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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The State of Idaho and the Solicitor General concede that a defendant who signs an appeal waiver retains the right to bring numerous claims on appeal, including challenges to the validity, scope, and enforceability of his plea or waiver. *See* U.S. Br. 23; Resp. Br. 26; Pet'r Br. 16-20. And they acknowledge that under this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), prejudice is presumed when an attorney deprives his client of an appeal to which the client has a right. U.S. Br. 13; Resp. Br. 8.

Those concessions—which markedly depart from what the State argued below—should resolve this case. An attorney who betrays her client's instruction to appeal deprives that client of his right to an appellate proceeding in which he may raise his retained claims. Therefore, prejudice must be presumed.

Rather than concede error (as past Federal administrations have done in just this respect, *see infra* pp. 20-21), the State and the Solicitor General argue for new rules, never adopted by any court. They claim that an appeal waiver allows an attorney to ignore her client's instruction to appeal unless the defendant identifies *unwaived* issues he wishes to pursue. U.S. Br. 21-22; Resp. Br. 22.

But *Flores-Ortega* itself arose in the context of a guilty plea that—with or without an appeal waiver—"reduces the scope of potentially appealable issues." 528 U.S. at 480. Nonetheless, the Court held the presumption of prejudice does not depend on whether a defendant can "specify the points he would raise" on appeal, *id.* at 486; it applies whenever a client has "instruct[ed] counsel to perfect an appeal." *Id.* at 485.

Nor is that the only problem with the other side's position. By allowing an attorney to ignore an instruction to appeal if she believes the defendant intends to raise a waived issue, Idaho and the Solicitor General give the attorney the power to veto a defendant's decision to appeal. That is incompatible with *Anders* v. *California*, 386 U.S. 738 (1967), which recognized the need for a judicial check on any such unilateral decisionmaking by counsel. A defendant may not be so readily deprived of his best opportunity to "demonstrate that [his] conviction, with its consequent drastic loss of liberty, is unlawful." *Evitts* v. *Lucey*, 469 U.S. 387, 399-400 (1985).

The State and the Solicitor General also conflate two fundamentally distinct decisions. The Sixth Amendment entrusts to the client alone the decision *whether to appeal*; the question of *which issues to*

raise on appeal is committed to the defendant's appellate attorney. *See Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The State and the Solicitor General would upend that basic allocation of responsibility between attorney and client, allowing trial counsel to usurp her client's decision to pursue an appeal when the client is unable to perform the appellate advocate's task of identifying suitable appellate issues.

There is no justification for the Court to depart from its precedents in this manner. The other side's rules would create more complexities for litigants and courts, not fewer. And the State's late-breaking effort to relitigate the facts of Mr. Garza's case—by erroneously claiming that Mr. Garza specifically instructed his attorney to raise a waived issue—is both inappropriate and immaterial. The judgment should be reversed.

ARGUMENT

I. Prejudice Should Be Presumed When An Attorney Disregards His Client's Instruction To Appeal Following An Appeal Waiver.

A. By Failing To Appeal, An Attorney Forfeits A Proceeding To Which The Defendant Was Entitled.

Flores-Ortega offered three independent rationales for holding that a defendant is entitled to a presumption of prejudice when his attorney disregards his instruction to appeal. Pet'r Br. 13-14. The first—and the only one to which the other side devotes any meaningful attention—is that by failing to file a requested notice of appeal, an attorney causes the forfeiture of an appellate proceeding "to which [the defendant] had a right." *Flores-Ortega*, 528 U.S. at 483.

In the proceedings below, the State argued this rationale did not apply to Mr. Garza because his appeal waiver forfeited *any* right to an appeal. That is the reasoning the court below accepted, Pet. App. 14a, and that is what the State argued in its brief in opposition, BIO 9, 15-16. It is also wrong. As all parties now acknowledge, a defendant who signs an appeal waiver retains the right to appeal several significant issues, including the validity and scope of the plea or waiver itself. *See* Pet'r Br. 16-20; U.S. Br. 23; Resp. Br. 26. Consequently, when Mr. Garza's attorney ignored his instruction to notice an appeal, the attorney forfeited the appellate proceeding to which Mr. Garza was entitled, triggering the presumption of prejudice.

To avoid this conclusion, the State and the Solicitor General propose alternative grounds for affirmance. The State now argues that an attorney's failure to file a notice of appeal does not cause the forfeiture of a proceeding if the defendant signs an appeal waiver and then instructs his attorney to appeal an issue within the scope of that waiver. Resp. Br. 22. The Solicitor General argues that a proceeding is forfeited only if the defendant instructs his trial counsel to appeal an unwaived issue, or if on postconviction review the defendant can identify a nonfrivolous unwaived issue that his appellate counsel "would have raised" on appeal. U.S. Br. 21-22.

Both of these new rules are as misguided as the reasoning they replace. When an attorney fails to file a notice of appeal, she deprives her client of a proceeding in which an appellate court reviews the defendant's claims and decides whether they are, in fact, waived or—if they are preserved—whether they have merit. To camouflage this deprivation, Idaho

and the Solicitor General attempt to reassign the resolution of the waiver question to trial counsel. They suggest that if trial counsel concludes the defendant is attempting to appeal a waived issue, she may veto any further proceedings herself. But this Court has consistently rejected analogous attempts to substitute the unilateral views of counsel for considered review by an appellate court. *See Anders*, 386 U.S. 738; *Penson* v. *Ohio*, 488 U.S. 75 (1988).

In *Anders*, this Court held that even if a defendant's appellate attorney "finds his [client's] case to be wholly frivolous," the attorney may not simply refuse to pursue the case. 386 U.S. at 744. Instead, the attorney must follow sufficient procedures, such as filing a brief "referring to anything in the record that might arguably support the appeal," to enable "the court—not counsel— * * * to decide whether the case is wholly frivolous." *Id.*; *see Smith* v. *Robbins*, 528 U.S. 259, 280 (2000) (holding that a State complies with *Anders* if it "requires both counsel and the court to find the appeal to be lacking in arguable issues"). By the same token, an attorney may not decline to pursue an appeal based solely on her assessment of the nature of the defendant's claims and the scope of the waiver; she must file a notice of appeal, and the appellate court will make its own assessment with the aid of counsel.

Both Idaho and the Solicitor General also assume that the defendant decides what issues to appeal before his attorney files the notice. That is doubly incorrect.

First, while a defendant has the right to decide *whether* to "take an appeal," he does not select *what*

issues to appeal. *Barnes*, 463 U.S. at 751-52. His "appellate advocate" does. *Id.* Indeed, in *Barnes* this Court rejected the contention that the Sixth Amendment requires an attorney to press any appellate issue "requested by the client"; that is "a matter of professional judgment" reserved for appellate counsel alone. *Id.* at 751.

Second, the decision of what issues to raise on appeal is not made at the notice-of-appeal stage. While trial counsel may begin to assess potentially appealable issues at that stage, that preliminary review is in no way binding.[1] After an appeal is perfected, *appellate* counsel engages in "careful advocacy" to ensure "substantial legal and factual arguments are not inadvertently passed over" or "forgone." *Penson*, 488 U.S. at 85. Further, in Idaho, as in federal court, indigent defendants generally obtain access to the record required to identify issues for appeal only after a notice of appeal is filed. *See* Idaho App. R. 19, 25.

Accordingly, the issues a defendant may specify when he instructs his attorney to notice an appeal cannot themselves determine whether the failure to file the notice forfeits a proceeding because those issues do not necessarily reflect, much less control,

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[1] Idaho Appellate Rule 17 provides that a notice of appeal must include a "preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal," but mandates that "any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal." Idaho App. R. 17(f). Attorneys comply with this rule simply by identifying the decision being appealed. *E.g.*, CR 197 (identifying "dismissal of Petitioner's Postconviction Petition" as the issue on appeal).

what arguments will actually be pressed on appeal. What matters in determining whether an attorney has deprived her client of a proceeding is whether the defendant "instruct[ed] counsel to initiate an appeal." *Flores-Ortega*, 528 U.S. at 477.

The State and the Solicitor General attempt to overcome these obstacles by redefining the nature of the proceeding in question. The State repeatedly refers to "the appeal" forfeited by Mr. Garza's attorney as "an appeal of his sentence." Resp. Br. 11, 13, 17. The Solicitor General similarly refers to "an appellate merits proceeding." U.S. Br. 18, 21, 22. But there is no separate appellate proceeding for sentencing issues or for "appellate merits review." There is simply *an appeal*, in which the defendant would be appointed counsel to review and press the full spectrum of claims available to the defendant.[2]

The Solicitor General's own analogies illustrate the distinction. The Solicitor General asserts that "[n]o one would say * * * that a defendant is prejudiced by his attorney's refusal to file an appeal in the wrong court" or to "notice a requested appeal from a clearly non-appealable order." U.S. Br. 20. But in those cases, the defendant would have no right to the requested appellate proceeding *at all*. All agree here

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[2] The State suggests Idaho defendants who sign an appeal waiver undergo some threshold proceeding before gaining the right to an appeal. Resp. Br. 26; *see also* U.S. Br. 17-18. That is incorrect. Idaho courts regularly consider whether a defendant has raised a waived issue after full briefing. *See State* v. *Taylor*, 336 P.3d 302, 304-305 (Idaho Ct. App. 2014) (rejecting the assertion that the applicability of an appeal waiver must be assessed through a pre-briefing motion to dismiss); *see also* Pet'r Br. 16-17 & n.4; Cert. Reply 8-9.

that a defendant has a right to an appeal following an appeal waiver. The waiver simply narrows the claims he may successfully bring.

The Solicitor General attempts to sidestep these problems by acknowledging that a defendant who has not instructed his attorney to appeal an unwaived issue may still be entitled to a presumption of prejudice if he can point to a "nonfrivolous" unwaived claim he would have raised on appeal. U.S. Br. 21-22. But a court "cannot" predetermine the merits of a proceeding "that never took place." *Flores-Ortega*, 528 U.S. at 483. The presumption of prejudice may not be made to turn on the hypothetical merits of the forfeited appeal. *See Lee* v. *United States*, 137 S. Ct. 1958, 1966 (2017).

Finally, *Flores-Ortega* itself confirms the State's and the Solicitor General's approach cannot be correct. There, the defendant's entry of a guilty plea substantially "reduce[d] the scope of potentially appealable issues." 528 U.S. at 480; *see also Class* v. *United States*, 138 S. Ct. 798, 808 (2018) (Alito, J., dissenting) (observing that a defendant who pleads guilty waives "all nonjurisdictional claims"). Yet the Court held prejudice is presumed without any requirement that a defendant identify "non-waived" issues he would have raised on appeal. U.S. Br. 8. There is no reason a different rule should apply in the case of an appeal waiver, which differs from a guilty plea only in degree, and preserves those claims most fundamental to the defendant's liberty and the integrity of the judicial process. Indeed, *Flores-Ortega* specifically referred to appeal waivers as part of the spectrum of guilty pleas but never suggested a different framework should apply to pleas that include those "express[ ]" waivers. 528 U.S. at 480.

The Solicitor General's only response, in a footnote, is to say that a guilty plea "preclu[des]" a defendant from raising most claims on appeal rather than "waiv[ing]" those claims. U.S. Br. 20 n.3. Even if this hyperformalistic distinction were accurate, it would be irrelevant: A guilty plea forecloses "merits consideration" of certain claims, which is all the Solicitor General considers germane. *See* U.S. Br. 21. In any event, the distinction is wrong. Guilty pleas effect a "waiver" of claims, just like appeal waivers. *E.g.*, *Class*, 138 S. Ct. at 805 (explaining that "[t]he Government is correct that a guilty plea does implicitly waive some claims"); *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969) (recognizing that "a plea of guilty" entails "effective waiver"). Defendants are advised as much when they plead guilty, both in Idaho and in the federal system. *See* Fed. R. Crim. P. 11(b)(1)(A)-(F); Idaho Crim. R. 11(c)(3).

B. An Attorney's Refusal To File An Appeal Requested By His Client Usurps A Decision Committed To The Client Alone.

The other side's position should be rejected for a second, independent reason: It would permit an unconstitutional encroachment on defendant autonomy.

The State and Solicitor General concede—as they must—that the decision whether to appeal ultimately "rests with the defendant." *Flores-Ortega*, 528 U.S. at 479; *see* Resp. Br. 19; U.S. Br. 26. Thus, when a criminal defendant "expressly" instructs his attorney to appeal, counsel "must abide by that [decision] and may not override it." *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1509 (2018). When the attorney instead "usurp[s] control" of that fundamental

choice, the "violation of [the defendant's] protected autonomy right [is] complete," and the defendant is entitled to relief without a requirement that he show any further prejudice. *Id.* at 1511; *see Bell* v. *Cone*, 535 U.S. 685, 686 (2002) (recognizing that *Cronic* applies where an attorney's violation of the right to counsel is "complete"); Cato Institute Br. 2-15.

The State and Solicitor General nonetheless contend a defendant may be barred from obtaining relief where his attorney disregards his instruction to appeal, if the defendant previously entered a plea agreement with an appeal waiver. They defend this rule by pointing to the potential negative consequences of pursuing an appeal when doing so might be viewed as a breach of a plea agreement. Resp. Br. 18; U.S. Br. 18, 20. That argument both misunderstands the nature of the autonomy right and mischaracterizes what is necessary to breach a plea agreement.

A defendant retains his autonomy right to make the fundamental choices about his defense even where the defendant's decision may be imprudent—indeed, even fatal. *See Faretta* v. *California*, 422 U.S. 806, 834 (1975) (recognizing that although a defendant may act "ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law' "). In *McCoy*, for example, the Court held the defendant had an autonomy right to advance a theory of innocence even though counsel "reasonably assess[ed]" that "a concession of guilt" was "best suited to avoiding the death penalty." 138 S. Ct. at 1508. It would defy logic to hold that a defendant retains his right to make a fundamental choice where he "risk[s]

death," *id.*, but not where he risks his plea agreement.

Nonetheless, the State (but not the Solicitor General) goes even further. Idaho explicitly contends that the risk of breach means an attorney acts in a professionally *reasonable* manner when she overrules her client's instruction to appeal if she believes her client wishes to appeal a waived issue. Resp. Br. 12-21. But *McCoy* makes clear an attorney is obligated to honor her client's wishes when a question is committed to the defendant, even if the attorney "reasonably assess[es]" that her client's decision is strategically unwise. 138 S. Ct. at 1508. It is necessarily deficient performance for an attorney to usurp that decision, even with the best of intentions. In fact, the deficient performance inquiry is not even before this Court: The Question Presented asks only if the presumption of prejudice applies. Pet. i.

The State and the Solicitor General also contend the "very filing" of a notice of appeal might put a defendant in breach of his plea agreement. U.S. Br. 9; Resp. Br. 17-18. It is hard to see how that could be. A notice of appeal is a piece of paper filed to preserve the client's opportunity to appeal. And since all agree that a defendant retains several claims under even the most broadly written waiver, no breach would be effectuated merely by filing that piece of paper. Indeed, the Federal Government itself recognizes that noticing an appeal has no legal consequence apart from preserving the client's right to appeal; prosecutors automatically notice "protective" appeals of criminal cases, no matter their merit, if the Solicitor General has not made an appeal decision before the jurisdictional deadline. *See* U.S.

Dep't of Justice, United States Attorneys' Manual § 2-2.132 (2018).

Idaho and the Solicitor General make a few further attempts to reconcile their position with this Court's autonomy precedents. None succeeds.

First, they contend that an attorney who ignores her client's instruction to appeal does not usurp the defendant's choice because the defendant "made the decision not to appeal * * * when he signed the plea agreements." Resp. Br. 27; U.S. Br. 25-26. But that (again) mischaracterizes the import of an appeal waiver: Because a defendant who signs an appeal waiver agrees only to forgo certain claims, the waiver cannot reflect a defendant's choice to forgo an appeal altogether.

Second, the State suggests it would actually *contravene* the autonomy rationale to permit a defendant to obtain an appeal, since his appellate attorney may press issues different from the waived issue the defendant wishes to raise. Resp. Br. 19-20. But that again confuses the question of *whether* to appeal with the decision of *what* to appeal. *Barnes*, 463 U.S. at 751. The client has the autonomous right to decide the "objective of the defense" by deciding whether to press or "forgo an appeal." *McCoy*, 138 S. Ct. at 1508. But it is for the attorney to decide "how best to *achieve* a client's objectives"—by deciding, for example, "what arguments to pursue." *Id.*

Third, the Solicitor General argues that *Flores-Ortega* "was not premised on autonomy interests" at

all. U.S. Br. 25. *Flores-Ortega* says otherwise.[3] In recognizing that an attorney may not ignore her client's instruction to appeal, the Court relied on precedent establishing that the defendant "has [the] ultimate authority" to make the "fundamental decision whether to take an appeal." 528 U.S. at 477 (citing *Barnes*, 463 U.S. at 751). The Court also repeatedly emphasized that the "decision to appeal rests with the defendant." *Id.* at 479, 485. And, in defining the showing required to presume prejudice, the Court spoke exclusively in terms of the defendant's autonomous decision to appeal—holding that a defendant must show he "want[ed]" or "would have insisted on" an appeal. *Id.* at 480, 485.

Fourth, the Solicitor General suggests in passing that *McCoy* is irrelevant because it did not involve a *Strickland* analysis. U.S. Br. 25. That gets things backwards. The autonomy interest in *McCoy* was derived from the Sixth Amendment right to counsel and the decisions that had previously been recognized as entrusted to the client, including the choice whether to "forgo an appeal." 138 S. Ct. at 1508. Indeed, the Court explicitly relied on cases finding overrides of such decisions presumptively prejudicial under *Strickland* and *Cronic*. *See id.* at 1511 (citing

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[3] So did the United States as *amicus curiae* in *Flores-Ortega*. The Solicitor General grounded the presumption of prejudice *exclusively* in terms of defendant autonomy, arguing that counsel's refusal to notice a requested appeal was "[t]he most obvious" case of ineffective assistance, and that presuming prejudice "makes sense," because "the client has made a decision that is his to make." U.S. Br. 17, *Flores-Ortega*, 528 U.S. 470 (2000) (No. 98-1441), 1999 WL 33611343, at *17, *18-19.

Cooke v. *State*, 977 A.2d 803, 849 (Del. 2009)); *id.* at 1507 (citing *State* v. *Carter*, 14 P.3d 1138, 1148 (Kan. 2000)). It would make little sense to disregard *McCoy*'s admonition against interfering with a defendant's autonomy where—as here—an attorney has *directly* usurped one of the fundamental choices committed to the defendant.

C. It Would Be Profoundly Unfair To Make A Defendant's Right To Appeal Dependent On His Ability To Articulate A Viable Issue For Appeal.

The *Flores-Ortega* Court held that it would be "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." 528 U.S. at 486. After all, "[t]here can hardly be any question about the importance of having [an] appellate advocate examine the record with a view to selecting the most promising issues" to appeal. *Barnes*, 463 U.S. at 752. And it is plainly inequitable to require a defendant with no legal training and potentially limited facility with English to "specify the points he would raise" on appeal, particularly during the short period before the notice-of-appeal deadline, when defendants in transit to prison may have difficulty communicating with counsel at all. *Flores-Ortega*, 528 U.S. at 474, 486 (citation omitted).

It would be *more*, not less, unfair to require a defendant who has signed an appeal waiver to specify unwaived issues for appeal in order to obtain his appeal as of right. The very factors that might make a defendant's plea agreement unknowing or involun-

tary—language difficulties, mental handicaps, or incompetence of trial counsel, to name a few—may similarly make it hard for the defendant to recognize or articulate claims that are preserved despite the appeal waiver. And appeal waivers themselves are often difficult to interpret, requiring a review of the "entire record" that indigent clients are ill-suited to perform themselves. *United States* v. *Lee*, 888 F.3d 503, 505 (D.C. Cir. 2018); *see* Pet'r Br. 31.[4]

The State and the Solicitor General ignore all of this. The State's rule deprives a defendant of an appeal unless he can show that he did not instruct his attorney to appeal a waived issue, Resp. Br. 22, forcing a defendant to forfeit an appeal merely because he was unable to distinguish waived from unwaived issues in the brief time allotted—and without the assistance of appellate counsel. That is plainly contrary to *Flores-Ortega* and basic principles of fairness.

The Solicitor General's rule is equally problematic. It would require a defendant to either inform his attorney of an unwaived claim he wished to bring, or to identify a nonfrivolous claim during postconviction proceedings. But *Flores-Ortega* specifically recog-

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[4] The State repeatedly asserts, for instance, that sentencing issues would "plainly" be within the scope of Mr. Garza's waiver. Resp. Br. 10. But the waiver states only that Mr. Garza "waives his right to appeal." Pet. App. 44a, 49a. Courts consistently hold that prospective waiver of sentencing issues "must be explicit; it will not be deemed implicit in a general waiver." *E.g. United States* v. *Capaldi*, 134 F.3d 307, 308 (5th Cir. 1998); *see also State* v. *Peterson*, 226 P.3d 535, 537 (Idaho 2010) (recognizing that plea agreements are construed strictly in favor of the defendant).

nized the inequity in requiring a defendant to "specify the points he would raise," and to do so "before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds." 528 U.S. at 486.

The State and the Solicitor General barely attempt to justify the profound inequity of their positions. The Solicitor General suggests that a defendant whose plea agreement contains an appeal waiver "presumably contemplated" the issues he would be waiving and is therefore "much better situated" to articulate issues he would want to appeal. U.S. Br. 27. That argument strains credulity. For one thing, a defendant who signs an appeal waiver often does so *before* important details are decided, including his sentence, any fines or restitution, and conditions for release. *See, e.g.*, *United States* v. *Medina-Carrasco*, 815 F.3d 457, 463-469 (9th Cir. 2016) (Friedman, J., dissenting). And there is no reason to think signing language saying one "waives [the] right to appeal," Pet. App. 44a, 49a, imbues a defendant with the expertise necessary to identify the issues that remain available to him on appeal and the ability to specifically articulate those issues to trial counsel.

The Solicitor General also suggests that depriving a defendant of an appeal is not inequitable because at least some claims challenging the voluntariness of a plea or waiver may be brought in postconviction proceedings. U.S. Br. 27. In fact, however, courts typically find those claims procedurally defaulted if they have not been brought first on direct appeal. *See Bousley* v. *United States*, 523 U.S. 614, 621 (1998). And even if a defendant tries to bring his claims on postconviction, he will face obstacles he would not have faced on appeal. He will have no

right to counsel, and his claims will be subject to the stringent procedures and standards that govern habeas proceedings. *See* IACDL Br. 22-27. For these reasons, the Court has recognized the essential role of direct appeal in "assur[ing] that only those who are validly convicted have their freedom drastically curtailed." *Evitts,* 469 U.S. at 399-400.

II. Denying A Presumption Of Prejudice Would Be Inefficient And Unworkable.

1. The State's and the Solicitor General's approach would also be cumbersome and inadministrable in practice.

For defendants, the other side's rules would elevate form over substance. They would grant a presumption of prejudice to defendants who knew to use the right verbal formula—telling an attorney to challenge, for instance, the "validity" of a plea, or perhaps asking to "appeal issues outside the scope of my waiver"—but deny the same presumption to defendants unaware of the need to avoid mention of waived issues. This would result in a "trap [for] the unwary," causing indigent defendants to forfeit their rights simply because they did not know what words to use. *Rose* v. *Lundy*, 455 U.S. 509, 530 (1982) (Blackmun, J., concurring).

The other side's approach would also create difficult obligations for already overburdened trial attorneys during the notice-of-appeal window. Today, although appointed counsel may, and ideally would, advise their clients about the benefits and drawbacks of appealing, they need simply follow whatever decision the client makes regarding whether to appeal. *See Flores-Ortega*, 528 U.S. at 477, 480. The other side's rules would greatly complicate matters.

When a defendant who signed an appeal waiver instructed her attorney to appeal, the attorney would not simply be required to comply. Instead, she would need to rapidly determine whether the issues her client expressed interest in raising were barred by the waiver—a determination often requiring analysis of the record (which generally would not even be available), the text of the waiver, and the applicable law. *See* Pet'r Br. 34-35. The attorney would further be required to parse her client's words to determine whether they encompassed a request to appeal issues outside the scope of the waiver. And all this analysis would be both hurried and wasteful, since the defendant's appellate attorney would not be limited to the issues a defendant (or even his trial counsel) identified as possible avenues for appeal. *See Barnes*, 463 U.S. at 751.

Nor could attorneys stop at the issues the client raised. Under the Solicitor General's rule, attorneys would be required to conduct their own independent analyses of the record and the plea agreement to determine whether there were any "nonfrivolous" issues the defendant *could* raise on appeal but failed to identify. U.S. Br. 22. The attorney's role at this brief, critical stage of the proceeding would thus be transformed from a largely "ministerial" one to a frenzy of analysis and consultation, all while the appeal clock ticks down. *Flores-Ortega*, 528 U.S. at 477.

Postconviction courts adjudicating claims of ineffective assistance would also face a more difficult task. Instead of answering a binary question—"did the client instruct her attorney to appeal?"—they would need to reconstruct the exact words the defendant

used; construe the waiver to decide whether the defendant's request was fairly included in its scope; and (under the Solicitor General's rule) determine whether there were any nonwaived issues the defendant *could* have raised. This already complicated analysis would be made even more difficult by the fact that the overwhelming majority of defendants lack the assistance of counsel in postconviction proceedings. Pet'r Br. 29.

All of this would mean more, not less, work for courts and governments. Government attorneys would be required to brief the merits of the defendant's claims in a wasteful collateral proceeding. And if the postconviction court granted relief and the defendant's appeal were reinstated, the appellate court would need to duplicate the postconviction court's merits analysis on direct review.

2. In contrast to the substantial costs of the other side's rules, a rule asking whether the defendant "instructed his counsel to file an appeal," *Flores-Ortega*, 528 U.S. at 486, would be—and in practice has been—easy to administer. A defendant simply needs to tell his attorney whether he wishes to appeal. The attorney is required to follow that instruction, after appropriate consultation. And, if the lawyer allegedly fails to do so, the postconviction court may resolve a claim of ineffective assistance by making a single factual determination: whether the defendant actually instructed his attorney to appeal.

The Solicitor General complains that this rule will result in frequent disputes between defendants and attorneys as to whether the defendant instructed his attorney to appeal. U.S. Br. 30. There is no evidence that has actually occurred in the 19 years following

Flores-Ortega; in fact, the substantial majority of courts that have adopted Mr. Garza's rule have had little difficulty screening non-credible claims on the papers. Pet'r Br. 39-40 & n.13. Furthermore, the risk of such disputes is considerably *greater* under the Solicitor General's rule, given that it would hinge on the precise words the defendant used, making factual disagreements more likely and "evidentiary hearing[s]" more necessary. U.S. Br. 30.

The Solicitor General also asserts that Mr. Garza's rule is likely to result in an increase in frivolous appeals. U.S. Br. 28. There is no evidence that has occurred, either. That is unsurprising. Defendants who raise issues barred by an appeal waiver risk exposing themselves to a "harsher punishment" if they are found to have breached their plea agreements. U.S. Br. 20. Defendants—particularly those advised as to the effects of their waivers—are unlikely to indiscriminately run that risk. The Solicitor General claims that defendants may insist upon appealing issues barred by their waivers simply to get a free trip out of prison. U.S. Br. 30-31. That remarkable suggestion is belied by the government's own recognition that appealing waived issues is not "free," but poses a serious risk to the defendant's liberty; one free trip out of prison could result in a far longer stint in prison.

Indeed, until its merits brief in this case, the United States took the position that the majority approach was both workable and correct. Following a stipulated remand from this Court in *Nunez* v. *United States*, 554 U.S. 911 (2008), the United States filed a statement in June 2008 explaining it "does not necessarily have an interest in advocating a holding

that would encourage defense counsel" to forgo filing notices of appeal following an appeal waiver, "rather than follow[ing] the simple rule of filing a notice of appeal on demand." Cir. R. 54 Statement of the United States 9, 546 F.3d 450 (7th Cir. 2008) (No. 06-1014). Although the government had previously taken the opposite position, it explained that, "upon further reflection," that position was "not viable" and "would be inconsistent with the presumed prejudice required by *Flores-Ortega*." *Id.* at 9-10. Multiple filings, from that Administration and the one that followed, adhered to the same position.[5] The United States identifies nothing that has occurred since then to suggest that the approach it advocated has proven unworkable or that the contrary view has grown more "viable."

III. Even Under The Other Side's Rules, Mr. Garza Is Entitled To Have His Appeal Reinstated.

Regardless of which rule this Court adopts, the decision below should be reversed. There is no dispute Mr. Garza "instructed his attorney to appeal," and that his attorney disregarded that instruction. Pet. App. 2a; *see id.* at 17a, 29a. That is suffi-

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[5] *E.g.*, *Watson* v. *United States*, 493 F.3d 960, 963 (8th Cir. 2007) (recognizing the United States' concession to the same effect); U.S. Br. 9 n.2, *Gomez-Diaz* v. *United States*, 433 F.3d 788 (11th Cir. 2005) (04-11105), 2004 WL 4986113, at *9 n.2 (conceding it is "unnecessary to engage in a prejudice analysis" where a defendant has given "express instructions" to appeal, irrespective of appeal waiver); Gov't's Resp. to Mot. to Vacate 4, *United States* v. *Falcon*, 2011 WL 777852 (D.R.I. Feb. 28, 2011) (No. 07-147-ML), ECF No. 43 (similar).

cient under *Flores-Ortega* to warrant a presumption of prejudice.

The same result obtains under the Solicitor General's rule. It is undisputed Mr. Garza "continuously" asked his counsel to appeal "via phone calls and letters." Resp. Br. 2. And, just weeks after his counsel failed to appeal, Mr. Garza executed a sworn affidavit stating that among the issues he wished to challenge was an "involuntary plea." CR 5-6, 10. Throughout the district court proceedings, he insisted that he "understood little," that there was a "lack of discussion regarding the waiver," and that his counsel "ignored" him. CR 162. Mr. Garza checked "no" when asked whether he believed he was waiving his appellate rights, was never advised about the waiver by the court, and was advised multiple times that he could appeal. *See* Pet'r Br. 32. These facts easily show "a reasonable probability that he would have pressed an issue that could be heard notwithstanding his waiver." U.S. Br. 9.

Mr. Garza would also prevail under the State's rule. The lower courts found that Mr. Garza instructed his attorney to appeal without suggesting that he in any way limited his request to issues within the scope of his waiver. Pet. App. 2a, 17a, 29a. The State, citing trial counsel's affidavit, claims that Mr. Garza specifically asked to "appeal his sentence(s)." Resp. Br. 22. The State never previously made this claim; in its Brief in Opposition, it stated simply that Mr. Garza "requested his trial counsel to file a notice of appeal" without qualification. BIO 2; *see also* S. Ct. R. 14. The State's late-breaking suggestion to the contrary is, at best, a disputed claim of fact that cannot properly be accept-

ed on a motion for summary judgment. *Ferrier* v. *State*, 25 P.3d 110, 112 (Idaho 2001). In any event, a request to appeal a "sentence" would comfortably include claims preserved by the waiver, including a challenge to Mr. Garza's sentence on the ground that it was imposed pursuant to an involuntary plea. *See also supra* p. 15 n.4 (noting that sentencing challenges may survive a general waiver). Even under the State's restrictive rule, then, the proper result is the same: Mr. Garza should be given his appeal.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted,

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