No. __-_____

THE SUPREME COURT OF THE UNITED STATES

LEONEL MARIN TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether a district court, when deciding a First Step Act motion on the pleadings, complies with *Concepcion v. United States*,[1] when it fails to calculate the benchmark Guidelines range or acknowledge the movant's arguments in favor of relief and states only that it is denying the motion based upon the government's arguments?

2. Whether a court should grant an appellant's motion to supplement the record where the supplemental evidence is needed to establish prejudice on appeal?

3. Whether Leonel Marin Torres was denied the effective assistance of counsel where he did not wish to be represented by the attorney appointed to file a First Step Act motion on his behalf, and the motion was filed against his wishes?

4. Whether the attorney's continued representation of Marin Torres, without Marin Torres's knowledge and against Marin Torres's stated wishes, violated his Sixth Amendment right to represent himself?

[1] 142 S. Ct. 2389 (2022).

5. Whether Marin Torres is entitled to equitable relief under the extraordinary circumstance of counsel failing to communicate with Marin Torres, act in accordance with his reasonable directive, or keep him informed of key developments in the case?

LIST OF PARTIES

Petitioner: Leonel Marin Torres was the Appellant on the above issues in the United States Court of Appeals for the Ninth Circuit.

Respondent: The United States was the Appellee on the above issues in the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Leonel Marin Torres respectfully petitions for a writ of certiorari to review memorandum disposition of the United States Court of Appeals for the Ninth Circuit in *United States v. Marin Torres*, No. 19-30164.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. *See United States v. Marin Torres*, No. 19-30164 (9th Cir. March 29, 2023). The opinion is attached as Appendix A to this petition at A1-A5. The district court's order, in No. 2:09-CR-00262-RSL-1, is attached at Appendix B at A6-12.

JURISDICTION

The district court had jurisdiction over this criminal matter pursuant to 18 U.S.C. § 3231 and the First Step Act § 404. The Ninth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291. The circuit court denied the petition for rehearing and the petition for rehearing en banc on May 5, 2023. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 404(b) of the First Step Act of 2018 provides:

> DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

Sections 2 and 3 for the Fair Sentencing Act of 2010 provide:

> SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION. (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended— (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams". (b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended— (1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams";

and (2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION. Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

8 U.S.C. § 3553(a)(1) provides:

(a)Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1)the nature and circumstances of the offense and the history and characteristics of the defendant

Federal Rule of Appellate Procedure 10(e)(2) provides:

If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals.

INTRODUCTION

Leonel Marin Torres's counsel filed a First Step Act motion against his wishes, denying him the effective assistance of counsel and the right to make his own defense. The district court compounded the injustice against him by denying the motion on the basis of the government's arguments, without demonstrating it considered Marin Torres's arguments for relief. Marin Torres objected to the proceedings at every opportunity, but to no avail.

Despite having this Court's guidance in *Concepcion v. United States*,[2] which requires a district court to make clear it reasoned through both parties' arguments, the Court of Appeals wrongly found the district court's reference to the government's arguments, alone, satisfied *Concepcion.*

This Court should grant certiorari.

STATEMENT OF THE CASE

1. Leonel Marin Torres was arrested after a woman called police and complained he was unwelcome in her apartment. PSR

[2] 142 S. Ct. 2389 (2022).

¶ 8.[3] She told police Marin Torres was a drug dealer and had threatened other people with a gun in the past. PSR ¶ 8. When police arrived, the door to the apartment was ajar but no one responded when they knocked. PSR ¶ 9. As they were leaving, the police saw Marin Torres come up the stairs of the apartment building and stopped him. PSR ¶ 9. Marin Torres answered the officers' questions honestly, including telling them the number of the apartment he was visiting and his name, and affirming a nickname he used. PSR ¶ 9. After conducting a pat-down search of his person, the police alleged they found a pistol and four plastic baggies of cocaine containing 9.18 grams of crack cocaine and .33 grams of powder cocaine, and cash in the amount of $240. PSR ¶ 9.

Marin Torres was initially indicted on one count of possession of cocaine base in the form of crack cocaine with the intent to distribute and one count of felon in possession of a firearm. ER 92-93.[4] After he moved to suppress the evidence

[3] PSR refers to the Presentence Report filed under seal in the Court of Appeals.

[4] ER refers to the excerpts of record filed in the Court of Appeals.

against him, the government filed a superseding indictment with an additional charge: carrying a firearm during and in relation to a drug trafficking crime. ER 90. The government also filed a penalty enhancement under 21 U.S.C. § 851 based on a prior drug offense from 1996,[5] which elevated Marin Torres's mandatory minimum term from five years to ten years on the drug possession count. ER 88; PSR ¶¶ 2, 71.

2. Marin Torres identifies as a Black man. *See* PSR. The statute and Sentencing Guidelines the court relied upon to impose a 16-year sentence on Marin Torres were the result of long-standing racist policies targeting the Black community under the guise of fighting a "War on Drugs." *See* Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. Kan. L. Rev. 941, 945 (2019). In 1968, President Richard Nixon's "law and order" presidential campaign intentionally and maliciously

[5] The 1996 conviction involved a "buy-bust" operation in which an officer received cocaine wrapped in wax paper (the amount so insignificant as to not be noted in the presentence report), after soliciting Marin Torres for drugs. PSR ¶ 29.

pandered to the public's racist beliefs about Black individuals and crime. *Id.* President Ronald Reagan declared illegal drugs a threat to national security in 1982 and, in response to the alleged national emergency, Congress passed the Anti-Drug Abuse Act of 1986, without even one committee hearing or congressional report. *Id.* at 946, 948; Anti-Drug Abuse Act, Pub. L. 99-570, 100 Stat. 3207 (1986).

Under the Anti-Drug Abuse Act, an individual convicted of a crack cocaine offense faced the same penalty for possession of a single gram as an individual convicted of an offense involving 100 times the amount of powder cocaine. *Id.* at 949. When it issued the first Sentencing Guidelines in 1987, the U.S. Sentencing Commission adopted this 100-to-1 ratio to set forth the relevant mandatory minimums. *Dillon v. United States*, 560 U.S. 817, 821 (2010). In other words, based upon the directive set forth in the Anti-Drug Abuse Act, the Commission "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Id.* (quoting *Kimbrough v. United States*, 552 U.S. 85, 96 (2007)).

A 1995 U.S. Sentencing Commission report revealed the devastating effect the Anti-Drug Abuse Act had on Black communities, showing 88.3 percent of crack cocaine offenders were Black and, due to the 100-to-1 ratio, "the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine." Exum, *supra* at 950. That same year the Sentencing Commission urged Congress to fix the disparity between crack and cocaine penalties, but for the first time in the history of the Guidelines, the president and Congress rejected the Commission's proposed amendment. *Id.*

Over the next two decades, the Commission and the law enforcement community strongly criticized the 100-to-1 ratio. *Dorsey v. United States*, 567 U.S. 260, 268 (2012). The Commission issued four separate reports informing Congress the ratio was unjustified for many reasons, including that research did not support the relative harm between crack and powder cocaine suggested by the ratio, sentences using the ratio were contrary to the Sentencing Reform Act's "uniformity" goal because it failed to distinguish between major drug traffickers

and low-level dealers, and the general public now understood the ratio reflected blatantly racist policies. *Id.*

Only in 2010 – fifteen years after the Commission revealed the devastating effect this racist law had on Black communities – did Congress finally accept the Commission's recommendations and enact the Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010). See *Dorsey*, 567 U.S. at 269-70. This act changed the penalty structure for cocaine base offenses so that anyone found to possess less than 28 grams was subject to a sentence of up to 20 years, with no mandatory minimum sentence. 21 U.S.C. § 841(b) (2018); see *Dorsey*, 567 U.S. at 269 (explaining effect of section 2 of the Fair Sentencing Act). In *Dorsey*, this Court held the new penalty structure applied to any defendant sentenced after the enactment of the Fair Sentencing Act, even if the offense had been committed prior to that date. 567 U.S. at 278.

3. Because the court imposed the 192-month sentence upon Marin Torres a few months before Congress passed the Fair Sentencing Act, *Dorsey* did not offer Marin Torres relief from his unjust sentencing. However, the First Step Act later

created a freestanding remedy for individuals sentenced prior to the passage of the Fair Sentencing Act. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5194-249 (2018). Under § 404(b) of the First Step Act, the portion of the Fair Sentencing Act that reduced the statutory penalty for Marin Torres's possession conviction and eliminated the mandatory minimum applied retroactively.

4. Following the passage of the First Step Act, Marin Torres was identified as someone who potentially qualified for a reduced sentence and had previously been appointed counsel. ER 42. Pursuant to a district court general order, the court appointed counsel from the federal public defender's office to assist Marin Torres with filing a First Step Act motion, if Marin Torres so wished. ER 42.

Marin Torres represented himself at his trial and sentencing and had not sought representation for his First Step Act motion. Marin Torres Decl. ¶¶ 3-4.[6] He had one legal phone call from the prison with appointed trial counsel about the First

[6] The declaration citations refer to the exhibits to the motion to supplement filed in the Court of Appeals.

Step motion. Marin Torres Decl. ¶ 5; Carroll Decl. ¶ 4. Trial counsel's notes from that phone call reflect the attorney understood Marin Torres wished to proceed with filing the First Step Act motion, and wished to have trial counsel represent him. Carroll Decl. ¶ 4. But Marin Torres speaks Spanish, and a senior legal assistant with the federal public defender's office interpreted the conversation. *Id.* As Marin Torres later informed his counsel by letter, he did not believe the interpretation was accurate because the attorney's responses seemed incongruent with Marin Torres's statements. Marin Torres Decl. ¶ 5-7.

In that same letter, Marin Torres explained he did not want trial counsel to represent him on the First Step Act motion and directed counsel not to file the motion. Marin Torres Decl. ¶ 7. Marin Torres's letter was dated both February 28, 2019, and March 3, 2019, which reflected the date it was written and the date Marin Torres expected the letter to leave the prison. Marin Torres Decl. ¶ 10. Marin Torres titled this letter "EMERGENCY LETTER TO ATTORNEY DENNIS CARROLL REQUESTING TO NOT FILE THE MOTION ON MY BEHALF." Marin Torres

Decl. ¶ 9, Ex. A. Marin Torres also included a footer on each page of the letter with this same title. Marin Torres Decl. Ex. A.

Marin Torres explained he did not wish to proceed with the First Step Act motion for two reasons. Marin Torres Decl. ¶ 11. First, Marin Torres believed the judge was biased against him and trial counsel had agreed it was unlikely, based upon the limited information the attorney had, that the motion would be granted. *Id.* Second, Marin Torres had recently transferred prisons and was still waiting to receive his property, including all of his legal documents, and he needed these documents to better support his request for relief. *Id.* In the letter, he asked his attorney request an extension of time to file so that he could review counsel's draft, obtain his legal documents, and have the opportunity to represent himself. Marin Torres Decl. ¶ 13.

Marin Torres mailed a copy of the first two pages of this letter to his brother, Hermes Marin Torres, who lives in Germany. (Marin Torres Decl. ¶ 15; Hermes Decl. ¶ 3).

In a letter dated a few days later, on March 8, 2019, the senior legal assistant sent Marin Torres a copy of the motion for resentencing under the First Step Act, which had been filed.

Carroll Decl. Ex. B. Trial counsel does not recall receiving Marin Torres's letter requesting he not file the motion, and has no record of receiving this letter. Carroll Decl. ¶ 6. Marin Torres did not receive a copy of the government's response to the motion, or the defense's reply, and his attorney has no record of providing these filings to Marin Torres. Marin Torres Decl. ¶ 16; Carroll Decl. ¶ 6.

Because Marin Torres did not receive the additional filings, he believed his attorney had received his letter and withdrawn the First Step Act motion. Marin Torres Decl. ¶ 16. Only when his attorney notified him that the court denied the motion did Marin Torres know the motion had been pending before the court. Marin Torres Decl. ¶ 17. He immediately contacted his attorney by phone. *Id.* Only then did he learn trial counsel had never received his letter. *Id.*

5. In the First Step Act motion, defense counsel argued Marin Torres was entitled to a plenary resentencing. Appendix E at A25. The defense asked "a sentencing hearing be scheduled at the earliest available date" so Marin Torres could address the court. Appendix E at A20. Counsel explained Marin Torres had

been sentenced under the harsh penalties set forth in the Anti-Drug Abuse Act at his original sentencing and argued Marin Torres was entitled to a full resentencing under § 404 of the First Step Act. Appendix E at A22, A25-28.

The government did not dispute Marin Torres was eligible for a sentence reduction under the First Step Act, but argued § 404 does not authorize a plenary resentencing and the court should decline to reduce Marin Torres's sentence because of his "history of violence." Appendix F at A42. In reply, defense counsel explained reducing Marin Torres's sentence would not pose a safety risk to the public because, even with the sentence reduction, Marin Torres would not be released until he was nearly 60 years old and studies have shown that, even among persistent offenders, recidivism declines as individuals approach age 60. Appendix G at A61-62. In addition, defense counsel explained the court "should reduce Mr. Marin Torres' sentence simply because the prior statutory and guideline scheme under which [he] was sentenced was unjust." Appendix G at A60.

6. The district court found Marin Torres eligible for a sentence reduction, but held he was not entitled to a plenary

resentencing. Appendix B at A8, A11. Based solely on its finding that Marin Torres "has a significant history of violence," the court denied Marin Torres relief under the First Step Act. Appendix B at A12.

7. Marin Torres appealed, challenging the district court's failure to hold a plenary resentencing or, in the absence of such a hearing, its failure to recalculate the benchmark Guidelines range and demonstrate it considered Marin Torres' arguments. Marin Torres also challenged his counsel's failure to withdraw the motion as Marin Torres specifically requested. The Court of Appeals for the Ninth Circuit rejected all of Marin Torres' challenges and affirmed the district court's order. Appendix A at A1-5. Marin Torres filed a petition for panel rehearing and a petition for rehearing en banc, both of which were rejected. Appendix at C at A13.

REASONS FOR GRANTING THE PETITION

I. The district court's failure to calculate the benchmark Guidelines range and make clear it considered Marin Torres's arguments for relief in his First Step Act motion violates *Concepcion*.

At sentencing, district court judges have always had the discretion to consider "a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender." *Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022). Indeed, a "uniform and constant in the federal judicial tradition" has been that a sentencing judge "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Id.* A district court judge is therefore permitted to conduct a broad inquiry at sentencing, with the scope "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.*

In *Concepcion*, this Court held a judge's discretion when evaluating a First Step Act motion is no different. *Id.* A court is obligated to calculate a benchmark Guidelines range, "as if the Fair Sentencing Act's amendments had been in place at the time

of the offense." *Id.* at 2402, n.6. Evidence of the movant's rehabilitation, his conduct in prison, and any Guidelines changes are all proper considerations when evaluating the motion. *Id.* at 2400-01. Even nonretroactive intervening changes in the law should be considered when raised by a party, as "the court may find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent." *Id.* at 2400.

Consequently, "district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments." *Id.* at 2404. While a court is permitted to dismiss uncompelling arguments "without a detailed explanation," it must provide "a brief statement of reasons." *Id.* (emphasis added). A district court is free to disagree with a policy argument and is not required to "rebut each argument." *Id.* However, the First Step Act requires the court to "make clear" it "reasoned through" both parties' arguments. *Id.*

As this Court explained, in summary:

> Put simply, the First Step Act does not require a district court to accept a movant's argument that evidence of

> rehabilitation or other changes in law counsel in favor of a sentence reduction, or the Government's view that evidence of violent behavior in prison counsels against providing relief. Nor does the First Step Act require a district court to make a point-by-point rebuttal of the parties' arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it.

Id. at 2404-05 (emphasis added).

The district court did not satisfy this fundamental obligation here. Counsel for Marin Torres argued the current Guidelines calculations and Marin Torres's reduced risk of recidivism due to his increased age weighed in favor of relief. Appendix G at A61-62. Counsel also argued the court should impose a lower sentence because Marin Torres had originally been sentenced pursuant to a racist law that caused grave injustice, and the First Step Act was enacted with the purpose of remedying that injustice. Appendix G at A60. The government opposed the motion based upon Marin Torres's "history of violence" and conduct in prison. Appendix F at A42.

But like in *Concepcion*, the district court wrongly believed its discretion was limited, and considered only the arguments put forth by the government. Appendix B at A8-12. It did not calculate the benchmark range nor even acknowledge the

mitigating arguments presented by Marin Torres. *See* Appendix B at A12.

The district court's reasoning and basis for its denial of Marin Torres's motion, as stated in its entirety, is as follows:

> "The First Step Act makes clear that sentence reductions are discretionary." *Mason*, 2019 WL 2396568 at *6 (citing First Step Act § 404(c)). "In deciding how to exercise their discretion and determine the extent of a sentence reduction under the Act, courts should consider the factors set forth in 18 U.S.C. § 3553(a), which requires consideration of the applicable guideline range as well as all other pertinent information about the offender's history and conduct." *Id.*
>
> Defendant has a significant history of violence. See 18 U.S.C. § 3553(a); see Dkt. #155.[ ] His post-sentencing convictions for assault only serve to heighten the Court's concern rather than alleviate it. See *United States v. Mitchell*, No. CR 05-00110 (EGS), 2019 WL 2647571, at *7 (D.D.C. June 27, 2019) ("… consideration of [the defendant]'s post-sentencing conduct and the factors set forth in 18 U.S.C. § 3553(a) is appropriate under Section 404(b) of the First Step Act."); *United States v. Berry*, No. 1:09-CR-05-2, 2019 WL 2521296, at *4 (W.D. Mich. June 19, 2019); *United States v. Williams*, No. 03-CR-1334 (JPO), 2019 WL 2865226, at *3 (S.D.N.Y. July 3, 2019). The Court declines to exercise its discretion to reduce defendant's sentence. See First Step Act, § 404(c).

Appendix B at A12.

The Court of Appeals acknowledged the district court did not "expressly reference" Marin Torres's arguments but affirmed the ruling because it determined "the reasons [the district court]

provided for denying Marin-Torres's motion nonetheless make clear why it did not find them persuasive." Appendix A at A3. But the reasons the district court provided for denying the First Step Act motion, as described by the court, were simply those presented by the government: Marin Torres's "background and history of violence," including his conduct in prison. *See* Appendix B at A12; Appendix F at A42.

This does not satisfy *Concepcion*. While a district court may cite one party's argument as the basis for its decision, *Concepcion* requires the court also make clear that it reasoned through the arguments presented by both parties, and demonstrate it considered all of the arguments before it. 142 S. Ct. at 2404-05. The district court's ruling shows it accepted the government's argument, but does not demonstrate it considered and reasoned through the arguments put forth by Marin Torres before denying his motion. This is error under *Concepcion*.

The Court of Appeals opinion, affirming this error, demonstrates the courts' inconsistent application of *Concepcion*. For example, in another Ninth Circuit case, *United States v. Carter*, the defendant filed a First Step Act motion and put forth

several arguments as to why the court should impose a lower sentence, including the fact the current Sentencing Guidelines ranges were shorter than at the time of his initial sentencing. 44 F.4th 1227, 1228 (9th Cir. 2022). The district court did not hold a hearing and denied Carter's motion in part, imposing a sentence lower than the current sentence but higher than Carter requested. *Id.* In that case, the Court of Appeals reversed, holding the district court had failed to meet its obligation under the First Step Act to both consider Carter's "nonfrivolous arguments and to prove that it had done so by providing 'a brief statement of reasons.'" *Id.* at 1229 (emphasis added).

That a district court may be required to demonstrate it considered both parties' nonfrivolous arguments in some cases but not others is a larger concern that this Court is uniquely positioned to address. *Compare United States v. Domenech*, 63 F.4th 1078, 1083-84 (6th Cir. 2023) (remanding and reassigning to a different judge where district court judge did not consider all nonfrivolous arguments), *United States v. Newbern*, 51 F.4th 230, 233 (7th Cir. 2023) (reversing where district court failed to address the movant's good-conduct argument), *and United*

States v. Reed, 58 F.4th 816, 823 (4th Cir. 2023) (reversing where district court did not recalculate the Guidelines range or explicitly mention the movant's argument), *with United States v. Akridge*, 62 4th 258, 265-66 (6th Cir. 2023) (affirming where district court cited movant's criminal history as the basis for his reasoning, but did not mention any of the arguments in support of relief). Marin Torres's case is a uniquely good vehicle for addressing this question, where the district made no mention of Marin Torres's arguments for relief in his First Step Act motion or even calculate the benchmark Guidelines range. This Court should grant certiorari.

II. Marin Torres should be allowed to supplement the record on appeal where the evidence is necessary to establish prejudice.

This Court has suggested courts should grant a motion to supplement under Federal Rule of Appellate Procedure 10(e) where the additional evidence is necessary for the defendant to establish prejudice on appeal. *See Greer v. United States*, 141 S. Ct. 2090, 2097, 2100 (2021). Pursuant to FRAP 10(e)(2):

> If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation

> of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals.

In *Greer*, this Court considered *Rehaif* errors, where the Government failed to prove in felon-in-possession cases that the defendant knew not only that he possessed the firearm but also that he was a felon at the time of the possession. *Greer*, 141 S. Ct. at 2095; *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court held a convicted felon is usually aware of his felony status, and this "simple point turns out to be important" in the two cases examined in *Greer*. 141 S. Ct. at 2095. Because a defendant is typically aware he has previously been convicted of a felony, he "faces an uphill climb" to show there is a reasonable probability that, but for the *Rehaif* error, the outcome of the district court proceedings would have been different. *Id.* at 2097.

However, this Court held there could be circumstances in which the defendant could make such a showing and, citing Rule 10(e), the Court explained that in those circumstances the defendant must demonstrate on appeal that he would have presented the necessary evidence to the district court in the absence of the error. *Id.* at 2098. The Court faulted the

defendants for failing to make this showing when it affirmed their convictions. *Id.* at 2097-98, 2100.

Indeed, even without considering Rule 10(e), courts have inherent authority to supplement the record on appeal in an extraordinary case. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). The Court of Appeals has granted requests to supplement the record where documents provide clarity or protect a party's unwaived rights. *See, e.g., Khrapunov v. Prosyankin*, 931 F.3d 922, 924 n.2 (9th Cir. 2019) (granting the parties' request to supplement the record with decisions in the English courts relevant to the litigation, as well as with declarations explaining the consequences of those decisions); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 n.6 (9th Cir. 2011) (granting intervenors' motion to supplement the record with four declarations to establish Article III standing because they were not required to establish standing before the district court); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 n.3 (9th Cir. 2010) (granting the defendants' request to supplement the record with a declaration

attesting to facts not before the district court because it was relevant to whether the Court had jurisdiction).

Marin Torres sought to supplement the record with declarations from trial counsel, himself, and his brother in order to provide the information necessary for the court to fairly evaluate his claims of ineffective assistance of counsel and the violation of his right to make his own defense, and his claim for equitable relief. *See* Motion to Supp. at 1-2, 5-6.[7] The declarations Marin Torres sought to add to the record on appeal show what occurred between him and defense counsel, and how defense counsel's filing of the First Step Act motion without Marin Torres's permission prejudiced him. *See, e.g.*, Motion to Supp. App 5-6 at ¶¶ 13, 17; Motion to Supp. App 41-42 at ¶¶ 6, 7; Motion to Supp. App 62-63, 66, 76, 81, 90 (describing Marin Torres's arrival in the United States from Cuba, his limited English proficiency, his distrust of attorneys following his first conviction, his serious gunshot injury, and the lack of medical care he received for this injury while incarcerated).

[7] This motion to supplement was filed contemporaneously with the opening brief in the Court of Appeals.

Pursuant to *Greer*, Rule 10(e), and the Court's inherent authority, supplementing the record with this new material to allow for fair review of Marin Torres's claims of ineffective assistance, violation of his right to make his own defense, and equitable relief is proper.

III. The supplemental materials demonstrate Marin Torres was denied the effective assistance of counsel.

Marin Torres was entitled to the effective assistance of counsel for his First Step Act motion for resentencing. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (the constitutional guarantee of effective assistance of counsel applies "to the whole course of a criminal proceeding," including at pretrial and sentencing); U.S. Const. amend. VI.

Counsel is ineffective, and reversal required, where Marin Torres can show the attorney's representation "fell below an objective standard of reasonableness" and this deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. In certain circumstances, such as where counsel's deficient conduct deprives the defendant of his appeal, prejudice is presumed. The

performance prong of *Strickland* "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice." *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994); *see also Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir. 2005). Communication between the attorney and client is critical to effective representation. Under Rule 1.4(a)(3) of the ABA Model Rules of Professional Conduct, a lawyer is required to "keep the client reasonably informed about the status of the matter." Pursuant to 4-1.3(d) of the ABA Standards for Criminal Justice, defense counsel has a "duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes." These rules and standards serve as "guides to determining what is reasonable" under *Strickland*, 466 U.S. at 688.

An interpreter was necessary to allow Marin Torres and defense counsel to engage in the open exchange of advice and information. Carroll Decl. ¶ 4. Marin Torres had just one phone call with his attorney, who had not represented him at trial, to decide whether to allow the attorney to file the First Step Act

motion on his behalf. Carroll Decl. ¶ 4. A senior legal assistant with the federal public defender's office interpreted that one conversation between Marin Torres and his counsel. *Id.*

Marin Torres did not believe the interpreter was accurately interpreting his words. Marin Torres Decl. ¶ 5. When Marin Torres explained to his counsel that he needed his legal documents in order to prepare his First Step Act motion, trial counsel responded by stating he could not represent Marin Torres on other cases, but he could request that Marin Torres be present at the hearing. *Id.* This failure to communicate was devastating, because Marin Torres was trying to relay to his attorney what documents he wished to obtain in support of his First Step Act motion *prior* to filing. Because this information was not communicated to defense counsel, the attorney wrongly believed Marin Torres was "ok" with moving forward without additional information or consultation. Carroll Decl. ¶ 4.

Marin Torres had only one opportunity to file for relief under the First Step Act, as § 404(c) prohibits the court from considering more than one such request on the merits. It was unreasonable for defense counsel to move forward with filing the

motion on Marin Torres's behalf when Marin Torres still wished to gather supporting documents and possibly represent himself. *See Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). As a result of an error in interpretation, neither trial counsel nor the legal assistant providing the interpretation may have been aware Marin Torres expressed he wished to wait to file the First Step Act motion until he had access to the legal documents that would support his request for relief. Nonetheless, this failure in communication prevented Marin Torres from receiving the zealous, competent defense to which he was entitled.

The Court of Appeals held that even if the record was supplemented, Marin Torres could not show prejudice. Appendix A at A5. But prejudice is presumed where the deficiency leads to the loss of the proceeding or the actual or constructive denial of assistance of counsel during the proceeding. *See Roe v. Flores-Ortega,* 528 U.S. 470, 483 (2000); *United States v. Cronic*, 466 U.S. 648, 649-650 (1984).

Here, Marin Torres was denied the assistance of counsel because the attorney acted in direct opposition to Marin Torres's stated wishes. Marin Torres unequivocally requested in writing that defense counsel not file the motion. Marin Torres Decl. ¶ 8. When Marin Torres received a copy of the motion, but not a response or reply, he believed no further briefing had been filed because his attorney had withdrawn the motion. Marin Torres Decl. ¶ 16. Because he had represented himself in the past, Marin Torres was familiar with general motion procedure and knew to expect the response and reply briefs. However, he has no formal legal training and did not know that he should expect to receive a copy of the motion withdrawing the request for relief. Marin Torres Decl. ¶ 16. When he learned the motion had not been withdrawn, he immediately contacted counsel to resolve the failure in communication. Marin Torres Decl. ¶ 17. But it was too late. Trial counsel's failure to maintain communication with Marin Torres and keep him updated on the progress of his case caused counsel to act directly contrary to Marin Torres's stated wishes.

In the context of filing a notice of appeal, this Court has long held a lawyer acts unreasonably when he disregards the client's explicit instructions. *Flores-Ortega*, 528 U.S. at 477, (2000) (citing *Rodriquez v. United States*, 395 U.S. 327 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999)). This is because the "filing a notice of appeal is a purely ministerial task and the failure to file reflects inattention to the defendant's wishes." *Flores-Ortega*, 528 U.S. at 477. In *Flores-Ortega*, the Court held an evidentiary hearing was required to evaluate whether counsel had acted deficiently. 528 U.S. at 487.

Like filing a notice of appeal, filing the First Step Act motion was a ministerial task and trial counsel's act of moving forward with the motion despite Martin Torres's objections reflects an inattention to Marin Torres's wishes. The interpreter failed to accurately interpret Marin Torres's reservations about filing the motion during their phone conversation, and the attorney's failure to keep Marin Torres updated about the progress of the motion misled Marin Torres to believe counsel had received the letter and the motion was no longer pending before the court. Trial counsel acted deficiently when he failed to

engage in this fundamental communication with his client and, as a result, took actions directly contrary to Marin Torres's wishes. *See Flores-Ortega*, 528 U.S. at 477.

In addition, Marin Torres has demonstrated prejudice. Pursuant to § 404(c), he had only one opportunity to request a resentencing under the First Step Act. Defense counsel told Marin Torres it was unlikely the court would grant Marin Torres's motion. Marin Torres Decl. ¶ 11. When trial counsel drafted the motion, he did not provide a basis for reducing Marin Torres's sentence. ER 31-41. He only explained why Marin Torres was eligible for relief under the First Step Act and requested a plenary resentencing. *Id.* The government pointed to this omission in its response brief, stating, "Marin Torres is a defendant whose history of violence suggests that no reduction in sentence is warranted, and nothing in his motion provides any basis to conclude to the contrary." Appendix F at A42. Only in reply did defense counsel argue the sentence was unjust and explain why Marin Torres's age at release made him unlikely to recidivate. Appendix G at A60-61. Defense counsel offered no information about who Marin Torres was, what life

circumstances had led him to this point, and why the sentence was particularly unjust as applied to him. *See* 18 U.S.C. § 3553(a)(1) (factors to be considered at sentencing include the history and characteristics of the defendant).

Marin Torres sought additional time to compile supporting evidence for his motion and provide the court with more information. Marin Torres Decl. ¶¶ 12, 13. For example, Marin Torres came to the United States as a refugee from Cuba in 1996. Second Marin Torres Decl. at 3. He studied physical culture and sports in Cuba and worked as a boxer. *Id.* at 6, 31. Upon his arrival in the United States, he had no financial resources and spoke little English. *Id.* at 12, 33. Three years later, he was shot multiple times and seriously injured. *Id.* at 17. He was imprisoned while suffering from the gunshot trauma, and jail and prison officials denied him medical care, including basic supplies like colostomy bags. *Id.* at 20. This abuse was the subject of a civil lawsuit.[8]

[8] The action, *Torres v. Fleck et al.*, was filed in the Western District of Washington, under cause number 2:08-cv-00407-JCC.

Subjected to repeated discrimination based upon his race and ethnicity, Marin Torres learned to trust no one affiliated with the criminal justice system, which he asserts is unabashedly corrupt. *Id.* at 36. He has repeatedly asserted he was tricked into pleading guilty to the 1996 conviction the government relied upon to file the penalty enhancement in this case, which elevated the mandatory minimum term from five years to ten years on the drug possession count. Marin Torres Decl. ¶ 14; Second Marin Torres Decl. at 7; *see also* ER 88; PSR ¶¶ 2, 71. As a result, he has rejected assistance from defense attorneys, forcing him to defend himself against the government pro se.

None of this information was presented in defense counsel's general motion, which gave very little information about Marin Torres personally, and offered little for a court to consider when evaluating a reduction in sentence. Counsel's filing of the motion, against Marin Torres's wishes and without any mitigating information about Marin Torres's personal life and history, prejudiced him. *See Strickland*, 466 U.S. at 687.

IV. Defense counsel's filing of the First Step Act motion against Marin Torres's wishes violated his Sixth Amendment right to make his own defense.

The communication failure between defense counsel and Marin Torres also denied Marin Torres his right to represent himself on the First Step Act motion. *Faretta v. California*, 422 U.S. 806, 818-19 (1975); U.S. Const. amend. VI. In *Faretta*, this Court held the protection granted by the Sixth Amendment is not merely that a defense "be made" for the defendant but that the accused be permitted to make his own defense. *Id.* at 819; *see also Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942) (recognizing the defendant's "right to dispense with a lawyer's help"). This Court explained "an unwanted counsel" does not actually represent a defendant, as he does so "only through a tenuous and unacceptable legal fiction." *Id.*

In his letter, Marin Torres requested that defense counsel ask for an extension of time so that Marin Torres could file the motion himself after he received his legal documents. Marin Torres Decl. ¶ 12. This request was consistent with the position Marin Torres took throughout his case. Marin Torres represented himself at his trial and sentencing and strongly

opposed the court's order imposing standby counsel. ER 78, 81. Indeed, his desire to distance himself from counsel was so great that at sentencing he refused to accept a pen from standby counsel, asking if the court could provide him with one instead. ER 47-48.

Marin Torres did not wish for trial counsel to file the motion on his behalf, and did not know the attorney continued to represent him on the First Step Act motion until the district court issued its denial. The court's consideration of a First Step Act motion submitted by an attorney who Marin Torres did not intend to have represent him violated Marin Torres's Sixth Amendment right to represent himself. *Faretta*, 422 U.S. at 819.

V. Defense counsel's failure to communicate with Marin Torres or keep him updated on key developments warrants equitable relief.

Finally, an attorney's actions, or failure to act, can constitute "an extraordinary circumstance" that warrants equitable relief. *Gibbs v. Legrand*, 767 F.3d 879, 882 (9th Cir. 2014). In *Gibbs*, the petitioner sought post-conviction relief in state court. *Id.* The petitioner's attorney notified him the petition had been filed, but failed to inform him the petition was

later denied. *Id.* at 883. By the time the petitioner learned the state supreme court had denied his petition, the time had passed for filing a timely federal habeas petition. *Id.* at 883-84, 888. In the context of equitable tolling, the Court of Appeals explained the importance of taking a "flexible, fact-specific approach" to remedy an injustice. *Id.* at 885. This is because "specific circumstances, often hard to predict in advance" may "warrant special treatment in an appropriate case." *Id.* (quoting *Holland v. Florida*, 560 U.S. 631, 651-52 (2010)).

The Court of Appeals distinguished between "garden variety claims of excusable neglect" – such as the miscalculation of a filing deadline – and the failure of communication in *Gibbs*, which the court found constituted abandonment. *Gibbs*, 767 F.3d at 887 (quoting *Holland*, 560 U.S. at 651). The court held counsel is obligated to "perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, and to keep their clients informed of key developments in their cases" and, while the attorney had performed reasonably competent work, he had failed on all other

counts. *Gibbs*, 767 F.3d at 886 (quoting *Holland*, 560 U.S. at 652-53).

Defense counsel failed similarly here. He failed to receive critical information through the interpreter, failed to refrain from filing or withdraw the motion as Marin Torres requested, and failed to keep Marin Torres informed of the key developments in the case. In *Gibbs*, the court evaluated whether the attorney's failures were the cause of the petitioner's late filing and whether the petitioner had acted diligently in bringing the habeas petition before the court. 767 F.3d at 888-89. After answering both questions in the affirmative, the Court of Appeals reversed. *Id.* at 889, 893.

As is *Gibbs*, the attorney's failures here were the cause of the First Step Act motion being heard by the court against Marin Torres's wishes, and Marin Torres contacted his attorney immediately upon learning the motion had been pending before the court without his knowledge. Marin Torres Decl. ¶ 17. Marin Torres is entitled to equitable relief.

CONCLUSION

The Court should grant certiorari in this case.

Respectfully submitted this 2nd day of August, 2023.

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