No. _____

In the Supreme Court of the United States

Edward Rodriguez,

Petitioner,

v.

Timothy Filson, et al.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

Rene Valladares
Federal Public Defender,
District of Nevada
*Jonathan M. Kirshbaum
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Jonathan_Kirshbaum@fd.org

*Counsel for Petitioner

QUESTION PRESENTED

Whether the Ninth Circuit clearly erred in denying Rodriguez's request for a certificate of appealability on an ineffective assistance of counsel claim where counsel failed to file a notice of appeal despite Rodriguez expressing an interest in bringing an appeal?

List of Parties

The only parties to this proceeding are those listed in the caption.

List of Related Proceedings

State v. Rodriguez, CR07-0559 (2JDC Nev.) (Judgment of Conviction, entered Nov. 9, 2007)

Rodriguez v. State, No. 65067 (Nev. Sup. Ct.) (Order of Affirmance, issued April 14, 2015).

Rodriguez v. Filson, No. 3:15-cv-00339-MMD-WGC (Dist. Nev.) (order denying 28 U.S.C. § 2254 petition and denying certificate of appealability issued May 6, 2020)

Rodriguez v. Filson, No. 20-16050 (9th Cir.) (order denying request for a certificate of appealability on August 7, 2020)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward Rodriguez respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a Certificate of Appealability. *See* Appendix A.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed an unpublished order on August 7, 2020, denying Rodriguez's request for a Certificate of Appealability. *See* Appendix A.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court denied a Certificate of Appealability. *See* Appendix B at App.14. The Ninth Circuit denied Rodriguez's request for a Certificate of Appealability. *See* Appendix A at App.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. See also Sup. Ct. R. 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of counsel in a criminal prosecution.

STATEMENT OF THE CASE

Rodriguez pled guilty to murder. At the change of plea hearing, Rodriguez indicated that, although he was pleading guilty, he wanted to bring an appeal:

> Court:If the jury were to find you guilty, you could appeal.
> Do you understand that?

> Rodriguez: Yes, I do. Can I appeal now that . . . [I'm] pleading guilty, is that still appealable?[1]

This was more than enough to trigger trial counsel's duty to consult with Rodriguez about an appeal. Yet, this consultation did not occur.

Rodriguez was eventually sentenced to the maximum sentence of life without the possibility for parole. The trial attorney later acknowledged that he was surprised that the court imposed the maximum term and he knew that Rodriguez was unhappy with receiving the maximum sentence.[2] Nonetheless, he did not consult with Rodriguez about an appeal. No appeal was brought.

Rodriguez later raised an ineffective assistance of counsel claim based on counsel's failure to bring an appeal. An evidentiary hearing was held on the petition. At the hearing, Rodriguez testified that his trial attorney did not discuss an appeal with him.[3] The trial attorney did not contest Rodriguez's testimony. Rather, he testified he could not "remember any discussion on that level."[4]

Rodriguez subsequently filed a 28 U.S.C. 2254 petition raising the ineffectiveness claim. The district court denied the petition and did not grant a certificate of appealability. Appendix B at App.2-14. The Ninth Circuit also denied Rodriguez's request for a certificate of appealability without providing any reasoning, other than he had failed to meet the standard. Appendix A at App.1

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[1] ECF No. 25-2 at 71.

[2] *See, e.g.,* ECF No. 25-17 at 53, 58.

[3] ECF No. 25-17 at 33.

[4] *Id.* at 58.

REASONS FOR GRANTING THE PETITION

In *Slack v. McDaniel* this Court had occasion to construe the language of 28 U.S.C. § 2253 through a post-AEDPA lens and concluded that Congress intended to employ the same test that was used in *Barefoot v. Estelle*, 463 U.S. 880 (1983). 529 U.S. 473, 483-84 (2000). The *Slack* court concluded to obtain a certificate of appealability ("COA") under § 2253(c), a habeas prisoner must make "a substantial showing of the denial of a constitutional right," which was equivalent to "showing that reasonable jurists could debate" whether the petition "should have been resolved in a different manner" or that the issues presented were "adequate to deserve encouragement to proceed further." *Id.* (internal citation omitted).

Several years later the Court, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), provided additional guidance to the lower federal courts concerning the proper standards to be applied when reviewing a COA application. A petitioner does not need to show "the appeal will succeed." *Id.* at 338. Nor should a court decline a COA "merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* The Court emphasized, "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* At the COA stage, a court of appeals should "limit its examination to a threshold inquiry into the underlying merits of the claims" and ask only if the District Court decision was debatable. *Id.* at 327; *accord Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

This Court's precedent establishes a COA request does not require the applicant to demonstrate a winning case. In fact, the bar is set much lower than that. A petitioner need only present good reasons for allowing him to continue his challenge to an appellate court.

The Ninth Circuit's decision was clearly erroneous as Rodriguez easily met this standard. The record clearly demonstrated that Rodriguez was interested in an appeal, triggering trial counsel's duty to consult with him about an appeal. Further a rational defendant in his position would have wanted to appeal the surprise imposition of the maximum sentence. This Court should grant the petition and order the Ninth Circuit to grant the request for a certificate of appealability.

I. The Ninth Circuit should have granted a certificate of appealability on Petitioner's claim that his counsel was ineffective for failing to consult with him on his right to appeal once Rodriguez clearly indicated an interest in appealing.

A defendant claiming ineffective assistance of counsel must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant. *See Roe v. Flores-Oretega,* 528 U.S. 470, 476-77 (2000) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). In the loss of a direct appeal context, the inquiry is different. The Supreme Court applies a modified *Strickland* test for ineffective assistance of counsel applies to claims of ineffective assistance for failure to file a direct appeal. *See Flores-Ortega*, 528 U.S. at 477.

When considering a claim for ineffective assistance for failing to file a direct appeal the first step is to ask "a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal." *Id.* The Supreme Court has defined "consult" to mean "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478. If counsel did not consult with the defendant about filing a direct appeal, the question becomes whether the failure to consult constitutes constitutionally deficient performance. *See id.*

Flores-Ortega held, in evaluating whether counsel's representation fell below an objective standard of reasonableness, "that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. When making this determination, "courts must take into account all the information counsel knew or should have known." *Id*. The Court will also consider the specific nature of the state of legal proceedings, and trial counsel's conduct, during the notice of appeal time period. *See id.* at 477 (citing *Strickland*, 466 U.S. at 690).

Although the Court rejected a bright line rule requiring counsel to always consult with the defendant regarding his appellate rights, in the "vast majority of cases," the Court expects that lower courts will determine "that counsel had a duty to consult with the defendant about an appeal." *Id.* at 481

The second prong of *Strickland* requires a showing that, but for attorney error, there is a reasonable probability the result would have been different. The prejudice prong is also modified as it applies to claims of ineffective assistance for failing to file a notice of appeal. *Roe v. Flores-Ortega* requires the defendant to demonstrate "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484.

When counsel has failed to file a notice of appeal, counsel has deprived the defendant of the appellate proceeding altogether. *Id.* at 483. A presumption of prejudice applies when a defendant is deprived of an important stage of judicial proceedings. *See id.* While whether the appeal would have had merit has some bearing on a duty to consult inquiry, when "counsel's constitutionally deficient performance deprives a defendant of an appeal he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim." *Peguero v. United States*, 526 U.S. 23, 28 (1999).

Counsel's performance was clearly deficient as he did not consult with Rodriguez about an appeal even though Rodriguez expressed an interest in an appeal and a rational defendant in his position would want to bring an appeal.

Preliminarily, there wasn't a dispute here that there was no consultation. Rodriguez claimed there was not, and his attorney did not dispute that as he could not "remember any discussion on that level."

The record here demonstrates that counsel's duty to consult was triggered here. First, a rational defendant in Rodriguez's position would have wanted to appeal. While having a non-frivolous ground for appeal is one factor to consider, it is one factor in a multi-variant analysis. *See Flores-Ortega*, 528 U.S at 480. Only "by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal." *Id.*

Here, Rodriguez received the maximum sentence—life without the possibility of parole.[5] Counsel admitted he was surprised, based on his experience, that the maximum sentence had been imposed. He was also aware Rodriguez was not happy with the sentence.[6] It seems clear a rational defendant in Rodriguez's position would have wanted to appeal the sentence. *See, e.g., Pitmon v. State*, 352 P.3d 655 (Nev. 2015) (appealing a sentence as unconstitutionally vague); *Blume v. State,* 915 P.2d 282 (Nev.1996) (arguing on appeal that sentence violates Eighth Amendment's prohibition against cruel and unusual punishment); *Houk v. State,* 747 P.2d 659 (Nev. 1987) (arguing sentencing judge abused his discretion in imposing sentence).

Based on counsel's shock, and the imposition of the maximum sentence allowable, a reasonable defendant in Rodriguez's position would have wanted to appeal.

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[5] *See* ECF no.25-17 at 53.

[6] *See, e.g.,* ECF No. 25-17 at 53, 58.

Rodriguez also reasonably demonstrated a desire to appeal at the change of plea hearing. At this hearing, Rodriguez specifically inquired about his ability to appeal. His inquiry reasonably demonstrated to counsel, if not a specific desire to appeal, the desire to learn what, if anything, could be appealed if he pled guilty. Rodriguez's question can be reasonably interpreted as a request for information about an appeal. In other words, this question activated counsel's duty to consult. Indeed, there was nothing in the plea agreement advising him he could not bring an appeal should he plead guilty.[7] It was reasonable for him to believe an appeal was available.

And this duty was heightened here since the court gave Rodriguez a misleading response to his question about his ability to bring an appeal. Rodriguez's plea occurred midtrial. In response to his question about an appeal, the court told him he could not bring an appeal because the jury would no longer be deciding his case. As a result, there would be no more issues for appeal.[8] But that was not accurate, as even with a guilty plea, Rodriguez could raise challenges to his sentence. It was incumbent upon counsel to correct that misstatement and give the appropriate consultation to Rodriguez about an appeal.

Counsel clearly had a duty to consult with Rodriguez about an appeal. Counsel's performance was deficient for failing to do this.

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[7] *See* ECF No. 25-1.

[8] ECF No. 25-2 at 71.

Rodriguez can also establish prejudice. Rodriguez would have brought a direct appeal but for trial counsel's ineffective assistance. To satisfy the prejudice requirement, the defendant need not show there are non-frivolous grounds for appeal, only that there are substantial reasons to believe that he would have appealed. *See Flores-Ortega*, 528 U.S. at 476 (citing *Rodriguez v. United States*, 395 U.S. 327, 330 (1969)). It would be "unfair to require an indigent . . . defendant to demonstrate that his hypothetical appeal might have had merit . . . . Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 476.

Rodriguez was unhappy about his sentence. Counsel himself was surprised at the harsh sentence that was imposed. Rodriguez had previously indicated to the court during the plea colloquy he was interested in the appeal. These facts show that had counsel advised him about an appeal, Rodriguez would have wanted him to file a notice of appeal.

The bottom line is counsel's failure to consult with Rodriguez about his right to appeal meets the standard of ineffective assistance of counsel dictated in *Flores-Ortega*. The Ninth Circuit clearly erred in denying Rodriguez's request for a certificate of appealability.

CONCLUSION

This Court should grant the petition, vacate the order of the Ninth Circuit, and remand the case to the Court of Appeals and order that court to grant a Certificate of Appealability.

Dated December 22, 2020

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender