IN THE SUPREME COURT OF THE UNITED STATES

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No. 17-1026

GILBERTO GARZA, JR., PETITIONER

v.

STATE OF IDAHO

_____

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

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MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT

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Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in the oral argument in this case as amicus curiae and that the United States be allowed ten minutes of argument time. The United States today is filing a brief as amicus curiae supporting respondent and seeks an allocation of ten minutes of the argument time of respondent. Respondent has agreed to cede ten minutes of its argument time to the United States. Granting this motion therefore

would not require the Court to enlarge the overall time for argument.

1. This case concerns the proper interpretation and application of the Sixth Amendment right to the effective assistance of counsel. This Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), typically requires a defendant alleging a violation of that right to plead and prove case-specific prejudice from his attorney's constitutionally inadequate performance. The question presented in this case is whether a defendant who asks his attorney to file a direct appeal, despite having waived appellate rights in a plea agreement, may automatically obtain collateral relief, without any showing as to the issues he would have raised on appeal, if his attorney fails to perfect the appeal.

2. In 2015, petitioner pleaded no contest to a state charge of aggravated assault and guilty to a state charge of possession with intent to possess methamphetamine, pursuant to two separate plea agreements. Pet. App. 2a. In each plea agreement, petitioner waived his right to appeal. Id. at 3a. After the trial court accepted the plea agreements and imposed sentences in accordance with them, no notice of appeal was filed within the 42 days allowed by state law. Pet. App. 2a-3a; see Idaho App. R. 14(a).

Approximately four months later, petitioner collaterally attacked the judgment. He claimed, among other things, that his

counsel had been constitutionally ineffective for not filing appeals, despite petitioner's direction to counsel to appeal his sentences. Pet. App. 3a. The state district court rejected petitioner's ineffective-assistance claim, concluding that petitioner had not established that counsel's failure to appeal had prejudiced him. Id. at 28a-39a. The court recognized that, under Roe v. Flores-Ortega, 528 U.S. 470 (2000), "a presumption of prejudice" attaches to a "denial of [an] entire judicial proceeding" itself, such as an appeal, "which a defendant wanted at the time and to which he had a right." Pet. App. 34a (quoting Flores-Ortega, 528 U.S. at 483). But the court held that Flores-Ortega's rule of presumptive prejudice did not apply to a "defendant who had waived the right to appeal, as [petitioner] did." Ibid.

The state court of appeals affirmed, agreeing with the state district court that "prejudice is not presumed when the defendant waives the right to appeal and the attorney fails to file an appeal upon the defendant's request." Pet. App. 24a; see id. at 16a-27a. The state supreme court granted review and affirmed. Id. at 1a-15a. Like the lower courts, it "decline[d] to presume counsel ineffective for failing to appeal at [petitioner's] request when [petitioner] ha[d] waived the right to appeal as part of a plea agreement." Id. at 10a. It also found that petitioner, who had not identified "any non-frivolous grounds for appeal," had not

shown that he was prejudiced by his counsel's performance. Id. at 15a.

3. The United States has filed a brief as amicus curiae supporting respondent. The brief argues that counsel's failure to file a requested appeal prejudices a criminal defendant only if it "actually cause[s]" the defendant to "forfeit a judicial proceeding to which he was otherwise entitled." Flores-Ortega, 528 U.S. at 484, 485. When a defendant has voluntarily renounced rights to appellate review through an explicit waiver, however, the absence of such review cannot automatically be blamed on attorney error. Rather, the defendant must show that counsel's failure to appeal -- not his own waiver -- is what "actually" denied him merits review. To make that showing, a defendant may point to evidence that he expressed interest in appealing a non-waived issue; or he may identify nonfrivolous grounds for appealing despite the waiver.

The brief of the United States also argues that requiring a defendant to make the traditional showing of Strickland prejudice, by establishing a reasonable probability that he would have pressed an issue that could be heard notwithstanding his waiver, is supported by sound practical considerations. A defendant who signed an appeal waiver, and thus necessarily considered the scope of his appellate rights, is well-positioned to make such a showing, which is similar in kind to the prejudice showing required in

related Strickland contexts. A contrary rule, under which prejudice is presumed, would require the automatic reinstatement even of waived, frivolous appeals -- the very filing of which would breach the plea agreement and risk undoing the benefits the defendant received thereunder. And, at a minimum, a rule of presumptive prejudice would incentivize costly and burdensome evidentiary hearings, all for the sake of appeals that would have gone -- and, if reinstated, would go -- nowhere.

Finally, the brief of the United States argues that in this case, petitioner has not shown a reasonable probability that counsel's failure to appeal deprived him of substantive appellate review. Following his conviction and sentencing, petitioner asked trial counsel to "appeal," Pet. App. 42a, without specifying any particular issue he wished to raise. Petitioner has also failed, during post-conviction proceedings, to identify any nonfrivolous claim not barred by his appeal waivers that he would bring if allowed to file an out-of-time appeal.

4. The United States has a substantial interest in the Court's resolution of this case. Collateral attacks on federal and state criminal judgments are generally adjudicated under similar standards, and so the Court's ruling will affect the way that claims of ineffective assistance of counsel by federal prisoners are handled by federal courts. The United States has often participated in oral argument as amicus curiae in cases

involving the proper application of the Strickland standard, see, e.g., Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), Burt v. Titlow, 571 U.S. 12 (2013); Lafler v. Cooper, 566 U.S. 156 (2012), Missouri v. Frye, 566 U.S. 134 (2012), Martinez v. Ryan, 566 U.S. 1 (2012), and the United States participated in oral argument in Flores-Ortega, supra. We therefore believe that the government's participation in oral argument would materially assist the Court in its consideration of this case.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

SEPTEMBER 2018