No. 17-1026

IN THE

Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Supreme Court of Idaho

BRIEF FOR PETITIONER

CATHERINE E. STETSON
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004

ERIC D. FREDERICKSEN
ERIK R. LEHTINEN
MAYA P. WALDRON
IDAHO STATE APPELLATE
PUBLIC DEFENDER
322 East Front St., Ste. 570
Boise, ID 83702

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

DAVID M. SHAPIRO
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611

Counsel for Petitioner

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?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Supreme Court of Idaho

BRIEF FOR PETITIONER

INTRODUCTION

In *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that when an attorney "disregards specific instructions from the defendant to file a notice of appeal," the attorney has rendered deficient representation, and the defendant should be "presum[ed]" to have suffered prejudice. *Id.* at 477, 482. Three reasons buttressed that unanimous holding. The attorney's failure to perfect an appeal causes the "forfeiture" of the entire proceeding. *Id.* at 483. It wrests from the defendant a "fundamental decision" entrusted to him alone: the decision whether to take an appeal. *Id.* at 477. And it would be unfair to require an "indigent, perhaps *pro se*, defendant" to "specify the points he would raise were his right to

appeal reinstated" in order to establish prejudice. *Id.* at 486.

Flores-Ortega arose in the context of an appeal following the defendant's guilty plea. In the years since, the great majority of circuits—eight, to respondent's two—have held that its rule applies with equal force where a defendant enters a guilty plea containing an appeal waiver. The minority view, adopted by the Idaho courts below, strips away the presumption of prejudice in those circumstances, requiring defendants to first demonstrate the merits of the claims they *would* have brought had their attorneys followed the instructions to appeal.

The majority has the better approach. An "appeal waiver" does not waive all rights to appeal. Even the broadest appeal waivers are interpreted to preserve a client's right to appeal certain fundamental claims of error, among them a challenge to the voluntariness of the guilty plea; a claim that the government has breached the plea agreement; and a disagreement about the waiver's scope. Consequently, an attorney who disregards his client's instruction to appeal following a plea containing an appeal waiver still "forfeits a proceeding" to which the defendant is entitled; he still wrests from his client the "fundamental decision" whether to appeal; and he still forces the defendant into the "unfair" situation of needing to demonstrate on his own that his appeal would have merit. Appeal waiver or no, the holding and logic of *Flores-Ortega* apply with full force.

OPINIONS 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) is

unpublished, but 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. Petitioner timely filed a certiorari petition on January 23, 2018, which this Court granted on June 18, 2018. The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

1. In early 2015, Gilberto Garza, Jr., entered into two plea agreements in Idaho state court: an *Alford* plea to aggravated assault, and a guilty plea to possession of a controlled substance.[1] Each plea agreement stipulated to a proposed sentence for the offense. Pet. App. 40a-41a, 46a-47a. Each agreement also contained a provision stating that Mr. Garza "waives his right to appeal." *Id.* at 44a, 49a.

Under Idaho law, such a provision (commonly known as an "appeal waiver"), combined with the guilty plea itself, barred Mr. Garza from raising

---

[1] Because the district court disposed of this case on summary judgment, all facts are viewed in the light most favorable to Mr. Garza. *Ferrier* v. *State*, 25 P.3d 110, 112 (Idaho 2001).

many claims on appeal. But not all of them. The Idaho Supreme Court, like every federal court of appeals, has held that a defendant who signs an appeal waiver nevertheless retains the right to appeal his conviction or sentence on certain grounds—for example, that he did not knowingly, intelligently, and voluntarily consent to the plea agreement or to the provision waiving his right to appeal. *State* v. *Cope*, 129 P.3d 1241, 1244-47 (Idaho 2006); *State* v. *Murphy*, 872 P.2d 719, 720 (Idaho 1994). In other words, in Idaho (and elsewhere), an "appeal waiver" never operates as a *total* appeal waiver.

Indeed, during his plea proceeding and sentencing, Mr. Garza indicated that he did not believe that he was waiving all of his appeal rights, and the district court repeatedly advised him as much. In February 2015, Mr. Garza completed a Guilty Plea Advisory Form that asked, "Have you waived your right to appeal your judgment of conviction and sentence as part of your plea agreement?" CR 97.[2] Mr. Garza answered "No." *Id.* During a subsequent plea and sentencing hearing, the judge noted that Mr. Garza's plea agreements contained an appeal waiver, but advised Mr. Garza: "[Y]ou have the right to appeal, and if you cannot afford an attorney, you can request to have one appointed at public expense." CR 132. In the judgment for each offense, the court similarly advised that "[y]ou, Gilberto Garza, Jr., are hereby notified that you have the right to appeal this order to the Idaho Supreme Court," and "you have the

[2] "CR" refers to the record on file with the Idaho Supreme Court.

right to be represented by an attorney in any appeal." CR 118, 121.

Consistent with this advice, Mr. Garza informed his attorney shortly after entry of his judgment of conviction and sentence that he wished to appeal. Pet. App. 3a. Mr. Garza repeated that instruction in "numerous phone calls and letters." *Id.* Nonetheless, Mr. Garza's attorney declined to file a notice of appeal. *Id.* In the attorney's view, an appeal would have been "problematic," given that Mr. Garza had "waived his right to appeal." *Id.* at 52a.

2. "Thus, no appeals were filed, despite Garza's expressed desire to file them." *Id.* at 29a. Mr. Garza promptly filed a *pro se* petition for postconviction relief. In it, he asserted that his trial counsel rendered ineffective assistance by disregarding his instruction to file a notice of appeal. *Id.* at 30a; *see also* CR 10, 31. Mr. Garza further argued that he did not "knowingly" and "voluntarily" "plead guilty," and that he had entered an "involuntary plea." CR 6, 10.

The district court granted summary judgment in favor of the State. The court began by noting that, under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), an attorney renders ineffective assistance if he engages in "objectively unreasonable" conduct that prejudices the defendant. Pet. App. 33a. It further explained that in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court held that "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." Pet. App. 33a-34a. The district court acknowledged that, since *Flores-Ortega*, eight federal circuits had concluded that the *Flores-Ortega* rule

applies "even if the defendant ha[s] validly waived the right to appeal." *Id.* at 35a. And under that "majority rule," there was no question that Mr. Garza would prevail: It was undisputed that he expressly instructed his attorney to file a notice of appeal, and that his attorney refused to do so. *Id.* at 33a, 35a.

The district court, however, sided with the two circuits that hold the *Flores-Ortega* rule does not apply when a defendant has signed an appeal waiver. *Id.* at 35a-36a. Under that approach, such a waiver removes the presumption of prejudice that *Flores-Ortega* otherwise demands: a defendant who has signed an appeal waiver instead must first "show prejudice" from an attorney's failure to appeal, *id.* at 37a (emphasis in original), by identifying "non-frivolous" arguments he would raise on direct appeal, *id.* at 38a. The district court found that Mr. Garza's petition failed to make that showing. His claim that the pleas were involuntary, the court reasoned, lacked sufficient "factual support," and Mr. Garza had marshaled "no evidence" that the State breached the plea agreements or that his intended appeals were outside their scope. *Id.* The court accordingly dismissed the petition. *Id.* at 39a.

3. The Idaho Court of Appeals affirmed. *Id.* at 27a. Like the district court, it sided with the two-circuit minority view. *Id.* at 25a. Thus, it held, Mr. Garza was required at the postconviction stage 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." *Id.* at 27a. Under the heightened pleading standard Idaho applies to postconviction proceedings, the petition's factual allegations therefore

would need to be "verified" and "accompanied by admissible evidence supporting [the] allegations," or it would be subject to "summary dismissal." *Id.* at 18a-19a. The court of appeals found that Mr. Garza had not made this demanding showing. *Id.* at 27a.

4. The Supreme Court of Idaho affirmed. *Id.* at 5a. Recognizing that it was departing from the majority view, it 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." *Id.* at 10a. As the court saw it, "[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." *Id.* at 11a. Furthermore, it added, "[i]f 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." *Id.* at 14a. The court reasoned that, by refusing his client's express instruction to file a notice of appeal, an attorney "ensured [the client] would not be in breach of the plea." *Id.*

Like the lower courts, the Idaho Supreme Court thus held that Mr. Garza could prevail only by showing "resulting prejudice" from losing his direct appeal, by identifying "non-frivolous grounds for appeal." *Id.* at 15a. Because Mr. Garza did not make that showing, the Idaho Supreme Court affirmed the judgment of dismissal. *Id.*

SUMMARY OF ARGUMENT

The *Flores-Ortega* rule applies where an attorney has disregarded his client's express instruction to appeal—no matter the particulars of the judgment or plea from which that appeal is taken. By its terms,

the *Flores-Ortega* rule is categorical. It brooks no exceptions for appellate waivers. And all three rationales underpinning the rule hold equally fast where a defendant has signed an appeal waiver.

First, an attorney's refusal to follow instructions to file a notice of appeal following an appeal waiver results in "the forfeiture of a proceeding" to which the defendant is entitled. *Flores-Ortega*, 528 U.S. at 483. It is immaterial that an appeal waiver diminishes the number of claims a defendant may bring, or that his chances of success on appeal may be low. *Flores-Ortega* itself involved a defendant who entered a guilty plea, which necessarily "reduce[d] the scope of potentially appealable issues." *Id.* at 480. And this Court has explained more than once that when a lawyer's unreasonable conduct causes the forfeiture of a judicial proceeding, prejudice is presumed even if the defendant has shown "no plausible chance" of success in the proceeding he was denied. *Lee* v. *United States*, 137 S. Ct. 1958, 1966-67 (2017); *Flores-Ortega*, 528 U.S. at 484-485.

Second, an attorney who overrules his client's decision to "take an appeal" usurps the defendant's right to make that "fundamental decision" about his defense. *Flores-Ortega*, 528 U.S. at 477; *see McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1508 (2018). A defendant who signs an appeal waiver as part of a plea agreement retains the autonomy to decide for himself whether to pursue an appeal in which he can raise any claims preserved by the waiver. And it is the defendant's autonomous right to decide whether to risk the consequences of being found in breach of his plea agreement if he appeals an issue that is deemed waived.

Third, just as in *Flores-Ortega*, it would be "unfair" to require an indigent, usually *pro se* defendant to specify the grounds he wishes to appeal in order to establish that his attorney rendered ineffective assistance. 528 U.S. at 486. There is no right to counsel in habeas proceedings, and *pro se* defendants will generally have difficulty identifying and supporting preserved appellate claims without the assistance of an attorney. A defendant should not be penalized with the loss of a counseled appeal merely because he cannot articulate the claims he might have pursued with the assistance of counsel.

The State's contrary rule, which strips the presumption of prejudice where the defendant has signed an appeal waiver, is unworkable and inefficient. *Some* narrowing of claims on appeal plainly does not extinguish the presumption; the *Flores-Ortega* rule was announced in the context of an appeal from a guilty plea, which greatly reduces the scope of appellate claims even without an express waiver. Courts therefore will face an intractable line-drawing problem in determining when a plea agreement waives a sufficient number of claims to trigger the denial of the presumption of prejudice, a challenge made all the more difficult because appeal waivers come in all shapes and sizes. The State's rule also would waste judicial resources by forcing the defendant to preview his merits case before the habeas court, almost always without the benefit of counsel. It is far more practical and efficient to presume prejudice whenever a lawyer disregards an instruction to appeal. That enables a single court to resolve the merits of the defendant's appeal, with the assistance of counsel, and with the benefit of established procedures—including summary disposition

and the *Anders* process—for quickly disposing of frivolous appeals.

The Idaho Supreme Court's judgment should be reversed.

ARGUMENT

I. The Presumption Of Prejudice Applies When An Attorney Fails To Notice An Appeal At The Direction Of A Defendant Who Has Signed An Appeal Waiver.

A. Under *Roe* v. *Flores-Ortega*, Prejudice Is Presumed If An Attorney Disregards An Instruction To File A Notice Of Appeal.

The Sixth Amendment guarantees to every criminal defendant "the right * * * to have the assistance of counsel for his defence." This provision requires that a defendant receive the assistance of counsel at "'critical stages of a criminal proceeding,' including when he enters a guilty plea," *Lee* v. *United States*, 137 S. Ct. 1958, 1964 (2017), at sentencing, *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984), and on appeal, *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012). As the Court has explained, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage." *Penson* v. *Ohio*, 488 U.S. 75, 85 (1988). In appellate proceedings, no less than at trial, "careful advocacy" is required "to ensure that rights are not forgone," that "substantial legal and factual arguments are not inadvertently passed over," and that a defendant is not left unrepresented when "'fac[ing] an adversary proceeding.'" *Id.* (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985)).

The constitutional right to assistance of counsel requires, of course, *effective* counsel. *United States* v. *Cronic*, 466 U.S. 648, 653-654 (1984). In *Strickland*, this Court set forth a two-part test to determine whether an attorney has rendered ineffective assistance in derogation of a defendant's Sixth Amendment right. Under that test, an attorney's conduct is deemed constitutionally ineffective if it was both "professionally unreasonable" and "prejudicial to the defense." 466 U.S. at 691-692.

Typically, a defendant bears the burden of showing that he suffered prejudice, by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-694. But "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 692; *see Cronic*, 466 U.S. at 658-659. For instance, an error is "legally presumed to result in prejudice" where it entails the "[a]ctual or constructive denial of the assistance of counsel altogether." *Strickland*, 466 U.S. at 692. That is because the Court "presum[es] that counsel's assistance is essential," and a trial is necessarily "unfair if the accused is denied counsel at a critical stage." *Cronic*, 466 U.S. at 659. Likewise, a defendant need not "show prejudice" where his counsel has "usurp[ed] control of an issue within [the defendant's] sole prerogative," thereby "block[ing] the defendant's right to make the fundamental choices about his own defense." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1511 (2018).

In *Roe* v. *Flores-Ortega*, the Court held that prejudice should also be presumed where an attorney has "deprive[d] a defendant of an appeal that he otherwise would have taken." 528 U.S. 470, 484 (2000). Lucio Flores-Ortega pleaded guilty to a murder

charge, and his attorney failed to file a timely notice of appeal. *Id.* at 473-474. Mr. Flores-Ortega subsequently filed a petition for habeas relief, contending that his attorney had violated his Sixth Amendment rights by not consulting with him before failing to file the notice. *Id.* at 474.

The Court explained that to make out his ineffective-assistance claim under *Strickland*, Mr. Flores-Ortega was required to show, first, that it was professionally unreasonable for his attorney to fail to consult with him about filing an appeal, *id.* at 479-480; and second, that there was "a reasonable probability that, but for counsel's deficient failure to consult * * *, he would have timely appealed," *id.* at 484. Both showings in the failure-to-consult context—deficient performance, and prejudice—require consideration of several "relevant factors" that shed light on whether "this particular defendant" or "a rational defendant" in the defendant's shoes "would want to appeal." *Id.* at 480.

At the same time, the Court made clear that where a defendant has *instructed* his attorney to appeal, "the question of deficient performance is easily answered." *Id.* at 478. The Court 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 (citing *Rodriquez* v. *United States*, 395 U.S. 327 (1969); *Peguero* v. *United States*, 526 U.S. 23, 28 (1999)). "This is so," the Court explained, "because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice" and counsel's disregard for his client's choice to challenge his conviction or sentence "cannot be considered a strategic decision." *Id.*

Where a defendant has demonstrated that he directed his attorney to file a notice of appeal, the Court went on, prejudice should be presumed without any "further showing from the defendant of the merits of his underlying claims." *Id.* at 484. The Court grounded that determination in three rationales.

First, an attorney's failure to follow her client's instruction "deprive[s] [the defendant] of * * * an appeal." *Id.* at 483. Courts presume prejudice when counsel abandons her client at a critical stage of a proceeding, because counsel's absence means that "the adversary process itself [is] presumptively unreliable." *Id.* (quoting *Cronic*, 466 U.S. at 659). An attorney's failure to file a notice of appeal deprives a defendant "of more than a *fair* judicial proceeding"; it "deprive[s] [him] of the appellate proceeding altogether." *Id.* That "even more serious denial of the entire judicial proceeding * * * demands a presumption of prejudice." *Id.* "Put simply," the Court explained, "we cannot accord any presumption of reliability to judicial proceedings that never took place." *Id.* (citation and quotation marks omitted)

Second, "the decision whether to appeal * * * rest[s] with the defendant," not counsel. *Id.* at 485. When counsel "disregards specific instructions from the defendant to file a notice of appeal," she usurps the defendant's "ultimate authority" to make this " 'fundamental decision.' " *Id.* at 477 (citing *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). Accordingly, courts must grant a defendant a "new appeal without any further showing" if a defendant "has objectively indicated his intent to appeal" and the attorney has " 'frustrated' " that intention. *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

Third, the Court explained that it would be "unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate" prejudice, "before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Id*. at 486. A defendant whose lawyer follows his instruction is permitted to proceed with his appeal, and receives the assistance of counsel in doing so, regardless of the appeal's merit; a defendant whose lawyer ignores his instruction should be afforded the same right. *Id.*

Each of these rationales pointed to the same conclusion for the *Flores-Ortega* Court: Where an attorney disregards her client's instruction to appeal, the client is entitled to the appellate proceeding he would otherwise have had, without being required first to " 'specify the points he would raise were his right to appeal reinstated.' " *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

B. This Court Should Not Create An Exception For Cases In Which A Defendant Has Signed An Appeal Waiver.

Flores-Ortega provides that a defendant is entitled to a presumption of prejudice when his attorney disregards his express instruction to appeal. That rule resolves this case. Both the opinion's language and its logic make clear that it applies with equal force where a defendant has entered a plea containing an appeal waiver.

To start, the language of the Court's opinion was categorical. The *Flores-Ortega* Court held that where an attorney "fail[s] to file a notice of appeal, despite being instructed by the defendant to do so," the defendant is "entitled to a new appeal *without*

any further showing." 528 U.S. at 485 (emphasis added); *see id.* at 477 (same). That rule is unequivocal and unconditional. It does not depend on whether the defendant was convicted after a full trial or entered an *Alford* plea or pled guilty, nor on the particulars of his plea.

The Court also did not simply overlook appeal waivers; to the contrary, it made clear that an appeal waiver should be considered elsewhere in the *Strickland* inquiry. The Court explained that, where an attorney fails to consult with his client as to whether to file an appeal, one "relevant factor" in determining whether the client would have wished to appeal had he been consulted is whether he "waived some or all appeal rights." *Id.* at 480. The existence of an appeal waiver is accordingly relevant in inferring the client's wishes where he is silent. But the Court gave no comparable indication that a waiver is relevant where it has been established that a client gave "specific instructions * * * to file a notice of appeal." *Id.* at 477-478. In that circumstance, the Court stated only that where an attorney "fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit." *Id.* (alteration in original) (quoting *Peguero*, 526 U.S. at 28).

Just as important as *Flores-Ortega*'s language is its tripartite logic: *All three* rationales the Court offered in support of a presumption of prejudice apply where a defendant gives an instruction to appeal after signing an appeal waiver. By declining to file an appeal at his client's direction, an attorney forfeits his client's right to an appellate proceeding in which the defendant could bring the numerous claims that survive an appeal waiver—including the right to

challenge the validity, scope, and enforceability of the waiver. The attorney also usurps his client's autonomous right to decide whether to lodge an appeal. And requiring a defendant to show that his hypothetical claims have merit *before* obtaining the right to a counseled appeal—as the State's rule would require—would be profoundly unfair to indigent, *pro se* defendants.

1. An attorney's failure to file an appeal at the direction of his client results in the forfeiture of an entire proceeding.

The *Flores-Ortega* Court's first rationale for applying a presumption of prejudice was that an attorney's failure to appeal at his client's instruction results in "the forfeiture of [the appellate] proceeding itself." *Flores-Ortega*, 528 U.S. at 483. That rationale applies with full force to a defendant who has signed an appeal waiver: The presence of that waiver does not alter the fact that the lawyer's conduct deprives the client of "an appeal altogether." *Id.*

a. Defendants who sign even the broadest appeal waivers nevertheless retain the right to appeal a number of fundamental issues concerning the validity, scope, and enforceability of their plea agreement and waiver.[3] Idaho, the jurisdiction in which Mr. Garza's case arose, is typical: Defendants who waive appellate rights still have a right to bring an appeal challenging whether the plea agreement as a whole or the appellate waiver in particular was entered

[3] This discussion assumes that appeal waivers uniformly set out a categorical waiver of the right to appeal. In fact, as discussed *infra* pp. 34-36, appeal waivers vary greatly, in terms of both scope and form.

into "voluntarily, knowingly, and intelligently." *State* v. *Cope*, 129 P.3d 1241, 1246 (Idaho 2006); *State* v. *Murphy*, 872 P.2d 719, 720 (Idaho 1994). An Idaho defendant is also entitled to bring an appeal alleging that particular issues fall outside the waiver's scope, a determination that must be made on a case-by-case basis. *State* v. *Straub*, 292 P.3d 273, 276-277 (Idaho 2013); *see State* v. *Taylor*, 336 P.3d 302, 305 (Idaho Ct. App. 2014) (collecting cases). And an Idaho defendant may bring an appeal alleging that the government has either breached the plea agreement or declined to enforce it. *Cope*, 129 P.3d at 1244, 1248; *see State* v. *Allen*, 141 P.3d 1136, 1139 (Idaho Ct. App. 2006); *State* v. *Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (per curiam).[4]

The federal courts of appeals, too, unanimously recognize that a defendant who has signed an appeal waiver retains his right to challenge whether the agreement was knowing and voluntary,[5] whether a claim is outside its scope,[6] and whether the govern-

---

[4] Idaho courts also allow defendants to appeal in order to argue that their sentences exceed the statutory maximum, *State* v. *Cope*, No. 29691, 2005 WL 783356, at *5 (Idaho Ct. App. Apr. 8, 2005), *aff'd*, 129 P.3d 1241 (2006), or that subsequent events or new information have rendered their sentences "plainly unjust," *State* v. *Holdaway*, 943 P.2d 72, 75 (Idaho Ct. App. 1997).

[5] *See United States* v. *Brown*, 892 F.3d 385, 394-396 (D.C. Cir. 2018) (noting that "[l]ike all other courts of appeals," the D.C. Circuit enforces a waiver only if it is "knowing, intelligent, and voluntary"); *United States* v. *Ready*, 82 F.3d 551, 556 (2d Cir. 1996) (same).

[6] *See United States* v. *Hardman*, 778 F.3d 896, 899 & n.2 (11th Cir. 2014) ("All eleven of our sister circuits with criminal jurisdiction agree" that even a valid appeal waiver "only

ment has breached the agreement[7] or declined to enforce it.[8] *See United States* v. *Rosa*, 123 F.3d 94, 98 (2d Cir. 1997) ("[N]o circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined." (quoting *United States* v. *Ready*, 82 F.3d 511, 555 (2d Cir. 1996))). In addition, courts generally agree that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver." *Campusano* v. *United States*, 442 F.3d 770, 774 (2d

---

precludes challenges that fall within its scope"); *United States* v. *Binkholder*, 832 F.3d 923, 926 (8th Cir. 2016) (stating that courts enforce an appeal waiver only if "a given appeal is clearly and unambiguously within [its] scope"); *United States* v. *Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016) ("[W]e will not bar the door to a criminal defendant's appeal if his waiver only arguably or ambiguously forecloses his claims.").

[7] *See United States* v. *Puentes-Hurtado*, 794 F.3d 1278, 1281 (11th Cir. 2015) (noting that "like the rest of [its] sister circuits," the Eleventh Circuit holds that a claim that the government breached the plea agreement is not barred by an appeal waiver).

[8] *See, e.g.*, *United States* v. *Goodson*, 544 F.3d 529, 533-537 (3d Cir. 2008) (An appellate waiver has "no bearing on an appeal if the government does not invoke its terms."); *see also United States* v. *Ortega-Hernandez*, 804 F.3d 447, 449 (D.C. Cir. 2015); *United States* v. *Quiñones-Meléndez*, 791 F.3d 201, 203 n.1 (1st Cir. 2015); *United States* v. *Banks*, 776 F.3d 87, 88 n.1 (2d Cir. 2015) (per curiam); *United States* v. *May*, 855 F.3d 271, 274 (4th Cir. 2017); *United States* v. *Story*, 439 F.3d 226, 231 (5th Cir. 2006) *United States* v. *Hampton*, 732 F.3d 687, 690 (6th Cir. 2013); *United States* v. *Kieffer*, 794 F.3d 850, 852 (7th Cir. 2015) (per curiam); *United States* v. *Maggio*, 862 F.3d 642, 646 (8th Cir. 2017); *United States* v. *Chaney*, 581 F.3d 1123, 1124 n.1 (9th Cir. 2009); *United States* v. *White*, 584 F.3d 935, 947 n.5 (10th Cir. 2009); *United States* v. *Valnor*, 451 F.3d 744, 745 n.1 (11th Cir. 2006).

Cir. 2006) (Sotomayor, J.). Courts have held, for example, that an appeal waiver does not prevent a defendant from bringing claims alleging a "miscarriage of justice," *United States* v. *Teeter*, 257 F.3d 14, 25 (1st Cir. 2001), or a deprivation of "a fundamental right," *United States* v. *Riggi*, 649 F.3d 143, 147 (2d Cir. 2011).[9]

The Department of Justice recognizes the same principle. It has instructed its attorneys that an appeal waiver "does not waive all claims on appeal," and that, "[f]or example":

> a defendant's claim that he or she was denied the effective assistance of counsel at sentencing; that he or she was sentenced on the basis of race; or that the sentence exceeded the statutory maximum, will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.

---

[9] Courts recognize, for instance, that notwithstanding an appeal waiver, a defendant can appeal to raise claims of ineffective assistance during the plea process or at sentencing, and can appeal the sentence on the ground that it exceeds the statutory maximum or was based on an impermissible consideration such as race. *See United States* v. *Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *Teeter*, 257 F.3d at 25-26; *Campusano*, 442 F.3d at 774-775; *United States* v. *Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States* v. *Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States* v. *Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States* v. *Freeman*, 640 F.3d 180, 193-194 (6th Cir. 2011); *United States* v. *Litos*, 847 F.3d 906, 910 (7th Cir. 2017); *United States* v. *Andis*, 333 F.3d 886, 891-892 (8th Cir. 2003) (en banc); *United States* v. *Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999); *United States* v. *Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004) (en banc) (per curiam).

U.S. Dep't of Justice, Criminal Resource Manual § 626 (citations omitted).[10]

In short, a defendant who signs an appeal waiver does not actually waive his *appeal*. Better put, he waives the right to bring certain claims on appeal, but retains the right to bring others.

b. When an attorney disregards his client's instruction to file a notice of appeal, the attorney thus "deprive[s]" the defendant "of a proceeding" in which to bring those claims. *Flores-Ortega*, 528 U.S. at 483. *Flores-Ortega* makes plain that such an error "mandates a presumption of prejudice." *Id.*

That presumption applies regardless of the kind or number of claims available to a defendant on appeal. When a defendant in Mr. Garza's position is denied a counseled appellate proceeding, he is deprived of an opportunity to be heard on questions fundamental to the integrity of the trial court's judgment, such as whether his plea was voluntary, whether the government honored its end of the bargain, and whether his plea or sentence was infected by some significant constitutional infirmity. These and other such claims fall outside an appeal waiver precisely *because* they are essential to ensuring the legitimacy of the judicial proceedings as a whole. The loss of a proceeding in which to bring them is plainly a "serious" deprivation, which may severely impact the

[10] The Department of Justice also instructs federal prosecutors that they should "not seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel," including such claims "made on direct appeal" when permitted by circuit law. U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-16.330, 9-16.331 (2017).

reliability of "the adversary process itself." *Id.* (quoting *Cronic*, 466 U.S. at 659); *see Lee*, 137 S. Ct. at 1965 (reaffirming this principle). And that deprivation is all the more severe because a direct appeal is typically the last proceeding in which a defendant is entitled to the assistance of counsel in pressing these claims. *See infra* p. 29.

To be sure, a defendant who has signed an appeal waiver usually will be constrained to a narrower set of appellate claims than other defendants, and his waiver may present an additional hurdle to success for certain issues that the government believes fall within its scope. But this Court has already made clear that neither of those considerations cancels out the presumption of prejudice.

For one thing, *Flores-Ortega* itself involved a guilty plea, which by its nature "reduces the scope of potentially appealable issues." 528 U.S. at 480. In the federal system, a guilty plea automatically bars the defendant from appealing "the constitutionality of case-related government conduct that takes place before the plea is entered" or raising any "claim that would contradict" the admission of guilt. *Class* v. *United States*, 138 S. Ct. 798, 805 (2018); *see United States* v. *Ruiz*, 536 U.S. 622, 629 (2002). Many states, including Idaho, hold that guilty pleas automatically forfeit an even broader set of claims. *See, e.g.*, *State* v. *Kelchner*, 936 P.2d 680, 682 (Idaho 1997) (explaining that the act of pleading guilty "constitutes a waiver of all non-jurisdictional defects"). Nonetheless, the *Flores-Ortega* Court had no difficulty concluding that an attorney's failure to appeal following a guilty plea entails "forfeiture of a proceeding * * * to which [the defendant] had a right." *Flores-Ortega*, 528 U.S. at 483. There is no

reason to create some fine-grained exception to this rule where a guilty plea contains an appeal waiver; in both cases, the defendant retains a narrow but important set of issues that he may appeal.

As for a defendant's chance of success on the merits, this Court has repeatedly held that where a defendant is denied a proceeding altogether, the presumption of prejudice does *not* turn on the merits of that hypothetical proceeding. Thus, in *Flores-Ortega*, the Court held—"following the suggestion of the Solicitor General"—that where a defendant is deprived of the right to appeal, a court should "presum[e] prejudice with no further showing from the defendant of the merits of his underlying claims." *Id.* at 484-485. Similarly, in *Lee*, the Court held that where an attorney's deficient performance caused a defendant to accept a guilty plea he otherwise would have rejected, the defendant is entitled to a presumption of prejudice even if he "ha[s] no viable defense"—that is, even where the defendant faces "no plausible chance of acquittal" and rests his hopes on "throwing a 'Hail Mary' at trial." 137 S. Ct. at 1966-67. The dispositive consideration was simply whether the "defendant was deprived of a proceeding altogether"; if so, the defendant was entitled to restoration of the proceeding he lost, without regard to his "likelihood of success" in that forfeited proceeding. *Id.*; *see also McCoy*, 138 S. Ct. at 1506-09.

Here, it is undisputed that Mr. Garza repeatedly and specifically instructed his attorney to file an appeal. It is also undisputed that Mr. Garza's attorney refused to follow that instruction. Pet. App. 52a. Mr. Garza therefore suffered the deprivation of "the entire judicial proceeding" to which he was entitled;

under *Flores-Ortega*, that error "mandates a presumption of prejudice." 528 U.S. at 483.

2. An attorney's failure to file an appeal requested by his client usurps a decision committed to the client alone.

Flores-Ortega explained that a defendant whose attorney ignores an instruction to appeal is afforded a presumption of prejudice not just because the defendant is deprived of a proceeding, but also because his attorney has usurped a "decision" that "rest[s] with the defendant" alone: the decision to take an appeal. *Flores-Ortega*, 528 U.S. at 485; *see Barnes*, 463 U.S. at 751 (same). Such a violation of a defendant's "autonomy right," *McCoy*, 138 S. Ct. at 1511, is sufficient, by itself, to entitle a defendant to a new appeal without any further showing. And that violation of an autonomy right occurs any time an attorney overrides his client's decision to file an appeal, regardless of whether the client has been convicted, or pled guilty, or entered a plea with an appeal waiver.

a. An attorney for a criminal defendant has wide discretion to make "strategic choices about how best to *achieve* a client's objectives," including "'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *Id.* at 1508 (quoting *Gonzalez* v. *United States*, 553 U.S. 242, 248 (2008)). But certain critical decisions are "reserved for the client," including the decision "whether to plead guilty" and the right to "decide * * * the objective of the defense." *Id.* When a client "expressly" instructs his attorney as to one of these matters, "his lawyer

must abide by that [decision] and may not override it." *Id.* at 1509.

If an attorney does override his client's decision, then the defendant may gain "redress" for that usurpation of a fundamental choice without satisfying the usual requirement to "show prejudice." *Id.* at 1511. That is because a violation of the client's "protected autonomy right [i]s complete" as soon as the attorney "usurp[s]" a matter within the client's "sole prerogative." *Id.*; *see also Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring) (An "action taken by counsel over his client's objection" has the "effect of revoking the agency with respect to the action in question") (citing *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966)).

One of the matters over which the "accused has ultimate authority" is the "fundamental decision whether to take an appeal." *Flores-Ortega*, 528 U.S. at 477; *see id.* at 489 (Souter, J., concurring in part and dissenting in part) ("Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer."); *McCoy*, 138 S. Ct. at 1508 (The decision to "forgo an appeal" is "reserved for the client"); *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (same); *Barnes*, 463 U.S. at 751 (same). An attorney's failure to file a requested appeal therefore "entitle[s]" the defendant "to [a new] appeal without showing that his appeal would likely have had merit." *Flores-Ortega*, 528 U.S. at 477 (alteration in original) (quoting *Peguero*, 526 U.S. at 28); *see also id.* at 489 (Souter, J., concurring in part and dissenting in part) ("[A]s the majority notes," a counsel's failure to "file [a requested] appeal * * * is, without more, ineffective for constitutional purposes.").

b. That principle applies whether or not a defendant has signed an appeal waiver. A defendant who has signed an appeal waiver must still make the "fundamental decision whether to take an appeal." *Flores-Ortega*, 528 U.S. at 477. That decision is not preempted by the waiver itself because a defendant who has signed a waiver unquestionably retains the right to bring certain claims on appeal. *See supra* pp. 16-20. Indeed, the violation of a defendant's autonomy right is particularly severe in this context because an attorney's decision to ignore his client's instruction to appeal in the face of a waiver deprives the defendant of an opportunity to argue that he did not voluntarily plead guilty or waive his appellate rights. The attorney's error therefore not only usurps the defendant's liberty interest in deciding whether to appeal; it implicates his fundamental right to decide "whether to plead guilty" or "waive the right to a jury trial" in the first place. *McCoy*, 138 S. Ct. at 1508. It would be more than a little ironic if the defendant's trial attorney—who may himself have induced or permitted the defendant to unknowingly or involuntarily plead guilty—were allowed to unilaterally veto his client's decision to assert a claim to that effect.

The Idaho Supreme Court suggested that attorneys should be permitted to override their client's decision to appeal because doing so may "cost their client the benefit of the plea bargain." Pet. App 14a; *see Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008). That gets things backwards. Like any party to a contract, a defendant must be permitted to decide whether and how to comply with his plea agreement, and whether he is willing to tolerate the consequences if he is found in breach. The fact that the decision

to appeal in the face of a waiver may have grave consequences for the client, including the potential rescission of the plea agreement, means that it is all the more important that the defendant "be free personally to decide" whether to "bear the personal consequences" of that decision. *Faretta* v. *California*, 422 U.S. 806, 834 (1975). The defendant, not the lawyer, has the right "to decide * * * the objective of the defense." *McCoy*, 138 S. Ct. at 1508. It is accordingly the defendant, not his lawyer, who is entitled to determine whether it is worth risking the rescission of his plea agreement in order to have a chance, "however small," of overturning the conviction or proceeding to trial. *Id.*; *see Faretta*, 422 U.S. at 834 (though a client may exercise his prerogative "ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law' "); *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (similar). "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508. And such choices "rest[ ] with the defendant." *Flores-Ortega*, 528 U.S. at 485.

The Idaho Supreme Court also asserted that an attorney has a duty to "keep[ ] frivolous and futile litigation out of the courts" that overrides any obligation to follow the client's directive to appeal. Pet. App. 13a. The State of Louisiana made virtually the same argument in *McCoy*, and this Court rejected it. The Court held that a defendant was entitled to demand that his attorney "maintain his innocence" even where the evidence against him was "overwhelming" and his "alibi"—that "corrupt police killed the victims"—was "difficult to fathom." 138 S. Ct. at

1506-09. Similarly, in *Lee*, the Court held that a defendant had the right to instruct his attorney to refuse a guilty plea even where he "had no real defense to the charge" and the prospect of conviction and subsequent deportation was "[a]lmost certain[ ]." 137 S. Ct. at 1962, 1968.

Indeed, this Court has already held—repeatedly—that an attorney is obligated to respect his client's wish to appeal even if "counsel finds [the client's] case to be wholly frivolous." *Anders* v. *California*, 386 U.S. 738, 744 (1967); *see Penson*, 488 U.S. at 80; *Smith* v. *Robbins*, 528 U.S. 259, 277-278 (2000). In *Anders*, the Court explained that the attorney's "role as advocate requires that he support his client's appeal to the best of his ability" even in that circumstance. 386 U.S. at 744. The Court held that courts may develop procedures to quickly screen out meritless appeals, including by permitting an attorney to file "a brief referring to anything in the record that might arguably support the appeal" and "request[ing] permission to withdraw" if he finds no merit in the client's claims. *Id.*; *see Robbins*, 528 U.S. at 276 (authorizing States to develop alternative procedures that achieve the same objective); *State* v. *McKenney*, 568 P.2d 1213, 1214 (Idaho 1977) (per curiam) (adopting a procedure that requires counsel to address the merits on appeal without withdrawal). But the Constitution does not permit an attorney to unilaterally abandon an appeal upon a "bare assertion" that "there is no merit to the appeal." *Penson*, 488 U.S. at 80. At minimum, it "requires both counsel *and the court* to find the appeal to be * * * frivolous" before the defendant may be denied the assistance of counsel on direct appeal. *Robbins*, 528 U.S. at 280 (emphasis added).

The Idaho Supreme Court's rationale cannot be reconciled with these precedents. It would make a defendant's right to appeal contingent on an attorney's unilateral judgment as to whether the appeal is meritorious. That would render *Anders* (and *Penson*) a dead letter for the overwhelming majority of criminal defendants. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005) (describing the rising prevalence of appeal waivers and finding, over a decade ago, that 90% of plea agreements in the Ninth Circuit and two-thirds nationwide include appeal waivers). Counsel for those defendants could simply assert that they find no merit to the appeal, refuse to perform the "ministerial task" of filing a notice of appeal, and thereby deprive the client of the counseled direct appeal to which he is entitled. *Flores-Ortega*, 528 U.S. at 477. That cannot be right.

Yet that is what occurred here. By his own admission, Mr. Garza's attorney disregarded his client's instruction to appeal because he deemed such an appeal "problematic" in light of the fact that his client allegedly "received the sentence(s) he bargained for." Pet. App. 52a. That usurpation of the client's decision whether to appeal did not amount to "assistance" of counsel in any meaningful sense. *Flores-Ortega*, 528 U.S. at 476-477. Rather, it effected the "[a]ctual or constructive denial of the assistance of counsel altogether," which is "legally presumed to result in prejudice." *Penson*, 488 U.S. at 88 (quoting *Strickland*, 466 U.S. at 692). Mr. Garza is accordingly "entitled to [a new] appeal." *Flores-Ortega*, 528 U.S. at 477; *see McCoy*, 138 S. Ct. at 1511.

3. It would be profoundly unfair to require defendants to make an individualized showing of prejudice.

A final consideration reinforces the first two rationales for presuming prejudice. As *Flores-Ortega* explained, it would be profoundly unfair to require an "indigent * * * defendant" to first prove that he was prejudiced by his attorney's improper refusal to follow his direction to appeal before even being permitted to pursue it. 528 U.S. at 486.

a. When a trial attorney disregards his client's instruction to perfect an appeal, he deprives the defendant of more than just an appellate proceeding. He deprives the defendant of the assistance of counsel altogether. "There is no constitutional right to an attorney in state post-conviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). And, in practice, the overwhelming majority of petitioners in postconviction proceedings cannot afford an attorney. *See* Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 23 (2007) (finding that in non-capital cases, 92.3% of postconviction petitioners lack counsel).

Accordingly, requiring a defendant to first demonstrate prejudice in order to have his appeal restored means "requir[ing] 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." *Flores-Ortega*, 528 U.S. at 486. As the Court has recognized, that is plainly "unfair." *Id.*

Pro se defendants face formidable challenges in identifying, let alone showing the merit of, the claims

they might have raised on appeal. *See Peguero*, 526 U.S. at 30 (O'Connor, J., concurring) (describing the "heavy burden" such a requirement would impose). "Those whose education has been limited and * * * who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal." *Rodriquez*, 395 U.S. at 330. "[T]hey may not even be aware of errors which occurred." *Id.* As a result, these defendants may in practice "be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one." *Id.*; *see Cronic*, 466 U.S. at 659 (describing "[t]he presumption that counsel's assistance is essential").

It is inequitable to impose these burdens on a defendant simply because his attorney failed to perform the "purely ministerial task" of filing a notice of appeal at his client's request. *Flores-Ortega*, 528 U.S. at 477. A defendant "who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Id.* And where counsel fulfills that basic obligation, he ensures the defendant receives his constitutional right to the assistance of appellate counsel—one who will search the record for meritorious issues that further the client's objective, formulate arguments, and present the case on his behalf. An indigent defendant should not be stripped of that right, and forced to develop viable claims on his own, simply because his attorney "disregard[ed] specific instructions." *Id.* Rather, a defendant "whose right to an appeal has been frustrated should be treated exactly like any other appellan[t]" and granted an appeal—and an attorney—without the need to "specify the points he would

raise were his right to appeal reinstated." *Id.* at 485 (quoting *Rodriquez*, 395 U.S. at 330).

b. This fairness principle applies with equal (indeed, arguably greater) force where a defendant has signed an appeal waiver. A *pro se* defendant may have severe difficulty identifying and articulating viable claims that fall outside the scope of his appeal waiver. Indigent defendants are unlikely to know the intricate legal rules governing which claims survive an appeal waiver—for instance, which claims go to the validity or scope of the plea agreement and which claims might implicate "fundamental" rights. *See supra* pp. 16-20. And even if a defendant has a valid claim, he may not properly identify it. For example, a defendant whose plea is involuntary may simply recite that he wishes to challenge his sentence, because that is the ultimate goal of his appeal.

Furthermore, an indigent defendant is not likely to be capable of competently presenting the complex and record-intensive claims preserved by an appeal waiver. For instance, few *pro se* defendants will be adept at assembling the record evidence necessary to show that a plea was not knowing and voluntary. *United States* v. *Lee*, 888 F.3d 503, 505 (D.C. Cir. 2018) (explaining that such a claim requires examination of "the entire record"). Likewise, demonstrating that a claim falls outside the scope of the waiver often requires extensive and complex contractual interpretation that will tax the capacities of an uncounseled defendant. *See, e.g.*, *United States* v. *Hunt*, 843 F.3d 1022, 1027-29 (D.C. Cir. 2016) (determining that a plea waiver "only arguably or ambiguously forecloses [the defendant's] claims" after analyzing particular language of plea agreement, statements at plea hearing, legal dictionaries,

restatement of contracts, and judicial precedent); *United States* v. *Burden*, 860 F.3d 45, 53-55 (2d Cir. 2017) (per curiam) (collecting other examples).

Indeed, the facts of this case illustrate the unfairness of requiring a defendant to identify and support the claims he would raise on appeal prior to receiving the assistance of appellate counsel. In Mr. Garza's *pro se* postconviction petition, he argued—among other things—that he did not "plead guilty * * * knowingly [and] voluntarily." CR 10; *see* CR 6. The district court dismissed the petition "for lack of supporting evidence," because Mr. Garza identified no record material to support that claim. Pet. App. 29a. In fact, there *was* record material supporting that claim. Mr. Garza answered "No" when asked prior to his plea if he thought he was waiving his appellate rights. CR 97. The district court then accepted both of Mr. Garza's pleas without inquiring into his waiver of appellate rights. CR 125-126, 128-130; *see* Idaho Crim. R. 11(d)(3) (requiring courts to inform the defendant of such waiver). And the court repeatedly informed Mr. Garza of his right to appeal at his joint plea-and-sentencing hearing and in its written judgments. *See supra* pp. 4-5. If Mr. Garza had received the appeal to which he was entitled, competent appellate counsel might easily have presented this evidence to the appellate court.

c. In contrast to the serious inequities to the defendant of requiring an individualized showing of prejudice, applying a presumption of prejudice poses no unfairness to the government. By granting a defendant the right to bring his appeal, a court simply restores the defendant to the position he would have been in had his attorney "follow[ed] the defendant's express instructions" to file an appeal.

Flores-Ortega, 528 U.S. at 478. At that point, the government retains the full benefit of the bargain it struck with the defendant. On one hand, if the defendant's appeal falls within the ambit of the appeal waiver, then the government may enforce the agreement: It may move to dismiss the appeal as barred by the plea agreement; and, if it wishes, it may seek to rescind the agreement as a consequence of the defendant's breach. On the other hand, if the defendant's claim is *not* covered by the waiver—if, for instance, that claim goes to the voluntariness or enforceability of the agreement—then the government has not been deprived of any part of its bargain. Either way, the government's waiver retains full force, and permitting the defendant to bring his appeal does not alter its legal effect.

II. A Test That Requires A Defendant To Prove Prejudice In The Presence Of An Appeal Waiver Is Impractical And Inefficient.

The State proposes a contrary rule that sounds simple enough on the surface: Courts should deny a defendant the presumption of prejudice whenever his plea agreement contains an appeal waiver. But the rule founders in practice. Courts will be forced to grapple with difficult questions as to whether, and how, the rule applies in the face of a wide variety of appeal waivers. The State's rule also requires a burdensome inquiry by the habeas court that will needlessly drain judicial resources. In contrast, applying a presumption of prejudice whenever an attorney ignores a defendant's instruction to appeal preserves a readily administrable, bright-line rule.

A. The State's Rule Is Unworkable.

1. While it may be convenient to refer to "appeal waivers" in some shorthand sense, appeal waivers are in fact subject to substantial variation. *See* Susan R. Klein et al., *Waiving The Criminal Justice System: An Empirical And Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 85-87, 122-130 (2015) (describing variation in written scope of plea agreements, across 17 variables, across and within jurisdictions, and over time). In the federal system, the scope of appeal waivers is left to the discretion of districts or individual prosecutors. U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-16.330, 9-16.331; Criminal Resource Manual, *supra*, § 626. Each state also employs its own framework for appeal waivers. *Compare, e.g.*, *State* v. *Sainz*, 526 A.2d 1015, 1021 & n.6 (N.J. 1987) (appeal waivers may never be enforced to bar appeal of sentence and may be enforced only through rescission), *with Ballweber* v. *State*, 457 N.W.2d 215, 218 (Minn. Ct. App. 1990) (appeal waiver may never bar appeal of sentence, period), *with State* v. *Loye*, 670 N.W.2d 141, 148 (Iowa 2003) (right to appeal may be waived "only if such a waiver is an express element of the particular agreement made by that defendant"). Some waivers preserve a defendant's ability to raise certain claims, including pretrial issues that would ordinarily be waived by the act of pleading guilty.[11] Others condition the

[11] *See, e.g.*, *United States* v. *Lopez*, 655 F. Supp. 2d 720, 721 (E.D. Ky. 2009) (noting that the defendant reserved the "right to appeal the District Court's denial of his pretrial motions to suppress and the arguments contained therein"); *State* v. *Eger*, 155 P.3d 784, 785 (N.M. Ct. App. 2007) (recognizing that

availability of an appeal on the defendant's receipt of a particular sentence.[12]

Even when two waivers are intended to have the same reach, prosecutors may employ different language to articulate that intention, leading to differences in the way the waivers are enforced in court. For example, federal appeal waivers vary in the language they use to bar challenges to a defendant's sentence, and courts of appeals have accordingly reached varying conclusions as to what types of challenges those waivers bar. *Compare, e.g.*, *United States* v. *Oladimeji*, 463 F.3d 152, 156-157 (2d Cir. 2006) (interpreting a sentencing appeal waiver to preserve challenges to a restitution order based on the waiver's reference to the "total term of imprisonment"), *with United States* v. *Johnson*, 541 F.3d 1064, 1066, 1069 (11th Cir. 2008) (interpreting a waiver to reach restitution challenges where it referred more generally to appeals of the defendant's "sentence"). And even when appeal waivers use identical language, they may be treated differently by the courts depending on the jurisdiction in which the case arises. *See In re Sealed Case*, 702 F.3d 59, 65 (D.C. Cir. 2012) (collecting cases); *United States* v.

---

defendant's conditional plea "specifically reserve[d] the right to appeal the issue of the six-month rule violation").

[12] *See, e.g.*, *United States* v. *Tapp*, 491 F.3d 263, 264 (5th Cir. 2007) (describing an appeal waiver that "reserved the right to appeal any punishment imposed in excess of the statutory maximum and any punishment that was an upward departure from the applicable guidelines range"); *Straub*, 292 P.3d at 276 (considering an appeal waiver that preserved the right to appeal a sentence "exceed[ing] the State's sentencing recommendation").

Worden, 646 F.3d 499, 503 (7th Cir. 2011) (same). The form of an appellate waiver may therefore differ from jurisdiction to jurisdiction, from court to court, and even from case to case.

This almost infinite potential for variation among appeal waivers makes it virtually impossible to administer a rule that makes the presumption of prejudice turn on the presence of an appeal waiver. Courts may not refuse to apply the presumption merely because an agreement waives *some* appellate rights; *Flores-Ortega* itself involved a guilty plea, which naturally "reduce[d] the scope of potentially appealable issues." 528 U.S. at 480. Courts will therefore have to determine when an appeal waiver is sufficiently comprehensive that it displaces the *Flores-Ortega* rule. And because of the wide variation among appellate waivers, courts will be forced to confront this question over and over again: Does a particular condition on an appeal waiver entitle the defendant to the presumption? What about the preservation of an additional issue for appeal or the use of different phrasing to describe the waiver? As different courts answer these questions differently, a defendant's entitlement to the presumption of prejudice will vary according to his jurisdiction, his prosecutor, or his judge.

The better approach is to maintain the straightforward rule this Court articulated in *Flores-Ortega*: An attorney must file the notice of appeal whenever his client instructs him to do so, full stop, regardless of the precise terms of his deal.

B. The State's Rule Wastes Judicial Resources.

Under the State's rule, a defendant is entitled to a new appeal only if he can convince the habeas court that he has a non-frivolous appellate claim that is not barred by his appeal waiver. That process imposes heavy burdens on both the litigants and the courts: A habeas petitioner, almost always acting *pro se*, must evaluate the voluntariness and scope of his waiver, assess the record to determine what claims remain to him on appeal, and then attempt to articulate those claims in his briefing. The government, in turn, must attempt to respond to the arguments put forward by the uncounseled petitioner. And, because a court must hold *pro se* litigants to a "less stringent standard[ ]," the habeas court itself must labor to construe the defendant's pleadings liberally to avoid overlooking a meritorious claim. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *see also, e.g.*, *Pabon* v. *Wright*, 459 F.3d 241, 248 (2d Cir. 2006) (submissions of a *pro se* litigant must be interpreted "to raise the strongest arguments that they suggest" (citation omitted)). Indeed, courts in the few jurisdictions willing to adopt the State's rule have recognized this corresponding burden, undertaking an " 'affirmative duty' " to examine the record for potential claims. *United States* v. *Dunlap*, No. 10-190, 2010 WL 4614557, at *2 (W.D. Pa. Nov. 5, 2010) (quoting *United States* v. *Mabry*, 536 F.3d 231, 237 (3d Cir. 2008)). Furthermore, if the defendant succeeds on habeas, a similar process must be repeated in front of the appellate court.

It is far more efficient simply to grant a defendant a new appeal once he has demonstrated that his

attorney disregarded his instruction to file a notice of appeal. The first and only review of the merits then occurs in front of the appellate court, eliminating any possibility of duplicative proceedings in multiple courts. It also increases the efficiency (and accuracy) of the merits review because a defendant is guaranteed the assistance of counsel on direct appeal. *See Coleman*, 501 U.S. at 752. That means his presentation of the merits of his case will be clearer and more comprehensive, making it easier for the government to respond to the defendant's arguments, and relieving the court of the need to carefully scrutinize the defendant's filings in search of meritorious claims.

These efficiencies are further enhanced by the range of procedural mechanisms appellate courts already have in place to quickly dispose of meritless appeals. For instance, the federal government may avail itself of procedures for summary dismissal where it believes that claims raised are within the scope of the defendant's waiver. Fed. R. App. P. 27, 11(g); *see, e.g.*, *Watson* v. *United States*, 493 F.3d 960, 963-964 (8th Cir. 2007) (allowing the government to prove, by dispositive motion, that a defendant's appeal waiver is enforceable). To take just one example, the Tenth Circuit has set forth a specific intra-circuit procedure for summarily dismissing appeals involving valid waivers. *United States* v. *Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). Many states, including Idaho, have similar procedures. *See* Idaho App. R. 32(a); Brief in Opposition at 8 (explaining that "[a]ny appeal attempted in the face of a valid waiver" will be "subject to summary dismissal," which "generally will occur prior to briefing").

The process this Court prescribed in *Anders*, 386 U.S. at 744, also has an important role to play in appeals following an appeal waiver. If a defendant's appellate attorney finds that the appeal waiver has left the defendant without any nonfrivolous claims, she is permitted to file an *Anders* brief, in which she requests withdrawal but "refer[s] to anything in the record that might arguably support the appeal." *Id.* This process serves the "valuable purpose of assisting the court in determining * * * that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson*, 488 U.S. at 81-82; *see also McKenney*, 568 P.2d at 1214 (adopting an *Anders* procedure that expends even "less of counsel and the judiciary's time and energy" by forgoing a separate motion to withdraw and requiring only counsel's views on the merits).

Presuming prejudice when a defendant can show that his attorney ignored an instruction to appeal will not open the floodgates to a stream of defendants pressing frivolous or forfeited appeals. In the nearly two decades since *Flores-Ortega*, eight federal courts of appeals have adopted the position that Mr. Garza advocates; habeas courts in those jurisdictions do not require defendants to specify the grounds for their appeal in order to be entitled to a presumption of prejudice. But that does not mean that they grant habeas relief whenever a defendant alleges that he instructed his attorney to appeal. A defendant must *prove* that fact, showing that, but for an attorney's deficient performance, the defendant "would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. Where the defendant lacks evidence of his request,

but signed an appellate waiver, courts have generally dismissed such allegations on the papers.[13] The showing is "easily" made only in the rare circumstance—like this one—in which there is uncontroverted evidence that the defendant instructed his attorney to file an appeal notwithstanding an appeal waiver, and the attorney disregarded that instruction. *Id.* at 478.

Moreover, only a minority of cases involve an alleged instruction. The far more typical circumstance is one like *Flores-Ortega* itself, in which the attorney simply did not consult with the client regarding the possibility of appeal following an appellate waiver. *Id.* at 477. In those "silent" cases, an appeal waiver again renders it difficult for defendants who lack meritorious claims on appeal to make the showing prescribed by *Flores-Ortega*. As *Flores-Ortega* explains, an attorney renders deficient performance by failing to consult with his client about the possibility of an appeal only "when there is reason to think

---

[13] *E.g.*, *Zanuccoli* v. *United States*, 459 F. Supp. 2d 109, 111-112 (D. Mass. 2006) (rejecting defendant's claim that he instructed his counsel to appeal as "highly implausible," without need for evidentiary hearing, given that "Petitioner expressly waived his right to appeal"); *Gonzalez* v. *United States*, No. 08-10223-PBS, 2012 WL 5471799, at *5 (D. Mass. Nov. 8, 2012) (same); *Stolkner* v. *United States*, No. 2:15-cr-00143-JDL-1, 2018 WL 3212007, at *5 (D. Me. June 29, 2018) (no evidentiary hearing necessary for "Petitioner's allegation that he directed counsel to file a notice of appeal" because "Petitioner signed a plea agreement in which he agreed to waive his right to appeal"); *Bookwalter* v. *United States*, No. 2:14-CR-82, 2018 WL 2407525, at *5 (E.D. Tenn. May 25, 2018) (same); *Ceasar* v. *United States*, No. 2:17-cv-308-FtM-38MRM, 2018 WL 1964197, at *6-7 (M.D. Fla. Apr. 26, 2018) (same).

either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. Furthermore, the failure to consult does not constitute ineffective assistance of counsel unless, "but for counsel's deficient performance, [the defendant] would have appealed." *Id.* at 484.

As *Flores-Ortega* itself indicated—and as the majority of circuits have held—the fact that the defendant "expressly * * * waived some or all appeal rights" is likely to weigh heavily against an affirmative showing on these questions. *Id.* at 480. A "rational defendant" will rarely wish to appeal following entry of a plea containing an appeal waiver, given the more circumscribed number of meritorious claims he can bring and the potentially severe consequences of breaching the plea agreement. *Id.*[14] And a defend-

---

[14] *See, e.g.*, *Parsons* v. *United States*, 505 F.3d 797, 799-800 (8th Cir. 2007) (finding that petitioner failed to establish duty to consult under *Flores-Ortega* in part because he "had waived his right to appeal"); *Jackson* v. *Attorney Gen. of Nevada*, 268 F. App'x 615, 620 (9th Cir. 2008) (finding "no merit" to petitioner's argument "[u]nder the first prong of the *Flores-Ortega* test" in part because the petitioner "waived all appellate rights" except challenges to jurisdiction or legality); *United States* v. *Washington*, 588 F. App'x 586, 586-587 (9th Cir. 2014) (same); *Devine* v. *United States*, 520 F.3d 1286, 1289 (11th Cir. 2008) (per curiam) (same); *United States* v. *Orosco*, 219 F. App'x 673, 674 (9th Cir. 2007) (same); *Johnson* v. *United States*, No. 5:16-CR-81-D-1, 2018 WL 1734920, at *13-14 (E.D.N.C. Mar. 14, 2018) (same), *report and recommendation adopted*, 2018 WL 1733983 (E.D.N.C. Apr. 9, 2018) (same); *Weems* v. *United States*, No. C17-1023RSL, 2018 WL 1470877, at *3 (W.D. Wash. Mar. 26, 2018) ("Particularly in light of the fact that petitioner had just

ant who just signed an appeal waiver is not likely to have engaged in other conduct that "reasonably demonstrated to counsel that he was interested in appealing." *Id.* [15] There may be exceptional cases in which a defendant does have a meritorious claim or strongly indicated that he wished to appeal notwithstanding the waiver. But those rare cases are precisely the ones in which defendants *should* be able to appeal—and in which their attorneys have an obligation to assist them in doing so.

* * *

Few rights are more "fundamental" to a criminal defendant than the "right to be represented by counsel," because it is the attorney who is charged with "assert[ing] any other rights [the defendant]

---

pleaded guilty pursuant to a plea agreement that waived appeal rights, counsel would have had no reason to suspect petitioner wanted to appeal."); *Mays* v. *United States*, No. 3:12-cr-110-J-34JRK, 2018 WL 3301895, at *4 (M.D. Fla. July 5, 2018) (same); *Perez* v. *United States*, No. 3:12-CR-0133-N (01), 2016 WL 4276006, at *8 (N.D. Tex. May 31, 2016), *report and recommendation adopted*, 2016 WL 4268927 (Aug. 15, 2016) (same).

[15] *See, e.g.*, *United States* v. *Calderon*, 665 F. App'x 356, 366 (5th Cir. 2016) (per curiam) (finding no duty to consult because "nothing material changed" after the defendant signed the appeal waiver); *Spear* v. *United States*, No. 3:12-CR-0323-D, 2015 WL 9583525, at *4 (N.D. Tex. Nov. 18, 2015), *report and recommendation adopted*, 2015 WL 9489569 (Dec. 30, 2015) (finding "no reason, given Petitioner's limited appeal rights, for counsel to believe that a rational defendant would want to appeal"); *Gonzalez* v. *United States*, No. 5:10-CR-00172-F-1, 2015 WL 5797628, at *2-3 (E.D.N.C. Oct. 1, 2015); *Moya* v. *United States*, No. 5:15-CR-064-01-C, 2018 WL 3039340, at *5 (N.D. Tex. May 30, 2018), *report and recommendation adopted*, 2018 WL 3038513 (June 19, 2018).

may have." *Cronic*, 466 U.S. at 653-654. When counsel disregarded Mr. Garza's express instruction to file a notice of appeal, he prevented Mr. Garza from pursuing the counseled appeal to which he is entitled. He usurped Mr. Garza's authority to make a fundamental choice about his own defense. And he stripped Mr. Garza of the aid of counsel in asserting some of his most basic, unwaived claims, including that his plea agreement was not knowing and voluntary.

"[N]o further showing" is necessary to establish that Mr. Garza was denied the "assistance of counsel." *Flores-Ortega*, 528 U.S. at 484. Because Mr. Garza has "made out a successful ineffective assistance of counsel claim," he is "entitled to a new appeal." *Id.* at 484-485.

CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted,

CATHERINE E. STETSON
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004

ERIC D. FREDERICKSEN
ERIK R. LEHTINEN
MAYA P. WALDRON
IDAHO STATE APPELLATE
PUBLIC DEFENDER
322 East Front St., Ste. 570
Boise, ID 83702

AMIR H. ALI
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

DAVID M. SHAPIRO
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611

Counsel for Petitioner

AUGUST 2018