No. 17-1026

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Respondent does not dispute that, after pleading guilty, Petitioner directed his lawyer to file a notice of appeal and his lawyer unilaterally forewent an appeal because the plea contained an appeal waiver. Respondent also does not dispute that whether the presumption of prejudice in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies in these circumstances is dispositive of Petitioner's claim.

Respondent does not deny the existence of a deep conflict among lower courts on this issue, but says they "apparently" just differ on the question of whether "a defendant ha[s] a right to at least limited appellate proceedings despite the waiver." BIO at 10, 13. Respondent's fanciful account is not how any of the courts below, any other court, any prior BIOs, or even Respondent before now understood the issue dividing the lower courts. It is also demonstrably false. The Idaho Supreme Court and all circuits have explicitly recognized that a defendant may directly appeal the validity or enforceability of an appeal waiver, the scope of the waiver (and any issue outside its scope), and the legality of the sentence imposed.

1. Respondent's invented account of the split conflicts with how everyone else sees it. The Idaho Supreme Court, for instance, explicitly understood the conflict to turn on "differing interpretations of the United State Supreme Court's decision in *Flores-Ortega*." Pet. App. 6a. It noted that "the United States Supreme Court" had not yet resolved the issue, *id.*—an observation that makes no sense under Respondent's reading. And it adopted the minority interpretation of this Court's decision: "[W]e conclude 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. In reaching that conclusion, the court did not cite a single decision premised upon Idaho law or appellate process.[1]

Before the Idaho Supreme Court, Respondent understood the same, stating, "The United States Supreme Court has not explicitly addressed the narrow question at issue here." Appellee Br. at 8. It explicitly set forth the conflict among the federal circuits—characterizing it as a choice between the "majority rule" and the "minority rule"—and argued straightforwardly that "the minority rule is better reasoned" because it "comports with both the *Strickland* two-prong test, and *Flores-Ortega*." Appellee Br. at 11–12, 17. And Respondent specifically acknowledged that in Idaho, an appeal waiver does not prevent an appeal "that the waiver was invalid or unenforceable," that "the state breached the plea agreement," or that "the claimed issues on appeal were outside the waiver's scope." *Id.* at 11–12; *see infra* at 3-6 (explaining that this is, in fact, the case).

Not a single one of the circuits or state high courts cited in the petition or in the BIO have conceived of the issue in the manner Respondent advances. *See* Pet. at 8–9.[2] Indeed, prior BIOs on this issue have

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[1] The only state court decision cited before making this choice was *McKinney v. State*, 396 P.3d 1168, 1171–72 (Idaho 2017), which itself "interpreted *Flores-Ortega*." Pet. App. 10a.

[2] In a footnote, Respondent contends that the conflict "is not as clear" as Petitioner and courts have described, citing *United States v. Razzoli*, 548 F. App'x 733, 736 (2d Cir. 2013). BIO at 13. That unpublished decision concerned an alleged failure to file a jurisdictionally barred interlocutory appeal. There had not even

conceded the intractable conflict on the question presented, but advised the Court that the proper vehicle would involve an appeal waiver without an additional waiver of collateral review. *See* Pet. at 13-14. That's this case.

2. Respondent's account of the split is also demonstrably false. Respondent is correct that the majority of lower courts, which interpret *Flores-Ortega* to require a presumption of prejudice independent of an appeal waiver, have recognized that a defendant who signs a waiver may challenge the validity, enforceability, and scope of the waiver. Pet. at 8–9, 10; BIO at 10. Respondent argues, however, that the minority of courts adopting the contrary position (which includes the Third Circuit, Seventh Circuit, and Idaho) have simply concluded that no "limited right of appeal remains despite the waiver" and "the appeal waiver is deemed conclusive of the appeal." BIO at 1, 12. That is not true.

Each of the Seventh Circuit, Third Circuit, and Idaho has explicitly recognized that these issues necessarily survive an appeal waiver. In rejecting the majority interpretation of *Flores-Ortega*, for instance, the Seventh Circuit specifically acknowledged that "waivers of appeal are not airtight" and a defendant has "a right to legal assistance" to challenge whether "the plea was involuntary," issues outside of the scope of the waiver, or "a sentence higher than the statutory maximum." *Nunez v. United States*, 546 F.3d 450, 454 (7th Cir. 2008); *see also Jones v. United States*, 167

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been a conviction to appeal at the time, let alone an appeal waiver; there was no client instruction to file an appeal; and the court never even cited or discussed *Flores-Ortega*.

F.3d 1142, 1144 (7th Cir. 1999) ("A waiver of the right to appeal does not completely foreclose review . . . [T]he right to appeal survives where the agreement is involuntary, or the trial court relied on a constitutionally impermissible factor (such as race), or . . . the sentence exceeded the statutory maximum.").[3] Similarly, the Third Circuit not only recognizes that a defendant may challenge the validity of his waiver on direct appeal, but has "decline[d] to adopt a blanket rule prohibiting all review" even for "otherwise valid waivers." *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

Like all these jurisdictions, Idaho courts uniformly recognize that a defendant whose plea contains an appeal waiver may contest the validity or enforceability of the waiver on direct appeal. This includes, for instance, the following issues:

- Whether the defendant "entered into his plea agreement voluntarily, knowingly, and intelligently." *State v. Cope*, 129 P.3d 1241, 1246 (Idaho 2006).[4]

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[3] Prior to the decision on remand in *Nunez*, the U.S. Solicitor General acknowledged the conflict over the meaning of *Flores-Ortega* (without Respondent's fanciful gloss), and recommended against plenary review because the petitioner's plea agreement, unlike the one here, included a waiver of collateral review. Brief of United States in Opposition at 13-14, *Nunez v. United States*, 554 U.S. 911 (2008) (No. 07-818), 2008 WL 2050805.

[4] *See also, e.g.*, *State v. Murphy*, 872 P.2d 719, 720 (Idaho 1994) (reviewing on direct appeal whether waiver was "was made voluntarily, knowingly and intelligently"); *infra* at 9 n. 12 (citing additional cases acknowledging these issues are available).

- "[W]hether the State breached the plea agreement which would allow the plea to be withdrawn." *Id.* at 1248-49; *see also id.* ("'A defendant is constitutionally entitled to relief when the State breaches a promise made to him in return for a plea of guilty.'" (citation omitted)).[5]
- Whether statements made by the district court at the plea hearing or sentencing "overr[o]de any provision in the plea agreement waiving the right to appeal." *Id.* at 1247–48.[6]

In addition, even where a defendant does not contest the validity or enforceability of his appeal waiver, he can appeal the scope of the waiver and is, of course, free to raise any issues outside its scope. *See State v. Taylor*, 336 P.3d 302, 305 (Idaho Ct. App. 2014) (collecting Idaho cases which "illustrate [that] the party against whom waiver is asserted may contest the . . . scope of the waiver" which may not "encompass all of the issues raised by the appellant"). For example, Idaho defendants have directly appealed whether

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[5] *See also, e.g.*, *State v. Allen*, 141 P.3d 1136, 1139 (Idaho Ct. App. 2006) (recognizing that where the State breaches a plea agreement it "would not be entitled to enforce its terms [against the defendant], including the appeal waiver. . . . Consequently, the question of the enforceability of the appeal waiver goes hand in hand with the question whether the State breached the plea agreement").

[6] As noted in the petition, Petitioner's judge specifically advised him at sentencing and in his judgments that he had a right to a counseled direct appeal. Pet. at 4.

their sentences,[7] other penalties such as restitution,[8] and post-judgment motions[9] are outside the scope of the waiver and succeeded in obtaining relief. Moreover, appeal waivers are not self-executing—where the State does not assert its rights under the waiver, the defendant may argue the full universe of issues on appeal.[10]

The question presented is whether an attorney can betray his client's instruction to preserve a counseled direct appeal on these issues and send him to post-conviction where he will, in all likelihood, be on his own. *See 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

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[7] *State v. Hansen*, 321 P.3d 719, 725 (Idaho 2014) (observing that the scope of a plea agreement "'is a question of law over which we may exercise free review'" and reviewing whether appeal waiver encompassed defendant's sentence (citation omitted)).

[8] *State v. Straub*, 292 P.3d 273, 276-77 (Idaho 2013) (observing that defendant "does not appeal the waiver itself, but rather the scope of that waiver" and holding that restitution order was outside scope of appeal waiver).

[9] *State v. Holdaway*, 943 P.2d 72, 74 (Idaho Ct. App. 1997) (appeal of post-judgment motion outside scope of waiver and thus "we do not find his appeal barred by the waiver in his plea agreement").

[10] *State v. Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (resolving merits of issue on direct appeal because the State did not assert plea waiver); *Hansen*, 321 P.3d at 725 ("'Plea agreements are essentially bilateral contracts between the prosecutor and the defendant.'" (citation omitted)); *see also e.g.*, *United States v. Goodson*, 544 F.3d 529, 533-37 (3d Cir. 2008) (An appellate waiver has "no bearing on an appeal if the government does not invoke its terms."); *United States v. Kieffer*, 794 F.3d 850, 852 (7th Cir. 2015) (same).

had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.").

3. Respondent makes much of the fact that Idaho appellate courts (like the federal circuits) have a process through which issues may be dealt with summarily, by motion, instead of full briefing. BIO at 8–11. According to Respondent, the availability and use of such procedures is somehow also connected to the differing interpretations of *Flores-Ortega*. *Id.* This is a distraction.

The Federal Rules of Appellate Procedure provide parties with the option of filing dispositive motions. *See* Fed. R. App. P. 27, 11(g). Several circuits have adopted local rules providing specific procedures for dispositive motions. *E.g.*, D.C. Cir. R. 27(g) & D.C. Cir. Handbook of Practice & Internal Procedures at 35–36 (procedures for seeking summary disposition); 3d Cir. R. 27.4 & I.O.P 10.6 (same). Idaho appellate courts have an analogous rule, which allows a party to file a motion to dismiss an appeal. *See* Idaho App. R. 32(a).

Whether a court of appeals offers an avenue for an appellate proceeding to take place summarily by motion or proceeds by briefing is beside the point. In either case, an attorney's refusal to file an appeal at his client's direction deprives the client "of the appellate proceeding altogether" and the presumption of prejudice is warranted. *Flores-Ortega*, 528 U.S. at 483.

Accordingly, this has nothing to do with the circuit split. As Respondent acknowledges, despite having summary procedures available, a majority of circuits have held that the *Flores-Ortega* presumption applies.

BIO at 10-12. Indeed, The Tenth Circuit, sitting *en banc*, set forth a specific intra-circuit procedure for summarily dismissing appeals with valid waivers, *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004), yet presumes prejudice when counsel refuses to file an appeal based on a waiver, *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005); *see also* 10th Cir. R. 27.3(A)(1)(d) (expressly providing that an appeal waiver may be a basis for summary disposition). And in the Third and Seventh Circuits, which decline to presume prejudice under *Flores-Ortega*, enforcement of an appeal waiver generally occurs after briefing, not dispositive motion.[11]

Respondent's suggestion that Idaho courts always resolve appeal waivers via summary dismissal on motion, BIO at 8–9, is incorrect. All of the decisions cited in Part 2 above were decided on direct appeal after full briefing. *See supra* at 3-6 & nn.3-10. Indeed, Idaho courts have explicitly recognized that in instances where the "scope and validity of the waiver" is at issue "resolution of the waiver issue by an early motion, rather than through the normal appellate process, may be inappropriate." *Taylor*, 336 P.3d at

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[11] *United States v. Mason*, 343 F.3d 893, 894 (7th Cir. 2003) ("Ordinarily the government urges waiver of appeal after the defendant has filed either a merits brief or an *Anders* brief."); *United States v. Williams*, 555 F. App'x 127, 127-28 (3d Cir. 2014) ("Typically, . . . the defendant, if he appeals, raises, in his opening brief, the reason or reasons why he believes the sentence that was imposed or the conviction itself should be set aside. And, typically, if there has been an appellate waiver, the government, in its responsive brief, will invoke that waiver, arguing why it should be enforced and, failing that, why the reason or reasons the defendant has raised for invalidating the sentence or the conviction are without merit.").

305.[12] Respondent itself argued that the application of appeal waivers can be resolved by motion or briefing. *Id*.

4. This Court recently reaffirmed that the decision to "forgo an appeal" is one of those critical steps "reserved for the client." *McCoy v. Louisiana*, No. 16-8255, slip op. at 6 (U.S. May 14, 2018); *see also generally* Amicus Br. of Yale Ethics Bureau. An attorney should not be able to veto a client who has made that decision, costing the client his right to a counseled direct appeal proceeding.[13]

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[12] Accordingly, when Idaho courts dismiss such appeals upon motion, it is generally (if not always) because the defendant "does not challenge the validity of the waiver provision in the plea agreement nor contend that the State in any way violated the plea agreement, nor does he maintain that the plea agreement was not voluntary, knowing, and intelligent." *State v. Huerta*, No. 37871, 2011 WL 11037654, at *1 (Idaho Ct. App. June 6, 2011); *State v. Contreras*, No. 40732, 2013 WL 6869867, at *1 (Idaho Ct. App. Dec. 31, 2013) (same); *State v. Faulkner*, No. 40729, 2013 WL 5486743, at *1 (Idaho Ct. App. Oct. 2, 2013) (same).

[13] As set forth in the petition, in *Anders v. California*, 386 U.S. 738 (1967), this Court established a specific procedure for an attorney to follow in the event that he or she believes there is no non-frivolous ground for appeal. Pet. at 11-12. The Idaho Supreme Court has recognized that *Anders* presents only the "minimal constitutional safeguards" and has adopted even more rigorous protection for criminal defendants, which prevents appellate counsel from withdrawing and requires a merits brief. *State v. McKenney*, 568 P.2d 1213, 1214-15 (Idaho 1977). No part of Petitioner's argument "seeks to impose" *Anders*' less stringent procedure on Idaho. BIO at 16 n.4. The point is that an attorney's refusal to appeal despite his client's direction undermines even the limited constitutional safeguards set forth in *Anders*. *See Campusano v. United States*, 442 F.3d 770, 774–77 & n.4 (2d Cir. 2006) (Sotomayor, J.).

State courts are routinely called upon to review attorney conduct under *Strickland v. Washington*, 466 U.S. 668 (1984), and, accordingly, this Court's decisions defining *Strickland* have frequently arisen out of state court proceedings, including *Flores-Ortega* and *Strickland* themselves. *See Flores-Ortega*, 528 U.S. at 473-74; *Strickland*, 466 U.S. at 671-75. The present conflict has created "needless confusion" over the obligations of counsel when instructed to file an appeal, and that confusion is particularly acute for lawyers in Idaho, who are simultaneously subject to two different rules. *See* Amicus Br. of Yale Ethics Bureau at 16–18; Amicus Br. of Idaho Association of Criminal Defense Lawyers at 8–10. Given the ubiquity of appeal waivers in modern plea agreements, *see* Amicus Br. of Idaho Association of Criminal Defense Lawyers at 4, the question presented recurs frequently and warrants this Court's attention.

CONCLUSION

For the foregoing reasons and those in the petition, certiorari should be granted.

Respectfully submitted,

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