No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Garza Jr. respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINION AND ORDER BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-15a) is published at 405 P.3d 576. The opinion of the Court of Appeals of Idaho (Pet. App. 16a-27a) has not yet been published, but is currently available at 2017 WL 444026. The district court's opinion (Pet. App. 28a-39a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on November 6, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has recognized that where such a claim is based upon trial counsel's forfeiture of the defendant's right to an appellate proceeding by failing to file a notice of appeal, the defendant need not show "actual prejudice" by "'specify[ing] the points he would raise were his right to appeal reinstated.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (quoting *Rodriquez v. United States*, 395 U.S. 327, 330 (1969)). Rather, to satisfy *Strickland*'s second prong, the defendant need only show that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Flores-Ortega*, 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)). Because an attorney who fails to file a notice of appeal deprives his client not only of "a *fair* judicial proceeding," but "of the appellate proceeding altogether," his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

As all three courts below acknowledged, there is a conflict of authority on whether this "presumption of

prejudice" applies where a criminal defendant instructs his trial counsel to file a notice of appeal, but counsel chooses not to do so because the defendant executed a plea agreement that includes an appeal waiver. Pet. App. 6a-8a, 22a-26a, 35a-36a. Eight circuits hold that the presumption applies. In conflict, two circuits, the court below, and a few other state high courts hold that a defendant must demonstrate actual prejudice by specifying the points he would have raised in his direct appeal proceeding.

The decision below is wrong and troubling. While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the legality of the sentence imposed. Where trial counsel refuses a criminal defendant's instruction to file a notice of appeal, counsel thus deprives the defendant of a counseled direct appeal on these issues "altogether." *Flores-Ortega*, 528 U.S. at 483. In such circumstances, it is grossly inequitable to require a defendant, who in all likelihood will be proceeding without counsel, to lay out the issues that could have been appealed. *Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

The question upon which courts are divided is perfectly presented on this record—indeed it was the decisive legal issue on this claim for all three courts

below. It is undisputed on this record that Petitioner directed his trial counsel to file a notice of appeal and that his counsel declined to do so because his plea agreement included a plea waiver. In the past, the United States has counseled this Court that the appropriate vehicle to resolve the conflict of authority on this issue would involve an appeal waiver that did not also waive collateral review. That's this case. *See infra* Part IV.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. In January and February 2015, respectively, Petitioner entered an *Alford* plea to aggravated assault and a guilty plea to possession of a controlled substance. Both plea agreements included a provision specifying that Petitioner waived his right to appeal. Pet. App. 44a, 49a.[1]

At a joint sentencing hearing, the district court accepted both plea agreements. The court acknowledged that Petitioner's plea agreement included an appeal waiver. CR 132.[2] It nonetheless advised Petitioner about his right to file an appeal and his right to be appointed counsel in the event he chose to appeal. *Id.* In its judgments of conviction, the court again advised Petitioner that he had the right to file an appeal and the right to counsel on appeal. CR 118, 121.

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[1] Petitioner also waived his right to file a motion under a state procedure for correcting or reducing a sentence. Pet. App. 44a, 49a (waiving rights under Idaho Criminal Rule 35).

[2] "CR" refers to the court record on file with the Supreme Court of Idaho, No. 44991.

2. Petitioner filed a *pro se* petition for post-conviction relief asserting that he had instructed his trial counsel to file a notice of appeal in numerous phone calls and letters, and that his counsel rendered ineffective assistance by failing to do so. In response, the government submitted an affidavit from Petitioner's trial counsel, in which trial counsel admitted that Petitioner "told me he wanted to appeal the sentence(s) of the court," and that counsel "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal." Pet. App. 3a, 52a; CR 148. The government contended that in light of Petitioner's appeal waiver, Petitioner was required to show actual prejudice from the loss of direct appeal proceedings. CR 82.

The district court denied Petitioner's claim. The sole issue addressed by the district court on this claim was whether Petitioner was entitled to the "presumption of prejudice" adopted by this Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The court observed that "[t]he parties agree on" all of the pertinent facts: That (1) Petitioner entered into plea agreements in which he waived the right to appeal; (2) Petitioner asked his trial counsel to file a notice of appeal, despite having waived his right to appeal; and (3) because of the appeal waivers, his trial counsel declined to act on his request to file appeals. Pet. App. 33a.

The court observed that although "there is no United States Supreme Court decision on point, . . . nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a. It explained that a majority of eight federal circuits hold that the presumption of prejudice

recognized in *Flores-Ortega* applies even where the defendant has signed an appeal waiver, Pet. App. 35a, while a minority of two federal circuits require a showing of actual prejudice, Pet. App. 35a-36a. The court adopted the minority position and dismissed Petitioner's claim on the basis that he had failed to show actual prejudice. Pet. App. 36a-39a.

3. The Court of Appeals of Idaho affirmed. That court similarly recognized that "[f]ederal circuit courts are split on the issue" and "[t]he majority of circuit courts have ruled that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived the right to appeal." Pet. App. 22a. "In such circumstances, the majority rule presumes prejudice" and "[a] client need only show that he or she instructed his or her attorney to appeal in order to demonstrate prejudice under the second *Strickland* prong." Pet. App. 22a (citation omitted). On the other hand, two circuits "have rejected the majority rule" and "maintain that prejudice is not presumed when the defendant waives the right to appeal." Pet. App. 24a. Like the district court, the court of appeals adopted the minority position and dismissed Petitioner's claim for failure to demonstrate actual prejudice. Pet. App. 25a-27a.

4. Petitioner filed a petition for review in the Supreme Court of Idaho, which granted review and affirmed. Like the courts below, the Idaho Supreme Court observed that "[t]here is a federal circuit split regarding the issue" of whether the presumption of prejudice applies given the existence of an appeal waiver "which involves differing interpretations of [this Court's] decision in *Flores-Ortega*." Pet. App. 6a. It recognized that "[a] majority of federal circuit

courts have interpreted *Flores-Ortega* to apply even in situations where the defendant has validly waived his right to appeal." Pet. App. 7a. "Under the majority approach, an attorney is required to file an appeal at his client's request, even if the attorney thinks the appeal would be frivolous" and "[w]hen counsel fails to follow his client's express direction to appeal, prejudice is presumed." Pet. App. 7a. On the other hand, "[t]wo federal circuit courts and a federal district court in an undecided circuit follow the minority approach," which does not presume prejudice in the presence of an appeal waiver and requires the petitioner to make an affirmative showing of prejudice. Pet. App. 8a. The court observed that some state courts of last resort had also adopted the minority approach. Pet. App. 8a-9a.

Adopting the minority position, the court held "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. It reasoned: "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights." Pet. App. 11a. The court affirmed the dismissal of his claim on the basis that Petitioner had not shown actual prejudice. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

There is a deep and acknowledged split of authority on whether the "presumption of prejudice" recognized in *Flores-Ortega* applies where trial counsel disregards a criminal defendant's instruction

to file a notice of appeal on the basis of an appeal waiver.[3] That question is important, recurs frequently, and is perfectly presented on this record. The Court should grant certiorari.

I. The Question Presented Is The Subject Of An Acknowledged Split.

As recognized by the courts below, eight circuits—the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh—hold that the presumption of prejudice recognized in *Flores-Ortega* applies where counsel disregards his client's direction to file a notice of appeal, irrespective of whether the client signed a plea agreement that includes an appeal waiver. *See Campusano v. United States*, 442 F.3d 770, 773 (2d Cir. 2006) (Sotomayor, J.) (rejecting the government's argument that because "substantive claims were precluded by [Petitioner's] waiver of appeal . . . the *Flores-Ortega* presumption of prejudice should not apply"); *United States v. Poindexter*, 492 F.3d 263, 268-69 (4th Cir. 2007) (presuming prejudice and rejecting government's argument that *Flores-Ortega* "did not involve an appeal waiver"); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007) (holding "that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal");

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[3] While Petitioner uses the "presumption of prejudice" terminology employed by this Court, it is worth noting that even under *Flores-Ortega*, a criminal defendant maintains the burden of establishing prejudice under *Strickland*. He simply satisfies that burden upon the lesser showing that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. On this record, it is undisputed that Petitioner specifically directed his counsel to appeal and thus satisfied this lesser showing.

Campbell v. United States, 686 F.3d 353, 360 (6th Cir. 2012) ("[E]ven when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel."); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007) (same); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (same); *United States v. Garrett*, 402 F.3d 1262, 1266 (10th Cir. 2005) (same); *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005) (same).

Two circuits—the Third and the Seventh—have reached the opposite conclusion. *See United States v. Mabry*, 536 F.3d 231, 240-41 (3d Cir. 2008) ("The analysis employed [in *Flores-Ortega*] in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver."); *Nunez v. United States*, 546 F.3d 450, 455-56 (7th Cir. 2008) (rejecting application of *Flores-Ortega* and reasoning that "[o]nce a defendant has waived his right to appeal . . . the defendant must show both objectively deficient performance and prejudice"). Both circuits acknowledged that their conclusions conflict with the majority of circuits. *Mabry*, 536 F.3d at 242 ("We . . . will part ways with the approach taken by the majority of courts of appeals."); *Nunez*, 546 F.3d at 453 (recognizing conflict with seven circuits).

As the Idaho Supreme Court observed, at least a few other state high courts have also adopted this minority position. Pet. App. 8a-9a (citing *Stewart v. United States*, 37 A.3d 870, 877 (D.C. 2012); *Buettner v. State*, 363 P.3d 1147, ¶¶ 14-15 (Mont. 2015); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007)).

II. The Decision Below Is Wrong And Deeply Troubling.

The minority position is wrong and seriously erodes the Sixth Amendment right to competent counsel and to a counseled direct appeal. As this Court has recognized, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez v. United States*, 395 U.S. 327, 330 (1969).

It is easy to fall into the trap of the court below, which, like other courts adopting the minority position, has reasoned that "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." Pet. App. 11a. But that is simply wrong. It is well-established that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver," *Campusano*, 442 F.3d at 774 (Sotomayor, J.), such that "even the broadest waiver does not absolutely foreclose some degree of appellate review." *Campbell*, 686 F.3d at 358. Those issues include, at a minimum, whether the waiver was made knowingly, voluntarily, and competently, whether the government breached the plea agreement, whether the sentence was imposed based upon constitutionally impermissible factors, and other challenges related to the legality of the sentence. *Campusano*, 442 F.3d at 774-75 (Sotomayor, J.). Thus, as in *Flores-Ortega* and *Rodriquez*, counsel's refusal to file a notice of appeal deprives his client of "an appeal altogether." *Flores-Ortega*, 528 U.S. at 483.

Moreover, just as in *Flores-Ortega* and *Rodriquez*, requiring a defendant to make a showing of prejudice after his trial counsel refused his express instruction and thus cost him his right to a counseled appeal would work an untenable burden on the defendant who will now, in all likelihood, be forced to proceed without counsel. *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 had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."); *Rodriquez*, 395 U.S. at 330 ("Applicants for relief [on postconviction] must, if indigent, prepare their petitions without the assistance of counsel . . . They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one."); *Peguero*, 526 U.S. at 30 (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion.").

This Court established a specific procedure for instances in which trial counsel believes there may be no basis for appeal in *Anders v. California*, 386 U.S. 738 (1967). The solution is not for counsel to unilaterally forfeit their client's right to a counseled direct appeal during the short notice-of-appeal stage. Rather, regardless of the perceived merits of an appeal, trial counsel is to preserve the defendant's right by filing a notice of appeal. Appellate counsel must then "support his client's appeal to the best of his ability," and if he ultimately "finds his case to be

wholly frivolous, after a conscientious examination of it, he should so advise the court . . . accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. The appellate court then conducts "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* The decision below would "undermine [*Anders*] and the principles of the Sixth Amendment by allowing attorneys who believe their clients' appeals to be frivolous simply to ignore the clients' requests to appeal." *Campusano*, 442 F.3d at 776 (Sotomayor, J.).

III. The Question Presented Is Important And Recurs Frequently.

The importance of this issue—whether an attorney's defiance of his client's instruction to file a notice of appeal appropriately costs that defendant his right to a counseled direct appeal—is self-evident. *See Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (recognizing that it would be "invidious" to deny criminal defendants the right to a counseled direct appeal).

Given the prevalence of appeal waivers in modern plea agreements, the minority position would effectively nullify the protections afforded in cases like *Flores-Ortega* and *Anders* in certain jurisdictions. *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) (observing that 90% of plea agreements in the Ninth Circuit and 65% of plea agreements across all circuits included appeal waivers).

The issue is now of special importance in Idaho. Because the position adopted by the court below conflicts with that of the Ninth Circuit, the standard for whether an attorney has rendered ineffective assistance of counsel will differ depending upon whether the attorney happened to be litigating in state court or federal court. Because such standards influence an attorney's understandings of his or her professional responsibilities, the many attorneys who appear before both state and federal courts face conflicting guidance. Furthermore, criminal defendants in Idaho (as well as Montana and Kansas) will have to engage in federal habeas litigation regarding whether the position adopted below is "contrary to, or involved an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1).

IV. The Question Presented Is Squarely Presented.

The question upon which the lower courts are divided was the only issue passed upon by the courts below to dispose of Petitioner's claim and is thus squarely presented. The facts are undisputed and straightforward: Petitioner instructed his trial counsel to appeal and his trial counsel declined to do so on the sole basis that Petitioner had signed plea agreements that included an appeal waiver.

In response to prior petitions for certiorari, the United States has acknowledged that there is a "conflict among the circuits" on the question presented, but counseled the Court to wait for a record that contains an appeal waiver without a waiver of collateral review. *See e.g.*, Brief of the United States in Opposition at 9, *Solano v. United States*, No. 15-9249 (U.S. Aug. 10, 2016). It has repeatedly advised

that because the plea agreements at issue in prior cases included a "waiver of [the] right not only to appeal, but also to bring any collateral challenge," the "conflict among the circuits [was] not . . . implicated." *E.g.*, *id.* at 9, 12-14. The appeal waiver in Petitioner's plea agreements did not include a waiver of collateral review and the conflict is thus squarely presented on this record.

No reasonable argument could be made that this issue requires further percolation. As the courts below acknowledged, "nearly every federal circuit court of appeals has resolved the question this case presents." Pet. App. 35a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 44991

GILBERTO GARZA JR.,	)	
	)	Boise, September
Petitioner-Appellant,	)	2017 Term
	)	
v.	)	2017 Opinion No. 112
	)	
STATE OF IDAHO,	)	Filed: November 6, 2017
	)	
Respondent.	)	Karel A. Lehrman, Clerk

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Jason D. Scott, District Judge.

District court order dismissing petitions for post-conviction relief, affirmed.

Eric D. Fredericksen, Idaho State Appellate Public Defender, Boise, for appellant. Maya P. Waldron, Deputy State Appellate Public Defender argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Kale Gans, Deputy Attorney General argued.

BURDICK, Chief Justice.

Gilberto Garza, Jr., appeals the Ada County district court's order dismissing his petitions for post-conviction relief. Garza signed two plea agreements relating to charges of aggravated assault and possession of a controlled substance

with intent to distribute. As part of his plea agreements Garza waived his right to appeal. Despite the waivers, Garza instructed his attorney to appeal. Garza's attorney declined to file the appeals, citing the waivers of appeal in the plea agreements. Garza then filed two petitions for post-conviction relief, alleging his counsel was ineffective for failing to appeal. The district court dismissed Garza's petitions concluding Garza's counsel was not ineffective in failing to appeal. The Court of Appeals agreed and affirmed. We granted Garza's timely petition for review and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves two underlying convictions and two corresponding petitions for post-conviction relief.[1] On January 23, 2015, Garza entered an *Alford* plea to aggravated assault (assault case), and on February 24, 2015, he pleaded guilty to possession of a controlled substance with intent to deliver (possession case). The plea agreements bound the district court to sentence Garza to five years in prison for the assault case (two years fixed, three indeterminate), and another five years in prison for the possession case (one year fixed, four indeterminate). The sentences were to run consecutively, along with another prison sentence previously imposed on Garza. The district court accepted the plea agreements and imposed sentence in accordance with them on the same day Garza entered the possession plea. In both binding

[1] The convictions were based on two Idaho Criminal Rule 11 plea agreements that were part of a global agreement that included a third case and other unfiled charges.

Idaho Criminal Rule 11(f)(1)(c) plea agreements, Garza waived his right to appeal, and waived his right to request relief pursuant to Idaho Criminal Rule 35. The court acknowledged that Garza had waived his right to appeal, but advised Garza of his appeal rights anyway. Garza did not appeal the convictions or sentences in the underlying cases.

Approximately four months later, Garza filed a petition for post-conviction relief in each case, asserting among other things that his trial attorney was ineffective for not filing notices of appeal. Garza stated in his affidavit submitted in the possession case that he asked his attorney to appeal, and in his affidavit submitted in his assault case that his attorney failed to appeal despite numerous phone calls and letters from Garza. Garza's former attorney stated in an affidavit that he did not file an appeal because Garza "received the sentence(s) he bargained for in his [plea] agreement" and "an appeal was problematic because [Garza] waived his right to appeal in his Rule 11 agreements."

The court appointed an attorney for Garza and issued a notice of intent to dismiss all of Garza's claims except for his claim of ineffective assistance of counsel. After both parties responded to the notice, the court dismissed all post-conviction claims except for the ineffective assistance of counsel claim regarding the failure to file an appeal. The parties then filed cross- motions for summary adjudication on Garza's remaining claim for post-conviction relief, where Garza sought a reopening of the appeals period in the underlying criminal cases on the basis of ineffective assistance of counsel. The district court dismissed Garza's

petitions, and the Court of Appeals affirmed. We granted Garza's timely petition for review.

II. ISSUE ON APPEAL

1. Was Garza's attorney ineffective when he did not file an appeal after Garza requested it even though Garza had waived his right to appeal as part of a Rule 11 plea agreement?

III. STANDARD OF REVIEW

When addressing a petition for review, this Court will give "serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court." *State v. Schall*, 157 Idaho 488, 491, 337 P.3d 647, 650 (2014) (quoting *State v. Oliver*, 144 Idaho 722, 724, 170 P.3d 387, 389 (2007)). "Proceedings for post-conviction relief are civil in nature, rather than criminal, and therefore the applicant must prove the allegations in the request for relief by a preponderance of the evidence." *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The district court may grant a motion by either party for summary disposition for post-conviction relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.C. § 19-4906(c). This Court exercises free review over the district court's "determination as to whether constitutional requirements have been satisfied in light of the facts found." *Dunlap*, 155 Idaho at 361, 313 P.3d at 17 (quoting *State v. Pearce*, 146 Idaho 241, 248, 192 P.3d 1065, 1072 (2008)).

IV. ANALYSIS

A criminal defendant is permitted to waive his right to appeal as part of a plea agreement. *State v.*

Murphy, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994). The waiver is valid and will be upheld as long as it was entered into knowingly, voluntarily, and intelligently as part of a plea agreement. *Id.* In this case, the district court found that Garza did not show that his plea was not knowing, voluntary, or intelligent, nor did Garza raise this issue on appeal. The sole issue remaining is whether, despite the appeal waiver, Garza still had the right to appeal and therefore his counsel was ineffective for failing to file an appeal at his request.

This Court has not yet decided whether counsel is ineffective if counsel denies his client's request to file an appeal when the client waived the right to appeal in a binding Idaho Criminal Rule 11 plea agreement. Garza argues that the district court erred in requiring him to show, rather than presuming, his counsel was deficient and that Garza was prejudiced when his attorney declined to file an appeal in light of the waiver. For the reasons discussed below, we affirm the district court's dismissal of Garza's petitions for post-conviction relief.

Criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance. *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *see also Booth v. State*, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011). A defendant claiming ineffective assistance of counsel must show that (1) counsel's representation was deficient; and (2) counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 688–92; *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To show counsel was deficient, the defendant has

the burden of showing that his attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Generally, when trial counsel fails to file an appeal at a criminal defendant's request, such performance is professionally unreasonable and therefore deficient. *Flores-Ortega*, 528 U.S. at 477; *Beasley v. State*, 126 Idaho 356, 362, 883 P.2d 714, 720 (Ct. App. 1994). To show that counsel's deficient performance was prejudicial, the defendant must show there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 669; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This test applies to claims that counsel was ineffective for failing to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 477. However, whether counsel was ineffective becomes unclear when the reason the attorney did not file the appeal is because the client waived the right to appeal as part of a plea agreement.

Neither the United States Supreme Court nor this Court have decided whether an attorney has provided ineffective assistance of counsel if the attorney declines to file an appeal after a defendant has requested it, when the defendant has waived the right to appeal as part of a plea agreement. There is a federal circuit split regarding the issue, which involves differing interpretations of the United State Supreme Court's decision in *Flores-Ortega*. The *Flores- Ortega* case did not involve an appeal waiver, but rather dealt with whether an attorney provided ineffective assistance of counsel when she failed to appeal because it was

unclear if her client wanted to appeal. *See Flores-Ortega*, 528 U.S. at 475. The Court held "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." *Id.* at 484.

A majority of federal circuit courts have interpreted *Flores-Ortega* to apply even in situations where the defendant has validly waived his right to appeal. Those circuits hold that attorneys are ineffective when they do not file an appeal after the clients requested it, regardless of whether the defendants had waived their rights. *See Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012); *United States v. Poindexter*, 492 F.3d 263, 265 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 794 (11th Cir. 2005). Under the majority approach, an attorney is required to file an appeal at his client's request, even if the attorney thinks the appeal would be frivolous. *Campusano*, 442 F.3d at 771–72. When counsel fails to follow his client's express direction to appeal, prejudice is presumed. *Id.* at 772. "The prejudice in failure to file a notice of appeal cases is that the defendant lost his chance to file the appeal, not that he lost a favorable result

that he would have obtained by appeal." *Sandoval-Lopez*, 409 F.3d at 1197.[2]

Two federal circuit courts and a federal district court in an undecided circuit follow the minority approach and hold that *Flores-Ortega* does not require an attorney be presumed ineffective for failing to appeal upon request when there has been a waiver of the right to appeal. *See Nunez v. United States*, 546 F.3d 450, 456 (7th Cir. 2008), *vacated on other grounds by Nunez v. United States*, 554 U.S. 911 (2008); *United States v. Mabry*, 536 F.3d 231, 242 (3d Cir. 2008); *Maes v. United States*, No. 15-CV-240-SM, 2015 WL 9216583, at *3 (D.N.H. Dec. 16, 2015). The minority approach does not presume deficiency or prejudice when an attorney denies his client's instruction to file an appeal when there has been an appeal waiver, and instead requires the defendant meet the test in *Strickland*, which requires showing deficient performance and prejudice. *Nunez*, 546 F.3d at 456. The minority approach holds that when a defendant waives his appellate rights, he no longer has a right to appeal, and therefore an attorney is not bound to file an appeal at his client's request. *Id.* at 455.

Though few other states have addressed the issue, the ones who have continue to apply the

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[2] While the Ninth Circuit follows the majority approach, its language in *Sandoval-Lopez* seems to indicate it has doubts about the policy considerations implicated under the majority approach. The court expressed that the defendant's appeal would likely have been dismissed or he would have lost, and it was likely wise for his attorney to not file the appeal as it was in breach of the plea agreement. *Sandoval-Lopez*, 409 F.3d at 1197.

Strickland test. *See Buettner v. State*, 2015 MT 348N, ¶¶ 14–15 (Mont. 2015) (applying the two-prong test of *Strickland* to determine that counsel was not ineffective in failing to file a notice of appeal); *People v. Miller*, 784 N.Y.S.2d 680, 681–82 (N.Y. App. Div. 2004) ("Where, as here, a defendant makes an informed and intelligent waiver of the right to appeal, ordinarily he or she will be precluded from arguing ineffective assistance of counsel, except to the extent that the claimed ineffective assistance impacts upon the voluntariness of the plea."); *Stewart v. United States*, 37 A.3d 870, 877 (D.C. Ct. App. 2012) (holding *Flores-Ortega* did not control when there had been an appeal waiver, and stating that "[defendant's] claim of ineffective assistance of counsel in relation to the failure to file a notice of appeal is palpably incredible . . . ."); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007) (citing Kan. Admin. Regs. § 105-3-9) (applying a modified adaptation of *Flores-Ortega*, however, it is limited by statutory language stating an attorney must "file notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant").

In a recent case, this Court discussed *Flores-Ortega* in the context of an ineffective assistance of counsel claim when counsel did not consult with a defendant about filing an appeal after the defendant waived his right to appeal. *McKinney v. State*, 162 Idaho 286, ___, 396 P.3d 1168, 1171–72 (2017). In *McKinney*, a defendant waived his right to appeal as part of a Rule 11 sentencing agreement, and then sought post-conviction relief on the ground that his attorney was ineffective for not consulting

with him about appealing his sentence, despite having waived his appeal rights in the plea. *Id.* at ___, 396 P.3d at 1179. This Court interpreted *Flores-Ortega* to not compel a bright-line presumption of deficiency or prejudice in the failure to consult context. *Id.* Rather, this Court considered whether counsel's failure to consult with the defendant about filing an appeal was deficient conduct that prejudiced the defendant, and concluded it was not. *Id.*

In this case, we decline to presume counsel ineffective for failing to appeal at Garza's request when Garza has waived the right to appeal as part of a plea agreement. Rather, to show ineffective assistance of counsel, Garza must show deficient conduct and resulting prejudice. In so holding, we 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, as there was here.

> The *Flores-Ortega* Court made clear that a presumption of prejudice applies in the context of an ineffectiveness claim because an attorney's deficient performance deprives the defendant of his or her opportunity for an appellate proceeding. Notably, *Flores- Ortega* did not address whether this principle has any force, let alone controls, where the defendant has *waived* his right to appellate and collateral review.

Mabry, 536 F.3d at 240 (citations omitted). In fact, the Court in *Flores-Ortega* stated, "The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time *and to which he had a right*, similarly demands a presumption of

prejudice." 528 U.S. at 483 (emphasis added). Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores- Ortega* would not apply after a defendant has waived his appellate rights. Therefore, an attorney who declines to file the appeal when there has been a waiver will not be presumed ineffective, nor will the attorney be found to have violated the Idaho Rules of Professional Conduct.

This approach is consistent with other areas of Idaho law. Idaho courts do not presume a defendant is prejudiced when an attorney fails to follow his client's instruction to file a Rule 35 motion, despite the client having the right to do so. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995).

> [T]o prevail on a claim of ineffective assistance of counsel an applicant . . . must show both that counsel's performance was deficient and that the deficiency prejudiced the applicant. Where the alleged deficiency is counsel's failure to file a . . . motion, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the test. If the motion lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of its pursuit.

Id. (quoting *Huck v. State*, 124 Idaho 155, 158–59, 857 P.2d 634, 637–38 (Ct. App. 1993)). As the district court correctly stated, "[i]t would seem

anomalous to presume prejudice in the failure-to-appeal context when the defendant waived the right to appeal, yet not presume prejudice in the Rule 35 context even when the defendant has not waived the right to file a Rule 35 motion." Other Idaho cases have adopted similar policies regarding when counsel is ineffective:

> When considering whether an attorney's failure to file or pursue a motion to suppress or strike evidence constitutes incompetent performance, the court is required to examine the probability of success of such a motion in order to determine whether counsel's decision against pressing the motion was within the wide range of permissible discretion and sound trial strategy. In *Carter v. State*, 108 Idaho 788, 794-795, 702 P.2d 826, 832-33 (1985), the Idaho Supreme Court held that counsel's failure to move to suppress the defendant's confession constituted ineffective assistance because it was obvious that the confession would have been suppressed. In *Maxfield v. State*, 108 Idaho 493, 501, 700 P.2d 115, 123 (Ct. App. 1985), we held that newly appointed counsel's failure to renew a motion to suppress was not deficient, since previous counsel had been unsuccessful on the same motion and no new grounds existed. Because it was clear that the new motion would have been denied as well, counsel's failure to make the motion was not deficient. See also, *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989), (counsel's failure to timely file a motion to suppress evidence seized from defendant's home was not deficient because defendant had failed to show that the items

> would have been suppressed); *State v. Youngblood*, 117 Idaho 160, 165, 786 P.2d 551, 556 (1990) (failure to move to suppress items seized was not error where items were obviously subject to plain view exception to exclusionary rule); *State v. Walters*, 120 Idaho 46, 56, 813 P.2d 857, 867 (1991) (failure of counsel to object to inadmissible opinion testimony was ineffective assistance.)

Huck, 124 Idaho at 158, 857 P.2d at 637. While the above cases do not deal with appeal waivers specifically, they show the policy of this Court to not presume counsel ineffective automatically when counsel exercises judgment in declining to file a motion where it would obviously be denied, or where the motion had previously been unsuccessful. *See Davis*, 116 Idaho at 406, 775 P.2d at 1248.

Moreover, a criminal defense attorney has a duty to the judicial system to exercise professional judgment and not file frivolous litigation, "and an appeal in the teeth of a valid waiver is frivolous." *Nunez*, 546 F.3d at 455; *See also* Idaho Rules of Professional Conduct 3.1. The defendant, even if allowed his appeal, will very likely still have his appeal dismissed as a result of the waiver, and "[t]here is no point in a constitutional rule that would yield an exercise in futility." *Nunez*, 546 F.3d at 456. Garza's attorney chose to exercise professional judgment and uphold the plea agreements that contained his client's original desire to waive his right to appeal. Such an exercise of judgment that keeps frivolous and futile litigation out of the courts will not be presumed ineffective assistance of counsel.

Additionally, a plea agreement is a bilateral contract, to which both the State and defendant are bound. *McKinney*, 162 Idaho at ___, 396 P.3d at 1178. Once a defendant has accepted the plea, he should be bound by the waiver therein. *Nunez*, 546 F.3d at 455. "Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). "[Garza] exchanged the right to appeal for prosecutorial concessions; he cannot have his cake and eat it too." *Id.* Moreover, a lawyer has a duty to avoid taking actions that will cost their client the benefit of the plea bargain. *Nunez*, 546 F.3d at 455. If an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety. Here, filing an appeal would have been a direct violation of the plea agreement, and the State would have been free to revoke the benefits of the plea given to Garza. When Garza's attorney declined to file an appeal because the right to appeal had been waived, counsel ensured Garza would not be in breach of the plea. We are cognizant 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. This is properly done in a petition for post-conviction relief or writ of habeas corpus, rather than on direct appeal.

In this case, we decline to presume Garza's counsel ineffective when counsel failed to file an

appeal at Garza's request because of the appeal waiver. Rather, to show ineffective assistance of counsel for failing to appeal in light of the waiver, Garza needed to show both deficient performance and resulting prejudice. The district court concluded that Garza was unable to show any non-frivolous grounds for appeal, and therefore could not show prejudice. Accordingly, we affirm the district court's dismissal of Garza's petitions for post-conviction relief.

V. CONCLUSION

We affirm the district court's dismissal of Garza's petitions for post-conviction relief. This Court does not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver. Rather, a defendant needs to show deficient performance and resulting prejudice to prove ineffective assistance of counsel. Because Garza cannot show such grounds, his petitions for post-conviction relief were properly dismissed by the district court, and the district court is affirmed.

Justices JONES, HORTON, BRODY and TROUT, Pro Tem, **CONCUR.**

APPENDIX B

COURT OF APPEALS OF IDAHO

[filed February 2, 2017]

Gilberto GARZA Jr., Petitioner-Appellant, v. STATE of Idaho, Respondent.	Docket Nos. 44015/44016

GUTIERREZ, Judge

Gilberto Garza Jr. appeals from the district court's summary dismissal of Garza's petitions for post-conviction relief. Specifically, Garza argues the district court erred because Garza's counsel rendered ineffective assistance by failing to file notices of appeal. For the reasons explained below, we affirm the district court.

I.

FACTUAL AND PROCEDURAL BACKGROUND

These consolidated appeals involve two underlying convictions and two post-conviction relief petitions. In Case No. CR–2014–09960, Garza entered an *Alford* [1] plea to aggravated assault, pursuant to Idaho Code §§ 18–901(a) and 18–905(a). In Case No. CR–2014–18183, Garza pled guilty to possession of a controlled substance with intent to distribute, pursuant to Idaho Code § 37–2732(a)(1)(A). Garza waived his right to appeal in

[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

both cases under binding Idaho Criminal Rule 11(f)(1)(C) plea agreements. At a joint sentencing hearing, the district court accepted the plea agreements.

Despite having waived his right to appeal, Garza instructed his attorney to file notices of appeal. His attorney declined, and no appeals were filed. Garza filed two petitions for post-conviction relief, which included allegations that his trial counsel was ineffective in failing to file notices of appeal within the forty-two-day limit. Garza's trial counsel noted in an affidavit that he "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements."

Garza filed motions for summary judgment and argued his right to appeal should be reinstated. The State cross-filed motions for summary dismissal. In addressing the motions, the district court focused on whether Garza's counsel was ineffective in failing to file appeals despite Garza's waiver of his appellate rights. The district court recognized that the issue is currently undecided in Idaho and that eight federal circuit courts adhere to the majority rule—prejudice is presumed when an attorney disregards the client's instruction to file an appeal, even if the client waived the right to appeal. The district court also considered the minority rule followed by two federal circuit courts—if a defendant waives his or her appellate rights, prejudice is not presumed when the attorney fails to file notices of appeal. The district court ultimately followed the minority rule and did not presume that counsel's failure to file notices of appeal was prejudicial. Instead, the district court required Garza to show prejudice and, specifically, to

show nonfrivolous grounds for appeal (either that the appeal waiver is invalid or unenforceable or that the issues Garza wants to pursue on appeal are outside the scope of the waiver). Because Garza did not make any such showing, the district court summarily dismissed Garza's petitions. Garza timely appeals.

II.

ANALYSIS

Garza argues the district court erred in summarily dismissing his petitions for post-conviction relief. A petition for post-conviction relief initiates a proceeding that is civil in nature. I.C. § 19–4907; *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). A petition must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. I.C. § 19–4903. In other words, the petition must present or be

accompanied by admissible evidence supporting its allegations or the petition will be subject to dismissal. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011).

Idaho Code Section 19–4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. *Id.*

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie

case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner's evidence. *See Roman*, 125 Idaho at 647, 873 P.2d at 901.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Sheahan*, 146 Idaho at 104, 190 P.3d at 923. Over questions of law, we exercise free review. *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069; *Downing v.*

State, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001).

In his petitions for post-conviction relief, Garza alleged his attorney rendered ineffective assistance of counsel by failing to file notices of appeal. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Barcella v. State*, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009). To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693 (1984); *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Knutsen v. State*, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Knutsen*, 144 Idaho at 442, 163 P.3d at 231. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

As noted, it is currently undecided in Idaho whether counsel is ineffective in failing to file an appeal upon the defendant's request for an appeal, despite the defendant having waived the right to appeal as part of a plea agreement. Federal circuit courts are split on the issue. The majority of circuit courts have ruled that an attorney who ignores his or her client's request for an appeal is ineffective, regardless of whether the client waived the right to appeal. *See Campbell v. United States*, 686 F.3d 353 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960 (8th Cir. 2007); *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007); *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007); *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006); *Gomez–Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005); *United States v. Sandoval–Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262 (10th Cir. 2005). In such circumstances, the majority rule presumes prejudice. *Campusano*, 442 F.3d at 772. A client need only show that he or she instructed his or her attorney to appeal in order to demonstrate prejudice under the second *Strickland* prong. *Poindexter*, 492 F.3d at 268–69.

The majority rule primarily relies on *Roe v. Flores–Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) for support. *See, e.g.*, *Poindexter*, 492 F.3d at 268. In *Flores–Ortega*, the United States Supreme Court addressed whether an attorney's performance was deficient in failing to file a notice of appeal when the defendant did not clearly express whether he wanted to appeal. *Flores–Ortega*, 528 U.S. at 477, 120 S.Ct. at 1034–35, 145 L.Ed.2d at 994–95. The Supreme Court first noted that 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." *Id.* at 477, 120 S.Ct. at 1035, 145 L.Ed.2d at 995. Then, in specifically addressing the issue before the Court under the performance prong of the *Strickland* test, the Supreme Court ruled that an attorney has a constitutionally imposed duty to consult with his or her client "when there is reason to think either (1) that a rational defendant would want to appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores–Ortega*, 528 U.S. at 480, 120 S.Ct. at 1036, 145 L.Ed.2d at 996–97. This is because "the decision to appeal rests with the defendant." *Id.* at 479, 120 S.Ct. at 1035–36, 145 L.Ed.2d at 996.

Turning to the prejudice prong of the *Strickland* standard, the Supreme Court further ruled that "the even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right ... demands a presumption of prejudice." *Flores–Ortega*, 528 U.S. at 483, 120 S.Ct. at 1038, 145 L.Ed.2d at 998–99. Thus, the Supreme Court held, "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 appeal." *Id.* at 484, 120 S.Ct. at 1039, 145 L.Ed.2d at 1000. The circuit courts following the majority approach interpret this language to support the proposition that prejudice is presumed when an attorney ignores a defendant's instruction to file a timely notice of appeal even when a defendant has waived his or her appellate rights. *See, e.g.*,

Campbell, 686 F.3d at 357. Notably, the defendant in *Flores–Ortega* did not waive his right to appeal. Regardless, the majority rule provides "it is only when the defendant either does not make his appellate wishes known or does not clearly express his wishes that an attorney has some latitude in deciding whether to file an appeal." *Poindexter*, 492 F.3d at 269. Accordingly, under the majority rule, an attorney is under an obligation to file an appeal if a defendant unequivocally instructs his or her attorney to file a timely notice of appeal. *Id.* "Simply put, *Flores–Ortega* reaffirms the time-honored principle that an attorney is not at liberty to disregard the appellate wishes of his client." *Poindexter*, 492 F.3d at 269. This is the case even when filing an appeal is contrary to the plea agreement or harmful to the defendant. *Sandoval–Lopez*, 409 F.3d at 1197.

Two circuit courts have rejected the majority rule. These circuits maintain 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. *See Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008) *vacated on other grounds by Nunez v. United States*, 554 U.S. 911, 128 S.Ct. 2990, 171 L.Ed.2d 879 (2008); *United States v. Mabry*, 536 F.3d 231 (3d Cir. 2008). Because prejudice is not presumed, the defendant must show nonfrivolous grounds for appeal. *Nunez*, 546 F.3d at 456.

In *Nunez*, the Seventh Circuit observed that an attorney has a judicial duty to avoid frivolous litigation, "and an appeal in the teeth of a valid waiver is frivolous." *Id.* at 455. An attorney also has a duty to avoid taking steps that will cost the defendant the benefit of the plea agreement. *Id.* Of

course, a defendant may elect to withdraw the plea and instruct his or her attorney to subsequently file a notice of appeal—this "amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too." *Id.* But with the waiver in effect, the *Nunez* court ruled the attorney's "duty to protect his client's interests militates against filing an appeal." *Id.* This is because the benefits of the plea agreement are jeopardized if an attorney disregards the waiver and files an appeal. *Id.* The Seventh Circuit further held that "a lawyer should do what's best for the client, which usually means preserving the benefit of the plea bargain. That this approach also honors the lawyer's duty to avoid frivolous litigation is an extra benefit." *Id.*

Following suit, the Third Circuit agreed with the approach in *Nunez* and adopted the minority rule. *Mabry*, 536 F.3d at 241. The court in *Mabry* held that the majority rule "curiously ... focuses not on the waiver but on the importance of the right to appeal" and, in doing so, "applie[s] *Flores–Ortega* to a situation in which it simply does not 'fit.' " *Mabry*, 536 F.3d at 233, 241. Pointing out the absence of a waiver in *Flores–Ortega*, the court noted that "surely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client with respect thereto." *Id.* at 242. *Mabry* focused on the validity of the waiver as a threshold issue and ended the analysis after concluding the defendant's waiver was valid—without addressing the *Strickland* test. *Mabry*, 536 F.3d at 242.

We are persuaded by the minority approach. Once a defendant makes the decision to waive his or her

rights to appeal, the defendant "has no right to countermand such a formal choice." *Nunez*, 546 F.3d at 455. Garza exchanged his right to appeal for prosecutorial concessions. He "cannot have his cake and eat it too." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995).

It is true that a defendant may still file a notice of appeal after waiving his or her appellate rights—but the appellate waiver denies the defendant a decision on the merits. This is because, as a result of the waiver, he lacks the right to appeal. As the district court noted, "because [Garza] waived the right to appeal, all he loses is the opportunity to see his appeal dismissed without a decision on the merits. This short-circuited appellate proceeding is not the kind of 'entire judicial proceeding' whose loss demands a presumption of prejudice." (quoting *Flores–Ortega*, 528 U.S. at 483, 120 S.Ct. at 1038, 145 L.Ed.2d at 998–99). Moreover, forcing an attorney to file an appeal—despite a waiver of appellate rights—impedes an attorney's ability to exercise professional judgment in deciding whether to file a notice of appeal. *See Nunez*, 546 F.3d at 456. An attorney has a duty to avoid frivolous litigation, and filing a futile appeal is frivolous. Frivolous appeals drain judicial resources and jeopardize the integrity of the judicial system.

Furthermore, while the majority rule purports to safeguard a defendant's rights, the minority approach better protects defendants. When a defendant waives his or her appellate rights pursuant to a plea agreement, and the attorney then follows the defendant's instructions to file an appeal, the defendant's plea agreement is rendered meaningless. The State may then withdraw

concessions and would likely be hesitant to make future concessions with that defendant. On a bigger scale, "if defendants could retract their waivers ... then they could not obtain concessions by promising not to appeal." *Wenger*, 58 F.3d at 282. In sum, the minority rule advances the attorney's duty to preserve the benefit of the plea agreement—thereby protecting the defendant.

Because prejudice is not presumed, Garza was required to make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver. Garza has made no such showing or argument. Therefore, the district court did not err in summarily dismissing Garza's petitions for post-conviction relief.

III.

CONCLUSION

The district court did not err in summarily dismissing Garza's petitions for post-conviction relief because, given that Garza waived his right to appeal, his counsel was not ineffective in refusing to file notices of appeal. We affirm the district court. Costs awarded to the respondent on appeal.

Judge MELANSON and Judge HUSKEY concur.

APPENDIX C

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed February 11, 2016]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case Nos. CV-PC-2015-10589 CV-PC-2015-10597 ORDER ON CROSS-MOTIONS FOR SUMMARY ADJUDICATION

On January 23, 2015, Gilberto Garza Jr. entered an *Alford* plea to aggravated assault in violation of I.C. §§ 18-901(a) and 18-905(a) in Ada County Case No. CR-FE-2014-09960 ("Aggravated-Assault Case"). Additionally, on February 24, 2015, he pleaded guilty to possessing a controlled substance with intent to deliver in violation of I.C. § 37-2732(a) in Ada County Case No. CR-FE-2014-18183 ("Possession-With-Intent Case"). Garza entered those pleas under I.C.R. 11(f)(1)(C) plea agreements. The plea agreements, if accepted, bound the Court to sentence Garza to five years in prison (two years fixed and three years indeterminate) in the Aggravated-Assault Case, as well as to another five years in prison (one year fixed and four years indeterminate) in the Possession-

With-Intent Case. Under the plea agreements, those bargained-for sentences were to run consecutive to both one another and a lengthy prison sentence Garza had just begun serving in another case, in which he was convicted of grand theft. Immediately after Garza pleaded guilty in the Possession-With-Intent Case, the Court accepted the plea agreements and imposed sentence in accordance with them.

The plea agreements barred Garza from appealing the convictions and sentences. Each plea agreement says that "Defendant Gilberto Garza Jr. waives his right to appeal . . . ." (Answers Pets. Post-Conviction Relief Ex. 1.) Both plea agreements are signed by Garza, and both appeal-waiver provisions are initialed by him. (Id.)

Despite having waived his right to appeal, Garza asked his trial counsel to file appeals. (Taber Affs. ¶ 11.) Garza's trial counsel says Garza acknowledged the appeal waivers in asking trial counsel to file appeals, but told trial counsel he wanted to file appeals anyway. (Id.) Because of the appeal waivers, Garza's trial counsel declined to file appeals. (Id.) Thus, no appeals were filed, despite Garza's expressed desire to file them.

About four months after receiving bargained-for consecutive sentences, Garza filed petitions for post-conviction relief in relation to the two underlying cases. With one exception, his post-conviction claims were summarily dismissed in an order entered on August 26, 2015. One dismissed claim was that Garza's pleas were involuntary. After notice, the Court dismissed that claim for lack of supporting evidence. Garza's remaining claim is

that, despite the appeal waivers, his trial counsel's failure to file appeals at his request constitutes ineffective assistance of counsel. Consequently, he asks the Court to reenter judgment in both underlying cases, thus reinstating his opportunity to appeal the bargained-for consecutive sentences.

In accordance with an amended scheduling order entered on December 2, 2015, the parties filed cross-motions for summary adjudication of Garza's remaining claim. The State of Idaho contends Garza's appeal waivers negated the duty his trial counsel otherwise would have had to file appeals at his request. The State also contends Garza was not prejudiced by his trial counsel's decision not to file appeals at his request, given the appeal waivers, even though prejudice would have been presumed in the absence of appeal waivers. Garza contends, by contrast, that the appeal waivers did not negate his trial counsel's duty to file appeals at his request, and that he is presumed to have been prejudiced by the non-filing of appeals, despite the appeal waivers.

As something of a side note, Garza points out that the Court did not discuss the appeal waivers with him during his plea hearings in the two underlying cases. (Mem. Supp. Pet'r's Mot. Summ. J. 3.) Discussing the appeal waivers was required by rule, assuming they had been called to the Court's attention. *See* I.C.R. 11(d)(3). Any failure of the Court to comply with that rule is not, however, relevant to whether Garza's trial counsel rendered ineffective assistance by not filing appeals at his request. Non-compliance with Rule 11(d)(3) would have been relevant to Garza's already-dismissed claim that his pleas were involuntary, had he

contended he did not appreciate or understand the appeal waivers when he entered his pleas. But Garza has never so contended at any stage of these post-conviction cases.[1]

The amended scheduling order permitted each party (i) to file a response to the other party's motion for summary adjudication, and (ii) to request oral argument on the cross-motions. Neither party availed itself of either opportunity, freeing the Court to decide the cross-motions based solely on the parties' respective moving papers, without oral argument. The Court determined, however, that supplemental submissions would be helpful. Consequently, on January 6, 2016, the Court entered an order giving Garza until January 27, 2016, to identify the issues he wants to pursue on appeal in the two underlying cases, 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. In that same order, the State was given until February 10, 2016, to respond to Garza's supplemental submission.

Garza filed a timely supplemental brief. In it, he identifies only one issue he wishes to pursue on appeal in the underlying cases: whether the Court

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[1] The closest he has come is pointing out that, on one of his two guilty plea advisory forms, he incorrectly answered Question 19, which asked whether the plea agreement involves an appeal waiver. (Pet'r's Supp. Br. 3.) As already noted, both plea agreements contain an express appeal waiver. Garza's incorrect answer to Question 19 on one guilty plea advisory form is inconsequential because, as just noted, he has never contended that he did not appreciate or understand, in entering his pleas, that appeal waivers were part of both plea agreements.

properly exercised its discretion in imposing the sentences to which he and the State agreed in the two I.C.R. 11(f)(1)(C) plea agreements. (Pet'r's Suppl. Br. 2.) He questions whether it is appropriate for the Court to ask him to identify non-frivolous appeal issues. (Id.) In that regard, he notes that under *Beasley v. State,* 126 Idaho 356, 883 P.2d 714 (Ct. App. 1994), prejudice to the petitioner is presumed if his trial counsel failed to file an appeal at his request. (Id. at 2-3.) As discussed below, however, *Beasley* can be distinguished on the ground that, unlike Garza, Beasley did not enter into an appeal waiver. That is why the Court asked Garza to identify his prospective appeal issues and explain why they are non-frivolous and not subject to dismissal as a result of his appeal waivers. Garza's supplemental brief gives no reason to think his hoped-for appeals would not be dismissed as a result of his appeal waivers.

The State filed a timely response to Garza's supplemental brief. Its response emphasizes Garza's knowing and voluntary agreement to the appeal waivers, and argues that *Beasley* is distinguishable because it did not involve an appeal waiver. (State's Suppl. Br. 2-3.)

The cross-motions were deemed under advisement as of February 10, 2016, when the State's response was filed. They are ready for decision.

Post-conviction claims may be summarily adjudicated if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). There is no genuine factual dispute here. The parties agree on the following key facts: (i) Garza entered into I.C.R. 11(f)(1)(C) plea agreements in which he waived the right to appeal; (ii) he asked his trial counsel to file appeals, despite having received the bargained-for consecutive sentences and despite having waived his right to appeal; and (iii) because of the appeal waivers, his trial counsel declined to act on his request to file appeals. In light of the parties' agreement on these facts-and in the absence of evidence that Garza's pleas were invalid, or that the State breached the plea agreements- Garza's claim is amenable to resolution as a matter of law.

To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy a two-pronged test. *E.g., Strickland v. Washington,* 466 U.S. 668, 687 (1984). First, the petitioner must prove his counsel's performance was deficient. *Id.* 'There is a strong presumption that counsel's performance fell 'within the wide range of professional assistance,'" so the petitioner must prove his "'counsel's representation fell below an objective standard of reasonableness.'" *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (198) (quoting *Strickland,* 466 U.S. at 688-89). Second, the petitioner must prove he was prejudiced by his counsel's deficient performance. *Strickland,* 466 U.S. at 687.

Generally speaking, trial counsel's failure to file an appeal at a criminal defendant's request is deficient performance that prejudices the defendant, irrespective of whether the appeal has

merit. *E.g., Beasley,* 126 Idaho at 359, 883 P.2d at 717; *Roe v. Flores-Ortega,* 528 U.S. 470, 477, 484 (2000). As the United States Supreme Court put it in *Flores-Ortega,* "[t]he . . . denial of the entire judicial proceeding *[i.e.,* the appeal] itself, which a defendant wanted at the time and to which he had a right . . . demands a presumption of prejudice." 528 U.S. at 483 (emphasis added). Neither *Beasley* nor *Flores-Ortega,* however, involved a defendant who had waived the right to appeal, as Garza did. The question this case presents is whether the same legal framework applies when the defendant had waived the right to appeal. That question has not been resolved by the United States Supreme Court, nor has it been resolved in a published Idaho appellate decision.

That said, an unpublished decision of the Idaho Court of Appeals resolved the question against the defendant. *State v. Garcia,* 2014 WL 7013214, at *3 (Idaho Ct. App. Dec. 12, 2014). In *Garcia,* the court held that Garcia's counsel, by failing to file an appeal at Garcia's request, did not render ineffective assistance because "the plea agreement waived Garcia's right to appeal, there is no evidence that the plea agreement was breached, and the record conclusively demonstrates that Garcia's plea agreement was made knowingly, voluntarily, and intelligently." *Id.* Here, as in *Garcia,* the defendant waived his right to appeal, there is no evidence the State breached the plea agreements, and the record conclusively demonstrates the voluntariness of the defendant's pleas. Consequently, were it a published decision, *Garcia* would dictate the result here: summary dismissal of Garza's claim. But, as *Garcia* itself

recites, it is not precedential and may not be cited as authority.

In the absence of a precedential Idaho appellate decision on point, the Court thinks it prudent to examine the state of federal jurisprudence. As already noted, there is no United States Supreme Court decision on point. But nearly every federal circuit court of appeals has resolved the question this case presents.

The majority rule-adopted in eight circuits, including the Ninth Circuit, which is responsible for appeals emanating from federal courts in Idaho-is that counsel's failure to file an appeal at a criminal defendant's request is deficient performance that prejudices the defendant, even if the defendant had validly waived the right to appeal. *See Campusano v. United States,* 442 F.3d 770, 775 (2d Cir. 2006); *United States v. Poindexter,* 492 F.3d 263, 273 (4th Cir. 2007); *United States v. Tapp,* 491 F.3d 263, 266 (5th Cir. 2007); *Campbell v. United States,* 686 F.3d 353, 358 (6th Cir. 2012); *Watson v. United States,* 493 F.3d 960, 964 (8th Cir. 2007); *United States v. Sandoval-Lopez,* 409 F.3d 1193, 1195-99 (9th Cir. 2005); *United States v. Garrett,* 402 F.3d 1262, 1266-67 (10th Cir. 2005); *Gomez-Diaz v. United States,* 433 F.3d 788, 791-94 (11th Cir. 2005).

A minority of two circuits follows the approach the Idaho Court of Appeals chose in its unpublished *Garcia* decision: that it is not ineffective assistance for trial counsel not to follow a defendant's instruction to appeal when the defendant has validly waived the right to appeal. *See United States v. Mabry,* 536 F.3d 231, 242 (3d Cir.

2008); *Nunez v. United States,* 546 F.3d 450, 456 (7th Cir. 2008). Additionally, the federal district courts within the First Circuit-which has not resolved this question itself-follow the minority rule. *See, e.g., Benjamin Maes v. United States,* 2015 WL 9216583, at *3 n. 1 (D.N.H. Dec. 16, 2015). Thus, the minority rule is being applied in three federal circuits.

The Court has reviewed these competing circuit decisions. Having done so, the Court considers the minority rule to be better reasoned. In that regard, the Court focuses on the prejudice prong of the *Strickland* test, rather than on the deficient-performance prong.[2]

When a defendant has waived his right to appeal in an enforceable plea agreement, dismissal-not consideration on the merits-is the fate that awaits any appeal the defendant files. *See, e.g., State v. Allen,* 143 Idaho 267, 270, 141 P.3d 136, 139 (Ct. App. 2006). That is because "[a] defendant's waiver of the right to appeal as a term of a plea

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[2] One might reasonably think trial counsel's failure to file an appeal at the defendant's request is deficient performance even if the defendant has waived the right to appeal, on the theory that it is ultimately the defendant's decision (not trial counsel's decision) whether to abide by the terms of the plea agreement. By failing to follow the defendant's instruction to appeal-even if that instruction is pointless, or even if it is foolhardy and in breach of the plea agreement-trial counsel usurps the defendant's authority as decision-maker. *Campbell,* 686 F.3d at 359-60 ("[I]t is a defendant's prerogative to take the stand, enter a guilty plea, or waive a jury trial, even if counsel advises against those actions. The same principle applies to the defendant's decision to pursue an appeal, even if that right has been severely limited and the outlook on the merits is bleak.") (internal citation omitted). Nevertheless, in deciding this case, the Court need not and does reach this question.

bargain is generally valid and enforceable." *Id.* Thus, while an appeal waiver does not stop the defendant from filing an appeal, it denies him a decision on the merits, as, in light of the waiver, he lacks the right to appeal. The defendant's having the "right" to appeal-indeed, the right to an "entire judicial proceeding" at the appellate level-was central to *Flores-Ortega's* holding that the defendant is presumed to have been prejudiced by his trial counsel's failure to appeal at his request. 528 U.S. at 483 ("The . . . denial of the entire judicial proceeding *[i.e.,* the appeal] itself, which a defendant wanted at the time and to which he had a right, . . . demands a presumption of prejudice."). It is unclear why a defendant who validly waived the right to appeal deserves the benefit of a counterfactual presumption that he is prejudiced by his trial counsel's failure to attempt to exercise a waived right. Such a defendant does not, in fact, lose his "right" to an "entire judicial proceeding" at the appellate level if his counsel fails to file an appeal at his request. Instead, because he waived the right to appeal, all he loses is the opportunity to see his appeal dismissed without a decision on the merits. This short-circuited appellate proceeding is not the kind of "entire judicial proceeding" whose loss demands a presumption of prejudice.

Such a defendant should, instead, be required to show prejudice.[3]

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[3] Idaho's courts take that approach in the similar context of motions for reduction of sentence under I.C.R. 35. Although a defendant has the right to file a Rule 35 motion, his trial counsel's failure to follow his instruction to do so does not presumptively prejudice him. Instead, prejudice must be shown. *See, e.g., Hassett v. State,* 127 Idaho 313, 318, 900 P.2d

In that regard, it would suffice for the defendant to show non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver. Thus, if the defendant shows that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope, he shows he was prejudiced by his trial counsel's failure to file appeals at his request. *See Nunez,* 546 F.3d at 453-56; *Mabry,* 536 F.3d at 239-44. Otherwise, he has not shown prejudice and, again, should not benefit from a wooden presumption that he was prejudiced by the denial of an appellate proceeding, the right to which he had waived.

Applying this legal framework to these cases, the Court notes that the appeals Garza asked his counsel to file have not even been argued, much less shown, to be outside the scope of Garza's appeal waivers. Moreover, the appeal waivers are valid parts of plea agreements into which Garza knowingly, voluntarily, and intelligently entered, as the record of the two underlying cases makes clear. In fact, the Court has already dismissed, for lack of factual support, Garza's claim to post-conviction relief on the theory that his pleas were not voluntary. Finally, the appeal waivers are enforceable by the State, as there is no evidence of a breach of the plea agreements by the State that would result in a loss of its right to enforce them.

221, 226 (Ct. App. 1995). It would seem anomalous to presume prejudice in the failure-to-appeal context when the defendant has waived the right to appeal, yet not presume prejudice in the Rule 35 context even when the defendant has not waived the right to file a Rule 35 motion.

Garza therefore has not shown any reason to believe the appeals he asked his trial counsel to file would have been considered on the merits. It appears, instead, certain that they would have been dismissed as a result of the appeal waivers. For that reason, even assuming *arguendo* that Garza's trial counsel performed deficiently by not filing the appeals, Garza's claim still must be summarily dismissed because he has not shown any resulting prejudice.

Accordingly,

IT IS ORDERED that the State's motion for summary adjudication is granted and Garza's. motion for summary adjudication is denied. Garza's lone remaining claim-that his trial counsel rendered ineffective assistance by failing to file appeals at his request-is summarily dismissed. Judgment therefore will be entered against Garza in a separate document, as required by I.R.C.P. 54(a) and 58(a).

Dated this 11th day of February, 2016.

/s/ Jason D. Scott
Jason D. Scott
DISTRICT JUDGE

APPENDIX D

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed January 22, 2015]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case No. CR-FE-2014-0009960 PLEA AGREEMENT PURSUANT TO ICR 11(f)(1)(C)

COMES NOW, Barbara A. Duggan, Deputy Prosecuting Attorney for Ada County, and Defendant Gilberto Garza Jr., on his own behalf and by and through his attorney of record, Paul Taber, and pursuant to Rule 11(f)(1)(C) of the Idaho Criminal Rules, herby submit the following plea bargain agreement to the Court for its acceptance or rejection:

1. The Defendant, Gilberto Garza Jr., shall enter a knowing, voluntary and intelligent plea of guilty to AGGRAVATED ASSAULT, FELONY in the Indictment. In CR-FE-2014-0009960. Defendant Gilberto Garza Jr. will enter an Alford Plea of Guilty. Gilberto Garza Jr. stipulates and agrees the State has substantial, strong evidence of his guilt and that a jury would find him guilty beyond a reasonable doubt. The Court shall enter the

following sentence for FELONY AGGRAVATED ASSAULT, a Judgment of Conviction with an imposed fixed term of two (2) years and an indeterminate term of three (3) years. Defendant Gilberto Garza Jr. will serve the sentence imposed in CR-FE-2014-0009960 consecutive to the sentence in CR-FE-2013-0006654. (Defendant is currently incarcerated in CR-FE-2013-0006654.) Gilberto Garza Jr. will be in the custody of the Idaho Department of Corrections. The sentence is an imposed, consecutive, prison sentence. The Court will not retain jurisdiction. The Ada County Prosecutor agrees to dismiss the Persistent Violator sentencing enhancement in CR-FE-2014-0009960 at the time of sentencing.

2. The Ada County Prosecutor's Office agrees to not file on Gilberto Garza Jr. for the Burglary and Grand Theft from Luis Garcia. It is also the State's understanding that an agent with the ATF agrees to not refer Gilberto Garza Jr., for federal prosecution for possession of ammunition on July 11, 2014 in Boise, Ada County, Idaho pursuant to 18 U.S.C. §922(g)(1) regarding the ammunition recovered from his place of residence as reflected in DR#2014-414682.

3. This ICR 11(f)(1)(C) Agreement is part of a global resolution of pending cases in Ada County which include CR-FE-2014-0009960, CR-FE-2014-0018183 and CR-FE-2014-0009959. Defendant Gilberto Garza Jr., will enter knowing, voluntary and intelligent guilty pleas in each of these cases. If Defendant Gilberto Garza Jr., fails to enter the requisite pleas of guilty in all three cases then the agreement in

each and all cases are nullified and all charges in each case will be reinstated, as well as, the Information(s) Part II, and the cases shall be set for trial(s). The Ada County Prosecutor may also file charges it agreed not to file in item 2.

Defendant Gilberto Garza Jr., will waive his Preliminary Hearing and plead guilty in District Court to Possession with Intent to Deliver Methamphetamine in CR-FE- 2014-0018183 with a separate ICR 11(f)(1)(C) agreement with one (1) year fixed and four (4) years indeterminate to be served consecutive to CR-FE-2014-0009960 and CR-FE-2013-0006654.

It is further anticipated that in CR-FE-2014-0009959 Defendant Gilberto Garza Jr., will enter pleas of guilty to amended charges of Misdemeanor Assault, Misdemeanor Carrying a Concealed Weapon (CCW) and Misdemeanor Battery.

4. The Defendant shall be ordered to provide a DNA sample. The Defendant shall be ordered to pay court costs and statutorily required fees, which may include a fee for the preparation of the Presentence Investigation Report (PSI.) Defendant Gilberto Garza Jr. may elect to remain silent and exercise his constitutional right to remain silent in the preparation of a PSI if a PSI is ordered by the court. There will be a $5,000. fine imposed as a civil penalty which will be ordered for the victim pursuant to I.C. §19-5307. The victim may address the Court via Victim Impact Statement (VIS.) The Court will enter a No Contact Order (NCO) on behalf of the victim.

5. The Defendant Gilberto Garza Jr. understands the Court is not bound to accept this binding plea bargain agreement and that if the Court should reject said agreement, the Defendant shall be allowed an opportunity by the Court to withdraw his plea of guilty and proceed to trial on the charge in the Indictment as well as the Information Part II which is or may be filed. The Defendant has reviewed discovery and conferred with learned counsel about his plea of guilty and the significant benefit provided to Defendant in the plea agreement. Defendant Garza asserts he is pleased and satisfied with his legal representation. The Defendant further understands that he has an absolute right to plead not guilty and persist in that plea, that he is presumed innocent, that he has a right to be tried by jury, and that he has the right to the assistance of counsel. Defendant further understands that he has the right to require the State to prove each and every element of the case against him beyond a reasonable doubt, that he has the right to remain silent and that the exercise of such right would not be used against him. Defendant further understands that at trial he would have the right to confront and cross-examine witnesses on his own behalf and the right to subpoena witnesses to testify. Finally, the Defendant understands that by pleading guilty he waives the above rights, including his right to trial by jury as well as any ICR 12 motions, as long as the court accepts this agreement and imposes the agreed upon terms.
6. Defendant Gilberto Garza Jr. acknowledges a

Grand Jury Transcript was ordered and stipulates to the court using the Grand Jury Transcript Testimony as additional factual bases for the entry of the plea of guilty. Defendant waives any and all challenges of the probable cause findings by the Grand Jury. Defendant acknowledges his guilt.

7. This is an ICR 11 (f)(1)(c) binding plea agreement. Defendant Gilberto Garza Jr. waives his right to appeal and waives his right to request ICR 35 relief.
8. Defendant, Gilberto Garza Jr., agrees with the language in the charging documents and the State's ability to prove him guilty beyond a reasonable doubt.
9. Defendant Gilberto Garza Jr. recognizes Perjury is a Felony Offense that carries a possible prison sentence of fourteen (14) years.
10. The parties hereto freely state that this Agreement constitutes the entire agreement between the Defendant Gilberto Garza Jr., his attorney, Paul Taber, and the Plaintiff, State of Idaho, and that no other promises, or inducements have been made, directly or indirectly, by any agent of the State of Idaho, including but not limited to the Ada County Prosecuting Attorney's Office, the Boise Police Department, the Ada County Sheriff's Office or any other governmental entity. In addition, the Defendant states that no person, including his attorney or any other individual has directly or indirectly threatened or coerced him to enter a plea of guilty or to do or refrain from doing anything in connection with any aspect of this case.
11. Should Defendant Gilberto Garza Jr. move to

withdraw his plea of guilty or should the court reinstate a plea of not guilty on his behalf, the State will use Defendant's testimony during his entry of plea of guilty and his written plea form, during the State's case at trial. Defendant waives his speedy. trial rights (Constitutionally and statutorily) in this event.

DATED, this 23 day of January, 2015

/s/ Gilberto Garza Jr. — 1/23/2015
Gilberto Garza Jr. — Date

/s/ Paul Taber — 1/23/2015
Paul Taber — Date

/s/ Barbara Duggan
Barbara Duggan

[seal]

APPENDIX E

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

[filed February 24, 2015]

STATE OF IDAHO Plaintiff, vs. GILBERTO GARZA, JR., Defendant	Case No. CR-FE-2014-0018183 PLEA AGREEMENT PURSUANT TO ICR 11(f)(1)(C)

COMES NOW, Barbara A. Duggan, Deputy Prosecuting Attorney for Ada County, and Defendant Gilberto Garza Jr., on his own behalf and by and through his attorney of record, Paul Taber, and pursuant to Rule 11 (f)(l)(C) of the Idaho Criminal Rules, herby submit the following plea bargain agreement to the Court for its acceptance or rejection:

1. The Defendant, Gilberto Garza Jr., shall enter a knowing, voluntary and intelligent plea of guilty to POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DELIVER, FELONY in the Information. In CR-FE-2014-0018183. Gilberto Garza Jr. stipulates and agrees the State has substantial, strong evidence of his guilt and that a jury would find him guilty beyond a reasonable doubt. The Court shall enter the following sentence for POSSESSION

OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DELIVER, FELONY a judgment of Conviction with an imposed fixed term of one (1) year and an indeterminate term of four (4) years. Defendant Gilberto Garza Jr. will serve the sentence imposed in CR-FE-2014-0018183 consecutive to the sentence in CR-FE-2013-0006654 and consecutive to CR-FE- 2014-0009960. (Defendant is currently incarcerated in CR-FE-2013-0006654.) Gilberto Garza Jr. will be in the custody of the Idaho Department of Corrections. The sentence is an imposed, consecutive, prison sentence. The Court will not retain jurisdiction. The Ada County Prosecutor agrees to refrain from filing the Persistent Violator sentencing enhancement in CR-FE-2014-0018183.

2. The Ada County Prosecutor's Office agrees to not file on Gilberto Garza Jr. for the Burglary and Grand Theft from Luis Garcia. It is also the State's understanding that an agent with the ATF agrees to not refer Gilberto Garza Jr., for federal prosecution for possession of ammunition on July 11, 2014 in Boise, Ada County, Idaho pursuant o 18 U.S.C. §922(g)(1) regarding the ammunition recovered from his place of residence as reflected in DR#2014-414682.
3. This ICR 11(f)(1)(C) Agreement is part of a global resolution of pending cases in Ada County which include CR-FE-2014-0009960, CR-FE-2014-0018183 and CR-FE-2014-0009959. Defendant Gilberto Garza Jr., will enter knowing, voluntary and intelligent

guilty pleas in each of these cases. If Defendant Gilberto Garza Jr., fails to enter the requisite pleas of guilty in all three cases then the agreement in each and all cases are nullified and all charges in each case will be reinstated, as well as, the Information(s) Part II, and the cases shall be set for trial(s). The Ada County Prosecutor may also file charges it agreed not to file in item 2.

It is further anticipated that in CR-FE-2014-0009959 Defendant Gilberto Garza Jr., will enter pleas of guilty to amended charges of Misdemeanor Assault, Misdemeanor Carrying a Concealed Weapon (CCW) and Misdemeanor Battery.

4. The Defendant shall be ordered to provide a DNA sample. The Defendant shall be ordered to pay court costs and statutorily required fees, which may include a fee for the preparation of the Presentence Investigation Report (PSI.) Defendant Gilberto Garza Jr. may elect to remain silent and exercise his constitutional right to remain silent in the preparation of a PSI if a PSI is ordered by the court.
5. The Defendant Gilberto Garza Jr. understands the Court is not bound to accept this binding plea bargain agreement and that if the Court should reject said agreement, the Defendant shall be allowed an opportunity by the Court to withdraw his plea of guilty and proceed to trial on the charge in the Information as well as the Information Part II which may be filed. The Defendant has reviewed discovery and conferred with learned counsel about his plea of guilty and the significant benefit

provided to Defendant in the plea agreement. Defendant asserts he is pleased and satisfied with his legal representation. The Defendant further understands that he has an absolute right to plead not guilty and persist in that plea, he is presumed innocent, that he has a right to be tried by jury, and that he has the right to the assistance of counsel. Defendant further understands that he has the right to require the State to prove each and every element of the case against him beyond a reasonable doubt, that he has the right to remain silent and that the exercise of such right would not be used against him. Defendant further understands that at trial he would have the right to confront and cross-examine witnesses on his own behalf and the right to subpoena witnesses to testify. Finally, the Defendant understands that by pleading guilty he waives the above rights, including his right to trial by jury as well as any ICR 12 motions, as long as the court accepts this agreement and imposes the agreed upon terms.

6. This is an ICR 11(f)(1)(c) binding plea agreement. Defendant Gilberto Garza Jr. waives his right to appeal and waives his right to request relief pursuant to ICR 35.
7. Defendant, Gilberto Garza Jr., agrees with the language in the charging documents and the State's ability to prove him guilty beyond a reasonable doubt.
8. Defendant Gilberto Garza Jr. recognizes Perjury is a Felony Offense that carries a possible prison sentence of fourteen (14) years.
9. The parties hereto freely state that this Agreement constitutes the entire agreement

between the Defendant Gilberto Garza Jr., his attorney, Paul Taber, and the Plaintiff, State of Idaho, and that no other promises, or inducements have been made, directly or indirectly, by any agent of the State of Idaho, including but not limited to the Ada County Prosecuting Attorney's Office, the Boise Police Department, the Ada County Sheriff's Office or any other governmental entity. In addition, the Defendant states that no person, including his attorney or any other individual has directly or indirectly threatened or coerced him to enter a plea of guilty or to do or refrain from doing anything in connection with any aspect of this case.

10. Should Defendant Gilberto Garza Jr. move to withdraw his plea of guilty or should the court reinstate a plea of not guilty on his behalf, the State will use Defendant's testimony during his entry of plea of guilty and his written plea form, during the State's case at trial. Defendant waives his speedy trial rights (Constitutionally and statutorily) in this event.

DATED, this 24 day of February, 2015

/s/ Gilberto Garza Jr.	2/24/2015
Gilberto Garza Jr.	Date
/s/ Paul Taber	2/24/2105
Paul Taber	Date
/s/ Barbara Duggan	2/24/2015
Barbara Duggan	Date

[seal]

APPENDIX F

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

GILBERTO GARZA, JR. Plaintiff, vs. STATE OF IDAHO, Respondent.	Case No. CV-PC-2015-10589 AFFIDAVIT OF PAUL R. TABER III

BEING FIRST DULY SWORN, your affiant hereby declares as follows:

1. My name is Paul R. Taber III.
2. I am an attorney licensed in the State of Idaho.
3. I have held a continuous license to practice law in the State of Idaho since September 24, 1992.
4. My profession is the practice of law and I have a private practice in Boise, Idaho. I also serve in the capacity of providing legal representation to clients who are conflicted the Office of the Ada County Public Defender.
5. My primary field of practice is criminal law.
6. I was the attorney of record for Gilberto Garza Jr. in CR-FE-2014-0009960, CR-FE-2014-00018183 and CR-FE-2014-0009959.
7. I am in receipt of a copy of the Court Order for Waiver of Attorney Client Privilege

concerning Petitioner Gilberto Garza's claims of ineffective assistance of counsel signed by Judge Scott on July 15, 2015 and received by me on July 20, 2015 in CV-PC-2015-10589 and CV-PC-2015-10597.

8. I have received a copy of the UPCPA Petition filed by Mr. Garza in CV-PC-2015- 10589 and CV-PC-2015-10597 wherein he makes allegations regarding my representation of him in CR-FE-2014-00018183 and CR-FE-2014-0009960.

9. Mr. Garza entered a plea of guilty in CR-FE-2014-00018183 pursuant to an ICR 11(f)(1)(c) Agreement that included the term that he waived his right to appeal.

10. Mr. Garza entered a plea of guilty in CR-FE-2014-0009960 pursuant to an ICR 11(f)(1)(c) Agreement that included the term he waived his right to appeal.

11. Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

Further your affiant sayeth naught.

DATED this 6 day of August, 2015

/s/ Paul R. Taber
Paul R. Taber III, Esq.