No.

IN THE
Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

ERIC D. FREDERICKSEN
MAYA P. WALDRON
STATE APPELLATE PUBLIC DEFENDER
322 East Front Street,
Suite 570
Boise, ID 83702

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner

QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Garza Jr. respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINION AND ORDER BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-15a) is published at 405 P.3d 576. The opinion of the Court of Appeals of Idaho (Pet. App. 16a-27a) has not yet been published, but is currently available at 2017 WL 444026. The district court's opinion (Pet. App. 28a-39a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on November 6, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has recognized that where such a claim is based upon trial counsel's forfeiture of the defendant's right to an appellate proceeding by failing to file a notice of appeal, the defendant need not show "actual prejudice" by "'specify[ing] the points he would raise were his right to appeal reinstated.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (quoting *Rodriquez v. United States*, 395 U.S. 327, 330 (1969)). Rather, to satisfy *Strickland*'s second prong, the defendant need only show that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Flores-Ortega*, 528 U.S. at 483 (citing *Smith v. Robbins*, 528 U.S. 259 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984)). Because an attorney who fails to file a notice of appeal deprives his client not only of "a *fair* judicial proceeding," but "of the appellate proceeding altogether," his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

As all three courts below acknowledged, there is a conflict of authority on whether this "presumption of

prejudice" applies where a criminal defendant instructs his trial counsel to file a notice of appeal, but counsel chooses not to do so because the defendant executed a plea agreement that includes an appeal waiver. Pet. App. 6a-8a, 22a-26a, 35a-36a. Eight circuits hold that the presumption applies. In conflict, two circuits, the court below, and a few other state high courts hold that a defendant must demonstrate actual prejudice by specifying the points he would have raised in his direct appeal proceeding.

The decision below is wrong and troubling. While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the legality of the sentence imposed. Where trial counsel refuses a criminal defendant's instruction to file a notice of appeal, counsel thus deprives the defendant of a counseled direct appeal on these issues "altogether." *Flores-Ortega*, 528 U.S. at 483. In such circumstances, it is grossly inequitable to require a defendant, who in all likelihood will be proceeding without counsel, to lay out the issues that could have been appealed. *Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

The question upon which courts are divided is perfectly presented on this record—indeed it was the decisive legal issue on this claim for all three courts

below. It is undisputed on this record that Petitioner directed his trial counsel to file a notice of appeal and that his counsel declined to do so because his plea agreement included a plea waiver. In the past, the United States has counseled this Court that the appropriate vehicle to resolve the conflict of authority on this issue would involve an appeal waiver that did not also waive collateral review. That's this case. *See infra* Part IV.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. In January and February 2015, respectively, Petitioner entered an *Alford* plea to aggravated assault and a guilty plea to possession of a controlled substance. Both plea agreements included a provision specifying that Petitioner waived his right to appeal. Pet. App. 44a, 49a.[1]

At a joint sentencing hearing, the district court accepted both plea agreements. The court acknowledged that Petitioner's plea agreement included an appeal waiver. CR 132.[2] It nonetheless advised Petitioner about his right to file an appeal and his right to be appointed counsel in the event he chose to appeal. *Id.* In its judgments of conviction, the court again advised Petitioner that he had the right to file an appeal and the right to counsel on appeal. CR 118, 121.

---

[1] Petitioner also waived his right to file a motion under a state procedure for correcting or reducing a sentence. Pet. App. 44a, 49a (waiving rights under Idaho Criminal Rule 35).

[2] "CR" refers to the court record on file with the Supreme Court of Idaho, No. 44991.

2. Petitioner filed a *pro se* petition for post-conviction relief asserting that he had instructed his trial counsel to file a notice of appeal in numerous phone calls and letters, and that his counsel rendered ineffective assistance by failing to do so. In response, the government submitted an affidavit from Petitioner's trial counsel, in which trial counsel admitted that Petitioner "told me he wanted to appeal the sentence(s) of the court," and that counsel "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal." Pet. App. 3a, 52a; CR 148. The government contended that in light of Petitioner's appeal waiver, Petitioner was required to show actual prejudice from the loss of direct appeal proceedings. CR 82.

The district court denied Petitioner's claim. The sole issue addressed by the district court on this claim was whether Petitioner was entitled to the "presumption of prejudice" adopted by this Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The court observed that "[t]he parties agree on" all of the pertinent facts: That (1) Petitioner entered into plea agreements in which he waived the right to appeal; (2) Petitioner asked his trial counsel to file a notice of appeal, despite having waived his right to appeal; and (3) because of the appeal waivers, his trial counsel declined to act on his request to file appeals. Pet. App. 33a.

The court observed that although "there is no United States Supreme Court decision on point, . . . nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a. It explained that a majority of eight federal circuits hold that the presumption of prejudice

recognized in *Flores-Ortega* applies even where the defendant has signed an appeal waiver, Pet. App. 35a, while a minority of two federal circuits require a showing of actual prejudice, Pet. App. 35a-36a. The court adopted the minority position and dismissed Petitioner's claim on the basis that he had failed to show actual prejudice. Pet. App. 36a-39a.

3. The Court of Appeals of Idaho affirmed. That court similarly recognized that "[f]ederal circuit courts are split on the issue" and "[t]he majority of circuit courts have ruled that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived the right to appeal." Pet. App. 22a. "In such circumstances, the majority rule presumes prejudice" and "[a] client need only show that he or she instructed his or her attorney to appeal in order to demonstrate prejudice under the second *Strickland* prong." Pet. App. 22a (citation omitted). On the other hand, two circuits "have rejected the majority rule" and "maintain that prejudice is not presumed when the defendant waives the right to appeal." Pet. App. 24a. Like the district court, the court of appeals adopted the minority position and dismissed Petitioner's claim for failure to demonstrate actual prejudice. Pet. App. 25a-27a.

4. Petitioner filed a petition for review in the Supreme Court of Idaho, which granted review and affirmed. Like the courts below, the Idaho Supreme Court observed that "[t]here is a federal circuit split regarding the issue" of whether the presumption of prejudice applies given the existence of an appeal waiver "which involves differing interpretations of [this Court's] decision in *Flores-Ortega*." Pet. App. 6a. It recognized that "[a] majority of federal circuit

courts have interpreted *Flores-Ortega* to apply even in situations where the defendant has validly waived his right to appeal." Pet. App. 7a. "Under the majority approach, an attorney is required to file an appeal at his client's request, even if the attorney thinks the appeal would be frivolous" and "[w]hen counsel fails to follow his client's express direction to appeal, prejudice is presumed." Pet. App. 7a. On the other hand, "[t]wo federal circuit courts and a federal district court in an undecided circuit follow the minority approach," which does not presume prejudice in the presence of an appeal waiver and requires the petitioner to make an affirmative showing of prejudice. Pet. App. 8a. The court observed that some state courts of last resort had also adopted the minority approach. Pet. App. 8a-9a.

Adopting the minority position, the court held "that *Flores-Ortega* does not require counsel be presumed ineffective for failing to appeal at the client's direction in situations where there has been a waiver of the right to appeal." Pet. App. 10a. It reasoned: "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights." Pet. App. 11a. The court affirmed the dismissal of his claim on the basis that Petitioner had not shown actual prejudice. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

There is a deep and acknowledged split of authority on whether the "presumption of prejudice" recognized in *Flores-Ortega* applies where trial counsel disregards a criminal defendant's instruction

to file a notice of appeal on the basis of an appeal waiver.[3] That question is important, recurs frequently, and is perfectly presented on this record. The Court should grant certiorari.

I. The Question Presented Is The Subject Of An Acknowledged Split.

As recognized by the courts below, eight circuits—the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh—hold that the presumption of prejudice recognized in *Flores-Ortega* applies where counsel disregards his client's direction to file a notice of appeal, irrespective of whether the client signed a plea agreement that includes an appeal waiver. *See Campusano v. United States*, 442 F.3d 770, 773 (2d Cir. 2006) (Sotomayor, J.) (rejecting the government's argument that because "substantive claims were precluded by [Petitioner's] waiver of appeal . . . the *Flores-Ortega* presumption of prejudice should not apply"); *United States v. Poindexter*, 492 F.3d 263, 268-69 (4th Cir. 2007) (presuming prejudice and rejecting government's argument that *Flores-Ortega* "did not involve an appeal waiver"); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007) (holding "that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal");

---

[3] While Petitioner uses the "presumption of prejudice" terminology employed by this Court, it is worth noting that even under *Flores-Ortega*, a criminal defendant maintains the burden of establishing prejudice under *Strickland*. He simply satisfies that burden upon the lesser showing that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. On this record, it is undisputed that Petitioner specifically directed his counsel to appeal and thus satisfied this lesser showing.

Campbell v. United States, 686 F.3d 353, 360 (6th Cir. 2012) ("[E]ven when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel."); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007) (same); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (same); *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005) (same); *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005) (same).

Two circuits—the Third and the Seventh—have reached the opposite conclusion. *See United States v. Mabry*, 536 F.3d 231, 240-41 (3d Cir. 2008) ("The analysis employed [in *Flores-Ortega*] in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver."); *Nunez v. United States*, 546 F.3d 450, 455-56 (7th Cir. 2008) (rejecting application of *Flores-Ortega* and reasoning that "[o]nce a defendant has waived his right to appeal . . . the defendant must show both objectively deficient performance and prejudice"). Both circuits acknowledged that their conclusions conflict with the majority of circuits. *Mabry*, 536 F.3d at 242 ("We . . . will part ways with the approach taken by the majority of courts of appeals."); *Nunez*, 546 F.3d at 453 (recognizing conflict with seven circuits).

As the Idaho Supreme Court observed, at least a few other state high courts have also adopted this minority position. Pet. App. 8a-9a (citing *Stewart v. United States*, 37 A.3d 870, 877 (D.C. 2012); *Buettner v. State*, 363 P.3d 1147, ¶¶ 14-15 (Mont. 2015); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007)).

II. The Decision Below Is Wrong And Deeply Troubling.

The minority position is wrong and seriously erodes the Sixth Amendment right to competent counsel and to a counseled direct appeal. As this Court has recognized, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez v. United States*, 395 U.S. 327, 330 (1969).

It is easy to fall into the trap of the court below, which, like other courts adopting the minority position, has reasoned that "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." Pet. App. 11a. But that is simply wrong. It is well-established that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver," *Campusano*, 442 F.3d at 774 (Sotomayor, J.), such that "even the broadest waiver does not absolutely foreclose some degree of appellate review." *Campbell*, 686 F.3d at 358. Those issues include, at a minimum, whether the waiver was made knowingly, voluntarily, and competently, whether the government breached the plea agreement, whether the sentence was imposed based upon constitutionally impermissible factors, and other challenges related to the legality of the sentence. *Campusano*, 442 F.3d at 774-75 (Sotomayor, J.). Thus, as in *Flores-Ortega* and *Rodriquez*, counsel's refusal to file a notice of appeal deprives his client of "an appeal altogether." *Flores-Ortega*, 528 U.S. at 483.

Moreover, just as in *Flores-Ortega* and *Rodriquez*, requiring a defendant to make a showing of prejudice after his trial counsel refused his express instruction and thus cost him his right to a counseled appeal would work an untenable burden on the defendant who will now, in all likelihood, be forced to proceed without counsel. *Flores-Ortega*, 528 U.S. at 486 ("[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."); *Rodriquez*, 395 U.S. at 330 ("Applicants for relief [on postconviction] must, if indigent, prepare their petitions without the assistance of counsel . . . They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one."); *Peguero*, 526 U.S. at 30 (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

This Court established a specific procedure for instances in which trial counsel believes there may be no basis for appeal in *Anders v. California*, 386 U.S. 738 (1967). The solution is not for counsel to unilaterally forfeit their client's right to a counseled direct appeal during the short notice-of-appeal stage. Rather, regardless of the perceived merits of an appeal, trial counsel is to preserve the defendant's right by filing a notice of appeal. Appellate counsel must then "support his client's appeal to the best of his ability," and if he ultimately "finds his case to be

wholly frivolous, after a conscientious examination of it, he should so advise the court . . . accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. The appellate court then conducts "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* The decision below would "undermine [*Anders*] and the principles of the Sixth Amendment by allowing attorneys who believe their clients' appeals to be frivolous simply to ignore the clients' requests to appeal." *Campusano*, 442 F.3d at 776 (Sotomayor, J.).

III. The Question Presented Is Important And Recurs Frequently.

The importance of this issue—whether an attorney's defiance of his client's instruction to file a notice of appeal appropriately costs that defendant his right to a counseled direct appeal—is self-evident. *See Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (recognizing that it would be "invidious" to deny criminal defendants the right to a counseled direct appeal).

Given the prevalence of appeal waivers in modern plea agreements, the minority position would effectively nullify the protections afforded in cases like *Flores-Ortega* and *Anders* in certain jurisdictions. *See, e.g.*, Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy,* 55 Duke L.J. 209, 231, 232 fig.7 (2005) (observing that 90% of plea agreements in the Ninth Circuit and 65% of plea agreements across all circuits included appeal waivers).

The issue is now of special importance in Idaho. Because the position adopted by the court below conflicts with that of the Ninth Circuit, the standard for whether an attorney has rendered ineffective assistance of counsel will differ depending upon whether the attorney happened to be litigating in state court or federal court. Because such standards influence an attorney's understandings of his or her professional responsibilities, the many attorneys who appear before both state and federal courts face conflicting guidance. Furthermore, criminal defendants in Idaho (as well as Montana and Kansas) will have to engage in federal habeas litigation regarding whether the position adopted below is "contrary to, or involved an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1).

IV. The Question Presented Is Squarely Presented.

The question upon which the lower courts are divided was the only issue passed upon by the courts below to dispose of Petitioner's claim and is thus squarely presented. The facts are undisputed and straightforward: Petitioner instructed his trial counsel to appeal and his trial counsel declined to do so on the sole basis that Petitioner had signed plea agreements that included an appeal waiver.

In response to prior petitions for certiorari, the United States has acknowledged that there is a "conflict among the circuits" on the question presented, but counseled the Court to wait for a record that contains an appeal waiver without a waiver of collateral review. *See e.g.*, Brief of the United States in Opposition at 9, *Solano v. United States*, No. 15-9249 (U.S. Aug. 10, 2016). It has repeatedly advised

that because the plea agreements at issue in prior cases included a "waiver of [the] right not only to appeal, but also to bring any collateral challenge," the "conflict among the circuits [was] not . . . implicated." *E.g.*, *id.* at 9, 12-14. The appeal waiver in Petitioner's plea agreements did not include a waiver of collateral review and the conflict is thus squarely presented on this record.

No reasonable argument could be made that this issue requires further percolation. As the courts below acknowledged, "nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC D. FREDERICKSEN
MAYA P. WALDRON
STATE APPELLATE
PUBLIC DEFENDER
322 East Front Street,
Suite 570
Boise, ID 83702

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Petitioner