No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARIO MURILLO-MORA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Bradley D. Price
Counsel of Record
PRICE LAW, PLC
30 4th Street, NW
Suite 100
Mason City, Iowa 50401
(515) 782-6101
brad@pricelawplc.com

Counsel for Petitioner

QUESTION PRESENTED

I. Whether Circuit Courts of Appeals can Properly Summarily Deny Issuance of a Certificate of Appealability to a Habeas Petitioner when the District Court Has Declined to Engage in the Ineffective-Assistance Analysis Required Under this Court's Precedent in *Roe v. Flores-Ortega*, 528 U. S. 470 (2000) and *Garza v. Idaho*, 139 S. Ct. 738 (2019).

LIST OF RELATED CASES

- *United States v. Murillo-Mora*, No. 15-cr-2015, U.S. District Court for the Northern District of Iowa. Amended Judgment entered Oct. 17, 2017; amended to correct clerical error Dec. 11, 2020.

- *United States v. Murillo-Mora*, 703 F. App'x. 435 (8th Cir. 2017), No. 16-3525, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Jul. 25, 2017.

- *United States v. Murillo-Mora*, No. 21-1252, U.S. Court of Appeals for the Eighth Circuit. Judgment entered Feb. 11, 2021.

TABLE OF CONTENTS

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS ..... Preceding and attached pursuant to S. Ct. R. 39.2

QUESTION PRESENTED i

LIST OF RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. The Question Presented is Recurring and of Critical Importance, and This Court Alone Can Ensure Adherence to its Precedent 5

II. The Decision Below is Incorrect 6

A. Petitioner satisfied the "substantial showing" requirement in 28 U.S.C. § 2253(c)(2) 6

CONCLUSION 10

INDEX TO APPENDICES

Appendix A: Judgment of the Eighth Circuit

Appendix B: Order of the U.S. District Court

Appendix C: Order of the Eighth Circuit denying petition for rehearing

Appendix D: Constitutional and Statutory Provisions required by S. Ct. R. 14.1(f)

TABLE OF AUTHORITIES

Cases:

Bowen v. Johnston, 306 U.S. 19 (1939) 9

Buck v. Davis, 137 S. Ct. 759 (2017) 6

Garza v. Idaho, 139 S. Ct. 738 (2019) 7

McMann v. Richardson, 397 U.S. 759 (1970) 7

Miller-El v. Cockrell, 537 U.S. 322 (2003) 6, 9

United States v. Murillo-Mora, 703 F. App'x. 435 (8th Cir. 2017) 3

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 7, 8, 9

Slack v. McDaniel, 529 U.S. 473 (2000) 6

Strickland v. Washington, 466 U.S. 668 (1984) 7

Tennard v. Dretke, 542 U.S. 274 (2004) 6

Constitutional and Statutory Provisions:

U.S. Const. amend. VI 7

18 U.S.C. § 1956(h) 2

21 U.S.C. § 846 2

28 U.S.C. § 2253(c)(2) 6

Other Authorities:

U.S.S.G. § 5K1.1 3

U.S. Court of Appeals Federal Judicial Caseload Statistics, Table B-7 (March 31, 2020), *available at* https://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2020/03/315 5

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARIO MURILLO-MORA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner, Mario Murillo-Mora, prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The July 2, 2021 judgment of the court of appeals, which appears at Appendix A to this petition, is unreported. The March 26, 2021 final order of the district court, which appears at Appendix B to this petition, is unreported. The September 22, 2021 order of the court of appeals denying Petitioner's timely petition for rehearing, which appears at Appendix C to this petition, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2021. The court of appeals denied petitioner's timely petition for panel rehearing on September 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Sixth Amendment to the United States Constitution, as well as 28 U.S.C. §§ 2253(c)(1)(B), 2253(c)(2), and 2253(c)(3) are reproduced verbatim at Appendix D to this petition.

STATEMENT OF THE CASE

A. Introduction

On remand from the Eighth Circuit for resentencing, Mario Murillo-Mora ("Petitioner") received the same custodial sentence originally imposed upon him. Although Petitioner desired to appeal that sentence, trial counsel did not consult with Petitioner concerning his appellate rights. In the § 2255 habeas proceeding that followed, the district court ignored counsel's failure to consult, and the Eighth Circuit summarily affirmed the denial of a certificate of appealability on Petitioner's ineffective-assistance claim.

B. Criminal Proceedings Below

On February 9, 2016, Petitioner pled guilty to conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). (Cr. DCD. 179).[1] The Presentence

[1] In this Petition:
"Cr. DCD" refers to N.D. Iowa Case No. 6:15-cr-2015-LRR.

Investigation Report ("PSR") calculated Petitioner's total offense level at 38, and his criminal history category at II, (PSR 11, ¶ 41), resulting in an advisory Guideline range of 262 to 327 months' imprisonment. (PSR 13, ¶ 63).

Before sentencing, the government refused to file a motion for sentence reduction under U.S.S.G. § 5K1.1. (Cr. DCD 296, 365). Trial counsel filed a motion to compel, which the district court struck for failure to attach a brief under the local rules. (Cr. DCD 296, 298). The district court adopted the Guideline range from the PSR, and sentenced Petitioner to 262 months' imprisonment. (Cr. DCD 300, 364).

Petitioner appealed his sentence to the Eighth Circuit, arguing (1) the district court abused its discretion in striking his motion to compel for failure to comply with local rules; and (2) the district court failed to afford him is right of allocution at sentencing. *United States v. Murillo-Mora*, 703 F. App'x. 435, 437 (8th Cir. 2017). The Eighth Circuit found no abuse of discretion, but vacated and remanded because Petitioner was not permitted to allocute. *Id.* at 437-38.

At Petitioner's resentencing on October 16, 2017 (Cr. DCD 421), the district court imposed the same custodial sentence. (Cr. DCD 421, 443). Petitioner did not appeal from the amended judgment.

C. Section 2255 Proceedings Below

On December 11, 2020, Petitioner filed a motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255. (Civ. DCD 1). The district court summarily denied all but one of Petitioner's claims. (Civ. DCD 8). That claim raised

---

"Civ. DCD" refers to N.D. Iowa Case No. 6:18-cv-2066-LRR.
"PSR" refers to the final presentence investigation report (Cr. DCD 336).
"Evid. Hrg. Tr." refers to the transcript of the evidentiary hearing in Case No. 6:18-cv-2066-LRR.

an ineffective assistance of counsel argument based upon trial counsel's failure to file a notice of appeal following resentencing despite Petitioner's desire that he do so. (Civ. DCD 8, pp. 20-22). The district court ordered appointment of counsel, and scheduled an evidentiary hearing on that claim. (Civ. DCD 8, p. 23).

On March 18, 2021, the district court held an evidentiary hearing on Petitioner's claim. (Civ. DCD 21). At the hearing, both Petitioner and trial counsel testified, and Petitioner submitted as exhibits correspondence between the two parties concerning taking an appeal following resentencing. (Civ. DCD 20, 21). During the hearing, both Petitioner and trial counsel testified that trial counsel had not consulted with Petitioner concerning whether to appeal from the amended judgment. (Evid. Hrg. Tr. 19, 39-40). Documentary evidence admitted did establish that two days after the resentencing, trial counsel sent Petitioner a letter stating he would not file a notice of appeal unless Petitioner directed him to do so. (Civ. DCD 22, p. 3). That letter did not make any reference to a 14-day requirement, although the district court found that Petitioner was on notice of the requirement because the court had so advised him at his resentencing.[2]

Trial counsel testified that he did not consult with Petitioner about whether to appeal the sentence. (Evid. Hrg. Tr. 19). Petitioner testified that he was unhappy

---

[2] The district court advised Petitioner as follows after his resentencing:

> Obviously, Mr. Murillo-Mora, if you think that you still have the right to appeal the sentence, you certainly can try to do so, and here's how you appeal. You have to file a written notice of appeal with the Clerk of Court here in the United States District Court for the Northern District of Iowa at Cedar Rapids, Iowa. If you do not file a written notice of appeal within the next 14 days, you forever give up your right to challenge this judgment and sentence.

Civ. DCD 22, p. 5).

with his amended sentence, and would have directed trial counsel to appeal had he been consulted. (Evid. Hrg. Tr. 40). The district court denied Petitioner's claim based on its finding no request to file an appeal had been communicated to trial counsel withing the required 14-day timeframe. (DCD 22, p. 6).

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Recurring and of Critical Importance, and This Court Alone Can Ensure Adherence to its Precedent.

During the 12-month period ending March 31, 2020, 2,495 appeals were filed on motions to vacate a sentence, while another 753 appeals were filed in habeas cases generally. *See* U.S. Court of Appeals Federal Judicial Caseload Statistics, Table B-7 (March 31, 2020), *available at* https://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2020/03/31. During that same period, 10,425 total criminal appeals were filed. *Id.* This Court's guidance on the question presented would therefore affect a significant percentage of criminal prosecutions each year. Thousands of cases each year are filed in which lower courts must be guided by clear standards for analyzing whether to grant a certificate of appealability. Where, as here, a district court declines to analyze the relevant legal authority that determines whether there has been denial of a constitutional right, the efficient administration of justice is impaired. Moreover, circuit courts are left with a record that precludes a meaningful review on appeal. This Court alone can compel adherence to its precedent in such a critical area of the federal criminal law, ensuring that fundamental constitutional protections are safeguarded while facilitating the proper administration of the federal courts.

II. The Decision Below is Incorrect.

A. Petitioner satisfied the "substantial showing" requirement of 28 U.S.C. § 2253(c)(2).

A certificate of appealability ("COA") "should issue if the [§ 2255] applicant has 'made a substantial showing of the denial of a constitutional right.'" *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting 28 U.S.C.§ 2253(c)(2)). This Court has interpreted this "substantial showing" standard to require that a petitioner "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'") (quoting *Slack*, 529 U.S. at 484 (quotation and citation omitted). This Court has cautioned that while the COA determination requires a general assessment of the claims in a habeas petition, it is not a merits analysis:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El, 537 U.S. at 336-37; *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Petitioner satisfied the substantial showing requirement by establishing that his counsel failed to consult with him about his right to appeal.

The "assistance of counsel" guaranteed by the Sixth Amendment includes the "right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970)). *Strickland* generally requires defendants to show both (1) deficient performance; and (2) prejudice. *Strickland*, 466 U.S. 687-88, 692. However, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken," this Court presumes prejudice. *Roe v. Flores-Ortega*, 528 U. S. 470, 484 (2000); *see also Garza v. Idaho*, 139 S. Ct. 738, 742 (2019) (holding presumption of prejudice not affected by appellate waiver).

The key facts of this case are not in dispute. First, trial counsel failed to confer with Petitioner concerning appeal from his resentencing. (Evid. Hrg. Tr. 19). Second, Petitioner was sentenced to the same custodial sentence on remand for that resentencing. Third, the district court declined to consider the question whether trial counsel had a constitutionally-imposed duty to consult Petitioner concerning appeal. Petitioner was deprived of his Sixth Amendment right to counsel, and a certificate of appealability should have issued.

The district court focused its attention on making a credibility determination to decide whether there was an explicit request that trial counsel appeal from resentencing. (Evid. Hr. Tr. 35-36). There was not. The record was clear on that fact, but that fact is not dispositive as a matter of law. As this Court has explained:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent,

> question: whether counsel in fact consulted with the defendant about an appeal.

Flores-Ortega, 528 U.S. at 478. The district court undertook no such inquiry, but instead made factual findings concerning Petitioner's credibility and based its Sixth Amendment analysis solely on whether an explicit request to appeal was communicated within the applicable 14-day timeframe. This Court has made clear that, while there is no *per se* constitutional duty to consult about an appeal in all cases, there is such a duty in certain cases:

> We ... hold 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 (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. at 480. Both prongs of this Court's test are met here, making this a case in which there was a constitutional duty to consult.

First, the totality of the circumstances would lead an objective observer to conclude that a reasonable defendant in this case would pursue an appeal. Petitioner appealed his original 262-month sentence. After remand and resentencing, Petitioner was given the same 262-month sentence. No rational observer could conclude that an incarcerated defendant originally dissatisfied with 262 months would somehow lose the desire to challenge that same sentence a mere matter of months later. Second, Petitioner "reasonably demonstrated" his desire to appeal when he took his first appeal to the Eighth Circuit. It is entirely reasonable—for the same reasons set forth under prong (1)—to consider Petitioner's

desire to appeal his 262-month sentence after his first sentencing as a desire to do so after the imposition of the same custodial sentence on remand.

The district court declined to engage in the foregoing *Flores-Ortega* analysis. Thus, the resulting opinion is directly contrary to this Court's opinion in *Flores-Ortega*. And the Eighth Circuit's summary denial of a certificate of appealability can only fairly be read as approval of the contents of the district court order. Given the district court's analysis, "reasonable jurists could debate" whether Petitioner's claim was correctly decided. *Miller-El*, 537 U.S. at 336. At a minimum, the "issues presented were adequate to deserve encouragement to proceed further" so that consideration could be given to this Court's *Flores-Ortega* precedent. *Id.*

This Court has long reminded parties that "the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). This Court alone can clarify for lower courts that adherence to its announced constitutional norms is required at such a critical stage of criminal litigation. At a minimum, lower courts should be required to consider this Court's relevant precedent when ruling on certificates of appealability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: December 16, 2021

Respectfully submitted,

Bradley D. Price
Counsel of Record
PRICE LAW, PLC
30 4th Street, NW
Suite 100
Mason City, Iowa 50401
(515) 782-6101
brad@pricelawplc.com

Counsel for Petitioner