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 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Idaho correctly hold that petitioner's forfeiture of the right to appeal was the result of his knowing and voluntary waiver, rather than his counsel's decision to not comply with petitioner's request to appeal despite the valid waiver, and therefore counsel was not presumptively ineffective?

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INTRODUCTION

The Supreme Court of the State of Idaho concluded that, because he knowingly, intelligently and voluntarily waived the right to appeal, petitioner Gilberto Garza, Jr., did not enjoy a right to appeal and therefore his counsel was not ineffective for declining to follow Garza's request to file a notice of appeal. Pet. App. 10a-11a. Specifically, the Supreme Court of Idaho applied this Court's statement in *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), that a presumption of prejudice arises when the actions of counsel deprive a defendant of an appeal "'*to which he had a right*.'" Pet. App. 10a-11a (emphasis original) (quoting *Flores-Ortega*). Although there is a split in authority among the federal courts of appeals regarding whether counsel who declines to file a requested appeal because of a prior waiver is presumed ineffective, the split turns mostly on the non-constitutional question of whether a waiver encompasses the entirety of an appeal or whether some limited right of appeal remains despite the waiver. Courts that conclude there is an appeal right that survives the waiver apply the presumption of ineffective assistance of counsel, while courts that find no appeal right post-waiver conclude that the standard *Strickland v. Washington*, 466 U.S. 668 (1984), analysis applies. Because the split is based primarily on the non-constitutional question of what appellate rights survive a waiver, the petition should be denied.

STATEMENT OF THE CASE

1. Garza pleaded guilty to aggravated assault and possession of a controlled substance with intent to deliver pursuant to plea agreements with the State of Idaho. Pet. App. 2a. As part of those plea agreements the district court bound itself to follow certain "bargained for" sentencing recommendations. Pet. App. 28a-29a. Garza also waived his right to appeal and his right to seek a reduction of his sentences under Idaho Criminal Rule 35. Pet. App. 2a-3a. The district court imposed the agreed-upon sentences. Pet. App. 29a. Garza requested his trial counsel to file a notice of appeal but, in light of the waiver, his counsel declined. Pet. App. 29a.

Garza subsequently filed petitions for post-conviction relief in the district court asserting multiple claims. Pet. App. 29a. The district court summarily dismissed all but one of these claims. Pet. App. 29a. The parties thereafter filed cross-motions in the district court for adjudication of the sole remaining claim: whether Garza's counsel was ineffective because he declined to file the requested notice of appeal. Pet. App. 30a. The district court ordered Garza to file supplemental briefing, identifying the issues he sought to pursue on appeal, "as well as to explain why his appeals would not be frivolous and not be subject to dismissal as a result of the appeal waivers." Pet. App. 31a. Garza filed supplemental briefing, stating the sole issue he would have pursued on appeal was a review of the trial court's exercise of sentencing discretion. Pet. App. 31a-32a.

The district court granted the state's motion for summary dismissal and dismissed the claim of ineffective assistance of counsel for not filing an appeal. Pet. App. 33a-39a. The district court reasoned that under Idaho law a defendant who validly waives his appeal rights is not entitled to "consideration on the merits" and that he "lacks the right to appeal." Pet. App. 36a-37a. A right to an appeal was "central" to *Flores-Ortega*'s holding that counsel who fails to file an appeal is presumed ineffective. Pet. App. 37a. The only "'right'" Garza lost was to "see his appeal dismissed without a decision on the merits." Therefore, the *Flores-Ortega* presumption did not apply. Pet. App. 37a. Rather, it was Garza's burden to show prejudice by showing "non-frivolous grounds for contending" that "the appeal waiver is invalid or unenforceable" or that there are issues "outside the waiver's scope." Pet. App. 38a. The court thereupon granted the state's motion for summary disposition because Garza did not allege there were issues beyond the scope of the waiver and Garza's claim that his pleas were involuntary had already been dismissed "for lack of factual support." Pet. App. 38a-39a.

2. Garza appealed from the summary dismissal of his post-conviction petition. Pet. App. 16a. On appeal he did not challenge the holding that his pleas, including his waivers, were valid. Pet. App. 5a. The Court of Appeals of Idaho noted that whether counsel is ineffective for "failing to file an appeal upon the defendant's request" where the defendant had waived his appeal rights was a question "currently undecided in Idaho."

Pet. App. 22a. Looking to other jurisdictions, the court noted a split in the federal appeals courts on whether the *Flores-Ortega* presumption applies in such a situation, with the majority holding that it does. Pet. App. 22a-25a. The Court of Appeals of Idaho was "persuaded by the minority approach," however, because a defendant does not have the right to countermand the waiver he entered in exchange for prosecutorial concessions. Pet. App. 25a-26a. Having entered the waiver, a defendant does not have a right to appeal and therefore the rationale underlying the *Flores-Ortega* presumption was inapplicable. Pet. App. 26a. Furthermore, "the minority approach better protects defendants" because filing the appeal would allow the state to "withdraw concessions" made in the plea agreement and would make the prosecution reluctant to make future concessions for an incomplete waiver. Pet. App. 26a-27a. In the absence of a presumption, and Garza having failed to show prejudice, the Court of Appeals of Idaho affirmed the district court. Pet. App. 27a.

3. The Supreme Court of Idaho granted discretionary review of the case and likewise affirmed the district court. Pet. App. 1a-15a. It reasoned that, in Idaho, a defendant may waive his right to appeal as part of a plea agreement, so long as the waiver is knowing, intelligent and voluntary. Pet. App. 4a-5a. To show ineffective assistance of counsel a petitioner must show deficient performance and resulting prejudice. Pet. App. 5a-6a. The court recognized the holding of *Flores-Ortega* that "'when 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.'" Pet. App. 6a-7a (quoting *Flores-Ortega*, 528 U.S. at 484). The court further recognized a "federal circuit split" on the issue of "whether an attorney has provided ineffective assistance of counsel" where an attorney declines to file a requested appeal because the "defendant has waived the right to appeal as part of a plea agreement." Pet. App. 6a-9a.

The Supreme Court of Idaho declined to presume Garza's counsel gave ineffective assistance. Pet. App. 10a. The court noted that such a presumption applies only where counsel's actions deprive a defendant of an appeal "'*to which [defendant] had a right*.'" Pet. App. 10a-11a (emphasis original, bracketed material added) (quoting *Flores-Ortega*, 528 U.S. at 483). "This approach" of not presuming prejudice "is consistent with other areas of Idaho law," including the filing of meritless motions, the duty to not engage in frivolous litigation, and the contractual nature of plea agreements that could be considered breached if an appeal is filed. Pet. App. 11a-14a. The court thus held that the proper standard to evaluate the decision to not file a requested appeal after a waiver was that of *Strickland v. Washington*, 466 U.S. 668 (1984) (counsel is ineffective when he offers deficient performance which prejudices the defendant). A defendant dissatisfied by counsel's decision to not file a notice of appeal could assert deficient performance and prejudice or challenge the appeal waiver in post-conviction proceedings. Pet. App. 14a-15a.

The court recognized that "there are conceivable situations where a defendant who has waived his right to appeal as part of a plea agreement may still seek to challenge his conviction or sentence, for example if he is sentenced illegally or the State breaches the plea agreement." Pet. App. 14a. Such claims, however, are "properly" asserted "in a petition for post-conviction relief or writ of habeas corpus, rather than on direct appeal." Id.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to review the Supreme Court of Idaho's decision in this case. The federal courts of appeals are divided regarding whether the *Flores-Ortega* presumption – that counsel who fails to file an appeal when requested is ineffective – applies where the defendant has waived the right to appeal. However, review of the rationale set forth in the cases involved in that split shows that courts that presume ineffective assistance of counsel generally afford a substantial right to appellate proceedings despite the waiver, while those that do not apply the *Flores-Ortega* presumption do not grant appellate rights absent an affirmative showing by the defendant that he retains such a right. Idaho falls into the latter camp by requiring appellants to demonstrate a right to appeal despite the waiver. Requiring a post-conviction petitioner to meet the same burden he would have to meet on appeal – the burden of showing a right to appeal – is consistent with *Flores-Ortega*.

The petition for certiorari should be denied because resolution of the issue presented turns upon the non-constitutional question of whether some right to appeal is presumed despite an appeal waiver. This Idaho state case is a particularly unsuitable vehicle through which to resolve the federal circuit conflict.

A. The Idaho Supreme Court Correctly Held That The *Flores-Ortega* Presumption Of Ineffective Assistance Of Counsel Does Not Apply Where, Under Idaho Law And Procedure, There Is No Right To Appeal.

In *Flores-Ortega* this Court reviewed application of the two-prong ineffective assistance of counsel standard consisting of deficient performance and resulting prejudice. 528 U.S. at 476-77. As to the first prong, the Court stated it has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable" because filing the appeal is a "purely ministerial task" that "cannot be considered a strategic decision." *Id.* at 477. It applied a presumption of prejudice in the second prong because failure to follow instructions to file deprives the defendant of "more than a *fair* judicial proceeding"; it deprives him of "the appellate proceeding altogether." *Id.* at 483 (emphasis original). The presumption of prejudice relies on the "critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484.

The Supreme Court of Idaho's application of these standards in light of Idaho law and procedure regarding appeals and appeal waivers practically compels the outcome it reached. In Idaho, a knowing, intelligent, and voluntary waiver of the right to appeal made as part of a plea agreement is valid and enforceable. Pet. App. 4a-5a. Any appeal attempted in the face of a valid waiver is subject to summary dismissal. *McKinney v. State*, 162 Idaho 286, ___, 396 P.3d 1168, 1179 (2017); *see also State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994). Such a dismissal generally will occur prior to briefing, but can happen any time the waiver is brought to the court's attention. *See State v. Taylor*, 157 Idaho 369, 370-72, 336 P.3d 302, 303-05 (Idaho App. 2014). Upon being made aware that an appellant has "waived the right to appeal the only issue(s) that the defendant seeks to raise on appeal" the Supreme Court of Idaho will "issue an order conditionally dismissing the appeal." *McKinney*, 162 Idaho at ___, 396 P.3d at 1178. The appellant is then given a chance to show "good cause why the appeal should not be dismissed." *Id.* If the appellant does not show good cause, the court "will dismiss the appeal." *Id.* Thus, if the defendant has entered an appeal waiver as part of the plea agreement, he may only pursue an appeal after demonstrating to the Supreme Court of Idaho that he or she has a right to appeal.

Under the Idaho Supreme Court's ruling, Garza had to make the same showing in post-conviction he would have been required to make to avoid dismissal of his direct appeal: That an appeal right survived the

waiver. This does not conflict with *Flores-Ortega*. In this post-conviction case Garza did not show that, had counsel filed the requested appeal, he could have met his burden of showing a right to the appeal. Garza did not claim that any appellate issues were beyond the scope of his appeal waiver, and did not challenge on appeal the post-conviction court's determination that the waiver was legally binding. Pet. App. 5a. Under Idaho law and procedure, outlined above, any appeal filed by his counsel would have been summarily dismissed without consideration of any merits of any claims because Garza could not have established any right to appeal in the face of his waiver. Pet. App. 9a-11a.

The lack of an appeal right is key here. The presumption of deficient performance and prejudice from failure to file a requested appeal articulated in *Flores-Ortega* are predicated on a right to appeal. *See*, *e.g.*, 528 U.S. at 484 ("counsel's deficient performance must actually cause the forfeiture of the defendant's appeal"). Under Idaho law, because of his knowing, intelligent and voluntary waiver, Garza had no state-law right to appeal. Pet. App. 10a-11a. The Supreme Court of Idaho's decision that the *Flores-Ortega* presumption did not apply because Garza had no right to an appeal was simply a straightforward application of state law to the question of whether Garza had a right to appeal that was forfeited by counsel. Granting certiorari in this case to resolve the federal circuit split is not appropriate because the question of whether Garza had a right to appeal is a question of state law.

B. The Federal Split Over Whether The *Flores-Ortega* Presumption Applies After An Appeal Waiver Is Apparently Based On Non-Constitutional Circuit Precedent Regarding What Appeal Rights Survived The Appeal Waiver.

The federal circuit courts that have applied the *Flores-Ortega* presumption of ineffective assistance where counsel does not file a requested appeal after an appeal waiver have, with the exception of the Ninth Circuit, done so on the basis that the defendant had a right to at least limited appellate proceedings despite the waiver, which right counsel forfeited. In at least three circuits that have held the presumption applies, a defendant who has waived his appeal still has the appellate right to proceed through the briefing stage. *Campusano v. United States*, 442 F.3d 770, 772-75 (2d Cir. 2006) (*Anders* brief[1] required because there are "exceptions to the presumptive enforceability of a waiver"); *United States v. Poindexter*, 492 F.3d 263, 270-72 (4th Cir. 2007) (a "typical" post-waiver appeal involves filing of an *Anders* brief or, if a merits brief is filed, the government filing a motion to dismiss); *Campbell v. United States*, 686 F.3d 353, 357-59 (6th Cir. 2012) ("even the broadest waiver does not absolutely foreclose some degree of appellate review," generally under the *Anders* framework).

Two circuits that have applied the presumption have done so because, under circuit precedent, the right to appeal survives the appeal waiver unless the

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[1] *Anders v. California*, 386 U.S. 738 (1967).

government proves, by dispositive motion, that the waiver is enforceable and applicable. *Watson v. United States*, 493 F.3d 960, 963-64 (8th Cir. 2007); *United States v. Garrett*, 402 F.3d 1262, 1265-67 (10th Cir. 2005). One has held that "[t]he reasoning of *Flores-Ortega* applies with equal force where, as here, the defendant has waived many, but not all, of his appellate rights." *Gomez-Diaz v. United States*, 433 F.3d 788, 793-94 (11th Cir. 2005).

Only two circuits have concluded that the *Flores-Ortega* presumption applies without analyzing what appellate procedure is employed where the defendant has waived appeal rights. The Fifth Circuit adopted the holdings of other circuit courts without articulating any particular ground for concluding the *Flores-Ortega* presumption applied where the defendant waived appeal rights. *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007). However, in the Fifth Circuit, like the Second, Fourth and Sixth, a defendant who has waived his appeal rights is entitled to have his counsel file an *Anders* brief. *United States v. Acquaye*, 452 F.3d 380, 381-82 (5th Cir. 2006). Likewise, the Ninth Circuit concluded *Flores-Ortega* alone "required" it "to conclude that it was deficient performance not to appeal and that [defendant] was prejudiced," even though this result was "contrary to common sense" and "troubling." *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196-97 (9th Cir. 2005). The Ninth Circuit, however, has "carved out a number of exceptions to the rule that a defendant can waive the right to appeal various claims." *United States v. Lo*, 839 F.3d 777, 785 (9th Cir.

2016). Thus, although these circuits did not specifically articulate what appeal rights were protected by application of the presumption, circuit precedent makes clear that such rights exist.

The circuits in the "majority" have precedent showing that an appeal waiver is not presumed absolute, and the defendant is therefore entitled to some degree of appellate review before the waiver will be enforced. Applying the presumption under such circumstances is entirely consistent with the *Flores-Ortega* rationale.

In contrast, the two federal circuits that have declined to apply the presumption of ineffective assistance of counsel have concluded that the appeal waiver is deemed conclusive of the appeal. In *Nunez v. United States*, 546 F.3d 450, 452-56 (7th Cir. 2008), the Seventh Circuit stated that the waivers actually "waiv[ed] the right to appeal" and any attempt to appeal "would have been dismissed in short order." A post-waiver defendant is not entitled to "the *Anders* procedure" because that procedure "is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal)." *Id.* at 455 (emphasis original). Likewise, in *United States v. Mabry*, 536 F.3d 231, 241-44 (3d Cir. 2008), the Third Circuit reasoned that there is no presumption of ineffective assistance because the "entitlement" of an appeal "disappears" with a valid waiver, and therefore "the ineffectiveness of counsel in not pursuing a waived appeal is less than clear." The court in *Mabry* concluded that the cases applying the *Flores-Ortega* presumption post-waiver

were not "well-reasoned" because they "disregard" the "validity of the waiver" and instead "seem to hold" that such waivers are "automatically invalid." 536 F.3d at 242. The *Mabry* court adopted the "proper focus" as set forth in *Nunez*, *supra*, of "giving effect to the waiver." *Id.*

All told, the circuits that have applied the *Flores-Ortega* presumption of ineffective assistance of counsel where counsel – because of an appeal waiver – does not follow a defendant's request to appeal have apparently done so based on circuit precedent holding that the defendant enjoys a limited right to pursue the appeal despite the waiver, either through briefing or until the government makes and wins a dispositive motion.[2] In contrast, the two circuits that do not apply the presumption consider the waiver valid unless the defendant meets a burden of showing a right to appeal, and therefore require the defendant in post-conviction to make the same showing of a right to appeal he would have had to have made on the appeal itself. In short, it

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[2] Indeed, the Second Circuit did not apply the presumption where it was clear under circuit precedent that the defendant enjoyed no appellate rights. In *United States v. Razzoli*, 548 Fed. Appx. 733, 736 (2d Cir. 2013) (unpublished), decided after *Campusano*, the Second Circuit held that "failing to file an interlocutory appeal from the district court's denial of [Razzoli's] Rule 33 motion" was not ineffective assistance of counsel because "there would have been no appellate jurisdiction over an interlocutory appeal of that order, and thus Razzoli cannot demonstrate prejudice from counsel's failure to file such an appeal." That the presumption does not apply sometimes even in "majority rule" circuits further shows that the split is not as clear or as well-defined as Garza contends.

appears the federal courts of appeals applying the *Flores-Ortega* presumption post-waiver (with one exception) do so under circuit precedent granting some limited right to appeal (rebuttable or otherwise) despite the waiver, while those that reject the application of the *Flores-Ortega* presumption do so where no appeal rights are presumed to survive the waiver.

Because the split in application of the *Flores-Ortega* presumption post-waiver apparently turns on the non-constitutional question of whether a limited right to appellate proceedings survives a waiver, there is no need for this Court to review the constitutional question Garza presents.

C. This Idaho Case Is Unsuitable For Resolving The Federal Split.

As shown above, under Idaho law the appeal waiver controls unless the appellant can show cause why the appeal should proceed. Therefore, under Idaho law, unless there are grounds for getting around or through the waiver there is no right to post-waiver appeal proceedings. Simply stated, by declining to file a notice of appeal counsel cannot forfeit proceedings to which a defendant is not entitled. Counsel's action, under Idaho law, did not "cause the forfeiture of [Garza's] appeal" and has not "deprived him of anything." *Flores-Ortega*, 528 U.S. at 484.[3]

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[3] That does not mean a defendant such as Garza cannot assert post-plea, post-waiver claims. He received a full opportunity in the state post-conviction court to demonstrate the existence of

Garza asserts the Supreme Court of Idaho's decision is "wrong and troubling" because an appeal waiver will only "substantially limit" the right to appeal. Pet. 3. This argument fails to recognize that, under Idaho law and the facts of this case, Garza's appeal rights were not merely substantially limited, but completely waived. *See* Pet. App. 11a ("Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal."), 38a (district court holding that Garza must show either that the "waiver is invalid or unenforceable" or that he can assert an issue "outside the waiver's scope"). Requiring a post-conviction petitioner to show that counsel was ineffective under the *Strickland* standard when counsel concluded that the waiver barred any appeal is no more "wrong and troubling" than requiring a petitioner to show that counsel was ineffective under the *Strickland* standard when counsel concluded that the defendant's Fourth Amendment rights were not violated and therefore did not file a motion to suppress.

Garza contends, citing Second Circuit precedent, that "'important constitutional rights require some exceptions to the presumption of enforceability of [an appeal] waiver,'" including "whether the waiver was made knowingly, voluntarily and competently, whether the government breached the plea agreement, whether

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evidence supporting his claim that his plea was not knowing and voluntary. *See* Pet. App. 38a. And he could have asserted that he was "sentenced illegally or the State breache[d] the plea agreement . . . in a petition for post-conviction relief." Pet. App. 14a. Garza chose not to.

the sentence was imposed based upon constitutionally impermissible factors, and other challenges related to the legality of the sentence." Pet. 10 (brackets original) (quoting *Campusano*, 442 F.3d at 774). As discussed in subsection B, *supra*, however, whether a circuit employs "exceptions to the presumption of enforceability" of an appeal waiver appears to the be the driving factor behind the federal split, with courts that have such exceptions applying the *Flores-Ortega* presumption while those that do not have such exceptions finding the *Flores-Ortega* presumption inapplicable. Idaho does not have exceptions to the presumption of enforceability of the waiver (rather, the waiver is presumed enforceable unless the defendant demonstrates otherwise), and Garza has made no argument that this Court should constitutionally require it to adopt exceptions to the presumption of enforceability.[4]

The *Flores-Ortega* presumption of deficient performance and prejudice is premised upon (1) the act of filing an appeal being merely ministerial and (2) the failure to file an appeal depriving the defendant of an appeal proceeding to which he had a right. The Idaho Supreme Court's holding that the *Flores-Ortega*

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[4] Garza also seeks to impose the *Anders* briefing procedure on Idaho, Pet. 11-12, even though that procedure is not constitutionally required, *Smith v. Robbins*, 528 U.S. 259, 276 (2000) ("we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals"), and has been specifically rejected in Idaho, *State v. McKenney*, 98 Idaho 551, 552-53, 568 P.2d 1213, 1214-15 (1977) (disallowing withdrawal of appointed counsel and obliging appellate counsel to brief the merits of the strongest issue possible).

presumption does not apply in this case because Garza enjoyed no appellate rights under Idaho law does not merit this Court's further review.

CONCLUSION

The State of Idaho respectfully requests this Court to deny Garza's Petition for Writ of Certiorari.

Respectfully submitted,

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