No. 17-1026

In the Supreme Court of the United States

GILBERTO GARZA, JR., PETITIONER

v.

STATE OF IDAHO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
ALLON KEDEM
Assistants to the Solicitor General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a defendant who asks his attorney to file a direct appeal, despite having waived appellate rights in a plea agreement, may automatically obtain collateral relief, without any showing as to the issues he would have raised on appeal, if his attorney fails to perfect the appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 17-1026

GILBERTO GARZA, JR., PETITIONER

v.

STATE OF IDAHO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case raises the question whether a criminal defendant who waives appellate rights in his plea agreement may obtain collateral relief based on his attorney's failure to perfect an appeal, without showing that he was deprived of any substantive appellate review. Because collateral attacks on federal and state criminal judgments are generally adjudicated under similar standards, the United States has a substantial interest in the outcome of this case.

STATEMENT

Following no-contest and guilty pleas in the District Court of the Fourth Judicial District of the State of Idaho, petitioner was convicted on one count of aggravated assault, in violation of Idaho Code Ann. §§ 18-901(a) and 18-905(a) (2016), and one count of possessing with intent to distribute a controlled substance (methamphetamine), in violation of Idaho Code Ann. § 37-2732(a) (2016). Pet.

App. 28a. He was sentenced to a total of ten years of imprisonment. *Id.* at 2a. He subsequently sought collateral relief, which the state district court denied. *Id.* at 28a-39a. The Court of Appeals of Idaho (*id.* at 16a-27a) and the Supreme Court of Idaho (*id.* at 1a-15a) affirmed.

1. In 2015, petitioner pleaded no contest to a state charge of aggravated assault, and guilty to a state charge of possession with intent to possess methamphetamine, pursuant to two separate plea agreements. Pet. App. 2a; see *id.* at 46a. In each plea agreement, petitioner "waived his right to appeal." *Id.* at 3a.

The plea agreements were "part of a global agreement that included a third case and other unfiled charges." Pet. App. 2a n.1. The State agreed not to file additional burglary and grand theft charges and not to refer petitioner for federal prosecution on a charge of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 29a, 41a, 47a. The State further agreed not to seek "Persistent Violator" sentencing enhancements, which would have exposed petitioner to potential life sentences. *Id.* at 41a-47a; see Idaho Code Ann. § 19-2514 (2017). The parties instead agreed to specific sentences totaling ten years of imprisonment, which would be binding on the district court if it accepted the plea agreements. Pet. App. 41a, 47a; see Idaho Crim. R. 11(f)(1)(C) and (3).

Consistent with an Idaho law authorizing a plea agreement to "include a waiver of the defendant's right to appeal the judgment and sentence of the court," Idaho Crim. R. 11(f)(1), petitioner's agreements stated that he "waive[d] his right to appeal and waive[d] his right" to file a motion for correction or reduction of his sentence under Idaho Crim. R. 35. Pet. App. 44a, 49a.

Petitioner signed both agreements and initialed the appeal-waiver provisions. *Id.* at 29a.

The trial court "accepted the plea agreements and imposed sentence[s] in accordance with them." Pet. App. 2a. The court expressly observed during the plea hearing that petitioner had waived his "appeal rights with respect to the sentences imposed." Idaho Sup. Ct. Clerk's Record on Appeal (CR) 132. But the court "advised [petitioner] of his appeal rights anyway." Pet. App. 3a; see CR 132.

No notice of appeal was filed within the 42 days allowed by state law. Pet. App. 3a; see Idaho App. R. 14(a).

2. Approximately four months after sentencing, petitioner collaterally attacked the judgment. Pet. App. 3a. Petitioner claimed, among other things, that his pleas had been involuntary and that his counsel had been constitutionally ineffective for not filing an appeal. *Id.* at 3a, 29a. After appointing postconviction counsel and providing notice, the state district court dismissed all of petitioner's claims except for the ineffectiveness claim, on which it reserved ruling. *Ibid.* It found, in particular, a "lack of supporting evidence" for petitioner's claim that his pleas had been involuntary. *Id.* at 29a.

As to the ineffectiveness claim, petitioner stated in affidavits "that he asked his attorney to appeal" and "that his attorney failed to appeal despite numerous phone calls and letters." Pet. App. 3a. Petitioner's former counsel stated in an affidavit that petitioner had asked him to appeal "the sentence(s) of the court," *id.* at 52a, but that "he did not file an appeal because [petitioner] 'received the sentence(s) he bargained for in his

[plea] agreement' and 'an appeal was problematic because [petitioner] waived his right to appeal in his [plea] agreements,'" *id.* at 3a; see *id.* at 52a.

The parties moved for summary adjudication of the ineffectiveness claim, with petitioner seeking "a reopening of the appeals period in the underlying criminal cases on the basis of ineffective assistance of counsel." Pet. App. 3a. The state district court directed petitioner to identify any issues he wished to pursue on appeal that were "non-frivolous and not subject to dismissal as a result of his appeal waivers." *Id.* at 32a. In response, petitioner filed a supplemental brief identifying "only one issue he wishe[d] to pursue on appeal in the underlying cases: whether the [trial court] properly exercised its discretion in imposing the sentences to which he and the State agreed." *Id.* at 31a-32a.

The state district court subsequently rejected petitioner's claim of ineffective assistance of counsel. Pet. App. 28a-39a. The court observed that this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), requires a defendant claiming ineffectiveness to establish both that his counsel's performance was deficient and that the deficient performance had prejudiced him. Pet. App. 33a. The court accepted that, "[g]enerally speaking, trial counsel's failure to file an appeal at a criminal defendant's request * * * prejudices the defendant, irrespective of whether the appeal has merit." *Id.* at 33a-34a. And the court recognized that, under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), "a presumption of prejudice" attaches to a "denial of [an] entire judicial proceeding" itself, such as an appeal, "which a defendant wanted at the time and to which he had a right." Pet. App. 34a (quoting *Flores-Ortega*, 528 U.S. at 483). The court observed, however, that *Flores-Ortega* did

not "involve[] a defendant who had waived the right to appeal, as [petitioner] did." *Ibid.*

"When a defendant has waived the right to appeal in an enforceable plea agreement," the state district court observed, the defendant "lacks the right to appeal," and his appeal will accordingly face "dismissal" rather than "consideration on the merits." Pet. App. 36a-37a. The court therefore reasoned that a defendant who has waived his appeal rights "does not, in fact, lose his 'right' to an 'entire judicial proceeding' at the appellate level," but instead "loses" only "the opportunity to see his appeal dismissed without a decision on the merits." *Id.* at 37a (quoting *Flores-Ortega*, 528 U.S. at 483). The court determined that such a defendant does not "deserve[] the benefit of a counterfactual presumption that he is prejudiced by his trial counsel's failure to attempt to exercise a waived right," but "should, instead, be required to *show* prejudice." *Ibid.*

The state district court explained that a defendant could satisfy that burden by establishing "non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver." Pet. App. 38a. For instance, "if the defendant shows that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope, he shows he was prejudiced by his trial counsel's failure to file appeals at his request." *Ibid.* The court found, however, that petitioner had not made the requisite showing, because his appeal waivers were valid and enforceable; he had agreed to the waivers knowingly and voluntarily; and he had not even "argued, much less shown," that the claims

he sought to raise on appeal fell "outside the scope" of the waivers. *Ibid.*

3. The state court of appeals affirmed. Pet. App. 16a-27a. The court agreed that "prejudice is not presumed when the defendant waives the right to appeal and the attorney fails to file an appeal upon the defendant's request." *Id.* at 24a. And it found that petitioner had "made no * * * showing" that he was prejudiced by the absence of an appeal following his waiver. *Id.* at 27a.

4. The state supreme court granted review and affirmed. Pet. App. 1a-15a. Like the lower courts, it "decline[d] to presume counsel ineffective for failing to appeal at [petitioner's] request when [petitioner] ha[d] waived the right to appeal as part of a plea agreement." *Id.* at 10a. And the court found that petitioner, who had not identified "any non-frivolous grounds for appeal," had not shown that he was prejudiced by his counsel's performance. *Id.* at 15a.

The state supreme court explained that granting relief automatically makes sense only where the defendant has lost "a right" to an appellate proceeding. Pet. App. 10a-11a (quoting *Flores-Ortega*, 528 U.S. at 483) (emphasis omitted). The court observed that "'an appeal in the teeth of a valid waiver is frivolous,'" and that a defense attorney has a duty both "not [to] file frivolous litigation" and "to avoid taking actions that will cost [his or her] client the benefit of the plea bargain." *Id.* at 13a-14a (quoting *Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008)). The court emphasized the importance of honoring appeal waivers, which are part of "a bilateral contract, to which both the State and defendant are bound" and which provide defendants a means of obtaining significant "'concessions'" from the State. *Id.* at 14a (citation omitted). "When [petitioner's] attorney declined

to file an appeal," the court noted, "counsel ensured [petitioner] would not be in breach of the plea." *Ibid.*

SUMMARY OF ARGUMENT

Counsel's failure to file a requested appeal prejudices a criminal defendant only if it "actually cause[s]" the defendant to "forfeit a judicial proceeding to which he was otherwise entitled." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 484, 485 (2000). When a defendant has voluntarily renounced rights to appellate review through an explicit waiver, the absence of such review cannot automatically be blamed on attorney error. Rather, the defendant must show that counsel's failure to appeal—not his own waiver—is what "actually" denied him merits review. Granting collateral relief for defendants, like petitioner, who have not made such a showing would be legally anomalous and promote frivolous appeals.

A. A defendant's Sixth Amendment right to the effective assistance of counsel is not violated unless he is prejudiced by counsel's errors. Accordingly, this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), typically requires a defendant alleging a violation of that right to plead and prove case-specific prejudice from his attorney's constitutionally inadequate performance. This Court explained in *Roe* v. *Flores-Ortega*, *supra*, that one of the few circumstances in which prejudice may be presumed is when an attorney's deficiency "deprived" the defendant of an "entire judicial proceeding," such as an appeal, which the defendant wanted "and to which he had a right." 528 U.S. at 483. But the Court also emphasized "the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal," *id.* at 484, requiring proof of such causation as a prerequisite for triggering the presumption, see *id.* at 484-486.

B. A defendant who has knowingly and voluntarily waived appellate rights must prove—not presume—that attorney error, rather than his own waiver, was responsible for the absence of substantive appellate review. An attempt to appeal an issue covered by an appeal waiver would be dismissed by the appellate court without reaching the merits. Therefore, when counsel fails to file an appeal requested by the defendant, it cannot be presumed that the lack of appellate review was due to counsel's inaction. Instead, the defendant's *own* choice to renounce his appellate rights, in return for concessions from the prosecution, may be the true cause.

To show that counsel's failure to appeal in fact caused him prejudice, the defendant must show a reasonable probability that, "but for" counsel's error, he would have appealed a claim that the court of appeals would have considered on the merits. *Flores-Ortega*, 528 U.S. at 484. He can make that showing directly, as by pointing to evidence that he expressed interest in appealing a non-waived issue; or indirectly, as by identifying nonfrivolous grounds for appealing despite the waiver. Either showing would establish that counsel's failure to appeal actually deprived the defendant of further merits review. But a generalized request to file a notice of appeal notwithstanding an appeal waiver, with no reasonably probable connection to any retained right to appellate review, would not suffice.

C. Petitioner argues that a per se rule of prejudice is necessary because, even where a defendant has generally waived his right to appellate review, he could potentially bring some claims outside the waiver's scope, such as a challenge to the validity or enforceability of the waiver itself. But the possibility that some defendants might have raised non-waived claims supports a case-

specific inquiry, not a rule of automatic prejudice—especially since valid appeal waivers are much more common than invalid ones. Nor can petitioner's proposed rule be justified by a defendant's interest in autonomy. To the extent such an interest could support a presumption of prejudice under *Strickland*, the defendant *already* exercised his autonomy by deciding to sign the appeal waiver.

Requiring a defendant to make the traditional showing of *Strickland* prejudice, by establishing a reasonable probability that he would have pressed an issue that could be heard notwithstanding his waiver, is neither unfair nor complex. The defendant will not have to show that he would have *prevailed* on such a claim, only that he would have raised it. A defendant who signed an appeal waiver, and thus necessarily considered the scope of his appellate rights, is well-positioned to make such a showing, which is similar in kind to the prejudice showing required in related *Strickland* contexts. By dispensing with that requirement, petitioner's rule would require the automatic reinstatement even of waived, frivolous appeals—the very filing of which would breach the plea agreement and risk undoing the benefits the defendant received thereunder. At a minimum, petitioner's rule will incentivize costly and burdensome evidentiary hearings, all for the sake of appeals that would have gone—and, if reinstated, would go—nowhere.

D. In this case, petitioner has not shown a reasonable probability that counsel's failure to appeal deprived him of substantive appellate review. Following his conviction and sentencing, petitioner asked trial counsel to "appeal," Pet. App. 42a, without specifying any particular issue he wished to raise. Petitioner has, by now,

abandoned any claim that his guilty pleas were involuntary. And when asked by the court on collateral review what claim he would bring if allowed to file an out-of-time appeal, he identified only one issue, which was squarely foreclosed by his waiver. Under those circumstances, petitioner is not entitled to reopen his criminal case.

ARGUMENT

A DEFENDANT WHO HAS WAIVED APPELLATE RIGHTS IS NOT PREJUDICED BY HIS ATTORNEY'S FAILURE TO FILE AN APPEAL UNLESS HE CAN SHOW THAT IT DEPRIVED HIM OF SUBSTANTIVE APPELLATE REVIEW

The "'right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,' * * * or a fair appeal." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)). Relief on a claim of ineffective assistance accordingly requires not only constitutionally deficient performance, but also "a breakdown in the adversary process that renders the result unreliable" and thus prejudices the defendant. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). A defendant cannot show, and is not entitled to presume, such a "breakdown in the adversary process" simply because no appeal was filed after he expressly agreed to waive appellate rights. Instead, a defendant must establish that the absence of substantive appellate review is attributable to his counsel's constitutional inadequacy, rather than to his own knowing and voluntary appeal waiver. Petitioner, who has not identified any retained appellate rights that he sought to invoke, has failed to make the requisite showing. And no sound reason exists to adopt a rule of per se prejudice that promotes the breaching of plea agreements through the filing of frivolous appeals.

A. An Ineffective-Assistance Claim Requires That Any Inadequacies In The Judicial Process Be Traceable To Counsel's Errors

1. The Sixth Amendment does not guard against all attorney errors. This Court has emphasized that the "right to effective representation" is a right to "*effective* (not mistake-free) representation." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). Thus, even where an attorney has rendered constitutionally deficient performance—*i.e.*, performance that falls "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690—"a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced," *Gonzalez-Lopez*, 548 U.S. at 147. "Counsel," the Court has explained, "cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *Ibid.*

In assessing prejudice, this Court "normally appl[ies] a strong presumption of reliability to judicial proceedings and require[s] a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the finding of guilt." *Flores-Ortega*, 528 U.S. at 482 (citations and internal quotation marks omitted). Thus, "in most cases," a defendant claiming ineffective assistance of counsel bears the burden to affirmatively prove from the record that counsel's mistakes prejudiced him. *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1910 (2017). In evaluating whether the defendant has carried that burden, the Court has generally avoided "categorical rules," which are "ill suited to an inquiry that * * * demands a 'case-by-case examination' of the 'totality of the evidence.'" *Lee* v. *United*

States, 137 S. Ct. 1958, 1966 (2017) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000)).

2. Although prejudice to the defendant is an invariable component of an ineffective-assistance claim, *Gonzalez-Lopez*, 548 U.S. at 147, the Court has identified a "very short list of errors for which prejudice is presumed," *Weaver*, 137 S. Ct. at 1916 (Alito, J., concurring in the judgment). The Court has cautioned, however, that a presumption of prejudice will be justified only "infrequently," *Florida* v. *Nixon*, 543 U.S. 175, 190 (2004), and it has repeatedly resisted attempts to create new categories of presumptively prejudicial errors. See, *e.g.*, *id.* at 190-191 (rejecting presumption of prejudice where counsel conceded defendant's guilt during capital case); *Bell* v. *Cone*, 535 U.S. 685, 697 (2002) (rejecting presumption of prejudice where counsel "fail[ed] to adduce mitigating evidence" and "waive[d]" closing argument in a capital case); *Cronic*, 466 U.S. at 666 (rejecting presumption of prejudice where counsel was inexperienced and unprepared); *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970) (rejecting claim of "per se" prejudice where counsel was not appointed until very shortly before trial).

The Court's pathmarking decision in *Strickland* v. *Washington*, *supra*, identified three limited circumstances in which prejudice may be presumed: an "[a]ctual or constructive denial of the assistance of counsel altogether"; where the "state interfere[s] with counsel's assistance"; and where "counsel is burdened by an actual conflict of interest." 466 U.S. at 692. The Court has explained that those types of errors "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658; see *Strickland*, 466 U.S. at 692 ("Prejudice in

these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.").

The Court has also recognized that a presumption of prejudice is warranted in an "unusual" circumstance where "counsel's deficient performance" causes "the forfeiture of a proceeding" to which the defendant "had a right." *Flores-Ortega*, 528 U.S. at 483. In *Roe* v. *Flores-Ortega*, *supra*, a defendant pleaded guilty but did not expressly waive his appeal rights, and his counsel did not file a notice of appeal. See *id.* at 473-474. The Court explained that a defendant in that circumstance can show ineffective assistance by proving either (1) that his attorney disregarded his express instruction to file an appeal or (2) that his attorney deficiently failed to consult with him about a potential appeal that he is reasonably likely to have taken. See *id.* at 478-486. The Court reasoned, in part, that because a proceeding that "never took place" necessarily lacks "reliability," a defendant who has proved that "counsel's deficient performance * * * deprived [him] of [an] appellate proceeding altogether" has ipso facto shown that counsel's errors prejudiced him. *Id.* at 483 (citation and internal quotation marks omitted). "[D]enial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right," the Court concluded, "demands a presumption of prejudice." *Ibid.*

Even in cases in which the loss of a proceeding is alleged, however, the Court has not dispensed with the requirement that a defendant prove that the loss was specifically attributable to his attorney. In *Flores-Ortega* itself, for example, 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 in fact have exercised his appellate rights. 528 U.S. at 484; see *id.* at 485-486. The Court emphasized that it was "break[ing] no new ground" by requiring proof that counsel's errors actually "caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." *Id.* at 485.

B. A Defendant Who Has Chosen To Waive Appellate Rights May Not Automatically Attribute The Absence Of Substantive Appellate Review To Counsel's Errors

A defendant whose right to a "judicial proceeding," *Flores-Ortega*, 528 U.S. at 485, has been qualified or limited by his own voluntary appeal waiver is not entitled to a presumption of prejudice when his counsel fails to file a notice of appeal. Such a "*per se* prejudice rule" would "ignore[] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal," *id.* at 484. Instead, a defendant must show that the absence of substantive appellate review was the result of counsel's inaction, rather than the defendant's own knowing and intelligent waiver of rights to such review.

1. A knowing and intelligent appeal waiver validly renounces rights to substantive appellate review

Separate from any asserted error regarding counsel's failure to file an appeal, a defendant who signs an appeal waiver has himself renounced the right to have issues within the scope of the waiver heard on the merits by an appellate court.

a. Appeal waivers are a common, beneficial, and enforceable mechanism by which the prosecution and the defense ensure that a defendant's guilty plea puts to rest various issues as to which the defendant would otherwise have a right to appellate review.

Although a defendant has "no constitutional right to an appeal," *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), federal and state systems grant appellate rights following a criminal conviction. See 18 U.S.C. 3742(a); 28 U.S.C. 1291; see, *e.g.*, *State* v. *Cope*, 129 P.3d 1241, 1245 (Idaho 2006). But rights to appellate review, like other procedural rights, are waivable. See, *e.g.*, *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.").

This Court has repeatedly recognized that a defendant may knowingly and voluntarily waive constitutional or statutory rights as part of a plea agreement. See, *e.g.*, *Ricketts* v. *Adamson*, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); *Town of Newton* v. *Rumery*, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). Every federal court of appeals with criminal jurisdiction has thus recognized that an appeal waiver is generally enforceable, as long as it was entered into knowingly and voluntarily.[1]

---

[1] See *United States* v. *Teeter*, 257 F.3d 14, 23 (1st Cir. 2001); *United States* v. *Riggi*, 649 F.3d 143, 146-147 (2d Cir. 2011); *United States* v. *Wilson*, 429 F.3d 455, 460-461 (3d Cir. 2005); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States* v. *Rene*, 577 Fed. Appx. 316, 317 (5th Cir. 2014) (per curiam); *United States* v. *Beals*, 698 F.3d 248, 255-256 (6th Cir. 2012); *United States* v. *Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005); *United States* v. *Andis*, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); *United States* v. *Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005); *United States* v. *Hahn*, 359 F.3d 1315, 1324 (10th Cir. 2004) (en banc) (per curiam); *United States* v. *Bascomb*, 451 F.3d 1292,

An array of procedural protections ensures that any defendant who agrees to waive appellate rights in a plea agreement does so "knowingly, voluntarily, and intelligently." Pet. App. 5a. In the federal system, Federal Rule of Criminal Procedure 11 specifies the responsibilities of defense counsel, the prosecution, and the district court to ensure that any plea is knowing and voluntary. Under Rule 11, "[b]efore the court accepts a plea of guilty or nolo contendere," the court must ensure that the defendant fully understands the rights he is giving up, Fed. R. Crim. P. 11(b)(1); that he enters into the agreement of his own volition, Fed. R. Crim. P. 11(b)(2); and that "there is a factual basis for the plea," Fed. R. Crim. P. 11(b)(3). Where the plea agreement contains a waiver of appellate rights, the defendant must be specifically informed by the judge of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N); see Idaho Crim. R. 11(f) (analogous state procedure for plea agreements that "include a waiver of the defendant's right to appeal the judgment and sentence of the court").

Appeal waivers, like other fruits of plea negotiations, can help secure a "'mutuality of advantage' to defendants and prosecutors, each with his own reasons" for agreeing to forgo further review. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. 742, 752 (1970)). Prosecutors value appeal waivers as a means of "preserv[ing] the finality of judgments and sentences imposed pursuant to valid pleas of guilty." *United States* v. *Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); see *Lee*, 137 S. Ct. at 1967 ("[T]he strong societal

---

1294 (11th Cir. 2006); *United States* v. *Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009).

interest in finality has special force with respect to convictions based on guilty pleas.") (citation and internal quotation marks omitted). And defendants use appeal waivers "to gain concessions from the government." *Rutan*, 956 F.2d at 829. One survey of federal prosecutions found, for instance, that plea agreements containing appeal waivers "more frequently" included fixed sentences or sentencing ranges, downward departures, safety-valve credits, and factual stipulations—all of which defendants used to "limit[] their exposure to unexpected negative results at sentencing." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212-213 (2005).

b. A defendant whose plea agreement includes an appeal waiver has knowingly and voluntarily forgone a general right to appellate merits review. He instead retains such a right only with respect to issues (if any) that fall outside the scope of the waiver.

All of the courts of appeals have recognized that, where an appeal is barred by the terms of a waiver that the government seeks to enforce, the appropriate course is to dismiss the appeal without reaching the merits.[2]

---

[2] See *United States* v. *Chandler*, 534 F.3d 45, 51 (1st Cir. 2008); *United States* v. *Rodriguez*, 416 F.3d 123, 128-129 (2d Cir. 2005), cert. denied, 546 U.S. 1140 (2006); *United States* v. *Khattak*, 273 F.3d 557, 563 (3d Cir. 2001); *United States* v. *Cohen*, 459 F.3d 490, 492 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *United States* v. *Bond*, 414 F.3d 542, 546 (5th Cir. 2005); *United States* v. *Sharp*, 442 F.3d 946, 952-953 (6th Cir. 2006); *United States* v. *Chapa*, 602 F.3d 865, 868-869 (7th Cir. 2010); *United States* v. *Washington*, 515 F.3d 861, 864 (8th Cir.), cert. denied, 553 U.S. 1061 (2008); *United States* v. *Lopez-Armenta*, 400 F.3d 1173, 1174 (9th Cir.), cert. denied, 546 U.S. 891 (2005); *United States* v. *Leyva-Matos*, 618 F.3d 1213, 1215 (10th Cir. 2010); *United States* v. *Johnson*,

Although a defendant who appeals despite a valid waiver might have his appeal docketed and his briefs read by the court prior to dismissal, he has no right to insist that he be *heard* by the appellate court on any issue that falls within the scope of the waiver. On those issues, the court's consideration is necessarily limited solely to the threshold question whether merits review is barred because the defendant has waived it.

Furthermore, a defendant who appeals despite a waiver may be found in breach of the plea agreement, allowing the prosecutor to withdraw any concessions that were negotiated as part of the agreement, such as the dismissal of other, potentially more serious charges. See, *e.g.*, *Ricketts*, 483 U.S. at 8-9. In the federal system, the government may also refuse to move for a cooperation-based reduction in sentence when the defendant fails to honor his own obligations. See, *e.g.*, *United States* v. *Richardson*, 558 F.3d 680, 682-683 (7th Cir. 2009).

2. A defendant who has signed an appeal waiver is not prejudiced unless his attorney deprived him of a right to appellate review that he did not renounce

Where a defendant has himself already waived rights to appellate merits review, his attorney's failure to file a notice of appeal is not invariably prejudicial. Rather, any error by the attorney in that regard affects the defendant only if it deprived him of a still-extant right to an appellate merits proceeding. In accord with the usual rule that a defendant bears the burden to show prejudice on an ineffective-assistance claim, a defendant who cannot plead and prove such deprivation should not be awarded collateral relief.

---

541 F.3d 1064, 1069 (11th Cir. 2008), cert. denied, 557 U.S. 906 (2009); *Guillen*, 561 F.3d at 532 (D.C. Cir.).

a. A defendant who has no right to appellate review on the merits is not prejudiced by its absence. Such a defendant is not "harmed" in any practical or constitutional sense, *Gonzalez-Lopez*, 548 U.S. at 147, because he loses only the chance to have his appeal dismissed on the basis of his own knowing and intelligent waiver. Nor has there been "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Without any showing that an appeal would have gotten past the threshold stage, a defendant has not suffered the "denial of [an] *entire* judicial proceeding * * * *to which [he] has a right*," such that prejudice may reasonably be presumed, *Flores-Ortega*, 528 U.S. at 483 (emphasis added). A defendant's entitlement to a counseled appeal is based not on its symbolic value, but on its substantive role in the legal process. See pp. 10-11, *supra*; p. 25, *infra*. The Court has explained, for example, that the assistance of counsel on appeal is "necessary to present an appeal in a form suitable for consideration on the merits," *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985), rather than for any formalistic purpose. The Court's presumption of prejudice when an appeal is not taken—which it has analogized to the presumption of prejudice when an appeal is taken but no appellate counsel is provided—similarly rests on the premise that a defendant is entitled to a fair hearing on the merits. See *Flores-Ortega*, 528 U.S. at 483.

In terms of "the reliability of the process," *Flores-Ortega*, 528 U.S. at 482 (citation and ellipsis omitted), appeals that would be dismissed at the threshold are no different than "judicial proceedings that never took place," *id.* at 483. An appeal in which no merits consid-

eration would occur plays no meaningful role in the "adversary process" of adjudicating the substance of disputes between parties. *Ibid.* (citation omitted). No one would say, for example, that a defendant is prejudiced by his attorney's refusal to file an appeal in the wrong court—*e.g.*, in the federal rather than state court of appeals. Nor would anyone say that a defendant is prejudiced if his attorney declines to notice a requested appeal from a clearly non-appealable order, such as a pretrial order denying a suppression motion. A defendant who would file an appeal barred by his own waiver likewise suffers no harm from his attorney's refusal to do so.

Indeed, a defendant may in fact *benefit* from his attorney's inaction. In light of the consequences of breaching a plea agreement, a defendant who files such an appeal could face an appreciably harsher punishment. See *United States* v. *Whitlow*, 287 F.3d 638, 640-641 (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.").[3]

---

[3] Petitioner notes (Br. 21) that, even without an appeal waiver, a guilty plea inherently "reduces the scope of potentially appealable issues," *Flores-Ortega*, 528 U.S. at 480. See, *e.g.*, *Class* v. *United States*, 138 S. Ct. 798, 805-806 (2018). But when a plea does not include an appeal waiver, it does not waive a defendant's "right" to an appeal. The inherent preclusive effect of a guilty plea is based not on any "conscious waiver," but instead on "the admissions necessarily made upon entry of a voluntary plea." *United States* v. *Broce*, 488 U.S. 563, 573-574 (1989). Although often treated as the functional equivalent of (and described as) a "waiver," the inherent preclusive effect of a guilty plea is more precisely described as barring appellate relief for claims that are not "consistent" with a valid admission of guilt and as "render[ing] irrelevant" the merits of claims that do not call the validity of the plea into question, *Class*, 138 S. Ct.

b. Because the absence of an appeal can be prejudicial only when a defendant has lost out on appellate merits review, a defendant who signed an appeal waiver cannot show ineffective assistance unless he demonstrates that he was denied such review. In particular, he must plead and prove that an appeal would not have been barred by his waiver—*i.e.*, that it would have been a "judicial proceeding * * * to which he had a right," *Flores-Ortega*, 528 U.S. at 483. Only by doing so can he establish that his attorney's deficiencies, rather than his own renouncement of appellate rights, "deprived [him] of the appellate proceeding," *ibid.*

As in other circumstances in which a defendant alleges that counsel's errors were what "caused [him] to forfeit a judicial proceeding to which he was otherwise entitled," *Flores-Ortega*, 528 U.S. at 485, such a defendant must show a "reasonable probability" that the proceeding would have occurred in the absence of counsel's errors, *ibid.* In this particular context—where the hypothetical proceeding at issue is merits consideration of an appellate claim—the defendant must show a reasonable probability that, but for counsel's deficient performance, he would have raised claims that the appellate court would have considered on the merits. A defendant could potentially make such a showing through direct evidence that he in fact requested, or at least expressed

---

at 805. It also necessarily leaves open the possibility that the defendant may appeal his sentence. An appeal waiver, in contrast, reflects a knowing and intelligent renunciation of a defendant's appellate rights; contemplates that the filing of an appeal may itself be a breach of contract with potentially severe consequences; and may thus properly be considered the root cause for the absence of appellate review in cases in which no appeal is taken.

interest in, an appeal on a non-waived issue. In the absence of such direct evidence, a defendant might point to "evidence that there were nonfrivolous grounds for appeal" despite the waiver, *Flores-Ortega*, 528 U.S. at 485, or to evidence that the waiver itself contemplated appellate consideration of certain issues—*e.g.*, through express reservation of such issues in a conditional plea, cf. Fed. R. Crim. P. 11(a)(2).

The requisite showing would thus mirror the showing required of any defendant whose ineffective-assistance claim rests on the denial of an appellate proceeding "to which he had a right," *Flores-Ortega*, 528 U.S. at 483. The Court made clear in *Flores-Ortega* that such a defendant must either show that he in fact sought the proceeding or a reasonable probability that counsel's errors caused him not to do so, *id.* at 483-486. In cases where, unlike in *Flores-Ortega*, a defendant has signed an appeal waiver, a generalized request that an attorney file an appeal—as opposed to an appeal request that is tied to a specific issue that the appellate court could consider—is not enough to show that appellate merits review would have followed. Instead, a defendant must show a "reasonable probability" that the appeal would have been one as to which he had a right to be heard. Without such a showing, an attorney's failure to file a notice of appeal has cost the defendant nothing, and he has accordingly suffered no denial of his Sixth Amendment right to the effective assistance of counsel, see *Gonzalez-Lopez*, 548 U.S. at 147.

C. Petitioner's Per Se Prejudice Rule Is Unsound And Would Produce Undesirable Results

Petitioner advocates a rule of per se prejudice that would attach no weight to a defendant's waiver of appellate rights, make no effort to discern whether an appeal

would have been heard on the merits, and automatically hold the attorney—rather than the defendant—responsible for forgoing substantive appellate review. But neither the "logic" (Br. 15) of *Flores-Ortega*, nor any other sound legal or practical considerations, support such a rule, which would result in of frivolous appeals.

1. Petitioner asserts (Br. 15-16) that an attorney's failure to file an appeal on behalf of a defendant who has waived appellate rights may cause the defendant to forfeit "the numerous claims that survive an appeal waiver—including the right to challenge the validity, scope, and enforceability of the waiver." He also points out (Br. 20) that "a defendant who signs an appeal waiver" may "waive[] the right to bring certain claims on appeal, but retain[] the right to bring others." And he notes (Br. 17-18, 36) that not all appeal waivers are identical in scope, that a defendant may litigate the scope of the waiver on appeal, and that some federal courts of appeals have recognized implicit exceptions to even broad appeal waivers.

The fact that *some* defendants might have raised non-waived claims, however, supports a case-specific inquiry—not petitioner's one-size-fits-all approach. This case does not present a circumstance in which prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 658 (countenancing presumption of prejudice in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The case-specific inquiry described above precludes relief only where a defendant cannot demonstrate a reasonable probability that, in his particular case, an appeal would have been heard on the merits. Little reason exists to believe that

the inquiry will reach an incorrect or unjust result in a significant number of cases. See *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991) ("[T]he justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.").

A defendant whose appeal waiver is quite narrow—leaving many issues open for appeal—may have little difficulty making the requisite showing. But a defendant like petitioner, whose appeal waiver is much broader and would admit of few exceptions, will face a more difficult hurdle. That is as it should be; few defendants who have broadly waived their appellate rights would in fact have a cognizable claim of an unenforceable waiver, breached plea agreement, miscarriage of justice, or deprivation of fundamental rights, see Pet. Br. 17-18. And many such claims will require further factual development, such that they would more appropriately be addressed on collateral review, rather than on direct appeal. Cf. *Massaro* v. *United States*, 538 U.S. 500, 505-506 (2003).

Variation in defendants' circumstances cannot justify a per se rule of prejudice that would countenance ineffective-assistance claims even by defendants—such as petitioner himself, see Part D, *infra*—who have broadly waived their appellate rights and cannot show that they would have raised any reviewable claim on appeal. A case-specific inquiry that requires such a showing as a prerequisite to relief is no more complicated, or likely to reach incorrect results, than the case-specific prejudice inquiries that this Court has required in other ineffective-assistance contexts. Any such inquiry "of necessity requires a case-by-case examination of the evidence," *Williams*, 529 U.S. at 391 (citation omitted),

which can include consideration of whether a defendant would have insisted on pressing particular legal arguments, see *Flores-Ortega*, 528 U.S. at 486 (recognizing that the strength of an argument is relevant to whether a defendant would have wanted to raise it on appeal).

As noted above, the appropriate case-specific inquiry in this circumstance mirrors the inquiry that is required whenever a defendant alleges that counsel's errors deprived him of a proceeding. The Court in *Flores-Ortega* itself rejected a "*per se* prejudice rule" that "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." 528 U.S. at 484. It instead reasoned that "[i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything and he is not entitled to relief." *Ibid.* Similar logic applies here, and the Court should make clear that a similar case-specific approach is required.

2. Petitioner separately contends that "a defendant whose attorney ignores an instruction to appeal" must be "afforded a presumption of prejudice," because that attorney has "usurped a 'decision' that 'rests with the defendant' alone." Pet. Br. 23 (quoting *Flores-Ortega*, 528 U.S. at 485) (brackets omitted). But petitioner's attempt to ground a rule of presumptive prejudice in a criminal defendant's "protected autonomy right," *id.* at 24 (citation omitted), is misplaced.

The Court has distinguished a defendant's right to autonomy from the right to effective assistance under *Strickland*, see *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1510-1511 (2018), and the presumption of prejudice in *Flores-Ortega* that petitioner seeks to extend was not premised on autonomy interests, see 528 U.S. at 483.

And by waiving his right to appeal, a defendant has *already* made a knowing and voluntary choice not to seek further merits consideration of issues within the scope of the waiver. See *Nunez* v. *United States*, 546 F.3d 450, 455 (7th Cir. 2008) ("Nunez *had* made a personal decision—a decision not to appeal. That's what the waiver was about."). Petitioner implicitly acknowledges as much, because he does not argue that a defendant has an autonomy interest in bringing claims barred by an appeal waiver. Cf. *Smith* v. *Robbins*, 528 U.S. 259, 278 (2000) (rejecting a "right to counsel for bringing a frivolous appeal"). A focus on the defendant's right to autonomy—properly understood to mean his right to appeal claims that he has not already voluntarily renounced—thus supports a case-specific approach that limits relief to such circumstances, not a per se rule that grants relief indiscriminately.[4]

3. Petitioner also contends (Br. 29) that prejudice must be presumed, rather than established on a case-by-case basis, because "it would be profoundly unfair" to require a defendant to prove that his potential appellate claims have merit before he is allowed to appeal them. Petitioner's argument misunderstands the case-specific showing that this Court's precedents would require.

Contrary to petitioner's suggestion (Br. 29-30), the prejudice inquiry would not require the defendant to establish that he would have *prevailed* on appeal, but only to establish "a reasonable probability" that counsel's

---

[4] Petitioner also errs in relying on the obligations of counsel to "support his client's appeal to the best of his ability." Br. 27 (quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967)). The right to the *Anders* procedure depends on having an "appeal[] as of right," 386 U.S. at 741, and does not apply to appeals that would be barred by a waiver. See *Nunez*, 546 F.3d at 455.

failure to notice an appeal has "actually" deprived him of merits review. See *Flores-Ortega*, 528 U.S. at 484. For that reason, "although showing nonfrivolous grounds for appeal" that were not waived "may give weight to the contention that the defendant would have appealed" on those grounds, the "defendant's inability to 'specify the points he would raise were his right to appeal reinstated' will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed" a claim that could have been considered. *Id.* at 486 (citation omitted). As noted, those "other substantial reasons" may include evidence that the defendant "expressed a desire," contemporaneously with or shortly after pleading guilty, to appeal an issue that fell outside his waiver. *Id.* at 485-486.

Petitioner asserts (Br. 31) that a defendant, proceeding pro se on collateral review, "may have severe difficulty identifying and articulating viable claims that fall outside the scope of his appeal waiver." But a defendant who knowingly and intelligently signed an appeal waiver presumably contemplated, when he did so, the effect that the waiver would have on his ability to appeal. He is therefore much better situated to articulate to the postconviction court what sort of appeal he might nevertheless have brought than is a defendant who did not sign such a waiver. Cf. *Flores-Ortega*, 528 U.S. at 486. And to the extent that such a defendant might assert that he did not understand what he was waiving, or that his attorney misadvised him about the waiver, he can raise those as separate postconviction claims.

In any event, any difficulty a defendant may face in identifying non-barred appellate claims is not a defect

in the case-specific approach, but instead an appropriate consequence of the defendant's own decision to waive appellate rights. The very purpose of an appeal waiver is to limit or eliminate appellate litigation. The constraining effects of an appellate waiver on a proceeding in which a defendant seeks to initiate appellate litigation thus provide no reason to *dispense* with a case-specific prejudice inquiry.

4. Petitioner's per se prejudice rule, furthermore, has little to recommend it as a practical matter. It will have few benefits, but would add significant litigation burdens, reduce the advantages of plea agreements, and potentially harm defendants themselves.

Even courts of appeals that have adopted petitioner's proposed rule have recognized that its application "will bestow on most defendants nothing more than an opportunity to lose." *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) (Sotomayor, J.); see *United States* v. *Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007) ("[M]ost successful § 2255 movants in the appeal waiver situation obtain little more than an opportunity to lose at a later date."). That is unsurprising. Relieving defendants of the requirement to prove case-specific prejudice eliminates the traditional tool that courts employ to identify situations in which counsel's deficiencies may actually have mattered.

A presumptive-prejudice rule would give rise to more frivolous appeals. If the defendant is required to prove case-specific prejudice on collateral review, courts can decide on the papers whether the defendant has identified a claim that would have been raised and considered on appeal notwithstanding his waiver. But if prejudice is presumed, the defendant can automatically reopen the time for filing an appeal whenever

counsel fails to file a requested appeal, regardless whether any or all of the defendant's potential appellate claims were waived. The vast majority of appeal waivers are valid, and "an appeal in the teeth of a valid waiver is frivolous," *Nunez*, 546 F.3d at 455. Such frivolous appeals impose real costs on the courts and the government, as well as on appointed appellate counsel.

Petitioner observes (Br. 38) that some appellate courts following his rule have adopted summary-dismissal procedures that allow the government to move for dismissal if "it believes that claims raised are within the scope of the defendant's waiver." But even courts that permit such dismissal motions routinely "defer[ ] action on the Government's motion until receipt of the briefs," requiring the parties to brief the merits of the defendant's underlying claims anyway. *United States* v. *Monahan*, 405 Fed. Appx. 742, 742-743 (4th Cir. 2010) (per curiam), cert. denied, 563 U.S. 1001 (2011); see, *e.g.*, *United States* v. *Manning*, 755 F.3d 455, 456 (7th Cir. 2014); *United States* v. *Andrade-Martinez*, 536 Fed. Appx. 385, 385 (4th Cir. 2013) (per curiam). And even where an appeal is resolved on the basis of a dismissal motion, attorneys on both sides must expend the effort to draft and respond to such motions, and courts must decide them—work that provides no meaningful benefit in cases where only waived claims are at issue.

Indeed, as previously noted (see pp. 18, 20, *supra*), a defendant may be *harmed* by reinstatement of a waived appeal, because a breach of the plea agreement would release the prosecution from its own reciprocal obligations. This case well illustrates the point. In return for petitioner's waiver of appellate rights and other concessions, the State made substantial concessions of its own, including promises to forgo further state charges and to

refrain from referring petitioner for federal prosecution. Pet. App. 2a-3a. An appeal in breach of the waiver would be unfair to the State and could put those benefits to petitioner at risk. See *Nunez*, 546 F.3d at 455 ("[C]ounsel's duty to protect his client's interests militates against filing an appeal.").

Petitioner suggests (Br. 39) that a rule of presumptive prejudice will not open the "floodgates" because a defendant who seeks an appeal through collateral review will still have to prove "that he instructed his attorney to appeal." But that is burdensome in itself. A defendant may be able to initiate protracted litigation solely through allegations in an affidavit, which some courts (over the government's objection) treat as sufficient to require an evidentiary hearing—even where the defendant's trial counsel represents that the defendant in fact "never asked [him] to file a notice of appeal." *Rodriguez* v. *United States*, 741 F. Supp. 2d 344, 346 (D. Mass. 2010); see, *e.g.*, *Berrio-Callejas* v. *United States*, 129 F.3d 1252, 1997 WL 704419, at *1 (1st Cir. 1997) (Tbl.) (per curiam) ("The court had no authority to credit petitioner's counsel's letter over petitioner's."); *Underwood* v. *United States*, Nos. 14-cr-89, 15-cv-228, 2016 WL 554835, at *3 (E.D. Tenn. Feb. 10, 2016); *Martin* v. *United States*, Nos. 07-cr-17, 10-cv-461, 2012 WL 2061934, at *4, *6 (D. Me. June 7, 2012). An evidentiary hearing, in turn, will usually require testimony from trial counsel and the defendant, who must be transported to the court (which may be in a different district from the one in which he is imprisoned). Indeed, this Court has previously noted that, for some defendants, the "collateral attack may [itself] be inspired by a mere desire to be freed temporarily from the confines of the

prison." *Blackledge* v. *Allison*, 431 U.S. 63, 72 (1977) (citation and internal quotation marks omitted).

D. The Lower Courts Correctly Denied Relief Because Petitioner Failed To Show That He Sought To Appeal Any Claim That He Did Not Waive

The courts below correctly rejected petitioner's request for a direct appeal.

Petitioner's collateral-review petitions did not identify any appealable claim that petitioner lost as a result of counsel's failure to notice an appeal. Following conviction and sentencing, petitioner asked trial counsel to "appeal the sentence(s) of the court," Pet. App. 52a, without identifying any claim that was not covered by his appeal waiver. See CR 10 (petitioner claiming he asked his attorney to file "an appeal"). On collateral review, petitioner argued—separate from his ineffective-assistance claim—that his guilty pleas were not knowing and voluntary. Pet. App. 29a. But the trial court rejected that argument on the merits "for lack of supporting evidence," *ibid.*, and petitioner did not pursue it further. See *id.* at 31a n.1 (petitioner "has never contended that he did not appreciate or understand" the appeal waivers). Finally, when asked for any issues he wished to pursue on appeal that were "non-frivolous and not subject to dismissal as a result of his appeal waivers," petitioner identified only one issue, which was squarely foreclosed by his waiver: "whether the Court properly exercised its discretion in imposing the sentences to which he and the State agreed in the [Rule] 11(f)(1)(C) plea agreements." *Id.* at 31a-32a.

Petitioner thus failed to establish that he "promptly expressed a desire to appeal" an issue that was appealable notwithstanding his appeal waiver, or that "there were nonfrivolous grounds for appeal" despite the waiver.

Flores-Ortega, 528 U.S. at 485. Counsel's failure to appeal on petitioner's behalf, therefore, did not "actually cause" petitioner to forfeit appellate review of any claim. *Id.* at 484. Petitioner thus failed to establish that he received ineffective assistance of counsel.

CONCLUSION

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
ERIC J. FEIGIN
ALLON KEDEM
Assistants to the Solicitor General
SANGITA K. RAO
Attorney

SEPTEMBER 2018