

No. 17-9044

IN THE SUPREME COURT OF THE UNITED STATES

ABEL HERIBERTO FABIAN-BALTAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-9044

ABEL HERIBERTO FABIAN-BALTAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 11-28) that a defendant who asks his attorney to file a direct appeal, despite having waived appellate rights as to his conviction and sentence, may state a claim for ineffective assistance of counsel if his attorney fails to perfect the appeal, without any showing as to the issues an appeal would have raised. He asks (Pet. 28) the Court to either (1) hold this case pending the Court's disposition of Garza v. Idaho, cert. granted, No. 17-1026 (oral argument scheduled for Oct. 30, 2018), in which the Court will consider a similar question; or (2) grant his petition for a writ of certiorari, vacate the Ninth Circuit's decision, and remand in light of McCoy

v. Louisiana, 138 S. Ct. 1500 (2018), in which the Court held that a defendant's Sixth Amendment rights are violated when his counsel concedes the defendant's guilt over his "intransigent and unambiguous objection," id. at 1507. Because the proper disposition of the petition may be affected by the Court's resolution of Garza, the petition should be held pending the decision in that case, and then disposed of as appropriate in light of that decision.

1. The Ninth Circuit agrees with petitioner that a defendant may state a claim for ineffective assistance of counsel based solely on his attorney's failure to perfect a requested appeal, even where the defendant waived appellate rights. See United States v. Sandoval-Lopez, 409 F.3d 1193 (2005). The district court concluded here, however, without briefing from the government, that petitioner could not raise such an ineffective-assistance claim on collateral review because his plea agreement included not only a waiver of appellate rights but also a waiver of collateral-review rights. Pet. App. B5. The court of appeals affirmed on that basis. Id. at A2.

The United States Attorney has represented that he would not seek to enforce petitioner's collateral-review waiver on the facts of this case.¹ If this Court determines in Garza that a defendant

¹ See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Department Policy on Waivers of Claims of Ineffective Assistance of Counsel 1 (Oct. 14, 2014), <http://www.justice.gov/file/70111/download> ("For cases in which a defendant's ineffective assistance claim would be barred by a

in these circumstances may state an ineffective-assistance claim, it would therefore be appropriate for the Court to grant this petition, vacate the decision below, and remand for reconsideration in light of the decision in Garza and without regard to petitioner's collateral-attack waiver.

2. No reason exists, however, to grant the petition, vacate the decision below, and remand for reconsideration in light of McCoy. McCoy arose on direct review, not collateral review, and concerned the Sixth Amendment implications of an attorney's concession of his client's guilt over the defendant's objection, not an attorney's alleged failure to file a notice of appeal. 138 S. Ct. at 1507; see id. at 1510. To the extent McCoy has any bearing on the question presented here, moreover, the Court can take that into account in Garza.²

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018

previously executed waiver, prosecutors should decline to enforce the waiver * * * when the defendant's ineffective assistance claim raises a serious debatable issue that a court should resolve.").

² The government waives any further response to the petition unless this Court requests otherwise.