No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ROBERT L. ROSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: September 16, 2020

QUESTION PRESENTED

In order to appeal a final order in a habeas corpus proceeding, a state prisoner must obtain a certificate of appealability. See, 28 U.S.C. § 2253(c)(1)(A). In *Harbison v. Bell*, 556 U.S. 180 (2009), this Court interpreted § 2253(c)(1)(A) narrowly to apply only to "final orders that dispose of the merits of a habeas proceeding," which it defined as a "proceeding challenging the lawfulness of the petitioner's detention." *Id*. at 183. The question in this case is two-fold. The first issue to be decided is whether a certificate of appealability is required to appeal an order denying a motion for enforcement made pursuant to Rule 70(a) of the Federal Rules of Civil Procedure. The second is, assuming that a certificate of appealability is required, whether the court of appeals correctly concluded that reasonable jurists would not debate whether the district court abused its discretion in denying the Petitioner a certificate of appealability

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Petitioner, Robert L. Rose (Rose), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is included in the appendix. (App., infra, 1a-22a). It is published at *Rose v. Guyer*, 961 F.3d 1238 (9th Cir. 2020). The district court's orders denying relief and denying a certificate of appealability are unpublished. They are, however, included in the appendix. (App., infra, 1b-3b; App., infra, 1c). They are also available on Westlaw. *See, Rose v. Kirkegard*, 2018 WL 10561909 (D.Mont. 2018); *Rose v. Kirkegard*, 2018 WL 10561910 (D.Mont. 2018).

JURISDICTION AND TIMELINESS OF THE PETITION

The opinion of the court of appeals was filed on June 18, 2020. (App., infra, 1a-22a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 70(a) provides as follows:

> PARTY'S FAILURE TO ACT; ORDERING ANOTHER TO ACT. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done – at the disobedient party's expense – by another person appointed by the court. When done, the act has the same effect as if done by the party.

Title 28 United States Code, Section 2253(c) provides, in pertinent part as follows:

> (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;
>
> . . . . .
>
> (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.

PRELIMINARY STATEMENT

Before a federal court can entertain an appeal from a "final order in a habeas proceeding," see, 28 U.S.C. § 2253(c)(1)(A), a petitioner "must first seek and obtain" a certificate of appealability (COA). *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). In *Harbison v. Bell*, 556 U.S. 180 (2009), this Court interpreted § 2253(c)(1)(A) narrowly to apply only to "final orders that dispose of the merits of a habeas proceeding," which is defined as a "proceeding challenging the lawfulness of the petitioner's detention." Federal Rule of Civil Procedure 70, by its terms,

applies only after judgment is entered and it cannot be used to grant, expand, or extinguish the rights held by the parties in the underlying litigation. It is apparent, therefore, that a Rule 70 motion does not touch on the merits of the litigation. By definition, the merits of the litigation – and by extension the rights and obligations of the parties – have already been determined before Rule 70 can even come into play. Despite this fact, the Ninth Circuit, in a case of first impression, determined that a COA is required before a prisoner can appeal from the denial of a Rule 70 motion.

This case presents an excellent vehicle for this Court to clarify its decision in *Harbison*. It also provides an opportunity for the Court to determine an issue that is bound to reoccur in other circuits, that is whether a COA is required to appeal from the denial of a Rule 70 motion to enforce judgment.

STATEMENT OF THE CASE

A. Factual Background

Rose was convicted in June of 2003 of aggravated kidnaping and two counts of assault. His convictions arose out of an allegation that he kidnaped a friend and co-worker at knife point, badly cutting him when he tried to escape. After he was arrested, Rose found a can of pepper spray in the back of a patrol car. When he arrived at the jail, he sprayed a law enforcement officer with the pepper spray. *State v. Rose*, 202 P.3d 749, 753 (Mont. 2009)(*Rose I*).

B. Proceedings in State Court

Following his arrest, Rose was charged with aggravated kidnaping, assault with a weapon, and assault on a peace officer. More than a year later, with trial less than two weeks away, the county prosecutor faxed a written plea offer to Rose's defense counsel. The letter stated:

> In an effort to settle this case, I am willing to offer a plea agreement along the following lines:

> I will dismiss the aggravated kidnapping charge and the felony assault on a judicial officer if your client pleads "open" to assault with a weapon and a misdemeanor assault which would run consecutively to the assault with a weapon.
>
> Additionally, I would agree to cap the Persistent Felony Offender at ten years with five years suspended.[1] This would run consecutive to the assault with a weapon. I would file an amended information with the above charges.
>
> Each party is free to argue for what it deems is an appropriate sentence as to length and [Department of Corrections] versus [Montana State Prison].
>
> Under this proposed plea, I have no objection to a "no contest" plea.
>
> . . . . .
>
> All other terms and conditions, including the length of parole or probation, would be subject to argument by both sides with the final decision being made by the court.

Rose v. Guyer, 961 F.3d 1238, 1241 (9th Cir. 2020)(*Rose III*).

Under the prosecutor's proposal, Rose faced, in the best case scenario, a sentence of 1.25 years before parole eligibility. With credit for time served, he would have already served this sentence. In the worst case scenario, he would be parole eligible in 6.25 years less any time served.[2] If Rose rejected the plea agreement and was convicted of the original charges, he could be sentenced to life or 130 years.

Without advising Rose of the offer, defense counsel made a counteroffer and, according to the State, moved for sanctions. *State v. Rose*, 304 P.3d 387, 390 (Mont. 2013)(*Rose II*). The

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[1] Under Montana's persistent felony offender law, Rose was subject to an enhancement of five to one hundred years imprisonment. *See*, Mont. Code Ann. § 46-18-502(1).

[2] The prosecutor's estimate was based solely on the sentence that could have been imposed on the assault with a weapon charge, which has a statutory maximum sentence of twenty years imprisonment. Rose would have been parole eligible after serving one quarter of his sentence. *See* Mont. Code Ann. § 46-23-201(2). Therefore, had he received a total sentence of five years imprisonment, he would have been eligible for parole in 1.25 years. Had he received a sentence of 25 years (twenty years for assault and five years for being a persistent felony offender) Rose would have been parole eligible in 6.25 years.

prosecutor was angered by defense counsel's actions and was not willing to offer a lower sentence, so he withdrew his offer.

Rose's trial began in June of 2003, as scheduled. After four days of trial, the jury returned its verdict finding him guilty of all three felony charges. He was subsequently sentenced to a term of 100 years with 20 years suspended. Rose filed a direct appeal in the Montana Supreme Court, but it rejected his arguments and affirmed. *State v. Rose*, 202 P.3d 749, 768 (2009)(*Rose I*).

C. Federal Habeas Proceedings

After exhausting his state post-conviction remedies, Rose filed a 28 U.S.C. § 2254 petition in federal court raising a number of different claims. Most of his claims were dismissed but the district court granted relief on his claim that defense counsel performed ineffectively when she failed to apprise him of the prosecutor's plea offer. On this claim, the district court granted Rose a conditional writ of habeas corpus, which ordered:

> On or before June 30, 2016, the State is required to reoffer the equivalent terms of the plea agreement proposed on May 21, 2003. The state trial court can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. . . . If the State does not meet the deadline for reoffering the plea agreement, Rose shall be immediately released from custody.

Rose III, 961 F.3d at 1241.

After the district court filed its conditional writ, the prosecutor sent Rose a letter outlining his proposed plea offer in the following terms:

> [I]n compliance with the [federal court's] order, the State will agree to the following terms, equivalent to [our] May 21, 2003 offer:
>
> 1. The State will move to dismiss the charge of aggravated kidnaping and assault on a judicial/peace officer;
>
> 2. Mr. Rose will plead guilty or no contest to the charge of assault with a weapon and misdemeanor assault;

3. The State will recommend a sentence of:

a. assault with a weapon: thirty years as a persistent felony offender, with five years suspended; and

b. assault (misdemeanor): six months jail time, consecutive to the sentence on the assault with a weapon.

4. Mr. Rose will be free to recommend any lawful sentence.

. . . . .

If [Rose] does accept this offer, I will formalize it in a standard plea agreement format used in Ravalli County for execution by all of us.

Rose III, 961 F.3d at 1242.

Rose accepted the prosecution's offer and, two weeks later, he received a plea agreement that contained a number of terms that were not included in its earlier correspondence, including several parole conditions and a provision requiring that he waive his right to appeal or file for post-conviction relief. Rose nevertheless signed the plea agreement and appeared in state district court for a change of plea hearing. At the hearing, however, the state court judge refused to accept Rose's guilty plea and rejected the agreement. As a result, Rose's convictions and sentence were left undisturbed. *Rose III*, 961 F.3d at 1242.

Rose filed an appeal with the Ninth Circuit arguing that the remedy chosen by the district court was insufficient in that it was at odds with this Court's holding in *Lafler v. Cooper*, 566 U.S. 156 (2012), and long-standing Ninth Circuit case law. He maintained that, absent any obligation on the part of the state court to accept his plea to the charges in the re-offered plea agreement and to sentence him within its parameters, the adverse effect of his Sixth Amendment injury was not remedied. The Ninth Circuit disagreed with his arguments and found that the district court did not

abuse its discretion in fashioning its remedy. (*Rose v. Kirkegard*, 720 Fed. App'x. 406 (9th Cir. 2018)). In doing so, it held:

> The district court did not abuse its discretion. *See*, *Loher v. Thomas*, 825 F.3d 1103, 1111 (9th Cir. 2016)(stating applicable standard of review). It ordered the remedy articulated by the Supreme Court for circumstances where "inadequate assistance of counsel cause[s] nonacceptance of a plea offer and further proceedings le[a]d to a less favorable outcome." *Lafler v. Cooper*, 566 U.S. 156, 160 (2012). In such circumstances, the "proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id*. at 171. "Once this has occurred, the [state trial] judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id*.
>
> Here the district court determined that Rose's counsel was constitutionally ineffective in failing to inform him of a favorable plea offer. The district court required the government to "reoffer the equivalent terms of the plea agreement proposed on May 21, 2003," and directed that the "state trial court can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." This remedy was in accord with *Lafler*, 566 U.S. at 171-75, and within the district court's "broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). We do not offer an opinion whether Rose has other avenues to challenge the subsequent actions taken by the Montana courts pursuant to the district court's ordered remedy, as that issue is not before us.

(*Rose v. Kirkegard*, 720 Fed. App'x. 406 (9th Cir. 2018).[3]

D. The Rule 70 Proceedings

After his case was affirmed on appeal, Rose filed a *pro se* motion under Rule 70(a) asking the district court to enforce its order granting habeas relief on the ground that the prosecution failed to comply with its mandate that it "reoffer the equivalent terms" of its 2003 plea offer. As stated

[3] Rose filed a petition for rehearing/rehearing *en banc*, as well as a petition for certiorari. Both were denied. (Ninth Circuit Cause No. 16-35586, Docs. 44, 46, 50). Prior to filing for certiorari, Rose filed a *pro se* motion to recall mandate. That was rejected on the ground that Rose was represented by counsel. (Ninth Circuit Cause No. 16-35586, Doc. 48).

earlier, after it determined that Rose had been deprived of effective assistance of counsel, the court granted Rose a conditional release order, which read in pertinent part as follows:

> On or before June 30, 2016, the State is required to reoffer the equivalent terms of the plea agreement proposed on May 21, 2003 . . . [I]f the State does not meet the deadline for reoffering the plea agreement Rose shall be immediately released from custody.

In his motion, Rose argued that the prosecution violated this directive because it did not reoffer the equivalent terms of its May 2003 plea offer. Although he acknowledged that the prosecution offered him a plea agreement – which he ultimately accepted – Rose maintained that the new agreement was not equivalent to that which was offered in 2003. Because the prosecution's 2016 offer differed significantly from its 2003 offer, Rose argued that it failed to meet the deadline set by the district court for offering an equivalent plea agreement. In light of this failure, he asked the district court to order his immediate release. *Rose III*, 961 F.3d at 1242.

The district court denied Rose's motion. It determined that he had not demonstrated that the prosecution failed to offer an equivalent plea agreement or meet the June 30 deadline. In its view, the new offer, although more specific, did not differ substantially from that made in 2003. The court agreed that the two offers differed in that the 2016 offer specifically stated that the State would ask for the statutory maximum sentence on both the charges. It also agreed that the new offer set forth a number of parole conditions that were not contained in Corn's version. But it found these differences immaterial because the prosecution could have recommended the same sentences and conditions at time of his 2003 sentencing. It also determined that Rose's arguments were moot in light of the fact that he signed the 2016 plea agreement and because the state trial court rejected the new "agreement in total and left Rose's original conviction and sentence in place." In light of the fact that "none of the purported conditions with which Rose [took issue]

were imposed upon him," the district court found his arguments to be "immaterial." (App., infra, 1b-3b).

Rose then filed an application with the district court for a COA to appeal the denial of his Rule 70 motion. The district court denied Rose's COA application but noted that it was "not aware of any authority requiring a [COA] to issue from an order denying a motion under Rule 70." The court also ordered that Rose's application for a COA be treated as a timely notice of appeal. (App., infra, 1c).

E. Proceedings on Appeal to the Ninth Circuit

Because Rose did not obtain a COA from the district court, a motions panel of the Ninth Circuit considered whether to issue Rose a COA. Finding it "an open question as to whether a [COA] is required to appeal from the denial of a Rule 70 motion," the motions panel referred Rose's case to a merits panel "to determine whether a COA is required under 28 U.S.C. § 2253(c)(1)(A) and, if so, whether [Rose] is entitled to a COA." The parties were also directed to brief the merits of Rose's appeal. *Rose III*, 961 F.3d at 1243.

In order to answer the first question – whether a COA is required to appeal from the denial of a Rule 70 motion – the merits panel determined that it was necessary to decide whether an order denying such a motion "pertain[s] to the district court's adjudication of the habeas petition." *Rose III*, 961 F.3d at 1244-45. Relying on its prior case law, *see United States v. Winkles*, 795 F.3d 1134 (9th Cir. 2015), and *Payton v. Davis*, 906 F.3d 812 (9th Cir. 2018), the panel decided that a COA is necessary to appeal from the denial of a Rule 70 motion. In *Winkles*, the court determined that, while a "bona fide Rule 60(b) motion . . . has nothing to do with the underlying merits of a habeas proceeding," the denial of an order denying such a motion nevertheless requires a COA to

appeal.[4] *Winkles*, 795 F.3d at 1142. In *Payton*, the court relied on *Winkles* to hold that a COA is required to appeal an order denying a Rule 60(d) motion.[5] *Payton*, 906 F.3d at 820.

In both *Winkles* and *Payton*, the Ninth Circuit determined that the COA requirement was not limited "to orders touching on the merits of a habeas petition or considering alleged defects in the integrity of the proceedings." Instead, it opted for a more "inclusive rule" that requires a COA to appeal an order that merely "pertain[s] to the district court's adjudication of the habeas petition." *Rose III*, 961 F.3d at 1245-46 (citing *Payton*, 906 F.3d at 819. A Rule 70(a) motion to enforce a conditional writ, like Rule 60(b) and Rule 60(d) motions, is not "wholly distinct from the habeas petition." *Rose III*, 961 F.3d at 1246. Therefore, according to the merits panel, a COA is required to appeal the denial of a Rule 70 motion.

> Upon the filing of a Rule 70(a) motion to enforce a conditional writ, a district court must decide whether a state has complied with the remedy designed by the district court in the underlying habeas proceeding. This decision will in turn determine whether the state cured the constitutional violation adjudicated in the habeas proceedings or whether the petitioner is entitled to immediate release from his unconstitutional detention.
>
> Therefore, a habeas petitioner must seek and obtain a COA to appeal an order on a Rule 70(a) motion to enforce a conditional writ of habeas corpus. Such an order "pertain[s] to the district court's adjudication of the habeas petition."

Rose III, 961 F.3d at 1246 (citations omitted).

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[4] Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005).

[5] Federal Rule of Civil Procedure 60(d) empowers a court "to set aside a judgment for fraud on the court."

Having concluded that a COA is required to appeal the denial of a Rule 70(a) motion, the panel turned its attention to the second question – whether Rose is entitled to a COA. The panel determined that he wasn't.

Under § 2253(c)(1)(A), a prisoner is only entitled to a COA if he "has made a substantial showing of the denial of a constitutional right." The panel determined that Rose could not make this showing because he could not establish that the district court abused its discretion when it determined that the 2016 plea agreement was "equivalent" to that offered in 2003. Like the district court, the panel acknowledged that the two offers differed in that the 2016 plea agreement specifically stated that the prosecution would ask for the statutory maximum sentence on the charges to which Rose pled guilty. But this was a distinction without difference because, in the panel's mind, the prosecution could have made the same recommendation in 2004, when Rose was sentenced. It also rejected his argument that the 2016 plea agreement contained a number of provisions – certain parole restrictions, an appeal waiver, and a restitution requirement – that were not included in the 2003 proposal. But it determined that each of these requirements could have – and likely would have been – included in a formal plea agreement, had one been drafted in 2003. Based on these conclusions, the panel determined that "none of Rose's arguments demonstrat[ed] that reasonable jurists would debate whether the district court abused its discretion in finding the State complied with the conditional writ and thus in denying Rose's Rule 70(a) motion." *Rose III*, 961 F.3d at 1247-48.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Ninth Circuit's decision conflicts with this Court's decision in *Harbison v. Bell*.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), an appellate court may not review "the final order in a habeas corpus proceeding" unless a circuit judge or judge issues a

COA. *See*, 28 U.S.C. § 2253(c)(1)(A). A judge may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *See*, 28 U.S.C. § 2253(c)(2). In *Harbison v. Bell*, 556 U.S. 180 (2009), this Court interpreted § 2253(c)(1)(A) in a limited fashion to "govern final orders that dispose of the merits of a habeas corpus proceeding – a proceeding challenging the lawfulness of the petitioner's detention." *Harbison*, 556 U.S. at 183.

The petitioner in *Harbison* was sentenced to death. After his § 2254 petition was denied, his federally appointed counsel moved to expand the scope of her representation to include his state clemency proceedings. The district court denied his request and the Sixth Circuit affirmed. This Court granted certiorari to determine, *inter alia*, "whether a COA is required to appeal an order denying a request for federally appointed counsel." *Harbison*, 556 U.S. at 182.

The Court held that a COA is not required to appeal the denial of such an order. In doing so, it noted that § 2253(c)(1)(A) applies only to final orders that dispose of the merits of a habeas proceeding, which it defined as "a proceeding challenging the lawfulness of the petitioner's detention." *Harbison*, 556 U.S. at 183. Because the order in *Harbison* did "not touch on the merits of the habeas petition [or] consider any alleged defects in the integrity of the proceedings arising out of the district court's adjudication of the petition," a COA was not required. *United States v. Winkles*, 795 F.3d 1134, 1142 (9th Cir. 2015).

Since *Harbison* was decided, lower courts have extended its holding to apply to other types of orders in habeas proceedings. The Ninth Circuit, for example, has cited *Harbison* in holding that a COA is not required to appeal an order modifying a protective order. *Lambright v. Ryan*, 698 F.3d 808 (9th Cir. 2012). The Fourth Circuit has determined that a COA is not required to

appeal an order dismissing a Rule 60(b) motion as an improper successive § 2255 motion.[6] *United States v. McRae*, 793 F.3d 392 (4th Cir. 2015). And, the Fifth Circuit has held that a COA is not required to appeal an order transferring a § 2255 motion. *United States v. Fulton*, 780 F.3d 683 (5th Cir. 2015). In each of these cases, the courts determined that the order at issue was "so far removed from the merits of the underlying habeas petition" that it could not be considered to be "'a final order[] . . . disposing of the merits of a habeas corpus proceeding . . . challenging the lawfulness of the petitioner's detention.'" *McRae*, 793 F.3d at 400 (citing *Harbison v. Bell*, 556 U.S. 180, 183 (2009)).

In cases where courts have determined that a COA is required, the order at issue had a direct nexus to the merits of the habeas petition. Courts have, for example, uniformly held that a COA is required to appeal from a "legitimate" Rule 60(b) motion. *Winkles*, 795 F.3d at 1139. In the habeas context, a "legitimate" Rule 60(b) motion is one that "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). [7]

In this case, Rose filed a motion under Federal Rule of Civil Procedure 70(a) to enforce judgment. Under Rule 70(a), a party is entitled to enforcement when a judgment "requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the

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[6] Because § 2255 "was intended to mirror § 2254 in operative effect" and the language used in §§ 2253(c)(1)(A) and (c)(1)(B) is functionally identical, this Court applies *Harbison's* reasoning to both § 2254 and § 2255. *Winkles*, 795 F.3d at 1141.

[7] An "illegitimate" Rule 60(b) motion is one that advances a "claim," i.e., "an asserted federal basis for relief from a . . . court's judgment of conviction" or that attacks the federal court's adjudication on the merits. Winkles, 795 F.3d at 1141 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)). These types of motions are generally treated as successive habeas petitions. *Id*.; Gonzalez, 545 U.S. at 532.

party fails to comply within the time specified." In his motion to enforce, Rose asked the district court to enforce its prior judgment due to the State's failure to comply with the conditions of the conditional release order – that is that the State failed to comply with the court's directive that it "reoffer the equivalent terms of the plea agreement proposed" in May of 2003.

Although a few lower courts have assumed that a COA is required to appeal the denial of Rule 70 motion, *see e.g.*, *Simpson v. Jackson*, 2018 WL 1194359 (S.D. Ohio 2018), Rose has been unable to find any authority, except the case at hand, directly holding that one is required. With that being said, it is clear, in light of *Harbison*, that a Rule 70 motion to enforce judgment is not a final order within the meaning of § 2253(c)(1)(A) and therefore does not require a COA to appeal its denial. A motion to enforce has nothing to do with the underlying merits of the district court's adjudication of the habeas proceedings. Nor does it touch on any alleged defect in those proceedings. It merely seeks to enforce the district court's order. As such, it is not a final order within the meaning of § 2253(c)(1)(A) and a COA is not required to appeal from its denial.

Even if this Court determines that a certificate of appealability is required to appeal a Rule 70 motion, Rose has "made a substantial showing of the denial of a constitutional right" and is entitled to proceed with and, ultimately prevail on, this appeal.

Although the COA inquiry "is not coextensive with a merits analysis," courts are required to consider, in a limited fashion, the "factual or legal bases adduced in support" of a petitioner's claims." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). A prisoner is entitled to a COA when he "demonstrate[s] that reasonable jurists would find the district court's assessment of [his] constitutional claims debatable or wrong." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

As stated throughout this brief, the prosecution was ordered to offer a plea agreement that was equivalent to that offered in May of 2003. Instead of doing so, it offered Rose an agreement

that contained a number of terms that were both different from and more onerous than those contained in its 2003 offer.

In granting habeas relief, the district court determined that Rose had been denied effective assistance of counsel due to his lawyer's failure to apprise him of a favorable plea offer. In coming to this conclusion, it expressly found that Rose established (1) that his lawyer's performance fell below an objective standard of reasonableness and (2) that there was a reasonable probability that, but for his lawyer's unprofessional errors, the result of Rose's state court proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

In order to neutralize the taint of Rose's constitutional injury, the district court's conditional writ required the prosecution to place him back in the position he occupied before trial and before his rights were violated. In order to meet this obligation, the prosecution was required to:

> . . . reoffer the equivalent terms of the plea agreement proposed on May 21, 2003. The state trial court can then exercise discretion in deciding whether to vacate the conviction from trial or leave the conviction undisturbed. *See, Lafler v. Cooper*, 132 S.Ct. 1376, 1389 (2012)(providing instruction for exercising such discretion). If the State does not meet the deadline for reoffering the plea agreement, Rose shall be immediately released from custody. *See, Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003)("the constitutional infirmity would justify *Nunes*' release, but if the state puts him in the same position, he would have been in had he received effective counsel, that would cure the constitutional error").

The district court's judgment in this case was unambiguous. It directly ordered the prosecution to reoffer the plea that had been offered – but not disclosed – to Rose before his trial. The judgment allowed the prosecution no room to offer any term that was not equivalent to those it offered in May of 2003. If the prosecution chose to forgo this option, it was required to immediately release Rose.

The prosecution failed to meet the first option. As set forth in the chart below, the agreement offered in 2016 contained a number of provisions that either differed from or were completely missing from the 2003 offer. The different or additional provisions are set forth in bold face.

2003 Plea Offer	**2016 Plea Agreement**
State agreed to dismiss the Aggravated Kidnaping and Assault on a Peace Officer charges	State agreed to dismiss the Aggravated Kidnaping and Assault on a Peace Officer charges
Rose would agree to plead guilty to Assault with a Weapon and Misdemeanor Assault	Rose would agree to plead guilty to Assault with a Weapon and Misdemeanor Assault
State agreed to recommend that the Persistent Felony Offender enhancement would be capped at ten years with five years suspended	**With respect to the Assault with a Weapon charge, State would recommend that Rose be sentenced to the statutory maximum of 20 years, with a ten year enhancement and five years suspended**
Each party was free to make their own sentencing recommendations at time of sentencing	**With respect to the misdemeanor assault charge, the State would recommend the statutory maximum of six months to be served consecutive to the sentence imposed for Assault with a Weapon**
All other terms and conditions of Rose's sentence, including the length and terms of parole and probation could be argued by the parties at time of sentencing	Rose was free to make his own sentencing recommendation
Rose could enter a no contest plea to the charges	**Rose would be subject to the following conditions of supervision: (1) he would have to register as a violent offender; (2) he could not possess or consume alcohol, non-prescription drugs, or any other intoxicant; (3) Rose could not enter any bar, casino, or other place where alcohol is the chief item of sale; (4) Rose would be subject to testing for alcohol or drug use; and (5) Rose would be required to pay $6,306.11 in restitution**

	Rose would be required to waive his right to appeal or otherwise challenge his convictions by direct appeal, habeas corpus, or post-conviction relief
	Rose could enter a no contest plea to the charges

As the above chart demonstrates, the 2003 offer was far more favorable to Rose than that made in 2016. Unlike the 2003 offer, the 2016 agreement required Rose to pay over $6,000 in restitution and to abide by several other conditions of release, which included invasive drug and alcohol testing. Unlike the 2003 proposal, the 2016 agreement required Rose to waive his right to appeal or collaterally attack his convictions and sentence. Under the 2003 proposal, the prosecution agreed to make its sentencing recommendation at time of sentencing. The 2016 agreement, by contrast, stated that the prosecution would recommend the statutory maximum for each of the crimes to which Rose agreed to plead guilty.

In the 2003 offer, the prosecutor set out what he represented to be the worst case scenario for Rose if he accepted the plea – Rose would be parole eligible in as little as 1.25 years and, at the most, in 6.25 years. As stated earlier, this was based on his potential sentence for assault with a weapon plus an extra five years for being a persistent felony offender. It did not include an extra six months for misdemeanor assault. Yet in its 2016 offer, the prosecution would have recommended that Rose serve an additional six months in county jail for the misdemeanor assault charge after he was paroled on the assault with a weapon charge. This discrepancy cannot be described as anywhere near "equivalent" to the 2003 offer. *See*, *Glover v. United States*, 531 U.S. 198, 203 (2001)("[O]ur jurisprudence suggests that any amount of jail time has Sixth Amendment significance.").

Under the district court's habeas order, Rose was entitled to a plea agreement that was "equivalent" to that offered in May of 2003. Any ambiguity in the 2003 offer – which may have included the prosecution's "best case-worst cast" estimation of sentence – should have been resolved in his favor. *United States v. De la Fuenta*, 8 F.3d 1333, 1338 (9th Cir. 1993)(ambiguities in a plea agreement should be resolved in defendant's favor).

In denying Rose's Rule 70 motion, the district court essentially resolved any ambiguities in the May 2003 plea offer in favor of the prosecution and against Rose. It determined, for example, that the 2003 offer's silence with regard to the prosecution's sentencing recommendation was of no moment because, in its view, "it was entirely possible, under the terms of the 2003 proposal, for the prosecution to recommend the same aggregate sentence" as that recommended in 2016. In construing the 2003 offer in this manner – that is resolving every doubt to the benefit of the prosecution – the district court violated the command of *De la Fuenta* and abused its discretion.

Because the prosecution failed to offer Rose a plea agreement that was equivalent to that proposed in 2003, Rose is entitled to enforce the district court's conditional writ, which means that he should either be offered an equivalent plea agreement or be immediately released. The district court abused its discretion when it failed to grant his Rule 70(a) motion to enforce and the Ninth Circuit was incorrect when it failed to grant him a COA.

In sum, Rose is entitled not only to a COA but also to enforcement of the district court's conditional writ. The Ninth Circuit's ruling to the contrary should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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