to the State's suggestion, *see* BIO 20-29, the Texas Court of Criminal Appeals' decision conflicts directly with this Court's precedent.

1. In *Flores-Ortega*, this Court reiterated the "long held" rule that a lawyer renders constitutionally deficient performance when he "disregards specific instructions from the defendant to file a notice of appeal." 528 U.S. at 477. "This is so," the Court explained, "because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Id.* "Filing such a notice is a purely ministerial task that imposes no great burden on counsel." *Id.* at 474.

There is no dispute that petitioner's trial counsel never filed a notice of appeal. *See* BIO 11. Nor is there any dispute that counsel claimed "he did not remember whether [petitioner] asked him to file an appeal." *Id.* at 8-9. Under *Flores-Ortega*, the court below should have held that these undisputed facts coupled with petitioner's sworn, unrebutted allegation that he "directed his attorney" to file an appeal establish deficient performance. *Id.* at 6; *see also Garza*, 139 S. Ct. at 746 ("Garza's

attorney rendered deficient performance by not filing the notice of appeal in light of Garza's clear requests.").[1]

The State, in response, tries to assure this Court that the decision below "sounds a great deal more damning than" it is. BIO 22. The State claims that "[t]he Court of Criminal Appeals based its decision on trial counsel's averment that he would have filed the notice of appeal had he been asked to do so." *Id.* at 2. But the court did no such thing. What the court said was that "trial counsel responded in a sworn affidavit, and based on that affidavit, the trial court found, among other things, that trial counsel did not remember whether [petitioner] asked him to file an appeal." *Id.* at 8-9. Counsel's failing memory was the only trial court finding the Court of Criminal Appeals deemed worthy of mention.

The "averment" the State cites was not even "among [the] other things" that the trial court found. To the contrary, the one practice of counsel's that the trial court mentioned in its findings was that he "routinely instructs his clients that he does not represent them on appeal." HCCR Supp. 12. The trial court did so only after making the express finding, relied on by the Court of Criminal Appeals, that counsel "does not remember whether [petitioner] instructed him to file an appeal." *Id.* This Court should reject the State's invitation to defer to a "factual determination" that the courts below never made. *E.g.*, BIO 10.

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[1] That the decision of the Texas Court of Criminal Appeals also conflicts with *Garza*, decided the same day as the ruling below, is even more reason to grant certiorari.

The Court should likewise reject any suggestion that petitioner's unrebutted testimony and his counsel's failing memory are in "direct conflict." BIO 11. A "direct conflict" would have been if trial counsel had said, for instance, that petitioner never asked him to file an appeal. But that was not his testimony. Rather, counsel says—and the courts below found—that he does not remember whether petitioner directed him to file an appeal. *Id.* at 8. The court below could have believed that petitioner directed trial counsel to file an appeal and that counsel has no memory of petitioner having done so. The two are entirely consistent.[2]

2. Even if the facts were as the State says they might be—they are not—the decision of the court below still conflicts with *Flores-Ortega*. Assume for the sake of argument that petitioner, as the State theorizes, "had expressed that he either did not or may not want to appeal." BIO 23. That would be the very situation *Flores-Ortega* addressed: "when the defendant has not clearly conveyed his wishes [about appealing] one way or the other." 528 U.S. at 477.

In that situation, courts must first determine "whether counsel in fact consulted with the defendant about an appeal." *Id.* at 478. To "consult," this Court emphasized, means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* "If counsel has not consulted with the defendant, the court must in turn

[2] Petitioner's sworn application is consistent with trial counsel's affidavit in another respect: both reflect counsel's erroneous belief that the onus was on petitioner to perfect his own appeal. *See* BIO 6, 8.

ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.* The court below did neither.

Any court performing the inquiry *Flores-Ortega* requires would find trial counsel's performance deficient. Counsel never advised petitioner "about the advantages and disadvantages of taking an appeal," *id.* at 478, even though the record shows he had a "constitutionally imposed duty" to do so, *id.* at 480. That duty to consult exists "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." *Id.* A "highly relevant factor in this inquiry," this Court explained, "will be whether the conviction follows a trial or a guilty plea." *Id.* Petitioner's conviction, unlike Flores-Ortega's, followed a jury trial, BIO 4, and the State does not even try to argue "that Petitioner would not have had a viable appeal," *id.* at 20.[3]

"The court below undertook neither part of the *Strickland* inquiry" *Flores-Ortega* mandates. 528 U.S. at 487. At a minimum, this Court should grant certiorari, vacate the lower court's decision, and remand in light of *Garza*'s recent affirmation of

[3] Instead, the State spends several pages speculating about why petitioner might not have wanted to appeal. *See* BIO 14-20. Suffice it to say there is no evidence in the record suggesting that petitioner or his counsel was ever aware of any supposed "drafting error in the indictment." *Id.* at 18. And the State's claim that the "inadvisability of appealing" in light of this alleged error "was likely a factor that was expressed to Petitioner at the conclusion of his trial" is pure conjecture. *Id.* at 20.

"*Flores-Ortega*'s separate discussion of how to approach situations in which a defendant's wishes are less clear." *Garza*, 139 S. Ct. at 746 n.9.

III. This Case Is an Ideal Vehicle for Resolving an Important Issue That Often Evades This Court's Review.

1. The constitutional issue this case presents will almost always reach this Court, as it did here, on petition by a pro se inmate. *See Garza*, 139 S. Ct. at 749 (recognizing that "most applicants" seeking postconviction relief "proceed *pro se*"). Yet this is the rare instance where the issue is perfectly preserved and cleanly presented.

Petitioner raised the Sixth Amendment issue in his state application for a writ of habeas corpus, seeking relief on the ground that "trial counsel was constitutionally ineffective for failing to file an appeal as instructed." HCCR 29. In the application, petitioner declared, under penalty of perjury, that he "wanted to appeal his conviction and sentence and directed his attorney to do so." *Id.* at 29, 40.

The trial court, without holding an evidentiary hearing, denied petitioner relief based on its finding that counsel "does not remember whether [petitioner] instructed him to file an appeal." HCCR Supp. 12. Contrary to the State's insinuation, *e.g.*, BIO 9-10, the trial court made no finding that petitioner was not credible.

Nor did the Texas Court of Criminal Appeals, which denied relief in a written opinion based on the trial court's finding "that trial counsel did not remember whether [petitioner] asked him to file an appeal." *Id.* at 8-9. This case arrives on direct review from that court.

2. This case also presents a constitutional question of utmost importance. As this Court recognized in *Flores-Ortega*, counsel's ineffectiveness in failing to file a notice of appeal leads "not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." 528 U.S. at 483. That weighty consideration is what animates the "presumption of prejudice recognized in *Flores-Ortega*," which "reject[s] attempts to condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof that the defendant's appeal had merit." *Garza*, 139 S. Ct. at 748-49 (quotation marks omitted).

Yet criminal defendants across the country are being deprived of their right to an appellate proceeding simply because their lawyer cannot remember being asked to fulfill the "purely ministerial task" of filing a notice of appeal. So, too, are defendants whose counsel failed to file a notice and then died in the interim.

This problem, like the problem of appeal waivers in *Garza*, disproportionately affects the indigent. Those who cannot afford lawyers are more likely to be represented by appointed counsel who may have dozens of pending cases and are therefore less likely to remember conversations with specific clients.

Furthermore, "because most postconviction petitioners will be *pro se*" and unschooled in habeas procedure, the ineffectiveness issue is often not raised until "years later," after memories of overworked defense counsel have faded or counsel has died. *Garza*, 139 S. Ct. at 749. The State harps on petitioner's waiting two years to file his pro se habeas application—another factual finding the courts below never

made. *See* BIO 25 (acknowledging that petitioner's alleged "delay in filing is not mentioned in the Court of Criminal Appeals order"). But delays are hardly unexpected in postconviction practice because pro se inmates often do not know when counsel has performed ineffectively, and it may take years for them to discover that their rights have been violated.

The facts here illustrate the challenges facing lower-income individuals seeking restoration of their appellate rights. After a jury convicted petitioner and the court sentenced him to twenty years in prison, petitioner directed trial counsel to file an appeal. Counsel never did. Nor did he advise petitioner of the advantages and disadvantages of taking an appeal. In fact, the two never spoke again despite petitioner's efforts while incarcerated to communicate with counsel about his appeal. The reason why is evident from the record: counsel believed, contrary to settled law, that *petitioner* "needed to take action on his own to perfect [the] appeal." BIO 9. Having just been convicted at trial and sentenced to nearly a generation of prison time, petitioner, according to his counsel, was supposed to fend for himself.

It is that lawyer's failing memory which, today, costs petitioner the appeal he swears he wanted to take. The Court must step in to rectify this miscarriage of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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