

20-8123
CASE NUMBER: _____

IN THE UNITED STATES SUPREME COURT

VERLAN PEREZ, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED

MAY 04 2021

OFFICE OF THE CLERK

MOVANT'S MOTION FOR A WRIT OF CERTIORARI

From the United States Court of Appeals
from the Fifth Circuit, Case Number: 20-10304

United States District Court for the Northern
District of Texas, Case Numbers: 3:19CV1688
and 3:17CR498-2

Verlan Perez, Jr., Pro Se

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QUESTION(S) PRESENTED

CAN AN APPEALS COURT DENY A CERTIFICATE OF APPEALABILITY TO A PETITIONER WHO HAS SHOWN THAT THE DISTRICT COURT IGNORED PRECEDENTIAL RULINGS FROM THIS COURT REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE COUNSEL REFUSED TO FILE NOTICE OF APPEAL AND CONSULT WITH THEIR CLIENT?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Assistant U.S. Attorney Jonathan Bradshaw, U.S. Attorney's Office
2. Assistant U.S. Attorney George Leal, U.S. Attorney's Office
3. Assistant U.S. Attorney Leigh Amy Simonton, U.S. Attorney's Office
4. Paul T. Lund, Attorney at Law, Dallas, Texas
5. Cody Lee Skipper, Attorney at Law, Dallas, Texas
6. Honorable Rebecca Rutherford, U.S. Magistrate Judge
7. Honorable Sam A. Lindsay, U.S. District Judge

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

- a. The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.
- b. The opinion of the United States District Court appears at Appendix B to the petition and is reported at Perez v. United States, 2020 U.S. Dist. LEXIS 33370.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 28, 2020. No petition for rehearing was timely filed in my case. An extension of time to file the petition for a writ of certiorari was granted to 150 days due to the COVID-19 pandemic, per Order, 2020 U.S. LEXIS 1643, No. 589 (March 9, 2020). See Supreme Court Rules 13.1 and 13.3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- a. Sixth Amendment, U.S. Constitution - Effective Assistance of Counsel,
- b. 28 U.S.C. § 2253(c)(2) - Certificate of Appealability.

STATEMENT OF THE CASE

Question 1

Can an appeals court deny a Certificate of Appealability to a Petitioner who has shown that the District Court ignored precedential rulings from this Court regarding Ineffective Assistance of Counsel where the Counsel refused to

file a Notice of Appeal and consult with their client?

RELEVANT PROCEDURAL BACKGROUND

The Petitioner pled guilty to Possession of a Schedule II Controlled Substance with the Intent to Distribute (21 U.S.C. § 841(a)(1) and (b)(1)(B) (viii)), and the U.S. District Court sentenced him to 156 months of imprisonment.

The Petitioner sought to have counsel file a Notice of Appeal because he believed he had an issue concerning how his sentence was formulated.

Petitioner's defense counsel -- Cody Lee Skipper, Esq. -- a former Assistant United States Attorney, represented the Petitioner at his re-arraignment through to his sentencing. Because of counsel's dereliction of his constitutional duties, the Petitioner filed a motion under 28 U.S.C. § 2255, arguing that counsel failed to consult with him regarding filing a direct appeal, and that counsel ignored any efforts by the Petitioner to arrange for a meeting to discuss filing a direct appeal.

An evidentiary hearing was held on October 29, 2019 which resulted in the denial of the § 2255 motion on February 27, 2020.

The Petitioner then filed a motion for a Certificate of Appealability to the U.S. Court of Appeals for the Fifth Circuit. That request was denied on December 28, 2020, but the Petitioner was not notified of the decision until March 11, 2021.

Because of the appeals court and the district court rulings, which are at odds with the U.S. Supreme Court's clear precedents in Garza v. Idaho, 139 S. Ct. 738, 203 L. Ed. 2d 77 (2019), and Roe v. Flores-Ortega, 528 U.S. 470, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000), the Petitioner is seeking relief via the writ of Certiorari.

ARGUMENT

Issue regarding counsel's ineffectiveness should not be a dividing issue.

This Court has addressed the question of whether or not a defense attorney is effective if he does not file a Notice of Appeal as instructed to do so. The Flores-Ortega decision should be the controlling precedent with all district and appellate courts.

On January 31, 2019, following sentencing, the Petitioner clearly instructed his counsel to file a Notice of Appeal. In the moments immediately following sentencing, the Petitioner leaned over to his defense counsel and expressed his dissatisfaction with his sentence, and he wanted to appeal. His defense counsel told him he would come to the county jail and consult with him.

After several months of the Petitioner's defense counsel not returning phone calls or letters, the Petitioner inquired at the courts as to the status of his appeal. To his surprise, the Petitioner discovered that nothing was filed. Around June 7, 2019, a letter was sent to the defense counsel, who never replied.

In an attempt to regain his appellate rights, the Petitioner filed a motion under 28 U.S.C. § 2255 on or about June 10, 2019. With a clear violation of his constitutional rights, as well as his right to an appeal, his efforts were rejected by the U.S. District Court for the Northern District of Texas - Dallas Division, and finally the Fifth Circuit Court of Appeals.

Was the Petitioner asking that his sentence be reduced? No, only that he be allowed to file an out-of-time appeal, see United States v. Tapp, 491 F.3d 770, 2007 U.S. App. LEXIS 15343 (5th Cir. 2007). But none of the courts saw fit to grant his request; they simply went against the controlling precedent and allowed an ineffective attorney to skirt his constitutional duties.

a. The district court held that no prejudice occurred when counsel failed

to file a Notice of Appeal.

When the Petitioner was before the district court, the Magistrate Judge recommended that the court deny his claim because, "...when counsel breaches his constitutionally imposed duty to consult, prejudice is not presumed." This is an example of how wrongly the district and appellate courts have misinterpreted this Court's decision in Garza and Flores-Ortega. In Garza, this Court strongly reiterated the prejudice in Flores-Ortega, where it states in one sentence that the loss of the, "...entire [appellate] process itself, which a defendant wanted at the time and which he had a right [to]...demands a presumption of prejudice." Id. at 483.

For the district and appellate courts to issue a statement claiming no prejudice is presumed when counsel breaches his constitutionally imposed duty is erroneous and completely against this Court's decisions. Now the Petitioner was to make it clear that his counsel's deficient actions did cause him prejudice.

- b. Counsel purposely refused to return phone calls or respond to messages from Petitioner.

At sentencing the Petitioner made it clear to counsel his desire to file a Notice of Appeal, and counsel agreed to do so. He did not.

The Petitioner attempted to reach out to defense counsel in order for him to come and do a consultation about filing an appeal. Counsel never responded. The Petitioner's family reached out to defense counsel, even visiting his office and leaving a message to get him to file an appeal, and defense counsel did not respond to Petitioner's family. In Garza, this Court stated that filing such a Notice of Appeal is, "...purely ministerial...and it imposes no great burden on counsel." citing Flores-Ortega at 474. But to the Petitioner's counsel, it was a burden and to the district court, as well as the appellate court, it was

perfectly appropriate for counsel to ignore his constitutionally

required duties, and to brush aside the precedents set by this Court.

Why should a writ of certiorari be granted to the Petitioner?

In the instant case, the Fifth Circuit agreed with the government, saying that because the Petitioner waived his right to appeal within his plea agreement, the defense counsel was not obligated to consult with him, not file a notice of appeal. This is at odds with, not only this Court's decisions, but with at least three other circuits, who have held that Flores-Ortega does apply in cases involving plea and collateral review waivers.

In Campusano v. United States, 442 F.3d 770, 2006 U.S. App. LEXIS 8182 at 771-72 (2nd Cir. 2006), where the plea agreement contained a conditional waiver of appeal and collateral relief, the district court denied Campusano's § 2255 motion, holding, inter alia, that unless Campusano requested counsel to appeal under the waiver, the Flores-Ortega rule could not apply. See Id. at 772-73. The Second Circuit Court of Appeals determined that the district court erred and remanded for an evidentiary hearing. Although applying the Flores-Ortega presumption to waiver cases would, "...bestow on most defendants nothing more than an opportunity to lose [or win]," the Second Circuit Court of Appeals could not, "...cut corners when Sixth Amendment rights are at stake." Id., see also Gomez-Diaz v. United States, 433 F.3d 788, 2005 U.S. App. LEXIS 28076, 19 Fla. L. Weekly Fed. C. 134, at 791-94 (11th Cir. 2005) (holding in cases with waivers of direct appeal and collateral review, that, "...[i]f the evidence establishes either that a petitioner's attorney acted contrary to his client's wishes, or that he failed to fulfill his duty to attempt to determine his client's wishes, prejudice is to be presumed, and petitioner is entitled to an out-of-time appeal, regardless of whether he can identify any arguably meritorious ground for appeal that would fit one of the exceptions contained in his appeal waiver.") citing United States v. Garrett, 402 F.3d 1262, 2005 U.S.

LEXIS 5443 (10th Cir. 2005) & n.5.(holding in cases with waivers of direct appeal and collateral review that the district court's rationale that counsel could not have rendered ineffective assistance for failing to file an appeal that was precluded by the appeal waiver was contrary to Flores-Ortega and circuit precedent.)

With the above circuits following this Court's lead in Flores-Ortega and Garza, the Fifth Circuit chose to reject that precedent and rule against the Petitioner. This is a clear division and must be settled by this Court so that all circuits are adjudicating these cases with justice and conformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Verlan Perez JR

Verlan Perez, Jr., Petitioner

Registration # 56328-177

4-23-21

Date

PROOF OF SERVICE

I, Verlan Perez, Jr., do swear or declare that on this date, April ____, 2021, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class

postage prepaid, or by delivery to a third-party commercial carrier for delivery within three calendar days.

The names and addresses of those served are as follows:

U.S. Solicitor General

Department of Justice

950 Pennsylvania Avenue, N.W., Room 5615

Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2021.

Verlan Perez JR

Verlan Perez, Jr., Petitioner

Registration # 56328-177

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APPENDIX - A