

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KLARK DEZIRAY HOPKINS — PETITIONER

VS.

THE STATE OF CALIFORNIA — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the presumption against waiver of fundamental constitutional rights and the Fourteenth Amendment Due Process Clause's guaranty against deprivations of liberty and property apply to the right to appeal and protect against the appeal's dismissal?
2. Does the presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *Garza v. Idaho*, 139 S.Ct 738 (2018) apply when defense counsel filed a notice of appeal where defendant's plea agreement included an appeal waiver, but deficiently obtained no certificate of probable cause, which resulted in the appeal's dismissal?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the highest state court, the California Court of Appeal, First Appellate District, Division Five decided the case was November 30, 2018. A copy of that decision appears at appendix C.

A timely review petition was thereafter denied by the California Supreme Court on February 13, 2019. A copy of the order denying review appears at Appendix D.

This petition for writ of certiorari is filed within 90 days of the California Supreme Court's February 13, 2019 order denying discretionary review.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) on the grounds that her rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Sixth Amendment to the U.S. Constitution.

The Sixth Amendment to the U.S. Constitution, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

B. The Fourteenth Amendment to the U.S. Constitution.

The Fourteenth Amendment to the U.S. Constitution, in pertinent part, guarantees: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On September 6, 2017, Napa County complaint number CR184555 charged Klark Deziray Hopkins (hereafter petitioner) with; count one, assault upon a peace officer (Pen. Code § 245, subd. (c))¹; count two, evading an officer (Veh. Code § 2800.2); count three, misdemeanor, driving when privilege suspended (Veh. Code § 12810.5). (CT 3-6.)²

On November 7, 2017, petitioner entered a no contest plea to count two conditioned on dismissal of counts one and three, three years' probation, and conditions. (CT 21-23.) The plea bargain promises made as condition of her plea appear at clerk's transcript 22, are contained within Appendix A, and included: "D will argue 17(b) at sentencing [,] refer to probation[,] D will receive probation with full search & seizure, [n]o additional jail, testing, no illegal drugs, probation term 3 years no early termination, waive appeal, [n]o guns / weapons / ammo[,] dismiss remaining charges as to Ms. Hopkins." (CT 22.)

On January 30, 2018, the sentencing court suspended imposition of sentence, denied a Penal Code section 17, subdivision (b) reduction to a misdemeanor without prejudice to renewal after 18 months of successful probation, placed petitioner on three years' probation, partially granted and denied defense objections to probation conditions, and imposed contested orders of marijuana prohibition³ and disputed \$3,243.72 restitution. (CT 40; 4; 50; 56; 9RT 566-568.)

¹ All further statutory references are to the California Codes, unless otherwise indicated.

² CT denotes clerk's transcript. RT indicates reporter's transcript.

³ Her longstanding medical condition included ongoing seizures. (CT 28.) On June 25, 2018 while her appeal was pending, the FDA approved Epidolex, the first marijuana-based drug for seizures. (FDA approves first drug composed of an active ingredient derived from medical marijuana to treat rare, severe forms of epilepsy, https://www.fda.gov/New_Events/Newsroom/Press_Announcements/_ucm611046.htm <as of 4/11/19>; Gatlin, *Can Cannabis Treat Seizures? Biotechs Say the Answer is Yes* (April 17, 2018) Investors Business Daily, <https://www.investors.com/news/technology/cannabis-biotechs-seizures> <as of 4/11/19>.)

On February 16, 2018, defense counsel filed a timely notice of appeal based on the sentence or other matters after the plea that did not affect the plea's validity, without a certificate of probable cause to appeal. (CT 64.)

Appellant contended on appeal that the invalid prohibition of the legal drug, marijuana, and restitution order constituted abuses of discretion. The plea bargain's "waive appeal" term (CT 22; App. A) did not waive her appeal on these legal issues because the bargain's express prohibition of "no illegal drugs" did not apply to marijuana, a legal, not illegal drug, and restitution was not mentioned at all within the bargain. Because both the marijuana prohibition and restitution orders were not expressly waived, occurred after the entered plea at sentencing, and did not attack the plea's validity, a certificate of probable cause to appeal⁴ was not required. *People v. Narron*, 192 Cal.App.3d 724, 730 (1987) [probation conditions not part of the plea bargain and imposed after the plea's entry, including restitution, were appealable without a certificate or probable cause]; *People v. Vargas*, 13 Cal.App.4th 1653, 1662 (1993) ["We conclude on the record before us that the general waiver of the right to appeal did not include error occurring after the waiver because it was not knowingly and intelligently made. Such a waiver of possible future error does not appear to be within defendant's contemplation and knowledge at the time the waiver was made."]; *Id.*, at p. 1663, fn. 7, original emphasis ["The People urge us to adopt a rule that a general waiver of appeal includes sentencing issues unless the defendant expressly reserves the right to appeal such issues. This appears to be the rule only in New York. (citations.) We decline to adopt such a rule finding a *general* waiver of the right to appeal is incompatible with a knowing and intelligent waiver of unknown future error."].) Additionally, the Fourteenth Amendment Due Process Clause

⁴ In California, an appeal by the defendant shall be taken upon a plea of guilty or nolo contendere except where the defendant files a statement and the trial court executed and filed a certificate of probable cause to appeal, Pen. Code § 1237.5, unless the notice of appeal states, as here, that the grounds arose after the plea's entry and do not affect the plea's validity. (Cal. Rules of Court, Rule 8.304(b)(1), 8.304(b)(4)(B).)

protected petitioner's right to appeal. Waiver and dismissal of petitioner's appeal would violate the Fourteenth Amendment and this Court's precedents. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Griffin v. Illinois*, 351 U.S. 12,18, 20 (1956); *Evitts v. Lucey*, 469 U.S. 387, 392, 393 (1985). Furthermore, since defense counsel did file a timely notice of appeal (CT 64), counsel's failure to seek and obtain a certificate of probable cause that resulted in the appeal's dismissal would prejudicially violate petitioner's Sixth Amendment right to effective assistance of counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 480, 484 (2000).

The California Court of Appeal, First Appellate District, Division Five dismissed the appeal, relied on its *People v. Mashburn*, 222 Cal.App.4th 937 (2012) and Division One's *People v. Espinoza*, 22 Cal.App.5th 794 (2018) decisions, considered petitioner's attempt to limit the waiver's scope a challenge to the validity of both the appeal waiver and the plea itself, concluded the plea bargain's term, "waive appeal" broadly "waived her entire right to appeal," without limitation, required a certificate of probable cause to appeal that was not obtained, and foreclosed defense counsel's ineffective assistance for failure to obtain a certificate of probable cause. (App. C.)

Petitioner timely petitioned the California Supreme Court for discretionary review. Petitioner expressly presented the issue and argued that the appeal's dismissal violated the Fourteenth Amendment in that reviewing courts indulge every reasonable presumption against waiver of constitutional rights. Appellant further presented and argued that the unfair dismissal breached the bargain. Also, petitioner presented and argued that an appellate court was not required to dismiss the appeal when the face of the record established defense counsel's deficient performance and presumptive prejudice. The appeal's dismissal violated petitioner's Sixth Amendment right to effective assistance and Fourteenth Amendment Due Process of Law. Finally, petitioner presented and argued that the presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470

applied when the defense attorney filed a notice of appeal, but no certificate of probable cause when the plea agreement included an appeal waiver. Petitioner further cited the oral argument transcripts in *Garza v. Idaho*, No. 17-1026 and expressly prayed that the petition should be granted and held pending *Garza*'s resolution. On February 13, 2019, the California Supreme Court summarily denied review. (App. D.)

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO DECIDE IMPORTANT CONSTITUTIONAL QUESTIONS OF VAST SCOPE WHETHER THE PRESUMPTION AGAINST WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE'S GUARANTY AGAINST DEPRIVATIONS OF LIBERTY AND PROPERTY APPLY TO THE WAIVER OF THE RIGHT TO APPEAL AND PROTECT AGAINST THE APPEAL'S DISMISSAL

Johnson v. Zerbst seminally concluded that courts indulge very reasonable presumption against waiver of fundamental constitutional rights. 304 U.S. at 464. The Fourteenth Amendment Due Process Clause protects against a person's deprivation of liberty or property without due process of law. Petitioner contends that the presumption against waiver of fundamental constitutional rights and the Fourteenth Amendment Due Process Clause's guaranty against deprivations of liberty and property applied to the right to appeal, protected against the appeal's dismissal, and warrant granting the writ to resolve these important constitutional questions.

This Court's precedents have recognized that while a state is not required to provide appellate review at all, once it does, the Due Process Clause protects petitioners and requires fair procedures in deciding appeals that comport with the demands of Due Process. *Griffin v. Illinois*, 351 U.S. at 18; *Douglas v. California*, 372 U.S. 353, 356-357 (1963); *Evitts v. Lucey*, 469 U.S. at 393, 396, 400-401, 405.

Santobello v. New York, 400 U.S. 257, 261 (1971) further enunciated that essential, highly desirable disposition of charges after discussions avoids the corrosive impact of enforced, pretrial idleness, protects the public, and enhances rehabilitative prospects, which all "presuppose fairness" securing an agreement between an accused and a prosecutor.

Most recently, *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019) recognized that the useful short-hand term, “appeal waivers” can “misleadingly suggest a monolithic end to all appellate rights.” *Ibid.* “In fact, however, no appeal waiver serves as an absolute bar to all appellate claims.” *Ibid.* A valid and enforceable waiver only precludes challenges that fall within its scope, not those outside its scope. *Ibid.* The widely varying language of appeal waivers leave many types of claims unwaived. *Ibid.* Also, even a waived appellate claim can still proceed if the prosecution forfeits or waives the waiver. *Id.*, at 744-745. Finally, some claims are unwaivable. *Id.*, at 745. “Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable — for example on the grounds that it was unknowing or involuntary.” *Ibid.*, fn. omitted.

Here, the California Court of Appeal’s opinion contravened *Garza*. The state court wrongly concluded that the term, “waive appeal” “waived her right to appeal” (App. C, p. 3) and erroneously construed the term as “a monolithic end to all appeal rights” and “an absolute bar to all appellate claims.” *Id.*, at 744. The state court opinion also refused to differentiate challenges that fell within, versus unwaived claims outside, the waiver’s scope. *Ibid.* Also, the state court overlooked that even a waived claim “can still go forward” if the prosecution forfeits or waives the waiver. *Id.*, at 744-745. Finally, the state court decision contravened reviewing courts’ agreement that defendants “[m]ost fundamentally” “retain the right to challenge whether the waiver itself is valid and enforceable — for example, on the grounds that it was unknowing . . .” *Id.*, at p. 745.

These important constitutional questions are vast in scope. Ninety-four percent of state convictions and ninety-seven percent of federal convictions are the result of guilty pleas. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” *Santobello*, 404 U.S. at 260. While petitioner acknowledges footnote 4 in *Garza* that this Court has

never recognized a constitutional right to appeal, 139 S.Ct. at 744, fn. 4, this Court’s precedents have nonetheless demanded from time immemorial that once a state provides appellant review, the Fourteenth Amendment Due Process Clause protects appellants and requires fair procedures in deciding appeals. *Griffin v. Illinois*, 351 U.S. at 18; *Douglas v. Illinois*, 372 U.S. at 356-357; *Evitts v. Lucey*, 469 U.S. at 396, 400-401, 405. The Fourteenth Amendment’s guaranty against deprivation of liberty and property fairly requires that reviewing courts indulge every reasonable presumption against the waiver of the right to appeal and the appeal’s dismissal. This “more admirable and workable rule” is compelled by the court’s precedents. *Garza*, 139 S.Ct. at 749. The writ should be granted to decide these important constitutional questions of vast scope.

II

THE WRIT SHOULD BE GRANTED BECAUSE THE PRESUMPTION OF PREJUDICE RECOGNIZED IN *FLORES-ORTEGA* AND *GARZA* APPLIED, REGARDLESS OF WHETHER PETITIONER SIGNED AN APPEAL WAIVER

A state may not extinguish the right to appeal because another right of appellant — “the right to effective assistance of counsel — has been violated.” *Evitts v. Lucey*, 469 U.S. at 400.

Here, defense counsel filed a notice of appeal. App. C, p. 1. However, defense counsel did not obtain a certificate of probable cause to appeal, despite an appeal waiver. *Id.*, at pp. 1, 3. Petitioner cited on appeal *Roe v. Flores-Ortega*, 528 U.S. 470. The opinion concluded that the failure to obtain a certificate or probable cause required the appeal’s dismissal and foreclosed petitioner’s argument that defense counsel provided ineffective assistance by failing to obtain a certificate of probable cause. *Id.*, at 1, 2, 3, 4. Petitioner presented issues on discretionary review to the California Supreme Court that the appeal’s dismissal violated her Sixth Amendment right to counsel’s effective assistance and Fourteenth Amendment Due Process and that the presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 applied when the defense attorney filed a notice of appeal, but defense counsel filed no certificate of probable cause where the defendant’s plea agreement included an appeal waiver that resulted in the appeal’s dismissal. Petitioner cited to the oral argument transcripts in *Garza v. Idaho*, No. 17-1026 and prayed that the petition be granted and held pending *Garza*’s resolution. The writ should be granted because the presumption of prejudice recognized in *Flores-Ortega* and *Garza* applied, regardless of whether petitioner signed an appeal waiver.

Petitioner’s attorney rendered deficient performance by not filing and obtaining a certificate of probable cause. *Garza, supra*, 139 S.Ct. at 746. “*Flores-Ortega*’s presumption of prejudice applies despite an appeal waiver.” *Garza*, 139 S.Ct. at 746-747. Counsel’s deficient performance

deprived petitioner of her appeal and prejudice was presumed. *Id.*, at 747. Petitioner's right to her entire appeal was denied. She made out a successful ineffective assistance of counsel claim regardless of whether petitioner had signed an appeal waiver, with no need for a further showing. *Id.*, at 747. *Garza* held that "the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver. This ruling follows squarely from *Flores-Ortega* and from the fact that even the broadest appeal waiver does not deprive a defendant of all appellate claims." *Garza*, 139 S.Ct. at 749-750. Certiorari should be granted, a per curium opinion should issue, and the judgment should be reversed, or the opinion should be vacated and the case should be remanded for reconsideration in light of *Garza*.

CONCLUSION AND PRAYER FOR ALTERNATIVE RELIEF

The writ of certiorari should be granted.

Alternatively, certiorari should be granted, a per curiam opinion should issue, and the judgment should be reversed.

Alternatively, certiorari should be granted, the opinion should be vacated, and the case should be remanded for reconsideration in light of *Garza*.

Dated: April 30, 2019

Respectfully submitted,

/s/ Carlo Andreani
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