No. 17-1026

In the
Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF OF AMICUS CURIAE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys. Currently, IACDL has over 400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensure that Idaho defendants receive adequate assistance of counsel at trial, and that they are able to fully effectuate their right to an appeal.

Furthermore, given the size and breadth of IACDL's membership, the organization has substantial expertise in the practical circumstances on the ground in Idaho regarding how defense attorneys, their clients, and courts operate. IACDL likewise has insight into how each of those actors deals with the issues implicated by the case at bar, i.e., plea agreements, waivers of appellate rights, notices of appeal, and ineffective-assistance claims. Accordingly, IACDL has both the interest and the knowledge to assist the Court with its resolution of the petition for certiorari.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received 10 days' notice of the filing of this brief and provided written consent to its filing.

REASONS FOR GRANTING THE WRIT

IACDL agrees fully with the contentions made in the Petition for a Writ of Certiorari and offers the additional points below in support of Petitioner.

I. THE QUESTION PRESENTED IS IMPORTANT.

In addition to the acknowledged circuit split, (Pet. 8-9), the Question Presented is especially important because it involves a defendant deprived of a "proceeding itself" and arises frequently.

First, this Court has repeatedly protected the rights of individuals who have forfeited a judicial proceeding due to the decisions or performance of their attorney. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, this Court described the distinction, based on a long line of case law, between ineffective assistance that merely causes "a judicial proceeding of disputed reliability" and ineffective assistance that causes "the forfeiture of a proceeding itself." 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)).

This Court held, "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Flores-Ortega*, 528 U.S. at 484. Courts should presume prejudice "with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding . . . entirely nonexistent." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 693-96 (1984)).

For more than a decade, Circuit Courts have interpreted *Flores-Ortega* to apply when defendants entered a plea agreement that included an appellate waiver. *See, e.g., Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006) (Sotomayor, J.); *United States v. Garrett*, 402 F.3d 1262, 1265-66 (10th Cir. 2005). For example, the Second Circuit reasoned that "important constitutional rights require some exceptions to the presumptive enforceability of [an appellate] waiver. . . . These constitutional protections are endangered if counsel fails to pursue an appeal without advising a client of the reasons for doing so." *Campusano*, 442 F.3d at 774-75 (citing *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000)). Likewise, the Tenth Circuit reasoned that the presumption of prejudice in post-waiver cases "serves to safeguard important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel." *Garrett*, 402 F.3d at 1265-66.

Just last Term, this Court reaffirmed the importance of the *Flores-Ortega* presumption of prejudice where an attorney's "deficient performance arguably led . . . to the forfeiture of a proceeding itself." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (citing *Flores-Ortega*, 528 U.S. at 483). Rejecting the Government's argument that a petitioner seeking to overturn a guilty plea could not show prejudice because he would have been unlikely to succeed at trial, this Court stated that the presumption of reliability in judicial proceedings "has no place where, as here, a defendant was deprived of a proceeding altogether." *Id.* at 1967.

Petitioner here was similarly "deprived of a proceeding altogether," a direct appeal. Because such complete deprivations are so important to ineffective assistance claims under *Strickland*, the Question Presented should be reviewed.

Second, the Question Presented will frequently recur until this Court acts to resolve the issue. The vast majority of criminal convictions follow plea agreements. *See, e.g., Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Moreover, most plea agreements include an appellate waiver. *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) (sixty-five percent of plea agreements across the Federal circuits include appellate waivers).

Due to the ubiquity of plea agreements and appellate waivers, some defendants will continue to find themselves in the same position as Petitioner: desiring to appeal after a guilty plea, but with counsel who choose not to file a notice of appeal because of an appellate waiver. Indeed, the Question Presented has arisen with such regularity since *Flores-Ortega* that ten of the federal Circuit Courts have decided it. *See Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. 2012) (surveying cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and concluding that "prevailing precedent from the Supreme Court, the Sixth Circuit, and the majority of our sister circuits mandates that even [after an appellate waiver] a defendant is entitled to counsel who will follow through on express instructions to proceed with an appeal").

Scholarly attention further shows the importance of the Question Presented. *See, e.g.,* Jacob Szewcyzk, Comment, *Following Orders:* Campbell v. United States*, The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489, 513 (2015) ("holding that defense counsel has provided ineffective assistance of counsel when failing to follow orders from his client to file an appeal, even if his client has waived that right, is the best way to protect defendants' rights and ability to make decisions regarding their own criminal proceedings"); Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 141, 174 (2013) ("appellate waivers should not alter pre-existing obligations between defense attorneys and their clients, like the obligation to file a requested appeal"); King & O'Neill*, supra*, 55 Duke L.J. at 256 ("Appeal waivers are firmly entrenched in plea agreement practice in federal courts.").

In sum, the Question Presented is important and frequently recurring. It is fully developed. It is not going away. It merits this Court's review.

II. APPELLATE WAIVERS RESULT FROM UNEQUAL BARGAINING POWER.

One dubious defense of the minority position is that criminal defendants must live with the deal they have struck, a "freedom of contract" type of argument. *See, e.g.*, Pet. App. 14a ("a plea agreement is a bilateral contract, to which both the State and defendant are bound"). As an initial matter, this argument misunderstands the effect of the bargain that has been struck by the defendant. As Petitioner

explains, a defendant who has signed a plea waiver maintains the right to appeal a number of important constitutional issues. Pet. 10.

The argument also presumes that criminal defendants have significant bargaining power when negotiating a plea agreement. The reality on the ground is quite different. *See, e.g.*, Steven L. Chanenson, *Guidelines from Above and Beyond*, 58 Stan. L. Rev. 175, 182 (2005) ("there is reason to question how much real trading occurs"); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 211 (1995) ("appeal waivers look . . . more like the price of admission to engage in the plea bargaining process at all"); Alexandra W. Remelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871, 904 (2010) (discussing how defendants have little choice but to accept plea agreements); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2014 (2000) (discounting the notion that the ability to waive appellate rights operates as a bargaining chip).

Plea agreements are akin to contracts of adhesion, which are, as this Court has noted, "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991). Prosecutors set the terms of plea agreements and present the fully drafted document to defense counsel, not the other way around. The plea agreements Petitioner entered are good examples, both containing nearly identical terms in what appears to be a sort of fill-in-the-blanks template. *Compare* Pet. App. 40a-45a *with* Pet. App. 46a-50a.

Some courts and commentators have recognized the inherent inequality in bargaining power between prosecutors and defendants. *See United States v. Raynor,* 989 F. Supp. 43, 49 (D.D.C. 1997) (describing plea negotiations as "inherently unfair; it is a one-sided contract of adhesion; it will undermine the error correcting function of the courts of appeals in sentencing."). Prosecutors determine the actual charge or charges brought against the defendant, which in turn determine the ultimate sentence that will result from the charges. Remelt, *supra*, 51 B.C. L. Rev. at 888. Prosecutors then create the terms of the plea agreement, and it is up to the defendant to enter into the contract on a *take-it or leave-it* basis. *Id.*

The lack of bargaining power is particularly alarming in the ten states that do not require prosecutors to provide discovery until shortly before trial. *See* Beth Schwarzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, New York Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html. In those jurisdictions, prosecutors often plea bargain without having provided information that could potentially be helpful to the defense, including disclosures required by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963); Schwarzapfel, *supra* (noting "lower courts have split over whether *Brady* material must be turned over before a plea").

In short, a criminal defendant's "freedom of contract" should not prevent a presumption of prejudice from arising when counsel fails to file an appeal based on an appeal waiver.

III. REVIEW WILL CLARIFY THE DUTIES OF DEFENSE COUNSEL.

By resolving the question presented, this Court will provide needed clarity to defense attorneys regarding their duty to file a notice of appeal and their related duty to consult with their clients regarding an appeal. First, the minority position allows *attorneys* to decide whether to appeal, not their clients. The State of Idaho argued below, for example, that Petitioner's "appeal waivers negated the duty his trial counsel otherwise would have had to file appeals at his request." Pet. App. 30a. In accepting this argument, the minority position ignores the long-held understanding that it is defendants who make the ultimate decision to appeal. *See, e.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) ("As a matter of professional ethics, . . . the decision to appeal should turn entirely on the client's interest."); *Flores-Ortega*, 528 U.S. at 479 ("the decision to appeal rests with the defendant"); ABA Criminal Justice Standard 4-5.2(a)(v) ("The decisions which are to be made by the accused after full consultation with counsel include . . . whether to appeal.").

Second, the minority position also allows defense attorneys to neglect their duty to consult with their clients about an appeal. This Court held in *Flores-Ortega* that defense counsel "has a constitutionally imposed duty" to consult with a defendant who has "reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480; *see also id.* at 488 (Breyer, J., concurring) ("in my view . . . counsel does 'almost always' have a constitutional duty to consult with a defendant about an appeal after a trial"). Here, it is apparent that Petitioner's attorney failed to discharge his duty to consult, despite

Petitioner asking him to appeal in "numerous phone calls and letters." Pet. App. 3a; *see also Flores-Ortega*, 528 U.S. at 493-94 (Ginsburg, J., concurring in part and dissenting in part) ("I think it plain that the duty to consult was not satisfied in this case").

The court below misread *Flores-Ortega* as broadly not compelling a presumption of prejudice in the "failure to consult context," Pet. App. 10a, while ignoring this Court's clear holdings that a duty to consult arises when a client has demonstrated an interest in appealing and that a presumption of prejudice *does* arise when counsel's performance "deprives a defendant of an appeal that he otherwise would have taken." 528 U.S. at 484.

Overlooking these duties, the minority position places undue weight on a defense attorney's duty not to file "frivolous" litigation. *See* Pet. App. 13a, 26a. More than a half-century ago, this Court provided a remedy for defense counsel who are asked to file an appeal they believe to be frivolous, in *Anders v. California*, 386 U.S. 738, 744-45 (1967). The solution is not to ignore the client's request to appeal. The court below did not make a single reference to *Anders*. *See* Pet. App. 1a-15a.

Finally, this Court's review will prevent the anomaly, created by the split in courts below, that defense attorneys in the same town have varying duties based on whether they are in state court or federal court. Due to the conflict between the Idaho Supreme Court and the Ninth Circuit, which follows the majority rule, the performance of a Boise attorney in state court is not presumed to be prejudicial if he ignores a client's request to appeal, while in federal court it is. *Compare* Pet. App. 15a ("This Court does

not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver.") *with United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (if "it is true that he explicitly told his lawyer to appeal his case and his lawyer refused, then we are required by *Flores-Ortega* to conclude that it was deficient performance not to appeal and that *Sandoval-Lopez* was prejudiced").

Therefore, this Court's review is needed to clarify the constitutional duties of defense counsel related to appellate filing and consultation when their clients' plea agreements contain an appellate waiver.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ John J. Korzen

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