

Garza v. Idaho: Prioritizing Client Autonomy in Criminal Appeals Regardless of an Appeal Waiver

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In Garza v. Idaho, the Supreme Court resolved a split in authority about whether courts should presume counsel prejudiced a criminal defendant's case when counsel failed to file a notice of appeal, holding the presumption of prejudice applies regardless of a defendant's appeal waiver. By correctly extending Roe v. Flores-Ortega's rule which requires courts to presume prejudice, the Court expanded the presumption's application for ineffective assistance of counsel claims under the Sixth Amendment.

Overall, Garza protected a defendant's right to appeal despite an appeal waiver, as counsel must now act on the defendant's appeal request. If counsel fails to file a notice of appeal, defendants have a lower burden in proving counsel's ineffective assistance after Garza. The decision, however, may decrease the leniency and finality of plea bargain sentencings because of the likely increase in appeals.

INTRODUCTION	272
I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARISING FROM PLEA BARGAINS	277
A. Plea Bargains Containing Appeal Waivers	280
B. Sixth Amendment Jurisprudence.....	283
1. Jones v. Barnes	285
2. United States v. Cronin	288
3. Strickland v. Washington	289
4. Roe v. Flores-Ortega	292
II. GARZA V. IDAHO	295
A. Facts and Procedural History in the Lower Courts	296
B. The Court's Opinion	298
C. Justice Thomas's Dissent.....	302

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III. APPROPRIATELY PROTECTING CLIENT AUTONOMY	307
A. <i>Aligning with Sixth Amendment Jurisprudence</i>	308
B. <i>Appeal Waivers Not Precluding Appeal</i>	311
C. <i>Addressing Defendants' Disadvantages</i>	315
D. <i>Trending Toward Client Autonomy, Away from Paternalism</i>	317
IV. DISRUPTED PLEA BARGAINS SAVED BY REDUCED BURDENS	319
A. <i>Destabilized Plea Bargain Processes</i>	320
1. Plea Bargain Sentencings	320
2. Notices of Appeal	321
3. Appeal Waivers as Part of Plea Bargains	322
B. <i>Reduced Burdens for Courts and Defendants</i>	324
C. <i>Inapplicable in Criminal Settlements</i>	326
CONCLUSION	327

INTRODUCTION

The growth of the United States in the late 1700s necessitated the assistance of attorneys, which gave rise to attorney-client relationships.¹ From the outset of this relationship, the general population has held both criticism² and respect for the legal profession.³ Despite these differing

1. See *A Brief Guide to the History of Lawyers*, SMOKEBALL (May 8, 2018), <https://www.smokeball.com/blog/brief-guide-to-the-history-of-lawyers/> [<https://perma.cc/9J2A-59JW>] (noting that in order for a society to need lawyers, there must be a certain level of advancement. The U.S. colonies achieved that level of advancement when they began to thrive financially in the late 1700s.); see also Jonathan Barker & Matthew Cosentino, *Who's in Charge Here? The Ethics 2000 Approach to Resolving Lawyer-Client Conflicts*, GEO. J. LEGAL ETHICS 505, 505 (2003) (“While ethics rules are frequently concerned with ensuring that a lawyer represents her client well, the question of whether she represents the client according to the client’s wishes is generally overlooked.”).

2. SMOKEBALL, *supra* note 1 (explaining that many people in the U.S. colonies were hostile to lawyers, as some colonies even outlawed lawyers); Susan Katcher, *Legal Training in the United States: A Brief History*, WIS. INT’L L.J. 335, 337 (2006) (explaining that English prejudice against lawyers took root in America as well. “Distrust of lawyers became an institution.”); see TOM PAXTON, *ONE MILLION LAWYERS* (1988). In this satirical folk song, the singer laments that “[i]n ten years we’re gonna have one million lawyers.” For the singer, an abundance of lawyers is worse than disease and war, causing him to wonder “[h]ow the world’s gonna take any more [lawyers].”

3. See SMOKEBALL, *supra* note 1 (explaining that twenty-five of the fifty-six men who signed the Declaration of Independence were lawyers); see also Harrison Barnes, *Top 20 Reasons Why There Is No Better Profession Than Practicing Law*, BCG ATT’Y SEARCH, <https://www.bcgsearch.com/article/900046288/Top-20-Reasons-Why-There-Is-No-Better-Profession-Than-Practicing-Law/> [<https://perma.cc/G4HR-X6RH>] (last visited Sept. 24, 2019) (“In fact [practicing law] can be about the clearest path to security, wealth and prestige there is.”).

viewpoints, attorneys provide services important to society.⁴ While attorneys have many roles,⁵ the United States' adversarial model of adjudication established the attorney's primary role as servant to her client.⁶ In criminal proceedings, though, a defense attorney serves as an advocate for her client but also as an officer of the court with responsibilities to the State.⁷ As agents of both their client and the court,⁸

4. Michael Serota, Opinion, *A Matter of Perspective: A Lawyer's Place in Society*, 38 A.B.A. STUDENT LAW. 16, 16 (2010) (arguing that lawyers inevitably have an unfavorable reputation because the media continues to demean the legal profession with caricatures. For example, the media portrays the "greedy partner at a top law firm in the flashy car; the rough-and-tumble district attorney; the seedy criminal defense attorney." However, lawyers play a more nuanced and significant role in our society than these caricatures suggest.); see Diane Jorgensen, *Role of a Lawyer in Society*, DEL. L. INC. (Oct. 30, 2016), <https://www.bestbuddiesdelaware.org/role-lawyer-society/> [<https://perma.cc/67YY-WHWY>] (noting that any individual interested in finding the best way to resolve a dispute or to prevent one from occurring seeks the help of an attorney. When people consult attorneys, it helps them avoid a wide range of problems and reduce financial loss.); see also Tim O'Hare, *Contributions Lawyers Make to Our Society*, THE L. OFFS. OF TIM O'HARE, <https://oharelawfirm.com/dallas-personal-injury-attorney/contributions-lawyers-make-to-our-society/> [<https://perma.cc/4UY7-W2NB>] (last visited Oct. 16, 2019) (explaining that attorneys are advocates and advisors for society. Without attorneys, individuals would have to undertake legal research and best apply it to their circumstances.).

5. See *Model Rules of Professional Conduct: Preamble & Scope*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [<https://perma.cc/d2a4-4y9w>] (last visited Sept. 24, 2019) (describing a lawyer as a representative of clients and thereby an advisor, advocate, negotiator, and evaluator); see also Jeena Cho, *What Is the Role of Lawyers?* ABOVE THE L. (Aug. 24, 2015), <https://abovethelaw.com/2015/08/what-is-the-role-of-lawyers/> [<https://perma.cc/j6qa-d6yg>] (noting Abraham Lincoln's description of lawyers as "peacemakers" and concluding that lawyers self-define the kind of lawyer they are).

6. Nancy Amoury Combs, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663, 683 (1994) (explaining how clients control the proofs and run the process of their trial. In turn, this preserves client autonomy by providing a client with the fullest voice possible in her case. Attorneys must act as an assistant to that process.); see Daniel Markovits, *What Are Lawyers For?*, 47 AKRON L. REV. 135, 135 (2014) ("[A]t least with respect to lawyers who function as litigators . . . lawyers should serve their clients.").

7. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION STANDARD 4-1.2, A.B.A. (2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/T49Y-HE4N>] (explaining that if the defendant does not have an attorney, a court should not be able to hear the case. The standard describes defense counsels' "difficult task" of serving both the court and their clients. This entails "serv[ing] as their clients' counselor and advocate with courage and devotion; [ensuring] that constitutional and other legal rights of their clients are protected; and [rendering] effective, high-quality legal representation with integrity."); but see Jacob G. Hornberger, *Private Attorneys Are Not "Officers of the Court"*, FUTURE OF FREEDOM FOUND.: HORNBERGER'S BLOG (Sept. 23, 2009), <https://www.fff.org/2009/09/01/hornbergers-blog-september-2009/> [<https://perma.cc/7Z9C-GQHL>] (arguing that viewing lawyers as officers of the court is "one of the most pernicious—and false—doctrines ever promulgated in the legal profession." Rather, attorneys should serve as agents for their clients, not for the state.).

8. See Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in Legal*

defense attorneys may be uncertain about where their power ends and their clients' autonomy begins.⁹

As such, in the criminal attorney-client relationship, a common area of conflict is whether the attorney or client trumps in the decision-making process.¹⁰ If counsel disregards a criminal defendant's wishes, the defendant can claim ineffective assistance of counsel under the Sixth Amendment¹¹ for redress.¹² In evaluating a claim of ineffective assistance, courts rely on the standard the Supreme Court established in

Ethics Scholarship, 107 YALE L.J. 2473, 2473–74 (1998) (describing three prevailing models of lawyering when a client's wishes conflict with her attorney's: the lawyer-as-statesman, the lawyer-as-friend, and the lawyer-as-hired-gun. The lawyer-as-statesman theory provides that a lawyer should pursue a client's goals only if those goals advance the legal system's view of justice. The lawyer-as-friend model, however, encourages lawyers to pursue only the clients' causes which advance the ideals of the lawyer's moral code. The lawyer-as-hired-gun theory prompts counsel to advance her client's causes only if those causes allow the client to exercise her rights freely, as intended by the Constitution.); *see also* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 387 (2000) (explaining that counsel's only duty to the court that is inconsistent with her duty to the client is to cite unfavorable authority or facts).

9. Gear, *supra* note 8, at 2473 (describing the two contrary goals that society requires lawyers to meet. First, lawyers must facilitate client autonomy. Second, though, lawyers must use their power to prevent clients from pursuing immoral goals—thereby impinging on client autonomy. Ethicists have resolved this tension by advising attorneys to limit a client's autonomy only when the client's moral code is opposite to that of the attorney's.); *but see* MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 42 (3d ed. 2004) (noting that while representing her client, an attorney cannot be tempered by her moral judgment of the client or of the client's case).

10. Arnold R. Rosenfeld, *In Lawyer-Client Relationship, Who Makes the Decisions?*, NEW ENGL.: IN-HOUSE (July 16, 2012), <https://newenglandinhouse.com/2012/07/16/in-lawyer-client-relationship-who-makes-the-decisions/> [<https://perma.cc/39UN-5J85>] (noting that even when a criminal lawyer insists on making all of the strategic decisions about her client's case, she should consult with her client and explain her reasoning before putting the decision into effect); *see* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 4 (1998) (explaining that the legal profession is "sharply divided" as to how decision-making power should be allocated. For example, legal scholars "vigorously disagree" about the appropriate role for the lawyer in wielding decision-making power in the attorney-client relationship.); *see also* DAVE FRISHBERG, *MY ATTORNEY BERNIE* (1987) (The singer in this jazz song describes counsel's control over him such that "[counsel] tells me what to do . . . [counsel] says, we sue, we sue/[counsel] says, we sign, we sign."); *see generally* Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515 (1987) (noting that the attorney-client relationship is governed by informed consent in that lawyers must act only, or at least primarily, on the direction of their clients).

11. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."); *see* *McMann v. Richardson*, 397 U.S. 759, 771 (1970). In *McMann*, the Court expanded the Sixth Amendment guarantee of the assistance of counsel to the guarantee of the assistance of *effective* counsel. The Court reasoned that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *Id.*

12. *See* Barker & Cosentino, *supra* note 1 at 514 (explaining that the list of actions counsel must take in order to provide effective counsel under the Sixth Amendment grants courts administrative efficiency when determining whether or not counsel provided effective assistance).

Strickland v. Washington.¹³ Under the *Strickland* standard, a defendant must prove two prongs: (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's performance prejudiced the defendant's case.¹⁴ Cases like *Roe v. Flores-Ortega* addressed the *Strickland* standard in the context of a defendant's appellate rights.¹⁵ In *Flores-Ortega*, the Court held that courts should presume a defendant automatically satisfied *Strickland*'s second prong if counsel failed to file a notice of appeal.¹⁶

The Court in *Garza v. Idaho* extended its application of the *Flores-Ortega* presumption, further clarifying the *Strickland* standard.¹⁷ Before *Garza*, the Court had not defined how appeal waivers affect ineffective assistance analyses.¹⁸ As a result, the courts of appeals inconsistently

13. *Strickland v. Washington*, 466 U.S. 668, 699 (1984); see James K. Howard, *Ineffective Assistance of Counsel in Capital Cases*, CRIM. L. PRACTITIONER (Nov. 22, 2013) <http://wclcriminal-lawbrief.blogspot.com/2013/11/ineffective-assistance-of-counsel-in.html> [<https://perma.cc/22B5-ZZJN>] (describing the most common instances when clients bring ineffective assistance of counsel claims in murder cases: (1) when counsel is inexperienced, (2) when counsel fails to search for mitigating evidence in murder trials, and (3) when counsel fails to object to the requirement that the defendant wear restraints in front of the jury).

14. *Strickland*, 466 U.S. at 693; see *Strickland v. Washington*, LEGAL DICTIONARY (Dec. 10, 2018), <https://legaldictionary.net/strickland-v-washington/> [<https://perma.cc/B3XZ-HH8N>] (explaining that the *Strickland* Court did not find that the facts in *Strickland* satisfied either prong of the Court's test for ineffective assistance of counsel. First, while counsel's decisions were not what other lawyers would have done, the decisions were at least reasonable enough for Sixth Amendment effective assistance purposes. Second, the facts weighed too strongly against the *Strickland* defendant at trial; thus the defendant's sentence would not have changed if counsel made different choices. The Court noted that if a court can dispose of an ineffective assistance of counsel claim by first analyzing the second prong, doing so is appropriate.).

15. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); see Dan McCue, *Justices to Resolve Circuit Split Over Appeal Waivers*, COURTHOUSE NEWS SERV. (June 18, 2018) <https://www.courthousenews.com/justices-to-resolve-split-over-appeal-waivers/> [<https://perma.cc/66JK-KLPA>] (explaining that eight circuits adopted *Flores-Ortega*'s presumption. Two circuits, however, had not adopted the presumption and thus required a showing of prejudice.).

16. *Flores-Ortega*, 528 U.S. at 483–84; compare *Flores-Ortega*, 528 U.S. at 483–84 (explaining that prejudice is presumed to satisfy *Strickland*'s second prong if counsel failed to file a notice of appeal that the defendant requested), with *United States v. Cronin*, 466 U.S. 648, 659 (1984) (concluding that prejudice is presumed if “the accused is denied counsel at a critical stage of his trial.”), and *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (holding that prejudice is presumed if the accused is left “entirely without the assistance of counsel on appeal.”).

17. *Garza v. Idaho*, 139 S. Ct. 738, 740 (2019); see Debra Cassens Weiss, *SCOTUS Rules 6-3 for Inmate on Ineffective Assistance; Dissent Implies Gideon Was Wrongly Decided*, A.B.A. J. (Feb. 27, 2019, 1:09 PM), <https://www.abajournal.com/news/article/supreme-court-rules-6-3-for-inmate-whose-lawyer-refused-to-file-appeal-notice-because-of-waiver> [<https://perma.cc/2USD-CEG8>] (explaining that the issue in both *Garza* and *Flores-Ortega* was whether the defendants were entitled to a presumption that their attorneys' failure to file notices of appeal caused them prejudice).

18. See Evan Lee, *Opinion Analysis: Defense Lawyer's Refusal to File Requested Appeal Constitutes Ineffective Assistance, Despite Defendant's Appeal Waiver*, SCOTUSBLOG (Feb. 28,

applied *Flores-Ortega*'s presumption of prejudice, meaning only some defendants had to prove prejudice under *Strickland*'s second prong.¹⁹ In *Garza*, the Supreme Court determined how an appeal waiver affects an ineffective assistance claim when counsel failed to file a notice of appeal.²⁰ Relying on its ineffective assistance precedents, the *Garza* Court confirmed that *Flores-Ortega*'s presumption automatically satisfies *Strickland*'s second prong when the defendant agreed to an appeal waiver.²¹

Thus, the Court in *Garza* resolved the split in authority by holding that *Flores-Ortega*'s presumption of prejudice applies regardless of an appeal waiver.²² Although Justice Thomas's dissent conveyed that the presumption improperly stretches Sixth Amendment protections, Justice Sotomayor's majority opinion correctly protected client autonomy.²³

2019, 10:54 AM), <https://www.scotusblog.com/2019/02/opinion-analysis-defense-lawyers-refusal-to-file-requested-appeal-constitutes-ineffective-assistance-despite-defendants-appeal-waiver/> [https://perma.cc/2XZL-BHA2] (explaining that *Flores-Ortega* did not involve an appeal waiver, as *Garza* did); see also Basem Besada & Luis L. Lozada, *Gilberto Garza, Jr v. Idaho*, CORNELL L. SCH. LEGAL INFO. INST. SUP. CT. BULL., <https://www.law.cornell.edu/supct/cert/17-1026> [https://perma.cc/T87S-NK9X] (last visited Oct. 16, 2019) (noting that the *Garza* Court decided the scope and validity of appeal waivers balanced against a defendant's right to file an appeal).

19. *Garza*, 139 S. Ct. at 743 (explaining that, for example, eight of the ten federal courts of appeals to address the issue applied *Flores-Ortega*'s presumption of prejudice when a defendant signed an appeal waiver); see Christina Luedtke, *Garza v. Idaho*, WILLAMETTE L. ONLINE, <https://willamette.edu/law/resources/journals/wlo/scotuscg/2018/06/garza-v.-idaho.html> [https://perma.cc/839K-DXGY] (last visited Oct. 8, 2019) (explaining that the Court granted certiorari in *Garza* to resolve the circuit split as to whether a defendant deserves a presumption of prejudice if she previously waived her right to appeal as part of a plea bargain).

20. *Garza*, 139 S. Ct. at 740; see Amy Howe, *Five New Grants, One CVSG, But No Arlene's Flowers*, SCOTUSBLOG (June 18, 2018, 2:26 PM), <https://www.scotusblog.com/2018/06/five-new-grants-one-cvsg-but-no-arlenes-flowers/> [https://perma.cc/7T3V-S4CJ] (explaining that the Supreme Court agreed to determine what the *Garza* defendant's burden of proof was in proving counsel's ineffective assistance).

21. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner at 3, *Garza v. Idaho*, 139 S. Ct. 738 (2019) (No. 17-1026) (explaining that the fundamental question in *Garza* is whether courts should discard the principle of defendant autonomy when defendants waive certain appeal rights as part of a plea bargain); see also Evan Lee, *Argument Preview: Can a Criminal Defense Lawyer Refuse to file an Appeal From a Guilty Plea Because of an Appeal Waiver?*, SCOTUSBLOG (Oct. 23, 2018, 2:53 PM), <https://www.scotusblog.com/2018/10/argument-preview-can-a-criminal-defense-lawyer-refuse-to-file-an-appeal-from-a-guilty-plea-because-of-an-appeal-waiver/> [https://perma.cc/96LT-MB8J] (explaining that *Garza* would answer: (1) whether it is a defense attorney's job to act "as an arm of the state" in enforcing a plea bargain against his client and (2) whether a defense attorney should notify his client before the appeals deadline expires that he will not be filing a notice of appeal).

22. *Garza*, 139 S. Ct. at 742. The *Garza* Court reversed and remanded the Idaho Supreme Court's holding in a 6-3 decision and held that the *Flores-Ortega* presumption applies in satisfying *Strickland*'s second prong.

23. *Id.* at 747 (asserting that an appeal waiver does not complicate the "straightforward application" of *Flores-Ortega*'s presumption of prejudice when counsel's conduct denied the

Without the Supreme Court's guidance to lower courts, defendants would continue to face inconsistent burdens in proving ineffective assistance when counsel failed to file a notice of appeal.²⁴

Part I of this Note begins by describing prosecutors' increased reliance on plea bargains containing appeal waivers.²⁵ Part I continues with an account of the Supreme Court's Sixth Amendment jurisprudence.²⁶ Next, Part II details the factual and procedural history of *Garza* and discusses the Court's decision as well as Justice Thomas's dissent.²⁷ Part III analyzes why the majority in *Garza* was correct and consistent with the Court's jurisprudence in prioritizing client autonomy.²⁸ Last, Part IV explains the likely impact of *Garza*, including how it decreased courts' and defendants' burdens but may destabilize plea bargain processes.²⁹

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARISING FROM PLEA BARGAINS

In contemporary criminal proceedings, plea bargains are the most common method of resolving cases.³⁰ A plea bargain is an agreement between a prosecutor and defendant in which the defendant agrees to

defendant a proceeding altogether); see *Flores-Ortega*, 528 U.S. 470, 477 (2000) (noting that the Court will presume prejudice with no further showing from the defendant when a violation of the right to counsel rendered the proceeding either unreliable or nonexistent).

24. See *Garza v. State*, Nos. 44015/ 44016, 2017 WL 444026, at *1 (Idaho Ct. App. Feb. 2, 2017). The Idaho Court of Appeals' ruled that for *Garza* to succeed on his claim of ineffective assistance of counsel, *Garza* would have had to show prejudice with evidence either that (1) his appeal waiver was invalid or unenforceable or (2) the claimed issues on appeal were outside the scope of the waiver. See also *Luedtke*, *supra* note 19 (noting that the minority of circuits required a defendant to prove actual prejudice if her attorney failed to file a notice of appeal).

25. See *infra* Section I.A (discussing the mechanics of plea bargains and appeal waivers as well as prosecutors' increased reliance on appeal waivers).

26. See *infra* Section I.B (explaining the *Strickland* standard for ineffective assistance of counsel and how *Flores-Ortega* honed it).

27. See *infra* Part II (discussing *Garza v. Idaho*, the case at issue in this Note).

28. See *infra* Part III (arguing that *Garza* correctly aligns with the United States Supreme Court's Sixth Amendment jurisprudence).

29. See *infra* Part IV (explaining *Garza*'s implications).

30. See Thea Johnson, *Johnson on Perceptions of Plea Bargaining*, LEGAL THEORY BLOG (July 30, 2019), <https://solum.typepad.com/legaltheory/2019/07/johnson-on-perceptions-of-plea-bargaining.html> [<https://perma.cc/CP3V-JW9U>] (explaining that although plea bargaining is the most common method of resolving cases in the criminal system, the public disapproves of it); see Mark A. Friese, *Plea Bargain Pitfalls*, VOGEL L. FIRM (June 4, 2019), <https://www.vogellaw.com/blog/2019/06/plea-bargain-pitfalls.shtml> [<https://perma.cc/2R5L-GGMA>] (stating that an estimated ninety to ninety-five percent of state court criminal cases are resolved through the plea bargaining process. In federal criminal cases, there is a plea of guilty in ninety-seven percent of cases.); see generally Robert K. Calhoun, *Waiver of the Right to Appeal*, 30 HASTINGS CONST. L.Q. 127, 128 (1995) ("Plea bargaining is the bedrock upon which modern criminal justice practice rests.").

plead guilty in exchange for concessions from the prosecutor.³¹ Typically, the State offers a plea bargain when it has a strong case against a defendant.³² Defendants who enter into a plea bargain frequently agree to an appeal waiver.³³ An appeal waiver requires the defendant's promise to not appeal her sentencing.³⁴ While the Supreme Court held that appeal waivers are constitutional,³⁵ a minority of courts have held they are invalid because of conflicts with due process, contract law, and public

31. *Plea Bargain*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/plea_bargain [<https://perma.cc/U6UN-SM3W>] (last visited Aug. 24, 2019); see Sara J. Berman, *The Basics of a Plea Bargain*, NOLO, <https://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html> [<https://perma.cc/EGN6-U43K>] (last visited Oct. 8, 2019) (explaining that the concessions a defendant may receive as part of a plea bargain may require the prosecutor to drop charges, reduce a charge to a less serious offense, or recommend a specific sentence to the judge).

32. *Plea Bargaining*, OFF. OF THE U.S. ATT'Y: JUST. 101, <https://www.justice.gov/usao/justice-101/pleabargaining> [<https://perma.cc/7FWX-4EUC>] (last visited Aug. 24, 2019); but see *When Should You Accept a Plea Bargain in Your Criminal Case?*, HG.ORG, <https://www.hg.org/legal-articles/when-should-you-accept-a-plea-bargain-in-your-criminal-case-30893> [<https://perma.cc/9JK2-FPN7>] (last visited Oct. 8, 2019) (explaining that prosecutors may offer plea bargains to reduce their workload. A plea bargain, after all, moves a defendant through the system faster, and sometimes the judge expects the prosecutor to make a plea bargain before the court rules.).

33. Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 871 (2010); see Thomas Seigel, *Guilty Pleas and Appeals*, LAWYERS.COM (Apr. 9, 2015), <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/guilty-pleas-and-appeals.html> [<https://perma.cc/2LCW-5UC8>] (last visited Oct. 8, 2019) (explaining that during a hearing, the judge will typically state that a defendant may have no right to appeal a conviction based on a guilty plea).

34. Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 347 (2015); see *A Generic Appeal Waiver Doesn't Preclude Claims of Ineffective Assistance of Counsel at Sentencing*, THE FED. CRIM. APPEALS BLOG (Aug. 25, 2018), https://www.federalcriminalappealsblog.com/a-generic-appeal-waiver-doesnt-preclude-claim-of-ineffective-assistance-of-counsel-at-sentencing-in-re-sealed-case-_f-3d_-d-c-circuit-no-16-3005-aug-17-2018/ [<https://perma.cc/9LF5-EY7B>] (noting that an appeal waiver requires a defendant to waive the right to make an appeal or to seek review after sentencing).

35. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020); see *Brady v. United States*, 397 U.S. 742, 756 (1970). In *Brady*, the Court held that when a defendant enters a plea of guilty and the plea bargain contains an appeal waiver, the defendant forfeits a broad range of legal and constitutional appellate claims which would have otherwise been available had the case gone to trial.

policy.³⁶ Appeal waivers nonetheless remain a popular component of plea bargains.³⁷

Plea bargains involve important decisions that may confuse a defendant, requiring counsel's guidance.³⁸ If counsel fails to properly discuss a plea bargain with her client, the client can file an ineffective assistance of counsel claim.³⁹ For instance, in *Hill v. Lockhart*, the defendant filed an ineffective assistance claim alleging counsel

36. Reimelt, *supra* note 33, at 884 (explaining that one district court and a minority of state courts held that plea bargains can never include an appeal waiver. These courts reasoned that appeal waivers fail to satisfy the due process “knowing and voluntary” test for appeals because such a waiver of future rights is inherently uninformed and unintelligent. These courts also concluded that appeal waivers violate contract law because the parties, the State and the defendant, hold unequal bargaining power. Additionally, they held that appeal waivers conflict with the public policy concern of correcting errors in law and fact through the appeal process.); see Charis Stanek, *Supreme Court Must Strike Down Plea Bargaining*, MIC (Aug. 3, 2012), <https://www.mic.com/articles/11949/supreme-court-must-strike-down-plea-bargaining> [<https://perma.cc/SV6K-R7FQ>] (explaining a study which demonstrated that when even an *innocent* person faces the risk of a severe punishment by going to trial, she is more likely to accept the plea bargain and thus eliminate the risk of the severe punishment); see also *Justice in America Episode 2: The 94%—Plea Deals*, THE APPEAL (Aug. 1, 2018), <https://theappeal.org/justice-in-america-episode-2-the-94-plea-deals/> [<https://perma.cc/2TF6-UUVL>] (noting that plea bargaining is often extremely coercive, even when the defendant is not guilty).

37. See Quin M. Sorenson, *Appeal Rights Waivers: A Constitutionally Dubious Bargain*, 65 FED. LAW. 32, 33 (2018) (explaining that appeal waivers appeared in plea agreements in the 1970s, gained popularity in the 1990s, and have become nearly universal in many districts); see also Bennardo, *supra* note 34, at 348 (noting that appeal waivers rose to popularity in the 1990s and are currently common components of plea agreements in many federal districts).

38. See *Ineffective Assistance of Counsel in Plea Bargaining*, JUSTIA, <https://www.justia.com/criminal/plea-bargains/ineffective-assistance-of-counsel-in-plea-bargaining/> [<https://perma.cc/9KR3-XCES>] (last visited Oct. 16, 2019) (explaining that a defendant may feel pressure to accept a plea deal or may be confused about the consequences of her decision); see also *How Would You Waive Your Right to An Appeal?*, LAW OFF. OF DANIEL A. HOCHHEISER, (Sept. 4, 2013), <https://www.hochheiser.com/Blog/2013/September/How-Would-You-Waive-Your-Right-to-an-Appeal-.aspx> [<https://perma.cc/5CHN-QEE>] (noting that the decision to agree to an appeal waiver should be made carefully as it may be “extremely dangerous”).

39. See *Ineffective Assistance of Counsel in Plea Bargaining*, *supra* note 38 (explaining that when counsel fails to discuss a client's options with her plea bargain, the defendant may have recourse through a Sixth Amendment claim. To succeed, however, the defendant must demonstrate severe misconduct by her attorney.); see also Alexis Kelly, *Ineffective Representation in Plea Bargains*, NOLO, <https://www.nolo.com/legal-encyclopedia/ineffective-representation-plea-bargains.html> [<https://perma.cc/6J2D-82ZP>] (last visited Oct. 16, 2019) (explaining instances when courts have found that counsel inadequately represented her client at the plea bargain stage. For example, counsel was constitutionally ineffective when there was no negotiation at all on behalf of a defendant; counsel failed to convey unbiased, complete, or correct information; and when counsel understated or overstated plea bargain risks in order to pressure a defendant either to go to trial or to plead guilty.); but see Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1700 (1994) (arguing that legal standards for ineffective assistance of counsel are “ill-suited” to the context in which they are most common, plea bargaining).

inadequately advised him during the plea bargain process.⁴⁰ In *Flores-Ortega*, the defendant filed the same, claiming counsel insufficiently communicated with him about appealing a plea bargain sentence.⁴¹

A. Plea Bargains Containing Appeal Waivers

Prosecutors have increasingly relied on appeal waivers in plea bargains since appeal waivers' inception in the 1970s.⁴² In fact, some attorney's offices require that every plea agreement include an appeal waiver.⁴³ An appeal waiver does not necessarily waive all claims on appeal, as the waiver's scope varies based on the language in its provision.⁴⁴

40. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). In *Hill*, the defendant alleged ineffective assistance of counsel after his attorney provided erroneous information about parole eligibility as part of his plea agreement. *Id.*; see Doug Plank, *Criminal Law Update: Right to Effective Assistance of Counsel Extended to Plea Bargains*, NAT'L LEGAL RSCH. GROUP, INC. (Apr. 13, 2012), <https://www.nlrg.com/criminal-law-legal-research/bid/77050/CRIMINAL-LAW-UPDATE-Right-to-Effective-Assistance-of-Counsel-Extended-to-Plea-Bargains> [https://perma.cc/VG3X-SVAU] (explaining that the *Hill* Court held that *Strickland's* requirements extend to when an attorney provides incompetent advice to a defendant that caused the defendant to accept a plea agreement).

41. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The *Flores-Ortega* Court held that the *Strickland* test applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. See Thomas L. Root, *Could SCOTUS Decision In Haymond "Bring Down Supervised Release?"*, LEGAL INFO. SERV. ASSOC. (Mar. 4, 2019), <https://www.lisa-legalinfo.com/tag/appendi/> [https://perma.cc/34WK-5Q4M] (explaining that after the *Flores-Ortega* decision, if a defendant asked her attorney to file a notice of appeal, and the attorney does not, the attorney has provided ineffective assistance regardless of the appeal's chance of success).

42. Bennardo, *supra* note 34, at 347 (noting that despite their popularity, appeal waivers have the effect of preventing defendants from accurately valuing their rights during the plea bargaining process. Appeal waivers also undermine a district court's incentives in observing proper sentencing practices.); see Sorenson, *supra* note 37, at 33 ("These [appeal waivers], among the most ubiquitous in plea agreements, are also among the most constitutionally dubious.").

43. Sorenson, *supra* note 37, at 33 (noting that a sizable majority of plea agreements across the nation include some form of an appeal waiver provision); see generally Brandon Sample, *Requirement of Consideration for Appeal Waivers*, SENTENCING.NET (Dec. 29, 2018), <https://sentencing.net/appeal/requirement-consideration-appeal-waivers> [https://perma.cc/FNP5-WPRT] (explaining that the government primarily treats the appeal waiver portion of a plea agreement as boilerplate language. Courts therefore rarely examine the rights that a defendant must give up in an appeal waiver.).

44. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (explaining that certain constitutional claims survive appeal waivers and that the scope of the waivers will vary with each case); but see Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 211 (2005) ("Scholars and litigants disagree about what is waived, by whom, at what price, and how often.").

The two primary types of appeal waivers are broad⁴⁵ and limited waivers.⁴⁶ A broad appeal waiver eliminates the defendant's right to appeal her sentence on any grounds.⁴⁷ Broad waivers efficiently limit the issues that appellate courts can address but prevent those courts' review of the sentencing process.⁴⁸ In contrast, limited appeal waivers allow a defendant to appeal a sentence if the prosecutor and defendant agreed to a different one.⁴⁹ Advantageously, parties can modify a limited waiver, but these waivers may overburden appellate courts by failing to reduce appealable issues.⁵⁰

45. Bennardo, *supra* note 34, at 348–49 (explaining that waivers vary widely in scope from broad blanket waivers of all appellate rights to individually-tailored waivers); *see* United States v. Johnson, 67 F.3d 200, 202 (9th Cir. 1995). In *Johnson*, the court interpreted the appeal waiver's bar on appealing "any sentence" as barring the defendant's appeal of issues arising from a law enacted between the defendant's plea and his sentencing.

46. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (explaining that some waivers may be limited to specific issues for appeal, such as a particular sentence, sentencing range, or guideline application); *see* Bennardo, *supra* note 34, at 349 (describing limited appeal waivers as "individually-tailored waivers in which the defendant retains the right to appeal specified aspects of the sentence under particular conditions.").

47. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (noting that a broad appeal waiver requires the defendant to waive any and all sentencing issues on appeal); *but see* King & O'Neill, *supra* note 44, at 211 ("Recent decisions embracing broad appeal waivers have continued to provoke criticism from commentators.").

48. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (describing how broad appeal waivers reduce claims available for appeal, but risk promoting guideline-free sentencing); *see* King & O'Neill, *supra* note 44, at 223 (noting that legal experts have attacked broad appeal waivers as "bad policy"); *see also* Michael M. O'Hear, *Defendant Can Challenge Attorney's Failure to Appeal Despite 2255 Waiver, Seventh Circuit Says*, MARQ. U. L. SCH. FAC. BLOG (Sept. 17, 2012), <https://law.marquette.edu/facultyblog/2012/09/defendant-can-challenge-attorneys-failure-to-appeal-despite-2255-waiver-seventh-circuit-says/> [<https://perma.cc/2JGS-7E9X>] (explaining that broad appeal waivers have become a routine part of federal criminal practice. Narrow interpretations of appeal waivers based on principles of reasonableness would help prevent injustices to the defendant.).

49. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (explaining that a defendant may appeal anything that differs from what the parties agreed to in the appeal waiver); *see* Angel A. Castro, *After Taking a Federal Plea Bargain*, A.A. CASTRO C.L.A.N. PLLC, <https://www.aac3clan.com/new-york-criminal-attorney/federal-crime-plea-bargaining/after-federal-plea-bargain/> [<https://perma.cc/9DR7-VUY6>] (last visited Oct. 9, 2019) (explaining, for example, that if the plea agreement states that the prosecutor will recommend the lower half of the available sentences for a particular offense, a limited appeal waiver would waive the defendant's right to appeal any sentence within the agreed-upon sentencing range. The defendant, however, would still be able to appeal a sentencing outside of the agreed-upon range.).

50. U.S. Dep't of Just., Criminal Resource Manual § 626 (2020) (noting that while limited appeal waivers may be beneficial to the parties, they allow more claims to be appealed than with broad waivers); *see* King & O'Neill, *supra* note 44, at 230 (explaining many prosecutors' belief that appeal waivers have reduced their appellate burden. As such, prosecutors with limited resources value broad appeal waivers.).

Overall, appeal waivers relinquish a defendant's appeal right to some degree.⁵¹ Legal scholars, however, regard the appeal right as nearly sacrosanct.⁵² Some have even requested that the Supreme Court explicitly recognize a due process right to appeal.⁵³ Appeals, after all, prevent a defendant's wrongful conviction by correcting lower courts' legal and factual errors.⁵⁴ But if a defendant's appeal waiver eliminates her right to appeal, she can still file a habeas corpus claim to overturn a wrongful conviction or sentencing.⁵⁵ Habeas claims require a court to

51. Bennardo, *supra* note 34, at 347 (“These [appeal] waivers, executed as part of a defendant’s plea agreement, relinquish the defendant’s right to appeal her yet-to-be-imposed sentence.”); see Richard J. Ovelmen & Rachel A. Oostendorp, *So You’re Telling Me There’s a Chance!—The Difference Between Waiver and Forfeiture*, MONDAQ (Mar. 7, 2018), <https://www.mondaq.com/unitedstates/Litigation-Mediation-Arbitration/680498/So-You39re-Telling-Me-There39s-A-Chance-The-Difference-Between-Waiver-And-Forfeiture> [<https://perma.cc/W46N-UVM2>] (describing that a waiver is the intentional relinquishment or abandonment of a known right); see generally Bruce R. Bryan, *The Appeal Process*, BRYAN APPEALS, <https://bryanappeals.com/resources/the-appeal-process> [<https://perma.cc/Q2NH-89FE>] (last visited Sept. 24, 2019) (noting that appeals are either of right or by permission. An appeal of right occurs when the party can automatically bring the case to the appellate court, after the party’s attorney files and serves a notice of appeal. Conversely, an appeal by permission requires the party to ask the appellate court for permission to appeal the case.); *Rule 11: Appeal by Permission from Appellate Court to Supreme Court*, TENN. ST. CTS., <http://www.tsc.state.tn.us/rules/rules-appellate-procedure/11> [<https://perma.cc/G6HF-LKUR>] (last visited Oct. 9, 2019).

52. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985) (noting that while the origins of the right to appeal are neither ancient nor constitutional, the right has remained unquestioned); see Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT’L L. 1, 1 (2011) (explaining that criminal appeals are a “crucially important feature” of the modern criminal process. Nevertheless, “[d]espite being both important and prevalent . . . very little scholarly attention has been given to the subject of criminal appeals.”).

53. See Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1219 (2013) (explaining that while federal and state judicial systems have increasingly relied on the appeal process to protect individual rights, the Supreme Court has repeated its nineteenth-century dicta that permits the denial of the right to appeal); see also James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 375–76 (1985) (explaining that in *McKane v. Durston*, a unanimous Supreme Court held that no matter how grave the offense, a criminal defendant has no constitutional right to appeal. Justice Brennan subsequently challenged this in *Jones v. Barnes* when he stated that *McKane* was arguably wrong and that the Supreme Court would likely overrule it.).

54. Robertson, *supra* note 53, at 1225 (citing Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 591–92 (2009)) (stating that as well as correcting errors, appellate rights protect innocent defendants against wrongful convictions); see *The Right to Appeal*, CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal/> [<https://perma.cc/LNA5-XZWJ>] (last visited Sept. 24, 2019) (explaining that a defendant’s right to appeal is the “the most obvious way in which individual judges are [held] accountable” because another independent judge or group of judges is able to review the decision).

55. *Difference Between an Appeal and an Application for Writ of Habeas Corpus*, BRODEN & MICKELSEN (Aug. 20, 2008), <https://www.brodenmickelsen.com/blog/difference-between-an-appeal-and-an-application-for-writ-of-habeas-corpus/> [<https://perma.cc/2NTL-YAFF>]. A

review a defendant's conviction or sentencing,⁵⁶ most commonly through an ineffective assistance of counsel claim under the Sixth Amendment.⁵⁷

B. Sixth Amendment Jurisprudence

Sixth Amendment jurisprudence has established and expanded protections for criminal defendants.⁵⁸ For example, in *Johnson v. Zerbst*, the Supreme Court held that in *federal* trials, the government must supply

defendant can bring an application for a writ of habeas corpus if she loses her direct appeal or if she elects not to pursue one. The habeas corpus procedure is used to raise issues that were not in the record: issues that the defendant could not have raised on direct appeal. In most states and in the federal system, the issues must be related to a denial of a constitutional right. *Id.* See Paul Wallin, *What is the Difference Between an Appeal and a Writ of Habeas Corpus?*, WALLIN & KLARICH, <https://www.wklaw.com/what-is-the-difference-between-an-appeal-and-a-writ-of-habeas-corpus/> [<https://perma.cc/AR6G-44MR>] (last visited Oct. 16, 2019) (noting that both an appeal and a habeas corpus claim are part of the appellate process).

56. See *Know Your Rights: Federal Habeas Corpus (Criminal Cases)*, LAW OFF. OF THE S. CTR. FOR HUM. RTS., <https://www.schr.org/files/post/HABEAS%20CORPUS%20PROCEDURE%20-%20FEDERAL%20HABEAS%20CORPUS.pdf> [<https://perma.cc/7QS6-J7RB>] (last visited Nov. 6, 2019) (explaining that in a habeas corpus proceeding, the court considers whether a person is being held illegally in prison or in jail or is illegally on probation or parole); see also *Jurisdiction: Habeas Corpus*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus> [<https://perma.cc/5QWB-ZEGD>] (last visited Nov. 6, 2019) (noting that a writ of habeas corpus challenges the legality of a prisoner's detention and does not necessarily involve an inquiry into the prisoner's guilt or innocence).

57. See *Difference Between an Appeal and an Application for Writ of Habeas Corpus*, *supra* note 55 (explaining that an "overwhelmingly large majority" of applications for a writ of habeas corpus allege that a defendant's attorney was ineffective); see also *Ineffective Assistance of Counsel*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/ineffective_assistance_of_counsel [<https://perma.cc/J947-VA3Z>] (last visited Oct. 10, 2020) (noting that ineffective assistance is a common habeas corpus claim because courts will overturn a defendant's conviction if the defendant succeeds with the claim); see also Corey Parker, *Raising an Ineffective Assistance of Counsel Argument on Appeal*, THE APP. L. FIRM, <https://theappellatelawfirm.com/blog/raising-ineffective-assistance-counsel-argument-appeal/> [<https://perma.cc/FJ6X-ZPM3>] (last visited Oct. 16, 2019) (explaining that when an ineffective assistance of counsel argument is successful on appeal, the defendant's conviction will be overturned. Nonetheless, the prosecutor will likely have an opportunity to bring a new trial against the defendant.); see generally *Coleman v. Thompson*, 501 U.S. 722, 725–26 (1991) (describing the petitioner's ineffective assistance claim as a basis for his habeas appeal).

58. See *Cuyler v. Sullivan*, 446 U.S. 335, 344–45 (1980) (clarifying that a defendant can argue that her right to effective counsel was violated whether she pays for her attorney or has a court-appointed counsel); see also *Evitts v. Lucey*, 469 U.S. 387, 387 (1985) (holding that just as the Sixth Amendment guarantees a criminal defendant the effective assistance of counsel at trial, the Sixth Amendment entitles a criminal defendant to effective assistance when appealing a conviction); see generally *Ineffective Assistance of Counsel*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/issues-we-face/ineffective-assistance-of-counsel/> [<https://perma.cc/5QMW-689F>] (last visited Oct. 16, 2019) (explaining that ineffective assistance of counsel, or "bad lawyering," constitutes a violation of a criminal defendant's Sixth Amendment right to counsel. Bad lawyering results in an unlevel playing field for the defendant and frequently leads to a wrongful conviction.).

counsel to criminal defendants at its expense.⁵⁹ The Court subsequently extended this requirement to state trials in *Gideon v. Wainwright*.⁶⁰

In addition to securing defendants' right to counsel, the Court's Sixth Amendment jurisprudence has defined a minimum standard for counsel's conduct.⁶¹ In *Anders v. California*, the Court held that counsel must support a defendant's appeal to the best of her ability.⁶² The *Anders* Court therefore ensured that counsel cannot ignore her client's wishes in an appellate proceeding.⁶³ Yet in other ineffective assistance cases, the Supreme Court overlooked protecting clients' decision-making power.⁶⁴

59. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); see *The Right to Counsel in Federal Trials in Johnson v. Zerbst*, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-right-to-counsel-in-federal-trials/> [<https://perma.cc/DH4P-K35Y>] (last visited Sept. 26, 2019) (explaining that *Zerbst* expanded the meaning of the Sixth Amendment from "the court *may* appoint counsel . . . [to] the court *must* appoint counsel in criminal cases.").

60. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (overruling *Betts v. Brady*, 316 U.S. 445 (1942), which denied counsel to indigent defendants in criminal trials); see Jessie Kratz, *Feature Document: A Right to a Fair Trial*, NAT'L ARCHIVES: PIECES OF HIST. (Dec. 23, 2016), <https://prologue.blogs.archives.gov/2016/12/23/featured-document-a-right-to-a-fair-trial/> [<https://perma.cc/R2TZ-VAW8>] (explaining that the impact of *Gideon* was "far-reaching." *Gideon* guaranteed defendants a constitutional right to counsel, compelling many states and counties to establish a system of public defenders. "The case is considered one of the most significant Supreme Court decisions in American history."); see also David Carroll, *A Chronic Resolve to America's Chronic Right to Counsel Deficiencies*, SIXTH AMEND. CTR. (Sept. 29, 2016), <https://sixthamendment.org/a-chronic-resolve-to-americas-chronic-right-to-counsel-deficiencies/> [<https://perma.cc/6Y3Y-FYH5>] (noting humorously that the Supreme Court established it is insufficient for states, in providing defendants with lawyers, to merely offer "a warm body with a bar card to stand beside an indigent person.").

61. See Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1162 (2012) (explaining that the Court's ineffective assistance jurisprudence has a "norm-shaping impact" on counsel's conduct); see also *Ethics Opinion 1048*, N.Y. ST. BAR ASS'N (Mar. 2, 2015) (noting that ineffective assistance jurisprudence shapes the lawyer's role).

62. *Anders v. California*, 386 U.S. 738, 744 (1967); see *Sixth Amendment—Right to Assistance of Counsel*, ANNENBERG CLASSROOM, <https://www.annenbergclassroom.org/resource/right-assistance-counsel/> [<https://perma.cc/5K3P-646W>] (last visited Sept. 24, 2019) (explaining that the *Anders* Court found the attorney was ineffective when he merely submitted a letter to the court stating the appeal had no merit and then withdrew from the case); see also Frederick D. Junkin, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 183 (1989) (explaining that *Anders* established the minimum standard of representation that the Sixth and Fourteenth Amendments require of appellate counsel).

63. See Junkin, *supra* note 62, at 183 (noting the *Anders* Court's requirement that appellate lawyers act as "active advocates" of their clients' interests (quoting *Anders*, 386 U.S. at 744)); but see Kip Nelson, *What Type of Review is Triggered by a "No-Merit" Brief?*, N.C. APP. PRACTICE BLOG (July 18, 2018), <https://www.ncapb.com/2018/07/18/what-type-of-review-is-triggered-by-a-no-merit-brief/> [<https://perma.cc/4LJA-J8WN>] (explaining that *Anders* allows an attorney to withdraw from an appeal in which she finds no legal merit so long as the attorney provides an explanatory brief).

64. See *Jones v. Barnes*, 463 U.S. 745, 745–46 (1983) (noting that the *Barnes* Court qualified the *Anders*' rule. In *Barnes*, the Court held that it protects a defendant's wishes at an appellate proceeding only if the defendant presents *nonfrivolous* issues on appeal. The *Barnes* Court made

1. *Jones v. Barnes*

For instance, after *Anders*, the Court in *Jones v. Barnes* held that if a defendant asks counsel to press issues on appeal, counsel does not need to raise every issue, even if it is nonfrivolous.⁶⁵ In *Barnes*, counsel listed seven claims which he considered including in his appellate brief and sought the defendant's input.⁶⁶ Counsel's brief listed only three of the seven claims, and during oral arguments, he did not address issues that the defendant raised in his pro se briefs.⁶⁷

The defendant alleged ineffective assistance, and the Second Circuit agreed, holding that counsel must argue points the defendant raised to her full ability.⁶⁸ The court relied on *Anders*—reasoning that because *Anders* prohibits counsel from abandoning a nonfrivolous *appeal*, it also prohibits counsel from abandoning a nonfrivolous *issue* on appeal.⁶⁹

clear that counsel thus has no obligation to present a client's *frivolous* issues on appeal.); *see also* David J. Gross, *Sixth and Fourteenth Amendments—Appointed Counsel Has No Constitutional Duty to Argue All Nonfrivolous Issues on Appeal*, 74 J. CRIM. L. & CRIMINOLOGY 1353, 1353 (1983) (explaining that in *Barnes*, the Court held that attorneys have no constitutional duty to raise every nonfrivolous issue that defendants request they argue).

65. *Barnes*, 463 U.S. at 751; *see* Peter Blair, *Specific Grounds on Which to Appeal: Ineffective Assistance by Counsel*, LAW OFF. OF PETER BLAIR (Aug. 13, 2015), <https://www.blairdefense.com/specific-grounds-on-which-to-appeal-ineffective-assistance-by-counsel/> [<https://perma.cc/9Z9H-DNEF>] (explaining that to provide effective assistance, counsel must discuss important legal decisions with her client).

66. *Barnes*, 463 U.S. at 748 (explaining that the defendant sent his counsel a letter listing several claims that he felt counsel should raise. In a return letter, counsel accepted some of the suggested claims but rejected most of them. Counsel explained that he rejected claims which would not aid the defendant in obtaining a new trial. Counsel then listed seven potential claims that he considered including in his brief and invited the defendant's "reflections and suggestions." The record did not indicate that the defendant responded to this letter.); *see generally* Karen A. Krisher, *Jones v. Barnes, the Sixth, and the Fourteenth Amendments: Whose Appeal Is It, Anyway?*, 47 OHIO ST. L.J. 163, 185–88 (1986) (explaining the facts of *Barnes* in detail).

67. *Barnes*, 463 U.S. at 748 (noting that counsel submitted the defendant's pro se brief. Afterward, the defendant filed two more pro se briefs which raised three of the issues counsel had not included in his brief.); *see* Krisher, *supra* note 66, at 185 (detailing that counsel explained to the defendant via letter that the defendant's proposed claims would not be helpful in winning a new trial and could not be raised on appeal, because the claims were not based on evidence in the record).

68. *Barnes*, 463 U.S. at 749 (explaining that the court of appeals established a new standard for ineffective assistance of counsel claims about an attorney's failure to raise colorable points on appeal); *see generally* *Barnes v. Jones*, 665 F.2d 427, 431–32 (2d Cir. 1981) (noting that the district court dismissed the defendant's claim of ineffective assistance of counsel. The court held that an attorney is not required to argue every conceivable issue on appeal, especially when some may be without merit. Rather, the district court held that it is counsel's professional duty to apply her strategic judgment in choosing only those issues with the greatest merit.).

69. *Barnes*, 463 U.S. at 750; *see* Richard N. Allman, *Jones v. Barnes and the Right to Counsel on Appeal: Is Effective Assistance of Counsel More than Faerie Gossamer?*, 4 PACE L. REV. 407, 416 (1984) (explaining that the *Anders* Court measured the effective assistance of counsel with the Fourteenth Amendment's standard of fundamental fairness, rather than the Sixth Amendment's

The Supreme Court disagreed, finding the Second Circuit overextended the *Anders* rule.⁷⁰ The Court reasoned that *Anders*, in ensuring counsel's effective advocacy for her client, defies requiring counsel to raise every claim a defendant requests.⁷¹ Thus, the *Barnes* Court held that a defendant does not have a right to compel counsel to press arguments that counsel declines to press.⁷² Instead, counsel provides her best advocacy when she decides which issues to press, independent of a defendant's wishes.⁷³ Although the Court affirmed that a defendant has the ultimate authority to make certain decisions,⁷⁴ it held

standard. After *Anders*, legal scholars encouraged courts to measure effective assistance of counsel by the Sixth Amendment's standards. They noted that while the Fourteenth Amendment addresses only fairness, the Sixth Amendment focuses more directly on counsel's quality of representation and thus would expand client protection beyond just the notion of fairness.).

70. *Jones v. Barnes*, 463 U.S. 745, 750 (1983) (noting that at the appellate level, a dissenting judge argued that the majority had overextended *Anders*. The judge's position was that *Anders* only determined that counsel must pursue nonfrivolous *appeals* and did not suggest counsel must advance all nonfrivolous *issues*.); see *Barnes*, 665 F.2d at 436. At the appellate court, the dissenting judge distinguished *Anders*—where counsel's complete refusal to brief and argue claims left the defendant without the aid of counsel in pressing his appeal—with *Barnes*, where counsel pressed the defendant's issues on appeal, but not *all* of the issues. *Id.* See generally Allman, *supra* note 69, at 423 (noting the appellate judge's "vigorous dissent" about applying the *Anders* rule to *Barnes*).

71. *Barnes*, 463 U.S. at 753–54 (explaining that requiring counsel to raise every colorable claim would compel judges to second-guess attorneys' reasonable, professional judgment); see Rebecca Wilhelm, *Effective (or Ineffective) Assistance of Counsel*, LAWYERS.COM, <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/effective-or-ineffective-assistance-of-counsel.html> (Apr. 9, 2015) (explaining that judges are reluctant to second-guess attorneys' judgment, as judges assume that lawyers know the best way to defend their clients); see also Kelly, *supra* note 39 (explaining that courts are wary of undermining the criminal process by affirming a defendant's claim of ineffective assistance of counsel. It would be problematic if every time a defendant did not like her lawyer or was unhappy with the outcome, the defendant could succeed on an ineffective assistance claim.).

72. *Barnes*, 463 U.S. at 751. In *Barnes*, the Court held that counsel's superior legal skills, as compared to the client's, meant that counsel does not need to advance all nonfrivolous issues. Rather, counsel must only select the most promising issues for review. See Krisher, *supra* note 66, at 189 (arguing that the *Barnes* Court's rationale that a defendant is more likely to be given the best possible representation when counsel decides which issues to press has both "strength and appeal." After all, trained counsel has "superior ability" as compared to the "untrained, legally inexperienced defendant." Therefore, counsel ought to decide which issues should be raised on appeal.); but see Uphoff & Wood, *supra* note 10, at 2–3 (noting that defendants have to unfairly bear the consequences of counsels' strategic decisions that backfire, even though the defendant may have had "little or no say in the decisions.").

73. *Barnes*, 463 U.S. at 754 (explaining that respect for counsel's reasonable, professional judgment ensures that counselors meet *Anders*' goal of effective advocacy); see Allman, *supra* note 69, at 428 (explaining that the *Barnes* Court, in holding that counsel need not raise all colorable issues that a client suggests, failed to adopt a precise standard for the effective assistance of counsel during the appellate process. The Court established what counsel does not need to do—rather than establishing what counsel must do.).

74. *Barnes*, 463 U.S. at 751 (explaining that a defendant possesses the ultimate authority to decide whether or not to plead guilty, waive a jury, testify on her own behalf, or take an appeal); see generally A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2017),

that the Sixth Amendment does not require counsel to raise all of the defendant's proposed claims.⁷⁵

The *Barnes* decision was met with limited support: Justice Brennan's dissenting opinion and the amicus brief from the National Legal Aid and Defender Association (NLADA) found error in dismissing the defendant's ineffective assistance claim.⁷⁶ Brennan critiqued the majority's disregard for the American Bar Association's conception of counsel as an advisor, which for Brennan signified that counsel advises, but does not decide for, her client.⁷⁷ He warned that *Barnes* would encourage attorneys to disregard their clients' wishes, thereby increasing clients' suspicion.⁷⁸ Like Brennan, the NLADA concluded that tradition

https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/H6KR-ETSM>] (explaining that counsel should allow the defendant to make the final decision on all matters, including strategic decisions).

75. *Jones v. Barnes*, 463 U.S. 745, 754 (1983); see David Carroll & Phyllis Mann, *Systemic Right to Counsel Failures Cannot be Resolved in Case-by-Case Reviews*, SIXTH AMEND. CTR. (Apr. 30, 2017), <https://sixthamendment.org/systemic-right-to-counsel-failures-cannot-be-resolved-by-case-by-case-reviews/> [<https://perma.cc/8ADC-36N9>] (summarizing that the *Barnes* Court held that even if a defendant's case has nonfrivolous issues that might merit reversal on appeal, the defendant cannot force his attorney to brief and argue those issues).

76. See *Barnes*, 463 U.S. at 755 (Brennan, J., dissenting) (explaining Brennan's "fundamental disagreement" with the *Barnes* majority over the meaning of a defendant's right to effective assistance of counsel. Brennan lamented that under *Barnes*, an attorney can refuse to raise issues with arguable merit even when her client directed her to raise them.); see also Brief of the National Legal Aid and Defender Association as Amicus Curiae Supporting Respondent at 4–5, *Jones v. Barnes*, 463 U.S. 745 (1983) (No. 81-1794) (arguing that the Second Circuit correctly held that counsel must raise every nonfrivolous issue that the defendant requests, as ethical and constitutional standards require).

77. *Barnes*, 463 U.S. at 759–60 (Brennan, J., dissenting) (citing the ABA Model Code of Professional Responsibility EC 7-7 (1980)) (noting that A.B.A. standards state counsel's role is to advise, and the decision regarding which issues to press is ultimately made by the client); compare MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE (AM. BAR ASS'N 1983) ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explain their practical implications."), with MODEL RULES OF PRO. CONDUCT R. 2.1 (AM. BAR ASS'N 1983) (explaining that as advisor, counsel is required to "exercise independent professional judgment").

78. *Barnes*, 463 U.S. at 762 (Brennan, J., dissenting); see Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. BAR FOUND. RSCH. J. 253, 258 (1986) (detailing an attorney's experiences as a public defender. His clients frequently considered him as "part of the court-house machinery." His clients thought that if the prosecutor and judge are part of the system, the defense attorney must be as well. Indigent clients also tend to think appointed counsel would work more diligently if they retained the counsel. The attorney noted that overcoming the defendants' skepticism is a "very slow process" which requires time and patience.); see also JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE 81 (1978) (explaining that clients are suspicious of public defenders because there is no financial exchange between them, so clients do not feel they have leverage over counsel. Second, a client typically cannot choose appointed counsel but merely receives one. Third, the entity paying the public defender—the government—is also paying the prosecutor and the judge, so many defendants have "real doubts as to whether 'their' lawyer really belongs to them.").

and codes of conduct grant the defendant rather than counsel the decision-making power over which issues to appeal.⁷⁹

2. *United States v. Cronic*

One year after the *Barnes* Court limited defendants' success with ineffective assistance claims, the Court in *United States v. Cronic* looked to expand it—this time addressing counsel's minimally required legal experience and preparation.⁸⁰ In *Cronic*, the district court appointed the defendant a young lawyer with a real estate background and gave the lawyer twenty-five days to prepare for trial.⁸¹ The defendant was convicted of numerous counts of mail fraud charges, but the Tenth Circuit reversed the conviction after concluding counsel provided ineffective assistance.⁸² In so concluding, the court did not rely on proof of counsel's errors or his failure to act reasonably.⁸³ Rather, a defendant need not supply proof of counsel's ineffective conduct but only proof that circumstances interfered with counsel's preparation, the Tenth Circuit held.⁸⁴

79. Brief of the Nat'l Legal Aid and Def. Ass'n as Amicus Curiae Supporting Respondent at 8, *Jones v. Barnes*, 463 U.S. 745 (1983) (No. 81-1794) ("Conversely, the client is traditionally granted decision-making authority in matters that more obviously affect the outcome of the case." (quoting ANNOTATED CODE OF PRO. RESP. DR 7-101 cmt. (AM. BAR FOUND. 1979))); *but see* Uphoff & Wood, *supra* note 10, at 5 ("[E]xamines how the Constitution and professional norms encourage, but do not mandate, lawyer dominance over most decision-making issues.").

80. *United States v. Cronic*, 466 U.S. 648, 649 (1984); *see generally* *Muniz v. Smith*, 647 F.3d 619, 623–24 (6th Cir. 2011). In *Muniz*, the court looked to *Cronic* to determine whether counsel sleeping during the defendant's cross-examination was sufficient to trigger a presumption of prejudice.

81. *Cronic*, 466 U.S. at 654 (explaining that, by comparison, the government spent over four years investigating the case by reviewing thousands of documents during the investigation); *see* *United States v. Cronic*, 675 F.2d 1126, 1128 (10th Cir. 1982) (noting that the attorney's lack of experience with criminal law was not in the record, but the *Cronic* case was likely his first criminal law experience).

82. *Cronic*, 675 F.2d at 1128 (explaining that the Court of Appeals did not intend to create a per se rule whereby an attorney's lack of relevant experience automatically gives rise to ineffective assistance of counsel. Rather, the court held that based on the facts of this case, it could not conclude that counsel adequately represented the defendant.); *see* *Cronic*, 466 U.S. at 655 (noting that the court indicted the defendant and two co-defendants on mail fraud charges involving the transfer of over \$9,400,000 in checks during a four-month period. The co-defendants agreed to testify for the government—allowing the court to easily convict the defendant on eleven of the thirteen counts in the indictment. The defendant received a 25-year sentence.).

83. *Cronic*, 675 F.2d at 1128 (noting that other cases have established that when circumstances hamper a lawyer's preparation, the defendant does not need to show specified errors in counsel's conduct to prove ineffective assistance); *see generally* Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail In a Systematic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625, 627 (2017) (explaining that the court of appeals reversed the conviction based on the circumstances surrounding counsel's preparation without determining whether counsel's performance prejudiced the defense).

84. *Cronic*, 675 F.2d at 1128. The court of appeals found that a showing of prejudice was not

The Supreme Court granted certiorari and disagreed.⁸⁵ Examining its jurisprudence,⁸⁶ the Court determined that if surrounding circumstances sufficiently compromise counsel's representation, a defendant succeeds on an ineffective assistance claim without addressing counsel's performance.⁸⁷ The Court qualified, though, that surrounding circumstances justify a presumption of ineffective assistance only when no attorney could provide reasonable assistance.⁸⁸ Applying this rule, the Court concluded that some attorneys could provide effective assistance with limited experience and preparation and dismissed the defendant's claim.⁸⁹

3. *Strickland v. Washington*

Later that year, in 1984, the *Strickland* Court refined the *Cronic* holding by establishing its two-pronged test for ineffective assistance of

necessary "when circumstances hamper a given lawyer's preparation of a defendant's case." In such an instance, the court held that courts should presume prejudice. *See generally* Powell v. Alabama, 287 U.S. 45 (1932) (holding that the government must assign counsel in a manner that is timely and affords "effective aid in the preparation and trial of the case.").

85. *Cronic*, 466 U.S. at 650; *see* Petition for a Writ of Certiorari for the Government at *i*, *Cronic*, 466 U.S. 648 (No. 82-660) (stating that the issue in *Cronic* was whether the court of appeals correctly reversed the defendant's convictions on the ground that he did not receive effective assistance of counsel at trial).

86. *See* Avery v. Alabama, 308 U.S. 444, 452–53 (1940) (holding that the circumstances surrounding the appointed counsel's three days to prepare for trial were favorable enough to not presume ineffective assistance. The *Avery* Court reasoned that counsel had easy access to the evidence and witnesses—rendering circumstances favorable to counsel's effective assistance and therefore creating no presumption of ineffective assistance.); *see also* Chambers v. Maroney, 399 U.S. 42, 54 (1970) (explaining that the Court refused to fashion a per se rule of ineffective assistance when a defendant alleges merely an untimely appointment of counsel without alleging improper performance at trial).

87. *United States v. Cronic*, 466 U.S. 648, 662 (1984); *see* *United States v. Roy*, 855 F.3d 1133, 1145 (11th Cir. 2017) (explaining that the Supreme Court applied *Cronic*'s presumption of ineffective assistance once after it decided *Cronic*: "[t]he scope of the *Cronic* exception is that narrow; the burden of showing it applies is that heavy.").

88. *Cronic*, 466 U.S. at 662 ("The dispositive question in [*Cronic*] therefore is whether the circumstances surrounding respondent's representation . . . justified such a presumption [of ineffective assistance]."); *see* Carroll, *supra* note 60 (explaining that *Cronic*'s ineffective assistance test is forward-looking. If certain unfavorable factors are present or if necessary factors are absent at the *beginning* of a case, a court should presume counsel's ineffective assistance.).

89. *Cronic*, 466 U.S. at 665 (explaining that the circumstances—that the attorney was young, his principal practice was in real estate, and this was his first jury trial—did not support a presumption of ineffective assistance. The Court reasoned that every experienced criminal defense attorney once tried her first case, and counsel's real estate background may have served him well in preparing for this case which concerned financial transactions.); *but see* Powell v. Alabama, 287 U.S. 45 (1932) (reversing the convictions and death sentences of nine defendants on the grounds of ineffective assistance of counsel because the defendants had not seen an attorney until the morning of the trial and thus had no chance of a meaningful defense).

counsel claims.⁹⁰ The *Strickland* Court held that a defendant claiming ineffective assistance must first show that counsel's representation fell below an objective standard of reasonableness,⁹¹ viewed at the time of her conduct,⁹² and measured by prevailing professional norms.⁹³ Second, the defendant must prove counsel's deficient performance prejudiced the defendant's trial, rendering it unfair and unreliable.⁹⁴

90. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see Chris Schmidt, *This Day in Supreme Court History—January 10, 1984*, IIT CHI.-KENT COLL. L.: ISCOTUSNOW (Jan. 10, 2017), <http://blogs.kentlaw.iit.edu/iscotus/day-supreme-court-history-january-10-1984/> [<https://perma.cc/DZ4T-NRQC>] (stating that the *Strickland* Court established a “demanding standard” for a defendant to succeed on an ineffective assistance claim); see Brian Gallini, *Teaching Strickland v. Washington Through the Case of Adnan Syed*, THE FAC. LOUNGE (Oct. 7, 2019, 9:00 AM), <https://www.thefacultylounge.org/2019/10/teaching-strickland-v-washington-through-the-case-of-adnan-syed.html> [<https://perma.cc/PQ6W-2XRV>] (explaining that the *Strickland* standard “permits almost anything to pass as constitutionally acceptable defense representation.”).

91. *Strickland*, 466 U.S. at 687–88 (noting that all of the federal courts of appeals have held that the proper standard for attorney performance is that of reasonably effective assistance (citing *Trapnell v. United States*, 725 F.2d 149, 151–52 (2d Cir. 1983)). The Court noted that the Sixth Amendment refers simply to “counsel” and does not specify the requirements of counsel's effective assistance (citing *Michel v. Louisiana*, 350 U.S. 91, 100 (1955))). See Kent A. Russell & Tara Hoveland, *Habeas Hints: Understanding and Satisfying the Strickland Test for AIC*, 1 CRIM. LEGAL NEWS 18, 18 (2018) (explaining that counsel's conduct falls below an objective standard of reasonableness when she performs contrary to her client's best interests in a way that a reasonable lawyer would not).

92. *Strickland*, 466 U.S. at 690 (noting that an intrusive, *post*-trial inquiry into a counsel's performance improperly encourages ineffective assistance challenges); see Whitney Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1141 (2007) (explaining that *Strickland* instructs courts to measure counsel's performance based on counsel's perspective at the time of her conduct, rather than in hindsight. As a result, despite cases involving questionable representation, lawyers are given the benefit of the doubt, and courts have reversed few convictions on the grounds of ineffective assistance.); see also Don Weaver, *The Objective Reasonableness Standard: Glancing in the Mirror Before Criticizing Graham v. Connor*, LEXIPOL (Mar. 31, 2017), <https://www.lexipol.com/resources/blog/objective-reasonableness-standard/> [<https://perma.cc/YB5E-NB7T>] (noting that it is rare for a criminal trial to proceed exactly as a party, attorney, or judge can plan or predict. “It is neither reasonable nor fair to defense counsel to judge their performance based on hindsight, outcome, or facts not known at the time of trial.”).

93. *Strickland*, 466 U.S. at 688 (noting that prevailing professional norms of practice are reflected in American Bar Association Standards, among other sources, which serves as a guide in determining what is reasonable); see Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator: Strickland's Potential for Incorporating Underfunded Norms into Legal Doctrine*, 5 FAULKNER L. REV. 199, 202 (2014) (noting that analysis under *Strickland*'s first prong will change in response to the underlying norms of attorney conduct, and those norms will in turn change the law itself); see also Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 517 (2009) (explaining the “dramatic shift” for defense attorneys after *Strickland*. On account of *Strickland*, the Court no longer ignores professional standards of conduct in deciding what constitutes counsel's constitutionally effective representation. Therefore, as a result of *Strickland*, “[d]efense attorneys must, on pains of being faulted for ineffective assistance, diligently investigate and defend their clients' cases.”).

94. *Strickland*, 466 U.S. at 687 (providing that a defendant's case is prejudiced when counsel's errors were “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”);

In *Strickland*, counsel decreased his efforts after learning the defendant confessed to two of three murder charges, against counsel's advice.⁹⁵ The court sentenced the defendant to death on all of the murder charges.⁹⁶ In response, the defendant claimed ineffective assistance because of counsel's reduced involvement during the sentence proceeding.⁹⁷

For the first prong of its test, the *Strickland* Court held that counsel made strategic decisions within the range of professional responsibility, thus meeting the Court's standard of reasonableness.⁹⁸ With the second prong, the Court held that the defendant did not prove counsel's failure

see Erin A. Conway, *Ineffective Assistance of Counsel: How Illinois Has Used the "Prejudice" Prong of Strickland to Lower the Floor on Performance When Defendants Plead Guilty*, 105 NW. U. L. REV. 1707, 1717 (2011) (explaining that *Strickland*'s first prong is objective and its second prong is subjective); see also *Strickland*, 466 U.S. at 693–94 (choosing against an outcome-determinative standard that would require the defendant to show that counsel's deficient conduct more likely than not altered the outcome of the proceeding. The Court determined that this outcome-determinative standard places too high a burden of proof for defendants.); but see Hill v. Lockhart, 474 U.S. 52, 54–55 (1985). In *Lockhart*, the defendant claimed his guilty plea was involuntary because counsel provided ineffective assistance by supplying erroneous information about the consequences of the guilty plea. The Supreme Court applied the two-pronged *Strickland* test. *Id.* at 58. But modifying *Strickland*'s second prong, the *Lockhart* Court required a higher burden of proof: that the defendant show but for counsel's deficient performance, he would have gone to trial rather than plead guilty. *Id.* at 59–60.

95. *Strickland v. Washington*, 466 U.S. 668, 672 (1984) (explaining that counsel actively pursued pretrial motions and discovery at first. Counsel, however, hopelessly minimized his efforts when he learned that the defendant confessed to the first two murder charges.); see Smith, *supra* note 93, at 538 n.84 (arguing that the *Strickland* majority "refused to accept" the attorney's admission of hopelessness and instead concluded that counsel made strategic choices for the client's case).

96. *Strickland*, 466 U.S. at 675. The defendant waived his right to a jury trial—acting once again against counsel's advice—and plead guilty to all charges, including the three capital murder charges. *Id.* at 672. See Elianna Spitzer, *Strickland v. Washington: Supreme Court Case, Arguments, Impact*, THOUGHTCO., <https://www.thoughtco.com/strickland-v-washington-4768693> [https://perma.cc/SMN9-BJDD] (Oct. 5, 2019) (explaining that at the plea hearing, the defendant told the judge he committed the burglaries, which escalated to more serious crimes, while under financial stress).

97. *Strickland*, 466 U.S. at 675 (noting that the defendant challenged counsel's assistance on six different counts. The defendant asserted that counsel was ineffective because he failed to: (1) move for a continuance to prepare for sentencing, (2) request a psychiatric report, (3) investigate and present character witnesses, (4) seek a pre-sentence investigation report, (5) present meaningful arguments to the sentencing judge, and (6) investigate the medical examiner's reports or cross-examine the medical experts.); see Robert Uzdevins, *The "Not So Supreme" Court: State Law Dictates Supreme Court Decision in Chaidez*, 7 DREXEL L. REV. 39, 44 (2014) (explaining that when counsel made the decisions that were under review, he was motivated to prevent the State from cross-examining his client and from presenting psychiatric evidence against the client).

98. *Strickland*, 466 U.S. at 699 (explaining that despite counsel's understandable feelings of hopelessness after the defendant confessed to two of the murders, the record did not indicate that counsel's professional judgment was distorted); but see Respondent's Brief in Opposition at *2, *Strickland*, 466 U.S. 668 (No. 82-1554) (noting that the district court established the "basic, historical fact" that counsel "ceased any serious preparation or investigation" after being "immobilized by a hopeless feeling" about the defendant's case).

to enter evidence⁹⁹ harmed his sentencing, which failed to satisfy the second prong.¹⁰⁰ In so holding, the *Strickland* Court established the standard for ineffective assistance of counsel claims.¹⁰¹

4. *Roe v. Flores-Ortega*

In 2000, the Court in *Roe v. Flores-Ortega* further defined the *Strickland* standard and honed the *Cronic* Court's presumption of ineffective assistance.¹⁰² The *Cronic* Court established that if unfavorable circumstances surrounded counsel's representation, courts should presume counsel's assistance was ineffective—enabling defendants to automatically succeed on an ineffective assistance claim.¹⁰³ The *Flores-Ortega* Court, however, limited its presumption to only *Strickland*'s second prong, still requiring defendants to prove the first

99. *Strickland*, 466 U.S. at 699–700. The defendant claimed that counsel should have offered evidence of the defendant's purported extreme emotional disturbance at the sentencing hearing as a mitigating factor. *Id.* at 675–76. See Susan K. VanBuren, *The Ineffective Assistance of Counsel Quandry* [sic]: *The Debate Continues* – *Strickland v. Washington* 104 S. Ct. 2052 (1984), 18 AKRON L. REV. 325, 326 (1984) (explaining that the *Strickland* defendant testified at trial that his family's financial struggle while he was unemployed incited his brief criminal behavior); see also FLA. STAT. § 921.141(6)(b) (1975); FLA. STAT. § 921.141(6)(f) (1975). The two statutory mitigating circumstances which the *Strickland* counsel would have had to establish are: (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

100. *Strickland*, 466 U.S. at 699–700. The Court found that counsel was justified in not entering the evidence of the defendant's psychological state because his mental state did not rise to the level of extreme disturbance. *Id.* Rather, the Court noted that counsel's admission of the evidence could have instead harmed the defendant's case, because the defendant's benign psychological reports would have directly contradicted his claim of extreme emotional disturbance. *Id.* at 700; see generally Spitzer, *supra* note 96 (explaining that the State executed the *Strickland* defendant two months after the *Strickland* Court handed down its decision).

101. See EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (2010) (arguing that the *Strickland* Court created an “extremely high burden” for defendants to establish ineffective assistance of counsel); see also Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996) (explaining that the *Strickland* standard created a presumption that counsel was competent and placed the burden of showing prejudice upon the defendant).

102. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (holding that the *Strickland* standard applies to claims that counsel provided ineffective assistance for failing to file a notice of appeal); see also Douglas Ankney, *SCOTUS: Presumption of Prejudice Recognized in Flores-Ortega Applies Regardless of Defendant's Appeal Waiver*, 2 CRIM. LEGAL NEWS 16, 16 (2019) (explaining that the *Flores-Ortega* presumption applies only in automatically satisfying *Strickland*'s second prong—requiring that the defendant prove *Strickland*'s first prong).

103. *United States v. Cronic*, 466 U.S. 648, 662 (1984) (describing that the question in *Cronic* was whether the surrounding circumstances justified the presumption that counsel provided ineffective assistance); see Carroll, *supra* note 60 (explaining that the *Cronic* presumption of prejudice would be met only if even the best attorney would not be able to adequately represent her client).

prong.¹⁰⁴ Accordingly, it held that when counsel failed to file a notice of appeal, courts must presume *Strickland*'s second prong is satisfied.¹⁰⁵

In *Flores-Ortega*, the prosecutor charged the defendant with numerous crimes,¹⁰⁶ and the defendant pled guilty to second-degree murder.¹⁰⁷ The court sentenced the defendant to fifteen years to life, and the judge informed him that he could appeal within sixty days.¹⁰⁸ While in lockup, the defendant could not communicate with counsel, and counsel did not file a notice of appeal.¹⁰⁹ As a result, the defendant alleged ineffective assistance.¹¹⁰ The district court denied relief, but the Ninth Circuit relied on precedent establishing that counsel's failure to file without the

104. See *Flores-Ortega*, 528 U.S. at 483 (explaining that when counsel's conduct allegedly denied the defendant an entire proceeding—as occurred in *Flores-Ortega*—courts must presume that counsel's performance prejudiced the trial); see also Lee, *supra* note 21 (noting that even if the *Garza* Court applied the *Flores-Ortega* presumption of prejudice, doing so would only satisfy *Strickland*'s second prong. Garza therefore would still be required to prove *Strickland*'s first prong.).

105. *Flores-Ortega*, 528 U.S. at 484; see Erin N. Rieger, *The Role of Professional Responsibility in the Ineffective Assistance of Counsel Claim in Roe v. Flores-Ortega*, 29 N. KY. L. REV. 397, 397 (2002) (explaining that the *Flores-Ortega* defendant received a life sentence in prison, did not speak English or know the law well, and could not communicate with his lawyer).

106. *Flores-Ortega*, 528 U.S. at 473 (noting that the court charged the defendant with one count of murder, two counts of assault, and personal use of a deadly weapon); see Brief for Respondent at 1, *Flores-Ortega*, 528 U.S. 470 (No. 98-1441) (explaining that the alleged homicide occurred during a brawl outside of a bar).

107. *Flores-Ortega*, 528 U.S. at 473 (describing the California rule governing the *Flores-Ortega* defendant's plea whereby the defendant could deny committing a crime but also admit that there is sufficient evidence to convict him); see Brief for Respondent, *supra* note 106 (explaining that the *Flores-Ortega* defendant repeatedly stated that he did not commit the crime but plead guilty because his attorney had advised him to do so); see also *People v. West*, 477 P.2d 409, 420 (Cal. 1970) (describing the *Flores-Ortega* defendant's plea agreement as one in which the defendant knows of the violation and is prepared to admit each of its elements).

108. *Roe v. Flores-Ortega*, 528 U.S. 470, 474 (2000); see *Ortega v. Roe*, 160 F.3d 534, 535 (9th Cir. 1998) (noting that after the hearing, the magistrate judge found that the defendant "had little or no understanding" of what an appeal meant or what the appeals process entailed).

109. *Flores-Ortega*, 528 U.S. at 474. The defendant's counsel wrote "bring appeal papers" in her file but did not file an appeal. *Id.* The defendant was in lock-up for ninety days after his sentencing. *Id.* Approximately 120 days after his sentencing, the defendant filed a notice of appeal which the court rejected because it was untimely. *Id.* See Rieger, *supra* note 105, at 397 (explaining that the court took the defendant into custody immediately after his sentencing. The defendant could not contact his attorney until ninety days had passed.); see also Brief for Respondent, *supra* note 106, at 2. The *Flores-Ortega* defendant described his time in custody as: "They just take you out to bathe, and they just lock you back up in your cell. You can't make a phone call, you're completely locked up."

110. *Flores-Ortega*, 528 U.S. at 476 (noting that the Court granted certiorari to resolve a conflict in the lower courts on counsel's obligations to file a notice of appeal); see CONG. RES. SERV., RL 33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1 (2010) (explaining that federal habeas corpus is a procedure in which a federal court can review the legality of an individual's incarceration).

defendant's consent constituted ineffective assistance¹¹¹ and remanded the case to the district court.¹¹² Because the lower courts disagreed on counsel's obligation to file a notice of appeal, the Supreme Court granted certiorari.¹¹³

Applying the *Strickland* standard,¹¹⁴ the *Flores-Ortega* Court held that counsel's failure to consult with the defendant about an appeal fell below an objective standard of reasonableness, satisfying *Strickland's* first prong.¹¹⁵ For the second prong,¹¹⁶ the Court examined precedent stating it is met if counsel denied the defendant her services at a critical stage.¹¹⁷ Counsel denied the defendant more than just her services at a critical stage, the Court reasoned, but rather denied the defendant an entire

111. *Flores-Ortega*, 528 U.S. at 475–76 (explaining that the magistrate judge and district court acknowledged that precedent required only that the defendant show she did not consent to counsel's failure to file a notice of appeal to succeed on an ineffective assistance claim. This rule, however, was established *after* the *Flores-Ortega* defendant filed his ineffective assistance claim. The magistrate judge and court therefore concluded that this precedent could not be applied retroactively to the *Flores-Ortega* defendant. The court of appeals, though, reversed, reasoning that the rule mirrored a case which predated the *Flores-Ortega* defendant's filing—and therefore counsel's failure to file a notice of appeal without *Flores-Ortega's* consent warranted relief.); *see generally* *United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995) (explaining how the defendant pled guilty, the court sentenced the defendant, and the defendant allegedly wanted to appeal. The defendant claimed he did not consent to counsel's failure to file a notice of appeal. If so, the court of appeals concluded that the defendant was denied effective assistance of counsel.).

112. *Ortega v. Roe*, 160 F.3d 534, 537 (9th Cir. 1998). The court of appeals instructed the district court to issue a conditional writ releasing the defendant from custody unless the trial court vacated the defendant's conviction and allowed a new appeal. *Id.*

113. *Flores-Ortega*, 528 U.S. at 476; *compare* *United States v. Tajeddini*, 945 F.2d 458, 468 (1st Cir. 1991) (per curiam) (holding that counsel provides deficient assistance if he fails to file a notice of appeal without the defendant's knowledge or consent), *abrogated by* *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), *with* *Morales v. United States*, 143 F.3d 94, 97 (2nd Cir. 1998) (holding that counsel provides deficient assistance if he failed to file a notice of appeal only if the defendant requested an appeal).

114. *Flores-Ortega*, 528 U.S. at 480–81. The *Flores-Ortega* majority disagreed with Justice Souter's dissent in *Flores-Ortega* as to why the *Strickland* Court rejected per se rules for counsel's conduct. *Id.* at 481. The majority reasoned it has consistently avoided imposing mechanical rules on counsel—even when those rules may lead to better legal representation—because the Sixth Amendment guarantees that criminal defendants receive a fair trial but does not guarantee the quality of legal representation. *Id.* Justice Souter, however, argued that *Strickland* rejected per se rules out of respect for lawyers' reasonable, strategic choices. *Id.* at 491.

115. *Flores-Ortega*, 528 U.S. at 481. The Court expected that other courts would conclude in the majority of cases that counsel had a duty to consult with his client about the appeal. *Id.* *See* *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (noting that the relevant question is whether counsel's choices were reasonable based on current professional norms).

116. *Strickland*, 466 U.S. at 687 (requiring proof that counsel's errors were so significant that counsel deprived the defendant of a fair trial).

117. *Flores-Ortega*, 528 U.S. at 483 (quoting *United States v. Cronin*, 466 U.S. 648, 659 (1984)); *see generally* *Cronin*, 466 U.S. at 659 (“The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage.”); *Penon v. Ohio*, 488 U.S. 75, 88–89 (1988) (holding that the complete denial of counsel on appeal requires a presumption of prejudice).

judicial proceeding—an appeal—which thus warranted a presumption to satisfy the second prong.¹¹⁸

As such, the *Flores-Ortega* Court established that a presumption of prejudice automatically satisfies *Strickland*'s second prong when counsel failed to file a notice of appeal.¹¹⁹ It did not rule on whether the presumption applies when a defendant agreed to an appeal waiver, however.¹²⁰ The Supreme Court's silence on the issue of appeal waivers in such a context resulted in a split of authority, which prompted the Court to hear *Garza v. Idaho*.¹²¹

II. GARZA V. IDAHO

The Supreme Court granted certiorari to Gilberto Garza in *Garza v. Idaho* from the Supreme Court of Idaho—an appeal of the court's denial of relief on Garza's ineffective assistance claim.¹²² This part proceeds with a summary of the facts and procedural history of Garza's case followed by a discussion of the majority opinion and Justice Thomas's dissent.¹²³

118. *Flores-Ortega*, 528 U.S. at 483–84 (describing this forfeiture of a judicial procedure as “unusual” because counsel's performance led not to a questionably judicial proceeding but rather to the forfeiture of a proceeding altogether. The Court reasoned that presuming prejudice was in line with its precedent that presumed prejudice when counsel rendered the proceeding either presumptively unreliable or nonexistent.); *see generally* Brief for Respondent, *supra* note 106, at 21. The defendant argued that requiring him to prove prejudice would be an “onerous burden.”

119. *Flores-Ortega*, 528 U.S. at 486; *see Lee*, *supra* note 18 (noting that after *Flores-Ortega*, courts presume prejudice when counsel failed to file a notice of appeal after the client's appeal request).

120. *Garza v. Idaho*, 139 S. Ct. 738, 742 (2019) (acknowledging that *Flores-Ortega* defendant did not sign an appeal waiver, as the *Garza* defendant had).

121. *Garza*, 139 S. Ct. at 743 (noting that, for example, eight of the ten federal courts of appeals have applied *Flores-Ortega*'s presumption of prejudice when a defendant signed an appeal waiver); *see Clay Wild*, *October 2018 Preview: Garza v. Idaho*, GEO. WASH. L. REV. (Sept. 29, 2018), <https://www.gwlr.org/october-2018-preview-garza-v-idaho/> [<https://perma.cc/Q7WP-B9CT>] (describing that *Garza* would resolve a “lopsided” circuit split); *see also Plea Waivers and Ineffectiveness of Counsel for Failing to Appeal Come to SCOTUS in Garza v. Idaho*, SENT'G L. & POL. (Oct. 30, 2018, 1:22 AM), (https://sentencing.typepad.com/sentencing_law_and_policy/2018/10/plea-waivers-and-ineffectiveness-of-counsel-for-failing-to-appeal-come-to-scotus-in-garza-v-idaho.html) [<https://perma.cc/AC95-U4WS>] (explaining that the sharp increase in plea bargains in the past few decades, coupled with the inclusion of appeal waivers in plea bargains, led the Supreme Court to *Garza*).

122. *Garza*, 139 S. Ct. at 743; *see Lee*, *supra* note 21 (describing that *Flores-Ortega*, which the Court decided nearly two decades prior, did not involve an appeal waiver. *Garza* therefore gave the Court an opportunity to address an ineffective assistance claim when counsel failed to file a notice of appeal, but the defendant agreed to an appeal waiver.).

123. *See supra* Section I.A (explaining plea bargains, appeal waivers, and appellate proceedings); *infra* Section I.B (discussing Sixth Amendment ineffective assistance of counsel claims).

A. *Facts and Procedural History in the Lower Courts*

In 2015, Gilberto Garza signed two plea agreements arising from Idaho's charges of aggravated assault and possession of a controlled substance with intent to deliver.¹²⁴ Both plea agreements included a clause stating Garza "waive[d] his right to appeal."¹²⁵ The court sentenced Garza to ten years in prison, and Garza informed counsel that he wished to appeal;¹²⁶ counsel did not file a notice of appeal.¹²⁷ Counsel informed Garza that appealing would be problematic because he had waived his right to appeal through the appeal waivers.¹²⁸ Dissatisfied, Garza sought post-conviction relief in Idaho state court, claiming ineffective assistance for counsel's failure to file a notice.¹²⁹

124. *See Garza v. State*, No. 44015/ 44016, 2017 WL 444026 at *1 (Idaho Ct. App. 2017) (noting Garza had entered an *Alford* plea to aggravated assault pursuant to Idaho law); *see also* Charles Montaldo, *What Is an Alford Plea?*, THOUGHTCO., <https://www.thoughtco.com/what-is-an-alford-plea-971381> [<https://perma.cc/8JZB-Y9GH>] (Mar. 17, 2019) (explaining that with an *Alford* plea, the defendant asserts innocence but admits that sufficient evidence exists for the prosecution to convince a judge or jury to find the defendant guilty. If a defendant accepts an *Alford* plea, the court may pronounce her guilty and impose sentencing as if the defendant had been convicted of the crime.).

125. *Garza*, 139 S. Ct. at 742. The Court recognized that the record suggested Garza may have been confused about whether he had in fact waived his right to appeal. *Id.* at 743 n.1. Garza answered "No" on a court form asking whether he had waived his right to appeal his conviction and sentencing as part of his plea bargain. *Id.* *See* Tonja Jacobi & Matthew Sag, *A Truly Unusual Coalition: Predicting Garza v. Idaho*, SCOTUS OA (Feb. 11, 2019), <https://scotusoa.com/garza/> [<https://perma.cc/7WZA-BBRN>] (noting that almost everyone at the *Garza* oral argument acknowledged that there are some rights that are unwaivable. For example, a plea waiver could not prevent an appeal for gross prosecutorial misconduct.).

126. *Garza*, 139 S. Ct. at 743 (noting that Garza attested that he "continuously reminded" his attorney of his desire to appeal via phone calls and letters, and that Garza's counsel acknowledged in his affidavit that Garza had told him he wanted to appeal the sentencing); *see* Transcript of Oral Argument at 16, *Garza v. Idaho*, 139 S. Ct. 738 (2019) (No. 17-1026). Counsel argued that when a defendant pleads guilty and signs an appeal waiver, the defendant has an interest in finality. Therefore, there are "few defendants" who would plead guilty, sign an appeal waiver, and then instruct their attorney to appeal.

127. *Garza*, 139 S. Ct. at 743; *see* Lee, *supra* note 18 (indicating that counsel did not disclose to Garza that he did not file a notice of appeal).

128. *Garza*, 139 S. Ct. at 743; *see* *Garza v. State*, LEAGLE, <https://www.leagle.com/decision/inidco20171107179> [<https://perma.cc/S3QJ-9FHG>] (last visited Oct. 13, 2019) (explaining that in both of his plea agreements, Garza waived his right to appeal and waived his right to request relief pursuant to Idaho criminal laws); *see generally* IDAHO CRIM. R. 11(f)(1)(c); IDAHO CRIM. R. 35. These state laws govern Garza's two plea agreements. Idaho Criminal Rule 11 provides that the prosecuting attorney establishes "a specific sentence [as] the appropriate disposition of the case." Idaho Criminal Rule 35 indicates that the court may correct a sentencing only if it is illegal.

129. *Garza*, 139 S. Ct. at 743; *see* Transcript of Oral Argument, *supra* note 126, at 6 (noting Justice Ginsburg's concern that Garza's appeal would allow him to "keep what's good about the plea bargain and discard what's not good; that is, [having] no right to appeal.").

The trial court denied relief, and the Idaho Court of Appeals and Idaho Supreme Court affirmed.¹³⁰ The Idaho Court of Appeals embraced the minority approach for ineffective assistance claims, holding that courts should not presume prejudice to satisfy *Strickland*'s second prong when the defendant agreed to an appeal waiver¹³¹ and affirming the trial court.¹³² Likewise, the Idaho Supreme Court affirmed, holding that Garza failed to meet either prong of the *Strickland* standard.¹³³ Based on policy reasons, the court rejected the presumption of prejudice because counsel declined to pursue an appeal that a judge would clearly deny.¹³⁴ Following Garza's denied relief, the Supreme Court granted his petition for certiorari to answer whether Garza must prove both of *Strickland*'s prongs or if the Court should apply the *Flores-Ortega* presumption to satisfy the prejudice prong.¹³⁵

130. *Garza*, 139 S. Ct. at 743; see *Garza v. State*, No. 44015/ 44016, 2017 WL 444026 at *2-3 (Idaho Ct. App. 2017) (explaining that prior to the court's decision, it was undecided in Idaho whether counsel's performance was deficient, *Strickland*'s first prong, in failing to file an appeal after the defendant waived her right to appeal as part of a plea agreement).

131. See *Garza*, 2017 WL 444026 at *5. The Idaho Court of Appeals agreed with the minority approach in *Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008), *abrogated by* *Garza v. Idaho*, 139 S. Ct. 738 (2019). The Court reasoned that once a defendant decides to waive her right to appeal, she has no right to revoke such a formal decision. *Garza*, 2017 WL 444026 at *5. For Garza to succeed on his ineffective assistance claim, the Idaho Court of Appeals required Garza to show 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.* See also *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). The court dismissed the defendant's appeal because the defendant agreed to an appeal waiver as part of a plea bargain and thus "cannot have his cake and eat it too."

132. *Garza*, 2017 WL 444026 at *5 (affirming that Garza's counsel was not ineffective for refusing to file a notice of appeal); see Joel Kershaw, *Garza v. Idaho (In Which Justices Thomas and Gorsuch Question the Right to Effective Court Appointed Counsel)*, KERSHAW, VITTOE & JEDINAK, PLC (Mar. 5, 2019), <https://www.monroecountylawyers.com/blog/2019/03/garza-v-idaho-in-which-justices-thomas-and-gorsuch-question-the-right-to-effective-court-appointed-c/> [<https://perma.cc/3TUX-TVKT>] (noting that the Idaho Court of Appeals affirmed the trial court's denial of Garza's attempt to preserve his appellate rights—holding that Garza failed to show either deficient performance or resulting prejudice, *Strickland*'s two-pronged requirement).

I 133. *Garza v. State*, 405 P.3d 576, 583 (Idaho 2017). The court recognized conceivable situations in which a defendant who waived her right to appeal as part of a plea agreement could still seek to challenge her conviction or sentence, such as if the State sentenced her illegally or breached the plea agreement. *Id.* The Idaho Supreme Court relied on the district court's conclusion that Garza was unable to show any nonfrivolous grounds for appeal and therefore concluded that Garza could not show prejudice. *Id.*

134. *Garza*, 405 P.3d at 582. The court reasoned that an attorney has a duty to avoid taking action that will cost their client the benefit of the plea bargain. *Id.* at 583 (citing *Nunez*, 546 F.3d at 455, *abrogated by* *Garza v. Idaho*, 139 S. Ct. 738 (2019)). The court warned that if Garza's counsel had filed an appeal, the State could have disregarded the plea in its entirety as a result of the defendant's breach of the agreement. *Id.* But see Transcript of Oral Argument, *supra* note 126, at 11 (explaining that it is understandable for a defendant to want to rescind a plea bargain, as nothing prohibits a defendant from rescinding a contract).

135. *Garza v. Idaho*, 139 S. Ct. 738, 743 (2019); see *Garza v. Idaho*, UNC SCH. OF GOV'T, <https://www.sog.unc.edu/sccc/cases/garza-v-idaho> [<https://perma.cc/9NX2-LRK5>] (last visited

B. The Court's Opinion

The *Garza* Court clarified *Flores-Ortega's* application¹³⁶: Justice Sotomayor's opinion for the majority held that "the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver."¹³⁷

Recalling its Sixth Amendment jurisprudence, the Court noted that under *Strickland*, a defendant claiming ineffective assistance of counsel must show: (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel prejudiced the defendant's case.¹³⁸ The *Cronic* Court established that courts must presume ineffective assistance entirely when unfavorable circumstances surrounded counsel's representation, independent of counsel's performance.¹³⁹ In turn, *Flores-Ortega* refined *Cronic* by applying the presumption to only *Strickland's* second prong, still easing defendants' burden of proof.¹⁴⁰ The Court in *Garza* continued this trajectory of easing defendants' burdens by extending the *Flores-Ortega* presumption to plea bargains with an appeal waiver.¹⁴¹

Oct. 17, 2019) (noting that the "crux of the case" in *Garza* was whether the *Flores-Ortega* presumption of prejudice applied despite the appeal waiver).

136. *Garza*, 139 S. Ct. at 742; see Melissa Davlin, *US Supreme Court Sides With Inmate on Appeals Case, Overturning Idaho Court's Ruling*, IDAHO STATESMAN (Feb. 28, 2019, 12:20 PM), <https://www.idahostatesman.com/news/local/crime/article226927649.html> [<https://perma.cc/QNR3-R3EL>] (noting that *Garza* gave more clarity on the standard for waiving certain rights in court).

137. *Garza*, 139 S. Ct. at 742; see Greg Mermelstein, *Garza v. Idaho: SCOTUS Recap*, NAT'L ASS'N FOR PUB. DEF. (May 7, 2019, 2:38 PM), https://www.publicdefenders.us/blog_home.asp?display=769 [<https://perma.cc/Q5MX-UZBZ>] (explaining that the *Garza* Court, in a 6–3 opinion, held that the defendant did not need to prove prejudice as the Court would presume it).

138. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see WEST, *supra* note 101 (noting that *Strickland* was a landmark case which established the standard for ineffective assistance of counsel claims).

139. *United States v. Cronic*, 466 U.S. 648, 662 (1984); see generally Samantha Jaffe, "It's Not You, It's Your Caseload": Using *Cronic* to Solve Indigent Defense Underfunding, 116 MICH. L. REV. 1465, 1474 (2018) (explaining that the question in *Cronic* dealt with the adequacy of defense counsel's trial preparation).

140. *Roe v. Flores-Ortega*, 528 U.S. 470, 483–84 (2000) (noting that with a presumption of prejudice, the defendant does not need to prove the merits of his underlying claims for appeal); see *Garza*, 139 S. Ct. at 742 (explaining that *Garza* asked whether the *Flores-Ortega* rule applies even when the defendant signed an appeal waiver).

141. *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019); see Scott H. Greenfield, *An Appeal to Nowhere*, SIMPLE JUST. (Feb. 28, 2019), <https://blog.simplejustice.us/2019/02/28/an-appeal-to-nowhere/> [<https://perma.cc/4NDN-ACXR>] (explaining that the *Garza* Court extended the rule of *Flores-Ortega*).

The majority explained that *Garza* hinges on two procedural devices, appeal waivers and notices of appeal.¹⁴² First, an appeal waiver never bars all appellate claims but bars only claims within its scope.¹⁴³ Highlighting the modern trend of protecting defendants' right to appeal, the Court noted that nearly every state provides criminal defendants a right to appeal either by statute or court rule.¹⁴⁴ Additionally, it explained that plea bargains are essentially contracts and, like contracts, enable defendants to bring many claims on appeal.¹⁴⁵ The Court therefore reasoned that all jurisdictions regard at least some claims on appeal as nonwaivable, such as the right to challenge the appeal waiver's validity because a defendant executed it unknowingly or involuntarily.¹⁴⁶ Second, the Court described that filing a notice of appeal requires minimal

142. *Garza*, 139 S. Ct. at 744. The Court found it helpful to first address appeal waivers and notices of appeal in analyzing Garza's case. *Id.* See Transcript for Oral Argument, *supra* note 126, at 35 (arguing that Garza's plea bargain entailed a waiver of a *procedure* rather than a waiver of *issues*).

143. *Garza*, 139 S. Ct. at 744 (explaining that appeal waivers improperly suggest a "monolithic end to all appellate rights."); see McCue, *supra* note 15 (noting that even the district court advised Garza of his rights to appeal and to be appointed counsel if he appealed).

144. *Garza*, 139 S. Ct. at 744 n.4; see Deanna Paul, *A Proposed Law Would Block Criminal Defendants From Giving Up Rights They Could Gain in the Future*, WASH. POST (July 2, 2019, 3:26 PM), <https://www.washingtonpost.com/nation/2019/07/02/new-law-would-block-criminal-defendants-giving-up-rights-they-could-gain-future/> [https://perma.cc/76U5-2RXE] (noting the national trend aimed at reducing defendants' incarceration, such as by ensuring a defendant's right to appeal a sentencing); see also Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counselor Performance*, 66 U. PITT. L. REV. 521, 531 (2005) (explaining that the appeal process is essential to the reliability of the criminal trial process and the protection of criminal defendants' constitutional rights).

145. *Garza*, 139 S. Ct. at 744. A defendant who signed an appeal waiver and directs counsel to file an appeal "does not . . . necessarily undertake a quixotic or frivolous quest." *Id.* at 745. See generally Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner at 6–10, *Garza*, 139 S. Ct. 738 (No. 17-1026) (collecting examples of appeal waivers allowing challenges to a sentence or conviction or allowing claims based on prosecutorial misconduct or changes in law).

146. *Garza*, 139 S. Ct. at 745; see *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (recognizing that the defendant did not waive his right to appeal a sentencing based on an arguably unconstitutional use of his naturalized status); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (acknowledging that the defendant did not waive his right to appeal a sentencing which exceeded the statutory maximum); see also Transcript of Oral Argument, *supra* note 126, at 5 ("All the parties before the Court agree that, even though Mr. Garza signed an appeal waiver, that certain fundamental claims survive that appeal waiver."); *id.* at 68 ("Mr. Garza here has a very colorable, I think meritorious claim, that his appeal waiver was involuntary." For example, Garza indicated on a form that he was not waiving his right to appeal. Additionally, no one at his plea hearings inquired about whether Garza was waiving his right to appeal, as required under Idaho law. People also informed Garza on three instances, once in the hearing and twice in judgments, that he had a right to appeal after agreeing to the plea bargain.).

effort,¹⁴⁷ given the notice's content is generally nonsubstantive.¹⁴⁸ Because counsel is not taxed in filing it, the Court concluded that only the defendant should dictate if counsel files.¹⁴⁹

Applying the *Strickland* standard, the Court held that counsel provided deficient performance by not filing a notice after Garza's appeal request, satisfying the first prong of unreasonableness.¹⁵⁰ The Court relied on *Flores-Ortega*, in which it held that a lawyer who disregarded her client's instruction to appeal acted unreasonably.¹⁵¹ It dismissed Idaho's argument that counsel strategically avoided breaching Garza's plea bargain, thus providing reasonable assistance.¹⁵² Counsel does not breach a plea bargain in filing a notice of appeal, the Court explained, so counsel was not strategic in declining to file.¹⁵³ As such, the Court held that

147. *Garza*, 139 S. Ct. at 745 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 474 (2000)); see Patricia M. Weaver, *Noting Your Appeal Isn't Always So Simple*, LEGAL TIMES (Feb. 19, 2007), (explaining that counsel's responsibility to file a notice of appeal is "generally a simple ministerial act of informing the court that you intend to appeal and providing basic related information.").

148. *Garza*, 139 S. Ct. at 745 (explaining that filing requirements for a notice of appeal reflect that claims are likely to be ill-defined or unknown at the time the filing notice is due. The defendant will likely not have important documents, such as transcripts, from the trial court. Further, defendants may receive new counsel for their appeals; thus, the lawyer responsible for the claims on appeal may not even be involved in the case at the time the notice of appeal is due.); see IDAHO APP. R. 17(a)–(h) (explaining the contents of a notice of appeal under Idaho law. A notice of appeal must contain simple statements such as the title of the action, title of the lower court, case number, parties, the judgment or order being appealed, and a preliminary statement of the issues the appellant is appealing, among other things.).

149. *Garza*, 139 S. Ct. at 746; see *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing that "[t]he accused has the ultimate authority" to decide whether or not to take an appeal).

150. *Garza*, 139 S. Ct. at 746; see Evan Lee, *Argument Analysis: Court Skeptical That a Lawyer May Unilaterally Countermand Client's Instruction to File a Criminal Appeal*, SCOTUSBLOG (Oct. 31, 2018, 11:41 AM), <https://www.scotusblog.com/2018/10/argument-analysis-court-skeptical-that-a-lawyer-may-unilaterally-countermand-clients-instruction-to-file-a-criminal-appeal/> [<https://perma.cc/V8H8-49EF>] (explaining that the application of *Strickland* to *Garza*'s case generates two questions. First, did *Garza*'s lawyer provide deficient performance by refusing to file a notice of appeal, despite *Garza*'s repeated requests? Second, must *Garza* demonstrate prejudice, or should the Court apply the presumption of prejudice adopted in *Roe v. Flores-Ortega*?).

151. *Garza*, 139 S. Ct. at 746. The Court concluded that counsel rendered deficient performance by not filing a notice of appeal despite *Garza*'s clear requests. *Id.* See *Flores-Ortega*, 528 U.S. at 477 (explaining that counsel's failure to file a notice of appeal cannot be considered a strategic decision. Filing a notice of appeal is a purely ministerial task, and a failure to file reflects inattention to or disregard for the defendant's wishes.).

152. *Garza*, 139 S. Ct. at 746. Idaho relied on *Strickland* to argue that counsel's strategic choices made after a thorough investigation are virtually unchallengeable (citing to *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). See Brief for Respondent at 17, *Garza v. Idaho* 139 S. Ct. 738 (2019) (No. 17-1026) (arguing that counsel's act of filing or not filing a notice of appeal requested by a client is a strategic decision for counsel. After all, filing a notice of appeal requires counsel to analyze legal issues related to whether or not to appeal despite a waiver—which is "squarely within the wide range of professional assistance provided by counsel.").

153. *Garza*, 139 S. Ct. at 746 (explaining that a defendant's appeal could raise claims beyond

counsel's failure to file the notice satisfied *Strickland*'s first prong as unreasonable performance.¹⁵⁴

Turning to *Strickland*'s second prong, the Court held that *Garza* required *Flores-Ortega*'s presumption of prejudice.¹⁵⁵ It reasoned that *Garza* factually matched *Flores-Ortega*: in both, counsel deprived the defendant of a desired appeal.¹⁵⁶ *Garza*'s appeal waiver did not complicate applying *Flores-Ortega*'s presumption.¹⁵⁷ After all, the *Garza* appeal waiver was comparable to the *Flores-Ortega* guilty plea because both reduced the scope of potentially appealable issues; hence, *Flores-Ortega* could control.¹⁵⁸ The Court's precedent also required a presumption of prejudice when counsel forfeited an appellate proceeding,

the appeal waiver's scope, in which case filing a notice of appeal would not breach the plea bargain); see *Roe v. Flores-Ortega*, 528 U.S. at 470, 477 (2000) (concluding that counsel's disregard for his client's choice to appeal cannot be considered a strategic decision)); but see Brief for Respondent, *supra* note 152, at 18 (arguing that *Garza* could secure an appeal only by showing that an issue for appeal was outside the scope of the appeal waiver. Counsel's assessment of what claims were outside of *Garza*'s appeal waiver was well within counsel's normal representation. Therefore, *Garza*'s counsel made a strategic decision in not filing a notice of appeal.)

154. See *Garza*, 139 S. Ct. at 745 (emphasizing that the decision of whether to appeal is the defendant's, not counsel's, to make); see also *id.* at 746 (disagreeing with the Idaho Supreme Court that the risk of breaching the defendant's plea agreement renders counsel's decision strategic. Because filing a notice of appeal does not necessarily breach a plea agreement, it is possible that the defendant would raise claims on appeal beyond the waiver's scope. The Court disagreed with its dicta in *Strickland* that "[counsel's] [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . ." by stating "[t]hat is not so." (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)); see generally Buck Files, *Another Ineffective Assistance of Counsel Case and a Dissent by Justice Thomas*, 48 VOICE FOR THE DEF. 1, 12 (2019) ("In every case, state or federal, a lawyer representing a defendant in a criminal case is required to give notice of appeal if the client requests it—even if the court has followed a plea recommendation and the defendant has signed a waiver of appeal.").

155. *Garza*, 139 S. Ct. at 747 (explaining that the Court should apply *Flores-Ortega* because both *Flores-Ortega* and *Garza* involved a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal); see Brief for Petitioner at 14, *Garza*, 139 S. Ct. 738 (No. 17-1026) (noting that both *Flores-Ortega*'s language and logic make clear that the Court should apply the *Flores-Ortega* presumption of prejudice when a defendant has entered a plea containing an appeal waiver).

156. *Garza*, 139 S. Ct. at 747; see Transcript of Oral Argument, *supra* note 126, at 55 ("What *Flores-Ortega* tells us is that once you know that the reason that the defendant lost out on an appellate proceeding to which he had a right, because of what counsel did, that automatically is prejudicial. You don't have to know whether he was going to win his appeal.").

157. *Garza*, 139 S. Ct. at 747 (supporting the *Flores-Ortega* presumption of prejudice because *Flores-Ortega*, like *Garza*, involved a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal); see generally Jacobi & Sag, *supra* note 125 (explaining that the central issue in *Garza* was the correct application of *Flores-Ortega*).

158. *Garza*, 139 S. Ct. at 747 (emphasizing that *Garza* retained a right to his appeal after his appeal waiver. *Garza* simply had fewer possible claims on appeal than other appellants.); but see John O. McGinnis, *How Thomas and Gorsuch Preserve the Generative Power of Originalism*, LAW & LIBERTY (Mar. 1, 2019), <https://lawliberty.org/how-thomas-and-gorsuch-preserve-the-generative-power-of-originalism/> [<https://perma.cc/A3YP-AE9B>] (arguing that the Court incorrectly relied on *Flores-Ortega* because in *Garza*, the defendant waived his right to appeal in return for the promise of a lighter sentence).

as Garza experienced.¹⁵⁹ Accordingly, the Court held that *Flores-Ortega*'s presumption applied.¹⁶⁰

The Court emphasized that Garza retained the right to appeal despite his appeal waivers.¹⁶¹ Garza did not need to prove that his appeal had merit for the *Flores-Ortega* presumption to apply.¹⁶² In fact, requiring Garza to demonstrate the merit of his appeal would create a pleading barrier that other appellants do not face and which *Flores-Ortega*, in reducing defendants' burdens, defied.¹⁶³ Finding both prongs of the *Strickland* standard met, the Court reversed the judgment of the Supreme Court of Idaho and remanded for further proceedings.¹⁶⁴

C. Justice Thomas's Dissent

Justice Thomas, joined by Justice Gorsuch in whole and Justice Alito as to Parts I and II, dissented, arguing that the majority's decision had no basis in either *Flores-Ortega* and other ineffective assistance precedents or the original meaning of the Sixth Amendment.¹⁶⁵ Thomas warned that

159. *Garza*, 139 S. Ct. at 747 (explaining that the Court will not soften the presumption of prejudice rule merely because a defendant seems to have a low chance of success on appeal); see generally *Smith v. Robbins*, 528 U.S. 259 (2000).

160. *Garza*, 139 S. Ct. at 747.

161. *Id.* at 748 (explaining that Garza merely had fewer possible claims on appeal than other appellants because of his appeal waiver); but see Brief for Respondent, *supra* note 152, at 9 (emphasizing that the conditions precedent to the Court determining counsel forfeited an appeal were missing. The first condition is that the client wanted the appeal. The second condition is that the client had a right to the appeal. Here, Garza did not have a right to appeal his sentencing, because he lost that right through his appeal waiver. It was therefore impossible for Garza's counsel to forfeit an appeal of his sentencing when Garza relinquished the right to that appeal in the first place.).

162. *Garza*, 139 S. Ct. at 748 (refuting the government's argument that a presumption of prejudice is contingent on the defendant showing that her appeal had merit); see Brief for Petitioner, *supra* note 155, at 22 (explaining that the Supreme Court has repeatedly held that when a defendant is denied a proceeding altogether, as Garza was, a presumption of prejudice does not turn on the merits of the claims the defendant would have brought).

163. *Garza*, 139 S. Ct. at 748; see Brief for Petitioner, *supra* note 155, at 2 (explaining that when courts did not apply *Flores-Ortega*'s presumption of prejudice to cases similar to Garza's, defendants had to demonstrate the merits of the claims they would have brought had counsel followed the instructions to appeal).

164. *Garza*, 139 S. Ct. at 749–50; see *Supreme Court Case Quick Updates: 2019 Term*, A.B.A., https://www.americanbar.org/groups/criminal_justice/resources/case_updates/ [<https://perma.cc/J43E-ZBBL>] (last visited Apr. 2, 2019) (explaining that the *Garza* Court reversed and remanded the decision of the Supreme Court of Idaho).

165. *Garza v. Idaho*, 139 S. Ct. 738, 750 (2019) (Thomas, J., dissenting); see Jules Epstein, *There is No Constitutional Right to Effective Counsel?*, TEMP. U. BEASLEY SCH. OF L., <https://www2.law.temple.edu/aer/there-is-no-constitutional-right-to-effective-counsel/> [<https://perma.cc/84BE-TVSS>] (last visited Oct. 15, 2019) (explaining that Justices Thomas and Gorsuch argued that “based on the historic origins of the Sixth Amendment, the right to counsel was only the right to have some lawyer be present and not an enforceable right to effective representation.”); see also McGinnis, *supra* note 158 (noting the interplay between the original

the majority's holding allowed a defendant's interest in appealing to "undo all sworn attestations to the contrary and resurrect waived statutory rights."¹⁶⁶

Thomas maintained that, to meet *Strickland's* second prong, a defendant who agreed to an appeal waiver must prove counsel prejudiced her case rather than have a court apply the presumption of prejudice.¹⁶⁷ He reasoned that the majority's reliance on *Flores-Ortega* undermined, rather than strengthened, its argument.¹⁶⁸ Under *Flores-Ortega*,

meaning of the Constitutional provision and precedent interpreting it. The Supreme Court has decided thousands of cases about the Constitution, many with little attention to the Constitution's original meaning. The original meaning of the Constitutional provision can therefore disappear down a "memory hole" replaced by the Court's own "deathless words" which then become precedent. As a result, the decisions of the Court can move farther and farther away from the original meaning of the Constitution because "interpretation of precedent is piled on interpretation of precedent."); see generally Jennifer S. Freel & Jeyshree Ramachandran, *Docket Check: Criminal Cases Currently Before the U.S. Supreme Court*, IN HOT PURSUIT (Crim. L. Sec. Fed. Bar Ass'n, Arlington, Va), Spring 2019, at 7, <https://www.fedbar.org/wp-content/uploads/2019/12/crim-spring-2019-v3-pdf.pdf> [<https://perma.cc/T4KS-FD7R>] (explaining that Justice Thomas's dissent received a "great deal of attention" because it questioned the Court's entire ineffective assistance of counsel jurisprudence).

166. *Garza*, 139 S. Ct. at 752 (Thomas, J., dissenting) (emphasizing that Garza admitted the appeal waiver was "by the book" and that he "received exactly what he bargained for in exchange for his plea"); see *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) ("The strong societal interest in finality has special force with respect to convictions based on guilty pleas.") (internal quotation marks omitted); see also Scott Lemieux, *Neil Gorsuch Is No Civil Libertarian*, LAW., GUNS & MONEY (June 27, 2019, 9:19 AM), <http://www.lawyersgunsmoneyblog.com/2019/06/neil-gorsuch-is-no-civil-libertarian> [<https://perma.cc/5HHJ-8S47>] (arguing that when Justice Gorsuch joined Justice Thomas's dissent, Gorsuch "sought to cast aside a significant constitutional protection for criminal defendants[.]" by resisting defendant-friendly Sixth Amendment jurisprudence).

167. *Garza*, 139 S. Ct. at 752 (Thomas, J., dissenting) (explaining the three ways Justice Thomas reasoned a defendant can show his counsel's deficiency in failing to appeal. The defendant can (1) identify claims she would have pursued that were outside the appeal waiver, (2) show that the plea was involuntary or unknowing, or (3) establish that the government breached the plea agreement.); see Brief for the United States as Amicus Curiae Supporting Respondent at 18, *Garza v. Idaho*, 139 S. Ct. 738 (2019) (No. 17-1026) (arguing that when a defendant waives her right to appeal, counsel's failure to file a notice of appeal is not "invariably prejudicial." It therefore does not categorically deserve *Flores-Ortega's* presumption of prejudice in satisfying *Strickland's* second prong. Rather, any error by counsel in that situation affects the defendant *only* if it deprived her of a still-existent right to an appellate proceeding.); see generally *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (explaining that in most cases, a defendant claiming ineffective assistance of counsel bears the burden of affirmatively proving that counsel's alleged mistakes prejudiced him).

168. *Garza*, 139 S. Ct. at 752 (Thomas, J., dissenting); see Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 23 (arguing that neither the logic of *Flores-Ortega* nor any other legal or practical consideration supports the majority's holding in *Garza*); see also Transcript of Oral Argument, *supra* note 126, at 45-46 (highlighting that, generally, when the Court applies a presumption of prejudice, the Court will reach the "correct result" in most cases. In *Garza*, however, the appeal waiver would ultimately be enforced and would prevent Garza from prevailing regardless of whether counsel was ineffective for failing to file a notice of appeal. Therefore, the presumption of prejudice would lead to an "incorrect result" on account of the appeal waiver denying Garza an appeal.).

counsel's failure to consult with the defendant about an appeal was not unreasonable in every case; thus, counsel's failure to appeal was not necessarily unreasonable.¹⁶⁹ Overall, Thomas concluded that the majority purported to follow *Flores-Ortega* but glossed over the most important difference: the *Flores-Ortega* defendant did not agree to an appeal waiver.¹⁷⁰

Consequently, Thomas found *Flores-Ortega* inapposite because there the proximate cause of the defendant's inability to appeal was counsel's failure to file the notice, while in *Garza*, the proximate cause was his agreement to the appeal waivers.¹⁷¹ Asserting that *Flores-Ortega* should not control when a defendant waived the right to appeal, Thomas rejected the Court's application of the presumption of prejudice.¹⁷² And therefore,

169. *Garza*, 139 S. Ct. at 752–53 (Thomas, J., dissenting) (emphasizing the *Flores-Ortega* Court considered whether the defendant's plea bargain waived appeal rights in determining the reasonableness of counsel's failure to consult about an appeal); see generally *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (noting *Strickland's* rejection of "mechanistic rules" governing what counsel must do. It would not be constitutionally deficient for counsel to consult with his client about an appeal when, for example, the defendant expressed satisfaction in a two-year sentence as part of a plea bargain and receives that sentence. If the defendant did not express any interest in appealing and counsel concluded there are only frivolous grounds for appeal, the *Strickland* Court concluded that counsel would not be professionally unreasonable in failing to consult with the defendant about an appeal.).

170. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting); see Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 18 (highlighting that the Court should have acknowledged that it had not dispensed with the requirement that a defendant prove the alleged loss, here an appellate proceeding, was specifically attributable to his attorney. In *Flores-Ortega*, the Court required the defendant to establish a "reasonable probability" that, but for his attorney's allegedly deficient failure to consult with him about an appeal, the defendant would have exercised his appellate rights (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000)); see generally Kent Scheidegger, *Clients, Lawyers, and Appeals*, CRIME & CONSEQUENCES BLOG (June 18, 2018, 8:33 AM), <http://www.crimeandconsequences.com/crimblog/2018/06/clients-lawyers-and-appeals.html> [<https://perma.cc/FB8K-ZMY9>] (explaining that the situation in *Garza* is "quite different" from *Flores-Ortega* because in *Garza*, the defendant agreed to give up his right to an appeal though an appeal waiver. Significantly, that did not occur in *Flores-Ortega*.).

171. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting); see Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 7 (explaining that when a defendant voluntarily renounces rights to appellate review through a waiver, as *Garza* did, the lack of an appellate proceeding cannot automatically be blamed on attorney error, as the *Flores-Ortega* presumption of prejudice requires. Rather, the defendant must show that counsel's failure to appeal, not the defendant's appeal waiver, denied her an appeal.).

172. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting) (noting that the judicial scrutiny of counsel's performance must be highly deferential and must focus on the reasonableness of counsel's conduct (citing *Strickland v. Washington*, 466 U.S. 668, 673 (1984))); see Transcript of Oral Argument, *supra* note 126, at 46 (arguing that the *Strickland* standard is sufficient to "catch those instances where there is a mistake" when counsel fails to file a notice of appeal because of the client's appeal waiver).

he concluded that Garza failed to demonstrate counsel's performance was unreasonable and prejudicial under *Strickland*.¹⁷³

For the first *Strickland* prong, Thomas argued that counsel's decision to not appeal was the only reasonable option.¹⁷⁴ If counsel filed a notice of appeal, he would have jeopardized Garza's plea and could not have reduced his sentencing.¹⁷⁵ To be sure, Garza entered into Rule 11 plea bargains,¹⁷⁶ pleas that establish an agreed-upon sentence from which the court cannot deviate.¹⁷⁷ Indeed, if Garza's counsel filed a notice of appeal, the court may have determined Garza breached his plea bargain

173. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting); see Charles Gallmeyer, *Supreme Court Further Defines Ineffective Counsel*, JURIST (Feb. 27, 2019, 1:57 PM), <https://www.jurist.org/news/2019/02/supreme-court-further-defines-ineffective-counsel/> [<https://perma.cc/6T2G-W2PG>] (explaining that Justice Thomas encouraged a more "specific rule" than *Flores-Ortega*'s presumption of prejudice. Thomas argued that defendants in Garza's situation must show prejudice by demonstrating potential appellate claims outside the appeal waiver, such as by showing the plea was coerced or that the government failed to follow the plea deal.).

174. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting); see also *United States v. Cronic*, 466 U.S. 648, 658 (1984) (explaining that counsel's challenged conduct under *Strickland*'s first prong must affect the reliability of the judicial process because "[a]bsent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated.").

175. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting) (explaining that counsel's act of filing a notice of appeal would not be favorable to Garza in any way, making it "worse than pointless" to file); see Brief for Respondent, *supra* note 152, at 27 (describing the risks Garza faced if counsel filed a notice of appeal. The prosecution could have reinstated the charges, which may have resulted in up to a life sentence for Garza).

176. See *Federal Rule 11 Plea Agreements*, FED. CRIM. ATT'YS OF MICH., <https://www.federalcriminalattorneysofmichigan.com/practice-areas/detroit-criminal-defense-resources/federal-and-state-practice-and-procedure/federal-rule-11-plea-agreements> [<https://perma.cc/NJL4-GLCC>] (last visited Sept. 26, 2019) (explaining that most pleas are pursuant to an agreement with the prosecutor, which is referred to as a Rule 11 plea); see also William Young, *Idaho's Infamous "Rule 11" Plea Agreement*, WILLIAM YOUNG & ASSOC. (Feb. 22, 2018), <https://www.youridattorney.com/what-is-a-rule-11-plea-agreement> [<https://perma.cc/G27T-9GW2>] (explaining that a Rule 11 plea agreement provides for a certain sentence if the defendant pleads guilty. A plea under this rule binds the court to the terms of the agreement. As such, the judge cannot add, subtract, or alter the terms of a Rule 11 agreement. This differs from a nonbinding agreement where the parties each argue for the sentence they feel is appropriate and the judge makes the final determination.).

177. *Garza v. Idaho*, 139 S. Ct. 738, 754 (2019) (Thomas, J., dissenting) (explaining that Garza sought to appeal so that his sentences would run concurrently, rather than consecutively which he agreed to in his plea bargain. Therefore, Garza sought to appeal a matter, his sentencing, which the district court had no discretion in changing because it was a Rule 11 plea bargain. Thus, counsel's act of filing a notice of appeal would have breached the Rule 11 plea bargain—thereby exposing Garza to a more unfavorable sentencing than the court provided.); see Craig Atkinson, *What is a Rule 11 Plea Agreement?*, ATKINSON L. OFF. (July 25, 2012), <https://atkinsonlawoffices.com/general-criminal-law-topics/rule11/> [<https://perma.cc/5GNU-6GM5>] (explaining that in a Rule 11 plea agreement, the judge does not have discretion to hand down a different sentence than what has been agreed to by the parties. The judge may, however, reject the plea agreement altogether, at which point the defendant would proceed to trial.).

and sentenced him to life rather than ten years.¹⁷⁸ As such, Thomas concluded that counsel reasonably declined to file a notice, as filing could have compromised Garza's favorable sentencing.¹⁷⁹

Addressing *Strickland's* second prong, Thomas disagreed with the majority's presumption of prejudice.¹⁸⁰ Garza voluntarily and knowingly relinquished his right to appeal through the appeal waivers.¹⁸¹ He therefore could not establish under *Flores-Ortega* that counsel caused the forfeiture of an appeal when Garza *himself* forfeited the appeal.¹⁸² Thomas addressed the majority's position that certain issues are never waivable,¹⁸³ highlighting that Garza did not seek to appeal nonwaivable issues but rather sought to appeal his sentencing, which Thomas deemed unappealable.¹⁸⁴ While precedent permits only the defendant to decide not to appeal, Garza already decided not to appeal when he agreed to the

178. *Garza*, 139 S. Ct. at 754 (Thomas, J., dissenting) (explaining that Garza's sentencing was likely to increase after an appeal, especially because of the trial court's concern that the agreed-upon sentence was too lenient); *see generally* United States v. Whitlow, 287 F.3d 638, 640–41 (7th Cir. 2002) (“[A] defendant's appeal, in disregard of a promise not to do so, exposes him to steps that can increase the sentence.”).

179. *Garza*, 139 S. Ct. at 754 (Thomas, J., dissenting) (explaining the different analysis under *Strickland's* first prong if Garza had informed counsel that he desired to file an appeal on an issue that had a chance of success on appeal. But Garza simply sought a more lenient sentence, which could not be advanced by an appeal, and thus counsel did not have a duty to file a notice of appeal. The Constitution does not urge attorneys to irrationally follow their client's stated desires when doing so only “courts disaster.”); *but see* Clark Neily & Jay Schweikert, *Garza v. Idaho*, CATO INST. (Aug. 17, 2018), <https://www.cato.org/publications/legal-briefs/garza-v-idaho> [<https://perma.cc/U8MJ-DATH>] (acknowledging that if a defendant files an appeal despite an appeal waiver, the defendant risks losing her plea bargain. It is, however, ultimately the defendant's choice to weigh that risk against the possible benefit of an appeal, so counsel should appeal if the client requests it.).

180. *Garza*, 139 S. Ct. at 754 (Thomas, J., dissenting).

181. *Id.*

182. *Id.* *See also* Transcript for Oral Argument, *supra* note 126, at 54–55 (explaining that Garza never contended at any stage of his post-conviction case that he did not understand the appeal waivers when he entered his pleas); *but see id.* at 5 (Garza's counsel argued that Garza's appeal waiver was “involuntary.”).

183. *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (listing appellate issues which are never waivable: (1) the voluntariness of the plea agreement and (2) a breach of the agreement by the State); *see generally* Puckett v. United States, 556 U. S. 129 (2009) (noting that an appeal waiver does not bar claims outside its scope).

184. *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (arguing that without the Court's application of the presumption of prejudice, Garza would not have been able to satisfy *Strickland's* second prong, as he was unable to identify any issues that he preserved on appeal. Therefore, his counsel's conduct could not have prejudiced him when there were no preserved issues to appeal.); *see* Transcript for Oral Argument, *supra* note 126, at 52 (noting that the district court asked Garza which issues he wished to raise on appeal. Garza specifically limited his appeal to his sentencing. The court noted that Garza did not raise any direct challenges to the appeal waiver.); *see also id.* at 57–58 (explaining the government's argument that *Flores-Ortega* requires a presumption of prejudice only when the defendant has the right to an appellate proceeding which the defendant was denied as a result of counsel's conduct. In Garza's case, though, the loss of his appellate proceeding was through *his* conduct of accepting the plea bargain with an appeal waiver.).

appeal waivers.¹⁸⁵ And thus, Thomas insisted Garza could not fault counsel for his own decision to sign appeal waivers.¹⁸⁶

Last, Thomas dismissed Garza's argument against requiring him, a pro se defendant, to identify issues he would have raised on appeal to satisfy the prejudice prong.¹⁸⁷ Other pro se defendants must prove both of *Strickland's* prongs, and Garza's case did not warrant an exception.¹⁸⁸

III. APPROPRIATELY PROTECTING CLIENT AUTONOMY

By applying the *Flores-Ortega* presumption, the Court in *Garza* continued its trend of protecting clients' autonomy in criminal appeals.¹⁸⁹ This part first establishes that the Court properly followed its Sixth Amendment ineffective assistance of counsel precedents.¹⁹⁰ Next, it

185. *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting); see Transcript for Oral Argument, *supra* note 126, at 60–61. (The United States argued that *Flores-Ortega's* presumption applies when counsel's conduct denies a client appellate review on the merits of the client's case. Because the court of appeals would automatically dismiss Garza's case on account of the appeal waiver anyway, Garza was not denied the requisite appellate review *on the merits*. Accordingly, *Flores-Ortega's* presumption of prejudice is inapplicable.)

186. *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (explaining that, for example, a defendant cannot waive her right against self-incrimination by testifying at her trial and then claim that her attorney prejudiced her by not moving to strike his damaging testimony from the record. Similarly, a defendant cannot waive her right to a jury trial and then later claim prejudice when counsel declines to seek a mistrial on the ground that the judge found her guilty.); see also Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 7 (noting that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal as a prerequisite for triggering the presumption of prejudice in satisfying *Strickland's* second prong (citing to and relying on *Roe v. Flores-Ortega*, 528 U.S. 470, 484–85 (2000))).

187. *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting).

188. *Id.* (remarking that Garza's fairness argument "rings hollow" because Garza was represented by counsel at every stage of litigation yet failed to articulate a single nonfrivolous, nonwaived issue that he would have raised on appeal); see Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 18 (explaining that the "usual rule" is that a defendant bears the burden to show prejudice on an ineffective assistance claim. A defendant who cannot prove such deprivation should therefore not be granted relief.)

189. *Garza*, 139 S. Ct. at 742 (applying the *Flores-Ortega* presumption of prejudice regardless of whether the defendant signed an appeal waiver); *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (applying a presumption of prejudice when counsel failed to file a notice of appeal for her client); see *United States v. Cronin*, 466 U.S. 648, 662 (1984) (applying a presumption of ineffective assistance when circumstances surrounding the trial are unfavorable to the defendant); but see *McGinnis*, *supra* note 158 (arguing that *Garza* improperly extended ineffective assistance of counsel claims beyond the original meaning of the Sixth Amendment. The *Garza* Court should not have extended *Flores-Ortega's* presumption of prejudice to this case.); see Brief for Respondent, *supra* note 152, at 18 (explaining that the *Garza* Court should not expand *Flores-Ortega* because *Flores-Ortega* is inapposite on account of the *Garza* notice of appeal. In *Flores-Ortega*, counsel's act of filing the notice of appeal, though unperformed, was ministerial. In *Garza*, however, counsel's act of filing the notice of appeal, though unperformed, was substantive. After all, counsel's act of filing the notice of appeal could have had legal ramifications because of the appeal waiver, potentially costing Garza the benefit of the plea bargain.)

190. *Infra* notes 193, 198; see also Brief for Respondent, *supra* note 152, at 28 (explaining that

demonstrates how *Garza* aligned with the Court's trend of affirming client autonomy and rejecting paternalism.¹⁹¹ Ultimately, it explains how the decision reinforced defendants' right to appeal regardless of an appeal waiver.¹⁹²

A. *Aligning with Sixth Amendment Jurisprudence*

The Court correctly applied the *Flores-Ortega* presumption of prejudice to Garza's case because the *Flores-Ortega* rule is categorical: so long as counsel failed to file a notice of appeal, *Flores-Ortega* controls.¹⁹³ The *Flores-Ortega* Court held that when counsel denied the defendant an appellate proceeding, courts should apply a presumption of prejudice to meet *Strickland*'s second prong.¹⁹⁴ Garza indeed suffered a "forfeiture of a proceeding" under *Flores-Ortega*.¹⁹⁵ Idaho law, after all, permits a defendant who agreed to an appeal waiver to appeal whether she entered into the plea agreement or appeal waiver voluntarily, knowingly, and intelligently—a proceeding which Garza's counsel

the lower courts, in denying *Flores-Ortega*'s presumption of prejudice in Garza's case, cannot reconcile themselves with Supreme Court precedent. For example, the Court's precedent established that a defendant's right to appeal can never be contingent on an attorney's judgment on whether the appeal is meritorious.; *but see Garza*, 139 S. Ct. at 753 (Thomas J., dissenting) ("This [court's] rule is neither compelled by precedent nor consistent with the use of appeal waivers in plea bargaining.").

191. *Infra* Section III.D; *but see* Brief for Louisiana et al. as Amici Curiae Supporting Respondent at 4, *Garza*, 139 S. Ct. 738 (No. 17-1026) (arguing that when a defendant knowingly and intelligently waives his appellate rights, as Garza did, an appellate court should never hear his case, as he has lost his right to appeal).

192. *Infra* Section III.B.

193. *See* Brief for Petitioner, *supra* note 155, at 7–8 (explaining that the *Flores-Ortega* presumption of prejudice applies when counsel disregarded her client's instruction to appeal—regardless of the particulars of the judgment or plea from which that appeal is taken); *see also* Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 4 (arguing that when attorneys fail to file a notice of appeal, the defendants suffer the same fate, the forfeiture of an appeal, whether or not they agreed to an appeal waiver. The same presumption of prejudice should therefore apply to both types of defendants.); *but see* Brief for the United States as Amici Curiae Supporting Respondent, *supra* note 167, at 13 (explaining that even when a defendant alleges the forfeiture of a proceeding, the Supreme Court has still required a defendant to prove that the forfeiture was specifically attributable to her attorney as part of her ineffective assistance claim).

194. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also* Brief for Petitioner, *supra* note 155, at 16 (arguing that the *Flores-Ortega* rationale applies with "full force" to a defendant who signed an appeal waiver).

195. *Garza*, 139 S. Ct. at 746 (explaining that the defendant expressly requested an appeal, but counsel failed to file a notice of appeal); *see Garza*, 139 S. Ct. at 753 (Thomas J., dissenting) (acknowledging that Garza suffered a forfeiture of his appeal, but arguing that it was Garza's appeal waiver—rather than counsel's inaction—which caused the forfeiture); *see also Flores-Ortega*, 528 U.S. at 483 (noting that *Flores-Ortega* was an unusual case because counsel's alleged deficient performance did not lead to a judicial proceeding of uncertain reliability but rather led to the forfeiture of an entire judicial proceeding altogether).

denied him.¹⁹⁶ Therefore, the *Garza* Court accurately applied the *Flores-Ortega* presumption because counsel's performance led to the forfeiture of a proceeding, regardless of additional circumstances like an appeal waiver.¹⁹⁷

Similarly, the Court's application of *Flores-Ortega*'s presumption conformed with its decision in *Jones v. Barnes*.¹⁹⁸ In *Barnes*, the Court established that a defendant's responsibilities do not include deciding which issues to raise on appeal, as that is one of counsel's responsibilities.¹⁹⁹ *Barnes*, in the context of an ineffective assistance claim, relieves a defendant from indicating which issues she would have raised on appeal, had counsel appealed.²⁰⁰ As such, the Court satisfied

196. See *State v. Cope*, 129 P.3d 1241, 1246 (Idaho 2006) (explaining how the district court ensured that the defendant had voluntarily, knowingly, and intelligently entered into his plea agreement by asking him questions on two separate occasions to that effect); *State v. Murphy*, 872 P.2d 719, 720 (Idaho 1994) (noting that a waiver of the defendant's rights would be upheld only if the entire record demonstrated that the waiver was made voluntarily, knowingly, and intelligently); see also Brief for Petitioner, *supra* note 155, at 20–21 (noting that the courts of appeals as well as the Department of Justice agree that a defendant who signed an appeal waiver still retains her right to challenge certain aspects of the agreement).

197. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 3 (explaining that eight federal courts of appeals have correctly held that *Flores-Ortega* presents a categorical rule: attorneys must never disregard a client's express instructions to file a notice of appeal); see also Brief for Petitioner, *supra* note 155, at 15 (describing *Flores-Ortega*'s presumption of prejudice as "unequivocal and unconditional" and thus that it does not depend on the particulars of a defendant's plea bargain).

198. See *Flores-Ortega*, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part) (relying on *Jones v. Barnes* to establish that the decision to seek or forgo an appeal is for the defendant herself, not for her lawyer); see also *Jones v. Barnes*, 463 U.S. 745, 752 (1983). The *Barnes* Court held that it is the defendant's role to determine whether or not to appeal, but it is not the defendant's prerogative to decide which issues or arguments to present on appeal. *But see* Brief for Louisiana et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 7 (arguing that the *Flores-Ortega* Court cited to *Barnes* and acknowledged that a defendant cannot tell counsel not to file an appeal and then later complain that, by following her instructions, counsel performed deficiently. In *Garza*, the defendant explicitly told his attorney to not file an appeal when he signed the appeal waiver. The *Garza* Court should have therefore aligned with *Flores-Ortega* and *Barnes* by not applying the *Flores-Ortega* presumption of prejudice.).

199. *Barnes*, 463 U.S. at 751–52; see Jennifer Franklin, *What Are Your Appellate Obligations to Your Client Following a Guilty Verdict and Sentencing?*, APP. ADVOC. BLOG (Mar. 27, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/03/what-are-your-appellate-obligations-to-your-client-following-a-guilty-verdict-and-sentencing.html [<https://perma.cc/J8Y5-L87G>] (explaining that under *Barnes*, the defendant holds the authority to determine whether to pursue an appeal, while it is counsel's responsibility to make strategic choices about which issues to raise on appeal); *but see* Brief for Respondent, *supra* note 152, at 19 (arguing that no one disputed that *Garza* alone should have made the decision of whether or not to appeal. *Garza*, however, made his decision of whether or not to appeal when he agreed to the appeal waiver—thereby deciding to not appeal.).

200. See *Garza v. Idaho*, 139 S. Ct. 738, 748 (2019) (requiring a defendant to show which issues or arguments her counsel should have pressed on appeal is especially improper when it was allegedly counsel who caused the defendant to lose her appeal. The Court therefore refused to place

the *Barnes* rule by applying *Flores-Ortega*'s presumption of prejudice.²⁰¹ The presumption relieves a defendant from having to identify issues on appeal she would have likely succeeded on, which *Strickland*'s second prong otherwise requires.²⁰² Thus, relying on *Barnes*, the Court properly rejected the dissent's requirement that Garza identify appealable issues to satisfy the second prong.²⁰³

The *Garza* Court rightly embraced the *Flores-Ortega* presumption in light of *Barnes* as well as *Flores-Ortega*'s discussion of appeal waivers.²⁰⁴ In *Flores-Ortega*, the Court stated that an appeal waiver is a relevant factor for whether counsel should file a notice of appeal when

a "pleading barrier" between a defendant and her opportunity to appeal, an opportunity she should not have lost in the first place.); *see also* Brief for Petitioner, *supra* note 155, at 29–30 ("Pro se defendants face formidable challenges in identifying, let alone showing the merit of, the claims they might have raised on appeal."); *see generally* *Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) (noting the "heavy burden" such a requirement would impose); *Rodriguez v. United States*, 395 U.S. 327, 330 (1969) ("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.").

201. *See Garza*, 139 S. Ct. at 746 (noting *Barnes* required that the defendant hold the ultimate authority in deciding whether to take an appeal); *see also* Transcript of Oral Argument, *supra* note 126, at 13 (explaining that under *Barnes*, the attorney makes the decisions about what issues to raise on appeal. The defendant should therefore not have to articulate what issues to raise on appeal. In fact, in Idaho, a defendant would not even be able to access the record to articulate issues for appeal because the record does not become available until after counsel files a notice of appeal.); *but see* McGinnis, *supra* note 158 (arguing that even if *Garza* complies with ineffective assistance precedent, it continues a line of jurisprudence that is not driven by the inner logic of the Constitution but rather by "varying coalitions of the justices and political imperatives of the day.").

202. *See Garza*, 139 S. Ct. at 749 (explaining that the *Flores-Ortega* presumption of prejudice "restores the status quo that existed before counsel's deficient performance forfeited the appeal." The presumption returns the defendant to the position she sought: the court granting an appellate proceeding after the defendant succeeds on an ineffective assistance claim.); *see also* Transcript for Oral Argument, *supra* note 126, at 13–14 (arguing that if the *Garza* Court did not apply a presumption of prejudice, a defendant with potentially limited education and limited exposure to the legal system would shoulder the burden of proof).

203. *See Garza*, 139 S. Ct. at 748 (explaining that a defendant proceeding to an appeal does not have to decide which arguments to press. When counsel's failure to file a notice of appeal denies a defendant an appellate proceeding, the defendant should not have to *now* decide which arguments to press to demonstrate her counsel was ineffective.); *see generally* Brief for Petitioner, *supra* note 155, at 30 (highlighting the inequity of the Court requiring Garza to prove which issues he would have raised on appeal merely because counsel failed to file a notice of appeal); *but see* Brief for Respondent, *supra* note 152, at 18–19 (explaining that under Idaho law, while a defendant may file a notice of appeal after waiving her right to appeal, she is nonetheless denied an appeal on the merits. In order to achieve an appeal on the merits, Garza would therefore have needed to show why his appeal was not barred by the waiver, by pointing to the meritorious issues on appeal.).

204. *See Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000) (explaining the factors which, though not determinative, are highly relevant to determine whether counsel had a duty to consult with her client about an appeal); *see also* Brief for Petitioner, *supra* note 155, at 12 (noting that both prongs of *Strickland*'s standard require an inquiry into several relevant factors under *Flores-Ortega*. One of those factors is whether the defendant agreed to an appeal waiver.).

the defendant was silent about her wish to appeal.²⁰⁵ Importantly, the *Flores-Ortega* Court did not indicate an appeal waiver is relevant under the different circumstances of when the defendant expressed her wish to appeal.²⁰⁶ The Court instead provided that when a defendant asked counsel to appeal and counsel failed to do so, counsel's performance was unreasonable.²⁰⁷ Hence, the *Garza* Court properly aligned with *Flores-Ortega*'s disregard for an appeal waiver when the defendant instructed an appeal.²⁰⁸

B. Appeal Waivers Not Precluding Appeal

The *Garza* Court correctly secured a criminal defendant's appeal right regardless of whether the defendant signed an appeal waiver.²⁰⁹ In fact, the Court's jurisprudence had established that the decision to appeal is

205. *Flores-Ortega*, 528 U.S. at 480 (explaining that even when the defendant pleads guilty, courts must consider factors such as whether the plea agreement waived some or all of the defendant's right to appeal); see Brief for Petitioner, *supra* note 155, at 12 (noting that an appeal waiver is a relevant factor only when counsel did not consult with her client about whether she desired to appeal).

206. *Flores-Ortega*, 528 U.S. at 478 (noting that an inquiry into the presence of an appeal waiver should occur only when counsel has failed to consult with her client about appealing a conviction or sentencing); see Brief for Petitioner, *supra* note 155, at 14 (explaining that *Flores-Ortega* made clear that when an attorney disregards her client's instruction to appeal, the client is entitled to the appellate proceeding she otherwise would have had).

207. *Flores-Ortega*, 528 U.S. at 480 (citing to and relying on *Rodriguez v. United States*, 395 U.S. 327 (1969)); see also Brief for Petitioner, *supra* note 155, at 22 (explaining that when a defendant is deprived of the right to appeal, a court should presume prejudice with no further showing from the defendant of the merits of her underlying claims (citing to and relying on *Flores-Ortega*, 528 U.S. at 485)).

208. *Flores-Ortega*, 528 U.S. at 485 (noting that if a defendant instructs counsel to make an appeal and counsel fails to do so, the defendant is entitled to a new appeal without any further showing) (relying on *Rodriguez v. United States*, 395 U.S. 327 (1969)); see also Brief for Petitioner, *supra* note 155, at 36 ("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.").

209. *Garza v. Idaho*, 139 S. Ct. 738, 747 (2019) (explaining the Court's holding that when counsel's deficient performance deprives a defendant of an appeal that she otherwise would have taken, the defendant has pled a successful ineffective assistance of counsel claim. Therefore, an inquiry into the merits of the appealable issues is not needed.); see Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 21 (arguing that the *Garza* Court should apply the presumption of prejudice not only because of *Flores-Ortega* but also because of the Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). In *Gonzalez-Lopez*, the Court held that a presumption of prejudice is appropriate when the "consequences" of an error are "unquantifiable and indeterminate." *Gonzalez-Lopez*, 548 U.S. at 150. Applied to *Garza*, an attorney's failure to file a notice of appeal despite the client's instructions satisfies *Gonzalez-Lopez*, regardless of whether there is an appeal waiver. After all, when counsel refuses to file a notice of appeal, the court would have to speculate about how a hypothetical appeal would have resulted, rendering the consequences unquantifiable and indeterminate. The *Garza* Court would therefore correctly apply a presumption of prejudice under both *Gonzalez-Lopez* as well as *Flores-Ortega*).

fundamentally the defendant's.²¹⁰ Consequently, the *Garza* Court accorded with its protection of the defendant's—and only the defendant's—right to decide to appeal.²¹¹ Indeed, in *Flores-Ortega*, the Court began its analysis with the principle that only the defendant owns the decision to appeal.²¹² And even if a defendant's appeal decision is difficult, the Court had already held that a defendant's difficult decision is not grounds to impinge on her autonomy.²¹³ As such, if the *Garza* Court had held otherwise, an attorney could constitutionally refuse to file a notice of appeal—defying the Court's protection of a defendant's right to appeal.²¹⁴

210. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). In *McCoy*, counsel conceded the defendant's guilt—despite the defendant's unambiguous objection. The Court determined that counsel provided constitutionally ineffective assistance of counsel. *See also Capital Punishment: McCoy v. Louisiana*, 132 HARV. L. REV. 377, 377 (2018) (explaining that *McCoy* answered the question of whether a defense attorney can admit her client's guilt without the client's consent. The *McCoy* Court held that control and decision-making within the attorney-client relationship divides based on the nature of the decision. Strategic trial management decisions are allocated to counsel, while defendants retain power over fundamental choices, such as whether to plead guilty or to appeal.).

211. *Garza*, 139 S. Ct. at 747; *see* Alice Kerr, *The Unappealing Turn of Events—Part II: Supreme Court Holds Defense Lawyer's Refusal to File Requested Appeal Constitutes Ineffective Assistance, Despite Defendant's Appeal Waiver*, LEGAL ETHICS IN MOTION (Mar. 8, 2019), <https://www.legalethicsinmotion.com/2019/03/the-unappealing-turn-of-events-part-ii-supreme-court-holds-defense-lawyers-refusal-to-file-requested-appeal-constitutes-ineffective-assistance-despite-defendants-appeal-w/> [<https://perma.cc/G4ED-2L6G>] (“Ultimately [*Garza's*] decision reinforces the client's authority to determine the objectives of legal representation.”); *see generally* Andrew Cohen, Gideon *Who? The Conservative War on Your Right to Counsel*, BRENNAN CTR. FOR JUST. (Mar. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/gideon-who-conservative-war-your-right-counsel> [<https://perma.cc/2YN5-99ZN>] (explaining that *Garza* ensured that a client has a right to expect that her lawyer will do what she asked the lawyer to do).

212. *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (explaining that because the decision to appeal rests with the defendant, the Court concluded that the better practice is for counsel to routinely consult with the defendant on the possibility of an appeal); *see* Rieger, *supra* note 105, at 397 (explaining that *Flores-Ortega* addressed counsel's obligations to consult with criminal defendants about the right to appeal).

213. *See Ricketts v. Adamson*, 483 U.S. 1, 3 (1987). In *Ricketts*, the defendant chose—perhaps for strategic reasons or as a gamble—to interpret his plea agreement in an unfavorable way. *Id.*; *see also* Brief of the Ethics Bureau at Yale as Amicus Curiae Supporting Petitioner at 14, *Garza v. Idaho*, 139 S. Ct. 738 (2019) (No. 17-1026) (“It would stand the rationale of *Ricketts* on its head to hold the defendant in *Ricketts* responsible for the consequences of his choice to risk breaching a plea agreement, while also depriving Mr. Garza of that same choice because he happened to have a disloyal lawyer who sabotaged his wishes.”); *see generally* Scheidegger, *supra* note 170 (“The U.S. Supreme Court today took up *Garza v. Idaho*, [] involving the intersection of two recurring themes: lawyer decisions v. client decisions . . .”).

214. *See* Brief for Petitioner, *supra* note 155, at 28 (remarking that it “cannot be right” that counsel's refusal to file a notice of appeal would deny the defendant her right to appeal); *see also* Brief of the Ethics Bureau at Yale as Amicus Curiae Supporting Petitioner, *supra* note 213, at 14 (noting that there are only a handful of exceptions allowing attorneys to avoid carrying out their clients' wishes, and no exception applied to *Garza's* counsel).

Moreover, the Court reasoned that appeal waivers never eliminate every appealable issue and correctly concluded that appeal waivers do not bar an appellate proceeding, as appealable issues always exist.²¹⁵ Before *Garza*, defendants who agreed to even broad appeal waivers brought issues on appeal, demonstrating the *Garza* Court's proper protection of a defendant's ability to appeal.²¹⁶ Because every defendant has at least some issues she may raise on appeal, the Court logically established that *Garza* was denied an appellate proceeding, requiring *Flores-Ortega's* presumption because counsel forfeited a proceeding.²¹⁷

The dissent's argument that *Garza* waived his right to appeal through an appeal waiver is therefore unpersuasive because a defendant never loses the right to appeal certain issues, even with an appeal waiver.²¹⁸ The Court soundly refuted the dissent's argument through its analysis of

215. See *Garza*, 139 S. Ct. at 744 (explaining that because plea bargains are essentially contracts, appeal waivers do not bar appeals outside of their scope (citing to and relying on *Puckett v. United States*, 556 U. S. 129, 137 (2009))); see also Transcript of Oral Argument, *supra* note 126, at 50 (noting that most issues on appeal are typically within the scope of an appeal waiver, barring an appeal of those issues. Occasionally, though, an appealable issue exists outside the scope of the waiver.).

216. See *Campbell v. United States*, 686 F.3d 353, 357–58 (6th Cir. 2012) (In *Campbell*, the defendant signed an appeal waiver—agreeing to waive the right to challenge his conviction or sentence on direct appeal or collateral review. The defendant instructed counsel to file a notice of appeal, but counsel failed to do so. The court determined that counsel provided ineffective assistance.); see also Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 9 (noting that the Supreme Court has recognized the tension between the constitutional right of defendants to have an active counsel on appeal and the professional obligation of counsel to not make frivolous arguments on appeal. The Court's holdings, however, have not wavered from the principle that defendants have a right to file an appeal and to have the assistance of counsel in doing so.).

217. See *Garza*, 139 S. Ct. at 747 (explaining that *Garza's* appeal waiver did not change the fact that he was denied an appellate proceeding); see also *FYI: Garza v. Idaho*, PROSECUTING ATT'YS COUNCIL OF GA. (Mar. 20, 2019), https://pacga.org/wp-content/uploads/2019/03/fyi_3_20_19_Garza_v_Idaho.pdf [<https://perma.cc/B5CX-MMPN>] (explaining that the *Flores-Ortega* Court reasoned that because a presumption of prejudice applies whenever the defendant is denied counsel at a critical stage of the proceedings, the Court should presume prejudice when counsel's deficiency forfeits an appellate proceeding altogether); but see *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (highlighting that *Garza* did not identify a nonwaived issue to bring on appeal. After all, *Garza* only identified "sentencing review" as his primary objective. The dissent would require a defendant to identify claims he would have brought on appeal for courts to conclude the defendant was denied an appellate proceeding.).

218. See *Garza*, 139 S. Ct. at 754–55 (Thomas, J., dissenting) (explaining that *Garza* knowingly and voluntarily bargained away his appellate rights in exchange for a lower sentencing through his appeal waiver. Therefore, *Garza* caused his own forfeiture of an appellate proceeding, not counsel.); see also *Lee*, *supra* note 18 (noting that the dissent agreed with the majority that the decision whether to appeal lies with a defendant. The dissent, however, argued that when a defendant signs a plea agreement containing an appeal waiver, she makes the decision to not appeal. Thus, by refusing to file an appeal, counsel merely "hold[s] the defendant to his own decision . . .").

cases about appeal waivers.²¹⁹ For example, the Court looked to *State v. Rendon*, in which the defendant agreed to an appeal waiver relinquishing the right to appeal his conviction but not his sentencing.²²⁰ When the defendant sought to appeal his conviction, the State failed to raise the waiver as proof he had relinquished the right to a conviction appeal.²²¹ The *Rendon* district court found that the waiver alone did not bar the defendant's appeal of his conviction.²²² Rather, it precluded the appeal only with the State's affirmative proof of such.²²³

Looking to *Rendon*, the *Garza* Court reasoned that when a defendant seeks an appeal despite an appeal waiver, the State must first demonstrate that the waiver in fact bars the appeal.²²⁴ Accordingly, the *Garza* majority disproved the dissent's position that an appeal waiver automatically extinguishes a defendant's right to appeal, as proof of the waiver's impact is required.²²⁵

219. *Garza*, 139 S. Ct. at 747; *see generally* *United States v. Archie*, 771 F.3d 217 (4th Cir. 2014); *State v. Rendon*, No. 38275, 2012 WL 9492805 (Idaho Ct. App. 2012). The *Garza* Court relied on both *Archie* and *Rendon* to demonstrate that appeal waivers do not categorically forfeit a defendant's right to appeal. After all, if that were the case, courts' analysis in determining whether they should grant a defendant an appeal despite an appeal waiver would consist simply in concluding that if an appeal waiver exists, a defendant has no right to appeal. Courts do not perform such simple analysis. Rather, courts require the State's affirmative proof that a defendant's appeal waiver in fact bars the particular appellate proceeding.

220. *Garza*, 139 S. Ct. at 747 n.10; *see Rendon*, No. 38275, 2012 WL 9492805, at *3 n.1 (noting that the *Rendon* defendant's plea agreement provided that the defendant waived his right to appeal the conviction but that he retained the right to appeal the sentence).

221. *Rendon*, No. 38275, 2012 WL 9492805, at *3 n.1; *see Rendon v. State*, No. 43048, 2016 WL 4263051, at *3 (Idaho Ct. App. 2016) (explaining that the defendant made an ineffective assistance claim which was dismissed on the grounds of res judicata, as another court had already decided the issue).

222. *Rendon*, No. 38275, 2012 WL 9492805, at *3 n.1 (explaining that the State failed to raise the defendant's appeal waiver after the defendant appealed); *see Rendon*, No. 43048, 2016 WL 4263051, at *4 (noting that the court granted the *Rendon* defendant a direct appeal because the State did not demonstrate that the defendant should be denied the appeal).

223. *Rendon*, No. 38275, 2012 WL 9492805, at *3 n.1.

224. *Garza v. Idaho*, 139 S. Ct. 738, 747 n.10 (2019); *see Rendon*, No. 38275, 2012 WL 9492805, at *3 n.1 (explaining that the defendant agreed to waive his right to appeal the judgment of his conviction but did not waive the right to appeal his sentencing. The State, however, failed to highlight the provision that waived the defendant's rights such that the State failed to object to the defendant's appeal of the court's judgment. The court summarized that "the state fail[ed] to raise the effect of this provision in defense to [the defendant's] appeal.").

225. *Garza*, 139 S. Ct. at 747; *compare id.* (concluding that *Garza* retained a right to appeal at least some issues despite his appeal waivers), *with* Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 2 (arguing that under state law, when a defendant waives her right to appeal, she no longer has any appellate proceeding available to her).

C. Addressing Defendants' Disadvantages

The Court examined how its decision would affect the modern criminal defendant who claims ineffective assistance.²²⁶ In doing so, the *Garza* Court recognized the split of authority on *Flores-Ortega's* presumption of prejudice, siding with the majority approach.²²⁷ Under this approach, the presumption of prejudice applied, while under the minority approach it did not.²²⁸ The minority approach thus required defendants to prove both of *Strickland's* prongs rather than just the first.²²⁹ By applying the presumption, the *Garza* Court remedied the higher burden of proof for defendants in minority jurisdictions.²³⁰

Furthermore, the Court recognized that an ineffective assistance claim, like other post-conviction proceedings, involves heightened standards of proof for defendants.²³¹ It next discussed a 2007 study indicating that

226. *See Garza*, 139 S. Ct. at 749 (relying on ineffective assistance jurisprudence and refusing to place unfair or ill-advised burdens on defendants (citing *Rodriguez v. United States*, 395 U.S. 327, 330 (1969))); *see generally* Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 24 (noting that if the Court did not apply the presumption of prejudice, *Garza* and other like defendants would be placed in an "unfair trap" because the pleading requirement is higher for post-conviction defendants).

227. *Garza*, 139 S. Ct. at 743 (explaining that the Court granted certiorari to resolve the split of authority on whether courts should apply the *Flores-Ortega* presumption of prejudice when counsel failed to file a notice of appeal because of an appeal waiver); *see generally* Luedtke, *supra* note 19 (noting the circuit split on the application of the *Flores-Ortega* presumption of prejudice when counsel failed to file a notice of appeal because of an appeal waiver).

228. *Garza*, 139 S. Ct. at 743; *see Garza v. State*, Nos. 44015/44016, 2017 WL 444026 at *1, *4 (Idaho Ct. App. 2017) (explaining the minority approach holding that when a defendant waives her appellate rights, she no longer has a right to appeal, and therefore counsel need not file an appeal at her client's request); *but see* *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (explaining that although the Ninth Circuit followed the majority approach, in this case, it had doubts. The court noted, in support of the minority approach, that it was wise for the defendant's attorney to not file the notice of appeal, as doing so would breach the defendant's plea bargain.).

229. *Garza*, 2017 WL 444026 at *3, *4 (explaining that under the minority approach, courts did not presume prejudice when counsel defied his client's instruction to file an appeal because of an appeal waiver. The minority approach therefore required the defendant to meet the test in *Strickland*, which required showing deficient performance and prejudice (citing *Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008))); *see* Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 4 (explaining that the minority approach relied primarily on the argument that if counsel files an appeal notice despite an appeal waiver, the defendant may have breached the plea bargain. The State may then be entitled to disregard the favorable sentencing.).

230. *See Garza v. Idaho*, 139 S. Ct. 738, 743 (2019) (explaining that the *Garza* Court granted certiorari to resolve the split in authority); *see also* *Garza v. State*, 405 P.3d 576, 580 (2017) (noting that under the minority approach, courts do not presume prejudice if an attorney disregards her client's instruction to file an appeal when the defendant executed an appeal waiver. The minority approach therefore requires the defendant to prove both the first and second prongs of the *Strickland* standard.).

231. *Garza*, 139 S. Ct. at 749 ("We accordingly decline to place a pleading barrier between a defendant and an opportunity to appeal that he never should have lost."); *see, e.g.*, 28 U. S. C.

over ninety percent of habeas petitioners, such as Garza, proceed without counsel.²³² Defendants who bring a habeas claim, after all, are not guaranteed the right to counsel because it is a post-conviction proceeding.²³³ The *Garza* Court relied on this study to understand the disadvantages that defendants like Garza face.²³⁴

The Court rightly considered how even defendants *with* counsel's assistance face challenges, such as language barriers.²³⁵ As a result, the Court deemed it unfair to hinge proof of counsel's prejudice in failing to file a notice of appeal on whether the defendant effectively communicated appealable issues to counsel, as the dissent proposed.²³⁶

§§ 2254, 2255. These federal laws govern federal court remedies, including habeas corpus proceedings such as an ineffective assistance claim. The defendant must provide clear and convincing evidence to rebut the presumption of a correct conviction or sentence. *See also* Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 25 ("The stringent pleading standards for postconviction petitioners have real teeth. Idaho courts routinely deny relief when petitioners do not submit the required evidence. . . . None of those standards applies to a criminal defendant prosecuting a direct appeal.").

232. *Garza*, 139 S. Ct. at 749 n.12 (citing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U. S. DISTRICT COURTS 23 (2007)); *see generally*, A.B.A. STANDARDS FOR CRIMINAL JUSTICE STANDARD 22-3.1 (AM. BAR ASS'N 1978), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk/#22-3.1 [<https://perma.cc/RGL2-882H>] (last visited Oct. 31, 2019) (explaining that the State should provide alternate resources for a defendant proceeding *pro se* in a post-conviction proceeding when the State cannot provide an attorney).

233. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (describing that the right to appointed counsel extends only to the "first appeal of right" but not to further proceedings); *see Garza*, 139 S. Ct. at 749 (noting that most defendants proceed *pro se* in post-conviction proceedings).

234. *Garza*, 139 S. Ct. at 748 (explaining that a defendant like Garza whose counsel frustrated his right to appeal should be treated exactly like any other appellant. The Court, therefore, refused to impose an "additional hurdle to clear" in requiring that Garza prove counsel in fact prejudiced his chance at an appeal (citing *Rodriguez v. United States*, 395 U.S. 327, 330 (1969))); *see generally* Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, VAND. U. L., <https://law.vanderbilt.edu/files/publications/King-CH13.pdf> [<https://perma.cc/JL5U-ZLXH>] (last visited Oct. 31, 2019) (explaining that post-conviction proceedings are a considerable risk because unlike a direct appeal, in which the Constitution guarantees counsel, most states do not routinely provide attorneys to assist with post-conviction petitions—not even to prisoners who are illiterate or suffering from mental illness); *but see Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (arguing that *pro se* defendants almost always bear the burden of showing ineffective assistance of counsel. Garza's ineffective assistance claim should therefore not be any different.).

235. *Garza*, 139 S. Ct. at 749 n.13 (explaining that a defendant's success with an ineffective assistance claim should not be hinged on how well she can articulate specific issues to appeal); *see* Brief for Petitioner, *supra* note 155, at 30 (arguing that, because of a language barrier, a defendant may not even be aware that counsel committed an error).

236. *Garza*, 139 S. Ct. at 745 (explaining that at the post-conviction stage—when there is limited time for counsel to file a notice of appeal—the defendant will likely not have important documents from the trial court, such as the transcripts of key proceedings. Further, the client may be in custody, rendering communication with counsel all the more challenging.); *see, e.g.*, FED. R. APP. P. 10(b) (2019) (explaining that under federal appellate law, a defendant cannot order a transcript from the reporter that is not already on file until *after* counsel files the defendant's notice of appeal).

The dissent's requirement would cause some defendants to forfeit their appeal right merely because they had difficulty communicating their wish to appeal.²³⁷ Instead, the Court properly acknowledged that post-conviction defendants face disadvantages which the *Flores-Ortega* presumption alleviates by automatically satisfying *Strickland*'s second prong.²³⁸

D. Trending Toward Client Autonomy, Away from Paternalism

Barnes, *Cronic*, *Strickland*, and *Flores-Ortega* illustrated the Court's growing recognition of criminal defendants' decision-making power.²³⁹ In 1983, the *Barnes* Court reinforced that the defendant holds the ultimate authority to make certain decisions about her case.²⁴⁰ Shortly after, in 1984, the *Cronic* Court established that counsel is merely a "guiding hand" to ensure the defendant receives a fair trial.²⁴¹ The same year as *Cronic*, the *Strickland* Court emphasized that the defendant makes informed decisions which influence counsel's actions.²⁴² In 2000, the

237. *Garza*, 139 S. Ct. at 749 n.13 (citing Brief for Petitioner, *supra* note 155, at 17); see Brief for Petitioner, *supra* note 155, at 30 (explaining that defendants who lack facility in the English language would be unfairly disadvantaged if defendants bore the burden of communicating to their attorneys which issues to raise on appeal).

238. *Garza*, 139 S. Ct. at 748 (arguing that courts should not treat a post-conviction defendant, such as *Garza*, differently than other defendants seeking an appeal merely because the post-conviction defendant's counsel failed to file a notice of appeal); see Brief for Petitioner, *supra* note 155, at 21 (explaining that while an appeal waiver is an "additional hurdle" for defendant's success on appeal, the Supreme Court already made clear that the appeal waiver does not "cancel out" the presumption of prejudice).

239. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 3 (describing client autonomy as a "bedrock principle" in the United States); see also *id.* at 4 (arguing that the Supreme Court has repeatedly rejected paternalistic arguments that override a criminal defendant's informed, voluntary decision. *Garza* should not be any different.); see generally *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

240. *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) ("What is at issue [in *Barnes*] is the relationship between lawyer and client—who has ultimate authority to decide which nonfrivolous issues should be presented on appeal?"); see JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 76 (Jack Stark ed., 2002) (explaining that *Barnes* ensured that certain decision-making power was guaranteed entirely to defendants. Those decisions are: surrendering the right to a jury, taking the stand to testify at trial, and deciding whether or not to appeal.); but see *Gross*, *supra* note 64, at 1362 (explaining that the *Barnes* dissent criticized the majority for "unduly restrict[ing] the individual autonomy and dignity of the defendant." The dissent argued that counsel should be the instrument of the client's autonomy, rather than the "engineer of an appeal" which the client does not support (citing *Jones v. Barnes*, 463 U.S. 745 (1983))).

241. *United States v. Cronic*, 466 U.S. 648, 658 (1984) (citing *Michel v. Louisiana*, 350 U.S. 91, 100 (1955)); see Brief for Respondent, *supra* note 152, at 22 (noting that *Cronic* supported a presumption of ineffective assistance to ease defendants' burdens of proof).

242. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); but see W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 97 (2018) (recognizing that the *Strickland* Court qualified its

Flores-Ortega Court highlighted that the defendant holds the power of instructing counsel to appeal, and counsel must defer to her wishes.²⁴³ Together, the Court's Sixth Amendment jurisprudence demonstrates its expanding protection of criminal defendants' autonomy.²⁴⁴ The *Garza* Court aligned by expanding criminal defendants' decision-making power.²⁴⁵

Additionally, the Court's protection of defendants seeking an appeal is in keeping with its shift away from paternalism.²⁴⁶ In criminal law, paternalism is the government's ability to make decisions for a defendant to protect her, typically through appointed counsel.²⁴⁷ The Court has increasingly rejected paternalistic rules that limit defendants' voluntary

protection of client autonomy. The Court, after all, also emphasized the importance of deferring to counsel's strategic choices.).

243. *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000); see Brief for Petitioner, *supra* note 155, at 23 (explaining that the *Flores-Ortega* Court established that the decision to appeal rests only with the defendant).

244. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 5 (explaining that the principle of defendant autonomy underlies the Supreme Court's decisions in a wide range of contexts, including the decision of whether or not to take an appeal. Taken as a whole, the jurisprudence established that "autonomy is a bedrock principle of the Sixth Amendment, and due process more generally."); see generally Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1572 (1992) ("The Supreme Court has at least paid lip service to autonomy as a social value").

245. *Garza v. Idaho*, 139 S. Ct. 738, 750 (2019) (noting that when an attorney performed deficiently in failing to file a notice of appeal, despite the defendant's express instructions to appeal, courts should apply a presumption of prejudice); see *Jacobi & Sag*, *supra* note 125 (noting that a 2018 Supreme Court case, *McCoy v. Louisiana*, embraced client autonomy. Likewise, in *Garza*, the Court established that regardless of counsel's concerns about jeopardizing a favorable plea deal by filing a notice of appeal, the client must have the choice to make that potentially unfavorable decision.).

246. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 4 ("When it comes to those fundamental matters within the scope of a criminal defendant's autonomy, this Court has repeatedly rejected similar paternalistic arguments for overriding a defendant's informed, voluntary decision. There is no reason [*Garza v. Idaho*] should be any different."); see also Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1148 (2010) ("[T]he paternalistic notion that lawyers should be entrusted with all decision-making in criminal cases because their law degrees qualify them to choose more wisely than defendants lacks empirical support [and] is inconsistent with landmark Supreme Court precedent . . .").

247. See Christophe Béal, *Can Paternalism Be "Soft"? Paternalism and Criminal Justice*, 44 RAISONS POLITIQUES 41, 42 (2011) (explaining that criminal legislation is paternalistic if it seeks to prohibit peoples' conduct that may harm them); see also Peter Suber, *Paternalism*, in PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (Christopher B. Grey ed., 1999), reprinted in Peter Suber, *Paternalism*, EARLHAM COLL., <https://legacy.earlham.edu/~peters/writing/paternal.htm> [<https://perma.cc/MW36-UESN>] (last visited Nov. 4, 2019) (explaining that an entity acts paternalistically when it acts for the good of another person without that person's consent, as parents do for children. Paternalism is perhaps "nowhere as divisive as in criminal law." After all, in criminal law, the State coercively acts for the defendants' good, often against defendants' wills.).

decisions.²⁴⁸ For instance, it has honored defendants' autonomy to make decisions about their trial, even if the decisions involve significant consequences.²⁴⁹ Consistent with this trend, the *Garza* Court established that unfavorable consequences, such as breaching a plea bargain or losing on appeal, cannot preclude a defendant from deciding whether to appeal.²⁵⁰

Overall, the *Garza* decision is sound because it accords with Sixth Amendment precedents about the presumption of prejudice. The Court conformed with jurisprudence on appeal waivers and addressed the disadvantages of defendants like Garza. It also affirmed the Court's trend of protecting client autonomy and rejecting paternalism.

IV. DISRUPTED PLEA BARGAINS SAVED BY REDUCED BURDENS

The decision in *Garza* clarifies and extends the *Flores-Ortega* presumption of prejudice.²⁵¹ It may, however, decrease the finality of plea bargain sentencing and reduce the impact of appeal waivers and notices of appeal.²⁵² Even so, *Garza* provides an efficient rule for courts

248. See *Michigan v. Mosley*, 423 U.S. 96, 108–09 (1975) (White, J., concurring) (noting that the Court has consistently rejected paternalistic rules that protect a defendant from her intelligent and voluntary decisions about her own case, unless a defendant is incompetent. If courts shielded defendants from their decisions, courts would not be respecting the individual, who is the lifeblood of the law. (citing *Faretta v. California*, 422 U.S. 806, 834 (1975))); see generally Randall L. Klein, *Sixth Amendment—Paternalistic Override of Waiver of Right to Conflict-Free Counsel at Expense of Right to Counsel of One's Choice*, 79 J. CRIM. L. & CRIMINOLOGY 735, 757 n.163 (1988) (noting that the court may be justified in acting paternalistically when the defendant might be incompetent).

249. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (“These [counsel’s decisions] 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.”); see also Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 15 (arguing that because defendants are permitted to risk the death penalty by making decisions in their trial, they should then be permitted to decide whether to risk losing the benefits of a plea agreement by appealing).

250. See Brief of the Cato Inst. as Amicus Curiae Supporting Petitioner, *supra* note 21, at 2 (noting that criminal defense is “personal business.” A criminal defendant may never face a more consequential occasion than her prosecution; thus, the defendant should be the decision-maker.).

251. Lee, *supra* note 18 (explaining that the *Garza* Court “confirm[ed] the applicability of *Flores-Ortega*,” and thereby extended the application of the presumption of prejudice); see Amanda Gurman, *Supreme Court Decision Impacts Assistance-of-Counsel Claims*, RIVKIN RADLER (Mar. 7, 2019), <https://www.rivkinradler.com/publications/supreme-court-decision-impacts-assistance-of-counsel-claims/> [<https://perma.cc/WW9N-5ATM>] (noting that in *Garza*, the Supreme Court expanded on *Flores-Ortega*'s exemption to the prejudice requirement, holding that prejudice can be presumed even if the defendant waived her right to an appeal).

252. See McGinnis, *supra* note 158 (explaining that before *Garza*, an appeal waiver gave counsel a plausible reason to not appeal a sentencing); see also Lee, *supra* note 18 (explaining that *Garza*'s plea agreement waiving his right to appeal is a practice that has become “commonplace throughout the nation.”).

assessing ineffective assistance claims while easing defendants' burden of proof.²⁵³

A. Destabilized Plea Bargain Processes

1. Plea Bargain Sentencings

In *Garza*, the Court prioritized a defendant's right to appeal over the judicial efficiency of decreased appeals.²⁵⁴ In fact, before *Garza*, courts relied on appeal waivers in plea bargains to reduce appeals,²⁵⁵ given appeal waivers rendered a sentencing unappealable and thus final.²⁵⁶ But in the wake of *Garza*, defendants can appeal despite an appeal waiver—thereby undermining the finality of a plea bargain sentencing.²⁵⁷

253. See Neily & Schweikert, *supra* note 179 (noting that *Garza* secured a defendant's fundamental right to decide whether to appeal a conviction, even when obtained through a plea bargain with an appeal waiver. *Garza* is particularly important because of the increasing prevalence of plea bargaining, rather than jury trials, as the default means of adjudicating criminal cases.); see also Dalia Deak, *A Win for Criminal Defendants at the U.S. Supreme Court*, HARV. CLINICAL & PRO BONO PROGRAMS (Apr. 18, 2019), <https://blogs.harvard.edu/clinicalprobono/2019/04/18/a-win-for-criminal-defendants-at-the-u-s-supreme-court/> [https://perma.cc/5XLZ-8RYB] (explaining that *Garza* was an important challenge to a “fundamentally unjust practice” in which counsel could act in disregard of her client's wishes); see also Davlin, *supra* note 136 (explaining that the Court's decision in *Garza* has “nationwide implications” in providing more clarity on how certain rights are waived in court).

254. See Basem Besada & Luis L. Lozada, *Gilberto Garza, Jr. v. Idaho*, CORNELL L. SCH.: LII SUP. CT. BULLETIN, <https://www.law.cornell.edu/supct/cert/17-1026> [https://perma.cc/9YYP-9WWA] (last visited Oct. 18, 2019) (predicting that the outcome of *Garza* would affect states that use appeal waivers to prevent frivolous appeals and promote judicial efficiency); see also Epstein, *supra* note 165 (noting that *Garza* ensured that lawyers always protect a defendant's right to seek review through an appeal).

255. See Lee, *supra* note 21 (explaining that prosecutors commonly insist on including appeal waivers in plea agreements to reduce defendants' appeals from guilty pleas); see also King & O'Neill, *supra* note 44, at 230 (describing a study in which prosecutors stated their shared belief that appeal waivers reduce their appellate burdens).

256. See *Garza v. Idaho*, 139 S. Ct. 738, 755 (2019) (Thomas, J., dissenting) (arguing that *Garza*'s rule will burden the appellate courts that must address appeals arising from plea bargains with appellate waivers); see also Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 14 (explaining that an appeal waiver “puts to rest” various issues which a defendant would otherwise have a right to appeal); see generally Davlin, *supra* note 136 (predicting that, after *Garza*, there will be a “big shift in procedure and how cases flow through the system.”).

257. See *Garza*, 139 S. Ct. at 755 (2019) (Thomas, J., dissenting) (explaining that *Garza* undermines the finality of criminal judgments because it affirms defendants' right to appeal even when an appeal waiver is present); see also Nicarican (@TheNicarican), TWITTER (Feb. 27, 2019), <https://twitter.com/SCOTUSblog/status/1100774994932580357> (noting that *Garza* agreed to appeal waivers, which the *Garza* Court seemed to ignore, such that “nothing [has] meaning or consequence anymore”); see generally *Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [https://perma.cc/8GLP-XZUN] (last visited Oct. 18, 2019) (noting that the amount of criminal appeals has decreased over time, so criminal appellate court caseloads are relatively small. From March 2017 through March 2018, criminal appeals decreased over six percent from the prior year. Criminal appeals have decreased nearly one-third compared to their amount in 2009.).

Considering the questionable legitimacy of some plea bargains, though, *Garza* correctly guarantees defendants the right to appeal a plea sentencing even if they agreed to an appeal waiver.²⁵⁸ In sum, *Garza* enables defendants to appeal a sentencing from a guilty plea, while before *Garza*, a sentencing was more final.²⁵⁹

2. Notices of Appeal

Garza may not only decrease the finality of plea sentencings, it may also weaken the significance of notices of appeal.²⁶⁰ Prior to *Garza*, counsel could use her professional judgment in determining whether to file a notice of appeal, and courts in minority jurisdictions would have likely deemed that effective assistance.²⁶¹ Yet after *Garza*, even if a client has no chance of success on appeal, counsel must file a notice of appeal upon her client's request.²⁶²

As a result, *Garza*'s requirement that counsel file the notice is equivalent to courts presuming a notice of appeal for all defendants, which would save attorneys time.²⁶³ Instead, even if her client will not

258. See Neily & Schweikert, *supra* note 179 (“[P]lea bargains of dubious legal and moral legitimacy make up the overwhelming percentage of today’s criminal convictions . . .”); see also Kershaw, *supra* note 132 (describing that even though *Garza* had agreed to waive most of his appellate rights, he still had the right to file a notice of appeal in order to preserve his appeal. The Court protected this right in *Garza*.)

259. Brief of the Idaho Ass’n of Crim. Def. Law. & the Nat’l Ass’n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 6; see A.B.A., STANDARDS FOR CRIM. JUST. CRIM. APPEALS: STANDARD 21-1.1 (AM. BAR. ASS’N 1978), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_crimappeals_blk/#1.1 [<https://perma.cc/3DA5-NEPH>] (last visited Oct. 18, 2019) (“The possibility of appellate review of trial court judgments should exist for every criminal conviction.” As such, a trial court determination which a court of appeals cannot review is undesirable.)

260. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191 at 1–2 (explaining that appeal waivers are “meaningful bargaining chips” for defendants in plea bargains); see also Greenfield, *supra* note 141 (arguing that *Garza*'s requirement that counsel file a notice of appeal could be more efficiently replaced with an assumption that counsel has filed a notice of appeal for each defendant, rather than requiring counsel to do what then becomes a legally meaningless act).

261. See McCue, *supra* note 15 (explaining that two federal courts of appeals did not apply the *Flores-Ortega* presumption of prejudice when counsel failed to file a notice of appeal because the defendant agreed to an appeal waiver); see generally Nunez v. United States, 546 F.3d 450, 456 (7th Cir. 2008) (demonstrating that before *Garza*, the Seventh Circuit, for example, did not require courts to presume prejudice when counsel failed to file a notice of appeal).

262. Greenfield, *supra* note 141 (explaining that after *Garza*, a notice of appeal is “just a piece of paper, a pro forma submission, the purpose of which is now lost to the ages.”); see *Garza*, 139 S. Ct. at 746 n.8 (explaining that a defendant’s right to appeal should not be hinged on counsel’s “bare assertion” that she believes there is no merit to the appeal (quoting to and relying on *Penson v. Ohio*, 488 U.S. 75, 80 (1988))).

263. Greenfield, *supra* note 141 (explaining that after *Garza*, defense attorneys will have to file a notice of appeal “just for kicks” to avoid being penalized for ineffective assistance. Yet, because

succeed on appeal, counsel must expend time in filing the notice, though futile.²⁶⁴ Nonetheless, the decision mandates that counsel file a requested notice of appeal and ensures that courts, rather than counsel, decide whether the defendant has an appealable issue.²⁶⁵

3. Appeal Waivers as Part of Plea Bargains

The *Garza* decision may reduce appeal waivers' effect in barring appeals.²⁶⁶ Consequently, the Court may have complicated plea bargains that contain an appeal waiver.²⁶⁷ Before *Garza*, prosecutors recommended lighter sentencings for defendants who agreed to a waiver because the sentence was final.²⁶⁸ Following *Garza*, though, prosecutors

counsel may in fact not have any issue to appeal, courts should more efficiently presume counsel has filed a notice of appeal for all defendants and then assess any meritorious issue on appeal.); see Files, *supra* note 154 (noting that after *Garza*, counsel is required to file a notice of appeal if the client requested it, even if the court followed a plea recommendation and the defendant signed an appeal waiver); but see Justice Thomas Decries Court's Latest "Defendant-Always-Wins" Rule, APP. SQUAWK (Mar. 2, 2019), <https://appellatesquawk.wordpress.com/2019/03/02/justice-thomas-decries-courts-latest-defendant-always-wins-rule/> [<https://perma.cc/RA76-FWL2>] ("A notice of appeal is nothing but a form that takes [counsel] five minutes to fill out . . .").

264. See *Garza*, 139 S. Ct. at 747 (Thomas, J., dissenting) (describing that in *Garza*'s case, counsel's act of filing a notice of appeal would have been "worse than pointless." If counsel filed a notice of appeal, he would have created "serious risks" for *Garza* because he would breach *Garza*'s plea bargain.); see generally Steve Kalar, *Case o' The Week: When in Doubt, File it Out—Fabian-Baltazar and Duty to File Notice of Appeal*, NINTH CIR. BLOG (Aug. 4, 2019, 9:08 AM) <http://circuit9.blogspot.com/2019/08/case-o-week-when-in-doubt-file-it-out.html> [<https://perma.cc/9CAK-45UW>] (explaining that after *Garza*, it would be "simpler just to eliminate appellate waivers altogether[]"); but see *Anders v. California*, 386 U. S. 738, 744 (1967) (arguing that a notice of appeal preserves the opportunity for an appeal).

265. See Greenfield, *supra* note 141 (noting that a defendant has a right to appeal a plea-bargaining sentence, even if the court has followed the plea recommendation); see also Amir Ali, *Access to Courts: Garza v. Idaho*, MACARTHUR JUST. CTR. (Jan. 23, 2018) <https://www.macarthurjustice.org/case/garza-v-idaho-u-s-supreme-court/> [<https://perma.cc/46E9-6KD7>] (explaining that *Garza* concerned one of the clearest instances in which a defense attorney abandoned a defendant and deprived the defendant of his right to appellate review).

266. See *Plea Waivers and Ineffectiveness of Counsel for Failing to Appeal Come to SCOTUS in Garza v. Idaho*, *supra* note 121 (explaining that "[t]he big policy question that underlies [*Garza*] is to what degree the courts will enforce appeal waivers"); see also Sorenson, *supra* note 37, at 33 (describing that before *Garza*, an appeal waiver was "indefinite and permanent" and usually did not include exceptions to its application).

267. *Plea Waivers and Ineffectiveness of Counsel for Failing to Appeal Come to SCOTUS in Garza v. Idaho*, *supra* note 121 (noting that by allowing a defendant to appeal despite an appeal waiver, *Garza* throws "an element of doubt" into the plea-bargaining process).

268. See *The Basics of A Plea Waiver*, BERRY L. FIRM, <https://jsberrylaw.com/blog/the-basics-of-a-plea-bargain/> [<https://perma.cc/ZGM8-VDH2>] (last visited Oct. 18, 2019) (explaining that in a plea bargain, a prosecutor agrees to recommend a lighter sentence for certain charges if the defendant agrees to plead guilty or to not contest the sentencing); see also Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, US. DEP'T. OF JUST. (Jan. 24, 2011) <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/YX49-M989>] (noting several studies have found that defendants who pled guilty were more likely to receive lighter sentences than if they had gone to trial).

offering a plea bargain with a waiver are cognizant the defendant can appeal.²⁶⁹

A defendant's ability to appeal despite an appeal waiver may affect how prosecutors both offer and uphold plea bargains.²⁷⁰ First, prosecutors will likely question their incentive to offer a lighter sentencing because a defendant, after *Garza*, can appeal the sentencing for an even lighter one—despite an appeal waiver.²⁷¹ As a result, prosecutors may include heavier sentencings in plea bargains with appeal waivers to account for the appealability.²⁷² Second, prosecutors might revoke plea bargains when defendants appeal sentences because of the defendants' potential breach by appealing.²⁷³ If a prosecutor revokes, a

269. See Greenfield, *supra* note 141 (arguing that if the *Garza* Court “wanted to give meaning to a defendant’s right to appeal following a plea agreement,” it would eliminate appeal waivers altogether rather than allow a defendant to appeal despite an appeal waiver); see also Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 1 (predicting that if the *Garza* Court held that counsel must file a notice of appeal despite an appeal waiver, it would allow a defendant to “sandbag the system” by negotiating a plea deal and then ignoring it).

270. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 5 (arguing that the *Garza* Court’s application of the *Flores-Ortega* presumption of prejudice would grant defendants a new “right” to breach promises made in plea bargains. In turn, prosecutors, wary of defendants breaching a plea bargain by appealing, may breach their end of the plea bargain promise. If so, defendants may receive longer sentences, more cases may go to trial, and final sentencing will take longer.); see also Brief for Respondent, *supra* note 152, at 13–14 (explaining that if *Garza*’s counsel filed a notice of appeal, *Garza* could have breached the plea agreement—thereby releasing the prosecution from its plea agreement obligations. As such, the prosecution could have charged *Garza* with additional felonies or could have sought a life sentence.).

271. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 1 (predicting that the *Garza* decision would remove any incentive for prosecutors to offer defendants reduced sentences and charges in exchange for appeal waivers); see also United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992) (explaining that prosecutors value appeal waivers as a means of “preserv[ing] the finality of judgments and sentences imposed pursuant to valid pleas of guilty.”); see generally Richard Ansara, *Appeal Waiver in Criminal Plea Bargain at Issue in Case Before SCOTUS*, THE ANSARA L. FIRM (Nov. 15, 2018) <https://www.fortlauderdalecriminalattorneyblog.com/appeal-waiver-in-criminal-plea-bargain-at-issue-in-case-before-scotus/> [<https://perma.cc/UY9U-AQFW>] (explaining that *Garza* will impact how federal and state courts resolve criminal plea bargains).

272. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 3 (noting that the terms of a plea bargain require the prosecutor to offer a certain sentence); see also Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 17 (noting that because of appeal waivers, prosecutors are more likely to provide favorable sentencings to defendants); see generally Kalar, *supra* note 264 (explaining that after *Garza*, defense attorneys concerns about the government breaching a plea bargain will increase. The government may, after all, start backing out of plea bargains when a defendant requests an appeal despite an appeal waiver.).

273. See Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 18 (explaining that if a defendant agreed to an appeal waiver but appeals, the court may conclude that the defendant breached the plea agreement. As such, the prosecutor could withdraw any defendant-friendly concessions that were part of the plea agreement.); see also Greenfield, *supra* note 141 (arguing that *Garza* “gained nothing but his name on a Supreme Court opinion” and could have lost his favorable plea bargain sentencing); but see Davlin, *supra* note 136 (explaining that counsel’s act of filling a notice of appeal does not necessarily breach a defendant’s plea bargain).

defendant loses the opportunity for a lighter sentence.²⁷⁴ To illustrate, Garza benefited from a ten-year sentence as a result of his plea bargain; if the prosecutor had revoked his plea bargain, the court could have sentenced him to life in prison.²⁷⁵ *Garza* may therefore destabilize plea bargain processes by prompting prosecutors to rethink defendant-favorable sentencings.²⁷⁶

B. *Reduced Burdens for Courts and Defendants*

If the *Garza* Court had aligned with the minority view on *Flores-Ortega*'s presumption, courts would face a line-drawing problem in determining whether the defendant sufficiently satisfied *Strickland*'s prejudice prong.²⁷⁷ The Court instead affirmed *Flores-Ortega*'s efficient rule which automatically satisfies it.²⁷⁸ In turn, the decision eased courts' ineffective assistance analyses, requiring them to evaluate only the first prong of unreasonableness when counsel failed to file a notice of appeal.²⁷⁹

274. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 16 (explaining that if prosecutors backed out of plea bargains, defendants would “lose the benefits of the bargain”—thereby returning the defendant to the position of being tried and sentenced); see also Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 29 (explaining that if the prosecution backs out of a plea bargain in response to the defendant's perceived breach of the agreement, the defendant would risk losing the benefits of the plea agreement).

275. See *Garza v. Idaho*, 139 S. Ct. 738, 750 (2019) (Thomas, J., dissenting) (noting that Garza avoided a potential life sentence by negotiating with the State of Idaho for reduced charges and a ten-year sentence as part of his plea bargain); see also Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 4 (explaining that if Garza's counsel had filed the notice of appeal, the prosecutor may have concluded that Garza breached the plea agreement. As such, rather than Garza's ten-year sentence under the plea agreement, he could have received two life sentences.).

276. See Brief for Louisiana, et al. as Amici Curiae Supporting Respondent, *supra* note 191, at 14 (explaining that before *Garza*, courts never recognized a right to breach a plea bargain. After *Garza*, however, a defendant's appeal despite an appeal waiver may cause the prosecutor to back out of the plea bargain, thereby breaching the agreement.); see also Kalar, *supra* note 264 (explaining that after *Garza*, attorneys “in the trenches” worry about the government backing out of deals).

277. See Brief for Petitioner, *supra* note 155, at 8 (noting that, without the presumption, courts' challenges in assessing ineffective assistance claims would be “made all the more difficult because appeal waivers come in all shapes and sizes.” Therefore, if the *Garza* Court did not apply the presumption, its ruling would be “unworkable and inefficient.”); see also Transcript of Oral Argument, *supra* note 126, at 49 (remarking that there is no evidence of practical problems resulting from a presumption of prejudice applied to cases like *Garza*'s).

278. Brief for Petitioner, *supra* note 155, at 9 (advocating for the application of *Flores-Ortega*'s rule); see Kalar, *supra* note 264 (explaining that *Garza* is a “nice outcome” because defendants get to file appeals despite appeal waivers).

279. See *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) (acknowledging that *Garza*'s rule “may be easy to administer”); see also Brief for Petitioner, *supra* note 155, at 37–38 (“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.”).

Similarly, *Garza* reduced defendants' burden in proving ineffective assistance claims.²⁸⁰ If the Court had declined to apply the *Flores-Ortega* presumption, *Garza* would have had to show counsel's failure to file a notice prejudiced his case.²⁸¹ Proceeding without counsel,²⁸² *Garza* would have needed to prove both of *Strickland*'s prongs on his own.²⁸³ And as a post-conviction defendant, *Garza* faced pleading standards higher than in other proceedings.²⁸⁴ Specifically, under Idaho law, a post-conviction petition must contain more than a short and plain statement of the claim.²⁸⁵ *Garza* would have thus needed to provide affidavits, records, or other evidence to meet both prongs rather than just the first.²⁸⁶

280. See Transcript of Oral Argument, *supra* note 126, at 22 (noting the explanation by *Garza*'s attorney that there are "added hurdles that go along with habeas proceedings that a defendant would now have to go through, not because he made any mistake, but because his agent failed to undertake a ministerial task"); see also *Garza*, 139 S. Ct. at 748 (arguing that the State of Idaho's denial of a presumption of prejudice was "both unfair and inefficient in practice").

281. See Transcript of Oral Argument, *supra* note 126, at 65–66 ("[T]he normal burden under *Strickland* is that a defendant who seeks to reopen an otherwise final judgment has the burden in all cases to establish that he was prejudiced."); see also Greenfield, *supra* note 141 ("[*Garza*] was a significant decision, as it would otherwise fall to the defendant to meet the requirements of *Strickland v. Washington* to show that counsel's screw-up, the failure to file the notice, would survive the second-prong of the test, that there was a reasonable probability of a different outcome.").

282. See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings."); see also Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 26 ("[U]nder Idaho law, a post-conviction petitioner has no statutory right to post-conviction counsel except in capital cases." (citing *Murphy v. State*, 156 Idaho 389, 395 (2014))).

283. *Garza v. Idaho*, FINDLAW, <https://caselaw.findlaw.com/us-supreme-court/17-1026.html> [<https://perma.cc/2W8B-AG5J>] (last visited Sept. 25, 2019) (explaining that defendants do not have the right to counsel in post-conviction proceedings. As such, the government's argument against the application of the *Flores-Ortega* presumption of prejudice would be "unfair, ill advised, and unworkable."); see Brief for Petitioner, *supra* note 155, at 9 ("[J]ust 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.").

284. See Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 145, at 4 (explaining that even if a defendant can raise a claim in postconviction proceedings, the defendant will typically have to do so under heightened pleading standards); see, e.g., *Pentico v. State*, 360 P.3d 359, 363 (Idaho Ct. App. 2015) (explaining that a defendant's postconviction petition must present admissible evidence supporting its allegations. If not, the court may dismiss the petition.).

285. *Pentico*, 360 P.3d at 363 (noting that a post-conviction petition must contain "much more than a short and plain statement of the claim that would suffice for a complaint"); see, e.g., *Fields v. State*, 314 P.3d 587, 591 (Idaho 2013) (detailing same).

286. *Pentico*, 360 P.3d at 363; *Fields*, 314 P.3d at 591 (citing Idaho Code §19-4903); see Brief for Petitioner, *supra* note 155, at 9 (arguing that courts should not penalize a defendant with the loss of an appellate proceeding merely because she cannot articulate the claims she might have pursued with the assistance of counsel).

Therefore, Garza would have had to prove counsel acted unreasonably in failing to file a notice of appeal and that counsel prejudiced his case.²⁸⁷ For the prejudice proof, Idaho law required Garza to demonstrate that his case's outcome likely would have been different, had counsel filed a notice.²⁸⁸ Garza would have thus needed to show that the court of appeals probably would have reduced his sentence.²⁸⁹ The *Garza* presumption of prejudice, however, eliminated this proof for Garza and all similar defendants.²⁹⁰

C. Inapplicable in Criminal Settlements

While *Garza* controls when a defendant executes an appeal waiver in a plea bargain, the Court left unanswered whether its rule applies to an appeal waiver in agreements other than a plea bargain, like a criminal settlement.²⁹¹ Some states permit appeal waivers in settlements resolving

287. Transcript of Oral Argument, *supra* note 126, at 23 (arguing that without the Court's application of the *Flores-Ortega* presumption of prejudice, Garza would have had to show that it was unreasonable for counsel to not file the notice of appeal and that counsel's inaction prejudiced Garza); *see also* *Garza v. Idaho*, 139 S. Ct. 738, 752–53 (2019) (Thomas, J., dissenting) (explaining that Garza failed to prove either prong of the *Strickland* standard: (1) that counsel's conduct was deficient and (2) that counsel prejudiced his case).

288. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The second prong of the *Strickland* standard requires the defendant to prove that counsel's deficient performance resulted in prejudice. *Id.*; *see also* *Greenfield*, *supra* note 141 (noting that it would be an "absurd burden" for Garza to meet the second prong of the *Strickland* standard).

289. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 167, at 8 (explaining that Garza would have to "identify nonfrivolous grounds for appealing despite the waiver"); *see also* *Garza v. State*, 405 P.3d 576, 579–80 (2017) (noting the Idaho Supreme Court's requirement that Garza show that counsel's deficient performance was prejudicial. Under Idaho's heightened standard, Garza would have to show that there was a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different, as the court would have granted Garza an appeal.).

290. Brief of the Idaho Ass'n of Crim. Def. Law. & the Nat'l Ass'n of Crim. Def. Law. as Amici Curiae Supporting Petitioner, *supra* note 146, at 6; *see Notices of Appeal, Appellate Waivers, and Effective Assistance: SCOTUS Gives Us Garza v. Idaho and Another Reminder to File Those NOAs*, FERTITTA & REYNAL, LLP (Mar. 4, 2019), <https://frlaw.us/notices-of-appeal-appellate-waivers-and-effective-assistance-scotus-gives-us-garza-v-idaho-and-another-reminder-to-file-those-noas/> [<https://perma.cc/Z6YG-A822>] (explaining that the *Garza* decision gave "defendants with appellate waivers a point on the scoreboard").

291. *See SCOTUS: Lawyer Who Ignores Client's Request For Appeal From Guilty Plea Is Ineffective*, ON POINT: WIS. STATE PUB. DEF. (Mar. 7, 2019), <http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scotus-lawyer-who-ignores-clients-request-for-appeal-from-guilty-plea-is-ineffective/> [<https://perma.cc/NJM4-FMW5>] (noting that, for example, state plea agreements in Wisconsin do not include appeal waivers. Post-conviction motions, however, are sometimes resolved through settlements that include appeal waivers.); *see also* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 1 (2006) (explaining that parties can agree to a settlement of a habeas proceeding. Nonetheless, parties rarely resolve habeas proceedings outside of the courtroom.).

a post-conviction motion.²⁹² Such waivers state that the defendant cannot appeal any order which the court issues from the settlement.²⁹³ The *Garza* decision does not indicate whether counsel's failure to file a notice of appeal in this context also requires *Flores-Ortega*'s presumption.²⁹⁴

The Court would likely decline to extend *Garza* to counsel's failure to file a notice from a settlement,²⁹⁵ because the Sixth Amendment does not guarantee post-conviction defendants the right to counsel.²⁹⁶ The right to counsel confers the right to the effective assistance of counsel, which is necessary for an ineffective assistance claim.²⁹⁷ Post-conviction defendants, lacking the right to counsel, cannot bring an ineffective assistance claim.²⁹⁸ Absent such a claim, the *Strickland* standard is not triggered, rendering the *Garza* rule inapplicable when counsel failed to file a notice of appeal in a criminal settlement.

CONCLUSION

Garza v. Idaho is a proper continuation of the Supreme Court's Sixth Amendment jurisprudence. It correctly extended the *Flores-Ortega* presumption of prejudice when counsel failed to file a notice of appeal,

292. See SCOTUS: Lawyer Who Ignores Client's Request For Appeal From Guilty Plea Is Ineffective, *supra* note 291 (explaining that in Wisconsin, for example, parties occasionally resolve post-conviction motions that include appeal waivers).

293. See *Waiver: Right to Appeal May be Waived as Part of Settlement Agreement*, CAUSE OF ACTION BLOG (Nov. 1, 2011), <https://causeofactionelements.blogspot.com/2011/11/waiver-right-to-appeal-may-be-waived-as.html> [<https://perma.cc/X7JZ-PSD8>] (explaining that, in a settlement hearing, the court asks the defendant if she agrees to no longer prosecute the appeal and if she agrees to not appeal an order of the court); see also Max S. Meckstroth, *Wisconsin Court of Appeals Enforces Parties' Stipulation to Remedies and Waiver of Judicial Review in Administrative Proceeding*, FOLEY & LARDNER LLP (Nov. 14, 2016), <https://www.foley.com/en/insights/publications/2016/11/wisconsin-court-of-appeals-enforces-parties-stipul> [<https://perma.cc/2QLX-NE7Y>] (describing a settlement agreement which provided that the defendant agreed to "waive its statutory right to judicial review"—thereby waiving her right to appeal).

294. See SCOTUS: Lawyer Who Ignores Client's Request For Appeal From Guilty Plea Is Ineffective, *supra* note 291 (asking whether *Garza* would apply when parties agree to resolve a post-conviction motion with a settlement that includes an appeal waiver. If counsel fails to appeal the outcome of the settlement, the question is then whether counsel provided ineffective assistance of counsel.); see generally Meckstroth, *supra* note 293 (explaining that state statutory provisions guaranteeing a court's judicial review do not prohibit parties from agreeing to waive the right to appeal as part of a settlement).

295. See Malani, *supra* note 291 (noting that criminal plea bargains, like *Garza*'s, are very similar to a post-conviction settlement. For example, in both, the defendant receives a shorter, more certain sentence. Further, in both, the attorneys avoid having to litigate a case.).

296. *Garza v. Idaho*, FINDLAW, *supra* note 283 (explaining that post-conviction defendants do not have the right to counsel).

297. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (expanding the Sixth Amendment guarantee of the assistance of counsel to the guarantee of the assistance of *effective* counsel).

298. See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (explaining that post-conviction defendants do not have a right to counsel and thus cannot claim ineffective assistance of counsel).

thereby strengthening criminal defendants' right to appeal. Accordingly, the *Garza* Court designated a defendant's wish to appeal as superior to counsel's judgment that an appeal is unwarranted. *Garza* requires that counsel file a notice of appeal upon her client's request regardless of an appeal waiver. If counsel failed to do so, courts must apply a presumption of prejudice to automatically meet *Strickland*'s second prong. In satisfying this prong, the *Garza* presumption aligned with Sixth Amendment precedent and reinforced defendants' autonomy. Ultimately, *Garza* may destabilize plea bargain processes, but these processes can be of questionable legitimacy, and the Court rightly risked disrupting them to protect criminal defendants' right to appeal.