No. _____

In the

Supreme Court of the United States

CARLOS MICHAEL LOPEZ

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari to the
Fourteenth Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Garza v. Idaho, 139 S. Ct. 738, 749-50 (2019), holds that a defense attorney offends the Constitution by failing to file a notice of appeal upon the client's request "regardless of whether the defendant has signed an appeal waiver." But what if a court *sua sponte* dismisses an appeal because it finds evidence of a waiver? Both yield the same result: the complete deprivation of the appeal.

The questions presented are:

1. Does due process require courts to "treat at least some claims as unwaiveable" on appeal? *See Garza*, 139 S. Ct. at 145.

2. Does due process guarantee a limited right to appeal?

3. Does an appellate court deny due process, corrupt adversarial process, and exceed its inherent powers by dismissing—*sua sponte* and prematurely—an appeal because the record shows a waiver?

RELATED PROCEEDINGS[1]

1. 262ND JUDICIAL DISTRICT COURT, HARRIS COUNTY, TEXAS

   The State of Texas v. Carlos Michael Lopez
   Case number 1564443
   Judgment entered April 26, 2019

   The State of Texas v. Carlos Michael Lopez
   Case number 1564444
   Judgment entered April 26, 2019

2. FOURTEENTH COURT OF APPEALS OF TEXAS

   Carlos Michael Lopez v. The State of Texas
   Case number 14-19-00380-CR
   Judgment entered on January 28, 2020

   Carlos Michael Lopez v. The State of Texas
   Case number 14-19-00381-CR
   Judgment entered on January 28, 2020

3. TEXAS COURT OF CRIMINAL APPEALS

   Carlos Michael Lopez v. The State of Texas
   Case number PD-0132-20
   Discretionary review refused on April 29, 2020

   Carlos Michael Lopez v. The State of Texas
   Case number PD-0133-20
   Discretionary review refused on April 29, 2020

[1] Although it is not a "related proceeding," Petitioner views Michael Buck's case, whose petition for writ of certiorari is nearly identical to this one (except the Statement of the Case), as its companion. *See Michael Buck v. The State of Texas*, No. _____.

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INTRODUCTION

When *Garza* declared, "all jurisdictions appear to treat at least some claims as unwaiveable," it overlooked Texas. *Garza*, 139 S. Ct. at 745. Texas appellate courts treat appeal waivers as absolute bars to appeal, so they routinely dismiss cases—without hearing or pretense of adversarial process—simply because the record contains a waiver. This practice not only denies Texas defendants their right to appeal. For many indigent defendants, it completely deprives them of counsel, the trial record, and any meaningful chance to advance even the most fundamental claims after conviction.

The Texas system is unfair, unworkable, and unacceptable – but it persists according to the conditions set by this Court. For while its decisions have established direct appeals and neutral tribunals as critical safeguards of the fundamental rights due criminal defendants, the Court adheres to an antiquated edict that there is no constitutional right to appeal. *McKane v. Durston*, 153 U.S. 684 (1894). Where the defendant has a right to appeal, the Court has failed to root the ability to raise claims despite an appeal waiver to the Constitution. *Garza*, 139 S. Ct. at 745, 749-50. And the Court has never delimited courts' powers to dismiss appeals *sua sponte* in adversarial appellate proceedings.

One way or another—this petition offers three—the Court should intervene into the deeply troubling Texas appellate system. Petitioner's case presents an ideal vehicle for this Court to re-examine the constitutional protections for criminal appeals, which have become essential to due process; delineate the scope of

permissible judicial intervention into an appellate proceeding; and upset Texas's unconstitutional system. The impact of this Court answering the questions presented would obviously be widespread, but for Texas defendants in particular the need for answers is urgent.

This court should grant certiorari.

OPINION AND ORDERS BELOW

The majority and concurring opinions of the Fourteenth District Court of Appeals of Texas are published at 595 S.W.3d 897. App. 1a-13a. The order refusing discretionary review at the Texas Court of Criminal Appeals is unpublished but may be viewed at 2020 Tex. Crim. App. LEXIS 347, 349. App. 14a.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1257(a). The court of appeals dismissed the appeals on January 28, 2020, and the Texas Court of Criminal Appeals refused discretionary review on April 29, 2020. By this Court's order of March 19, 2020, the filing deadline for this petition extends to September 26, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Am. XIV § 1.

2. Texas Code of Criminal Procedure Article 44.02 provides: "DEFENDANT MAY APPEAL. A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This article in no way affects appeals pursuant to Article 44.17 of this chapter." TEX. CODE CRIM. PRO. Art. 44.02.

STATEMENT OF THE CASE

Off the record on January 15, 2019, Petitioner pleaded guilty to two felony aggravated assault charges arising from the same incident that occurred while he was still only 17 years-old. The sides did not agree to a sentencing recommendation, so Petitioner had the right to appeal. TEX. CODE CRIM. PRO. Art. 44.02.

On the day that he pleaded guilty, Petitioner signed and initialed his "plea paperwork" (generic waivers of rights and admonishments that defendants are given to read and sign on the date of the plea) for both cases. App. 15a-29a. By signing them, Petitioner appeared to waive his presentence investigation hearing

("PSI").[2] *Id*. at 18a-19a. Petitioner also appeared to sign away his right to appeal in exchange for the State giving up its right to a jury trial. *Id*. at 15a.

Three months after Petitioner pleaded guilty and signed the papers, the trial court held a PSI sentencing hearing. The court sentenced Petitioner to 15 years in prison for both cases. The trial court also certified that Petitioner had waived his right to appeal. Nevertheless, Petitioner filed a *pro se* notice of appeal.

After the clerk filed its record in the appellate court, the court of appeals directed a letter to the trial court regarding the certification of the right to appeal. According to the letter, the court of appeals viewed the clerk's record as inconsistent with the certification, suggesting Petitioner had not validly waived his right to appeal. It asked the trial court to "review the records, and, if necessary, correct the certifications of the defendant's right of appeal." In response, the trial court filed an amended certification indicating Petitioner retained the right to appeal.

Petitioner then filed his brief. In it, he argued the trial court's jurisdiction over his case violated the Eighth Amendment to the United States Constitution, so his convictions could not be sustained. Pet. Br. 4. Petitioner contended that the constitutional error—not raised during trial—represented a structural defect that the appellate court had to consider on direct review. *Id*. at 11-13. Finally, Petitioner contended the error could not be "waived or forfeited" under state law.

[2] It cannot be seriously questioned that Petitioner did not intend to waive the PSI. The PSI was *the* purpose of him pleading guilty because it is a prerequisite for getting deferred adjudication in Harris County courts. *See* AH: 12. Waiving it convincingly shows he did not know what he was waiving.

The State of Texas responded the next day with a motion to dismiss the appeal. The State claimed the parties "bargained" for the defendant's waiver of the right to appeal. The State asked the court to give it "its end of the bargain" and dismiss the appeal.

Petitioner moved the court to "strike or deny" the State's motion because Texas appellate rules do not permit the motion – the State's argument belonged in its brief. Alternatively, Petitioner asked the court to deny the State's request because the record did not reflect an enforceable agreement to waive the right to appeal. Pet. Motion (August 1, 2019) 5-6. Petitioner lastly argued that, even if he had waived the right, he could raise his particular claim attacking the trial court's jurisdiction. *Id*. at 6.

Without ruling on the motions, the court of appeals abated the appeal for the trial court "to make findings of fact as to whether appellant's waiver of his right to appeal is valid." Petitioner challenged the abatement order and moved the court to reinstate the appeal. First, Petitioner contended the court's abatement of the appeal was procedurally improper. Second, Petitioner highlighted the fact that he had a statutory right to appeal, distinguishing it from typical plea bargain cases. Since the court of appeals had jurisdiction, it could not dismiss his appeal prematurely. Pet. Motion (August 26, 2019) 8.

The court of appeals denied Petitioner's motion to reinstate the appeal. During the abatement hearing back in the trial court, the prosecutor described how the language purporting to waive the right to appeal appeared in his office's plea

paperwork: "sometime last year (2018), the District Attorney's Office started putting this highlighted sentence (the appellate waiver) at the end of our plea paperwork" for PSI pleas. AH 6. Easy to miss, the prosecutor acknowledged that even the court of appeals "did not catch this one sentence at the end" when it issued its letter suggesting the record showed no waiver. *Id*. at 6-7.

Petitioner's trial attorney testified during the hearing. When the prosecutor asked him if he had read the new plea paperwork, the defense attorney replied, "I can't honestly tell you I read the paperwork again after 30 years." *Id*. at 13. Notwithstanding his failure to read them, the attorney averred that he gave his best efforts to explain "everything" to Petitioner. *Id*. at 13-14. He advised Petitioner that by pleading guilty he would waive his right to appeal some errors but, notably, told Petitioner that he would retain the ability to challenge sentencing errors. *Id*. at 13. The trial attorney expressed doubt that Petitioner understood everything because Petitioner "is a kid, and mentally he's more of a kid than even his age reveals." *Id*. The attorney added, "I don't think at the time that he was setting this for a PSI that he even thought about appeal." *Id*. at 14.

Following the hearing, the court of appeals asked the prosecutor to respond to Petitioner's motion to strike or deny. The prosecutor's response again urged the court to dismiss by granting the prosecution's motion or dismissing on the court's own motion. The court adopted the latter suggestion and notified the parties, "[t]he court will consider dismissal of these appeals on its own motion for lack of

jurisdiction due to appellant's waiver of his right to appeal." The court invited further briefing on the "jurisdictional issue" but did not require it.

On January 28, 2020, the court of appeals issued an opinion dismissing Petitioner's appeals. App. 1a-6a. The court relied on the one-sentence waiver that the district attorney's office inserted into its plea paperwork – the same one the appellate court itself had initially overlooked. *Id.* at 6a, 15a. The court reasoned that the inclusion of the sentence "compels us to conclude appellant's waiver of his right to appeal is valid. Accordingly, we dismiss these appeals for lack of jurisdiction." *Id.* at 6a. The court's opinion did not address Petitioner's arguments that the waiver was not enforceable, that Petitioner's particular claim could not be waived, or that the court could not dismiss at this stage since Petitioner had a statutory right to appeal. Nor did the court consider any evidence that contradicted the validity of the waiver.

Petitioner asked for discretionary review of the decision at the Texas Court of Criminal Appeals ("TCCA"). In his petition for review, he contended that the lower court's decision was erroneous for three reasons: he did not validly waive his right to appeal, the court deprived him of due process by *sua sponte* dismissing his appeal, and the court deprived him of due process by denying his right to appeal. PDR 13-19. The TCCA refused review. App. 14a.

REASONS FOR GRANTING THE PETITION

For decades, this Court has affirmed the importance of meaningful appellate review to protect constitutional values. At the same time, this Court has refused to

recognize even a limited constitutional basis for the right to appeal. The failure to tether the appeal to the Constitution has allowed Texas courts to perniciously and routinely subvert the fundamental interests advanced by cases from *Griffin* to *Garza*. This petition squarely presents the opportunity to harmonize this Court's case law with the Constitution's guarantees, upend the deeply troubling Texas system, and recognize a limited due process right to appeal – or not, and still upend the Texas system that is antithetical to adversarial process. This Court should grant certiorari.

I. THE QUESTIONS PRESENTED INVOLVE IMPORTANT ISSUES AND TROUBLING PROCEDURES THAT RECUR ALMOST DAILY.

The complete denial of an appeal and the consequences of that denial on later proceedings are of vital concern to our criminal justice system and the individuals caught within it. Petitioner's questions seek to vindicate the fundamental right of access to the courts that guarantees "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

The significance of appellate review to persons who have been unjustly convicted or sentenced can hardly be overstated. The appeal is usually their best chance for relief – and the only time most of them will have assistance of counsel. *See Garza*, 139 S. Ct. at 749. Without constitutional protection, their ability to appeal is threatened by cost-saving legislation, Cassandra Robertson, *The Right to Appeal*, 91 N.C.L. Rev. 1219, 1223 (2013), court-created rules like the one at issue here, *Lundgren v. State*, 434 S.W.3d 594, 598-99 (Tex. Crim. App. 2014) (holding

execution of appellate waiver precludes appellate jurisdiction), and ever-expanding waiver clauses, Nancy King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 246-47 (2005).

These threats to the right of appeal endanger the legitimacy of our criminal adjudicatory process. This Court has repeatedly shown that meaningful appeals help safeguard fundamental principles of justice such as fairness, equal protection of the law, adversarial testing, and the right of access to the judiciary. *See Garza*, 139 S. Ct. at 749 ("We have already explained why this would be unfair and ill advised" to leave unwaived claims for postconviction review instead of appeal), *Rodriquez v. United States*, 395 U.S. 327, 330 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings"), *Eskridge v. Wash. State Bd. Of Prison Terms & Paroles*, 357 U.S. 214, 215-16 (1958) ("The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review…"), and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance"). *See also Evitts v. Lucey*, 469 U.S. 387, 396-97, 405 (1985); *Anders v. California*, 386 U.S. 738, 745 (1967); *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

Meaningful review at least requires that the defendant have access to effective counsel and the trial record. *See Halbert v. Michigan*, 545 U.S. 605, 610, 619 (2005) ("Accordingly, we hold that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review"), and *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure… that automatically deprived him of a full record, briefs, and arguments on the bare election of his appointed counsel"). *See also Garza*, 139 S. Ct. at 748-50; *Evitts*, 469 U.S. at 393-94, 396-97; *Anders*, 386 U.S. at 744; *Douglas*, 372 U.S. at 356-57; *Lane v. Brown*, 372 U.S. 477, 484-85 (1963); *Eskridge,* 357 U.S. at 215-16; *Griffin*, 351 U.S. at 17-18.

Through these decisions, this Court has created a "symbiotic model of the relationship between trial and appeal" that establishes the latter as the most important insurance against injustice at the trial level. Marc Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 576-78 (1992). As the appeal goes, so goes the integrity of the system.

In a nutshell, that explains the problem with Texas. Texas courts treat appeal waivers as jurisdictional barriers, so they routinely dismiss cases when they

find a waiver in the record.[3] For example, Jacky Ray Radford filed a *pro se* notice of appeal on March 12, 2020. Eleven days later, the court of appeals dismissed his case because the trial court certified that he had waived his right to appeal. *Radford v. State*, 2020 Tex. App. LEXIS 2358, *1 (Tex. App.—Waco Mar. 23, 2020). The court of appeals dismissed Sheila Wright's case for waiver just six days after she filed her notice of appeal. *Wright v. State,* 2020 Tex. App. LEXIS 1627, *1 (Tex. App.—Waco Feb. 26, 2020). *See also Flores v. State,* 2020 Tex. App. LEXIS 4227, *4-*5 (Tex. App.—Houston [1st Dist.] June 4, 2020) (dismissing *sua sponte* for waiver), and *Scott v. State*, 2020 Tex. App. LEXIS 3936, *1-*2 (Tex. App.—Dallas May 11, 2020) (same). As is often the case, in none of these cases had the trial record/transcript been filed.

The Texas courts' practice reproduces the precise harms this Court sought to eliminate. For one, premature dismissals preclude even the most fundamental claims by completely depriving defendants of their appeal. *See Garza*, 139 S. Ct. at 745 (declaring "[m]ost fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the

[3] An insidious consequence of Texas courts treating waivers as jurisdictional is that many Texas attorneys treat them the same way, leading them to advocate against their own client's right to appeal (even after *Garza*). *See, e.g., Palmer v. State*, 2020 Tex. App. LEXIS 2170 (Tex. App.—Dallas Mar. 11, 2020) (appellate attorney suggests appellate court lacks jurisdiction where jury convicted defendant who then executed sentencing agreement and waiver, available at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=97da5888-0fd8-4aa1-b21c-a1e63deaa655&coa=coa05&DT=Brief&MediaID=ae81b6d4-7b19-4751-96fc-aec4381ee902); *Beard v. State*, 2020 Tex. App. LEXIS 2041 (Tex. App.—Houston [14th Dist.] Mar. 10, 2020) (same, brief at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=df422a59-3a87-468a-91e2-dbcb7f6717b1&coa=coa14&DT=Response&MediaID=76cb3d49-49f6-4e9b-8bb0-6f66c796f97d); *Jones v. State*, 2020 Tex. App. LEXIS 3344 (Tex. App.—Dallas Apr. 21, 2020) (same, brief at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=cae7fd3d-2795-4975-beff-74ec07cc2beb&coa=coa05&DT=Brief&MediaID=8ea5a723-08fd-4278-a923-713e0868f476).

grounds that it was unknowing or involuntary"). But what is more, Texas defendants have no postconviction right to counsel or to the trial record *except for* purposes of the appeal.[4] *In re Bonilla*, 424 S.W.3d 528, 532-33 (Tex. Crim. App. 2014) (declaring *habeas* applicants have no right to counsel and only right to know cost of records).[5] Premature dismissals of appeals can therefore deprive defendants of both counsel and the record for all times after conviction. They are left with no more than the "hopelessly forbidding" and "unfair" prospect of bringing their claims *pro se* in habeas writs without the record (unless, of course, they can afford habeas counsel and the record). *See Garza*, 139 S. Ct. at 749; *Evitts*, 469 U.S. at 396.

The same unfair barriers to meaningful review face probably most Texas defendants upon conviction because there is no right to appeal for plea-bargaining defendants except for issues previously raised by written motion and denied. TEX. CODE CRIM. PRO. Art. 44.02. *See also Chavez v. State*, 183 S.W.3d 675, 680 (Tex. Crim. App. 2006) (holding court "must dismiss a prohibited appeal without further action, regardless of the basis for the appeal"). Every day but holidays and weekends, plea-bargaining defendants forfeit whatever realistic claims they may have by virtue of their pleas, their poverty, and Texas's failure to provide them any mechanism for meaningful review.

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[4] Defendants sentenced to death are an exception to this general rule.

[5] The TCCA agrees that applicants need the record to succeed in their "first and only bite at the *habeas-corpus* apple," which only seems to underscore the unfairness of having no right to it, at least for indigent people. *In re Bonilla*, 424 S.W.3d at 532-33 ("In all likelihood, an applicant will need to obtain and review his trial and appellate transcripts to ensure that he considered the entire record so that he may present all his claims at what will likely be his first and only bite at the habeas-corpus apple. And the first step to obtaining a transcript is to find out how much it costs.")

Due process requires more, *i.e.*, a reasonable "opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Recognizing a constitutional right to appeal provides the remedy.

II. DENYING THIS APPEAL DENIED DUE PROCESS.

The decision below deprived Petitioner of due process not only because he had a right to appeal and to raise certain claims, but also because the lower court's actions struck at the heart of our fundamentally adversarial legal system.

A. *Garza* makes "certain claims" reviewable on appeal even where the record contains evidence of waiver.

The decision below conflicts with *Garza*. *Garza*'s holding "followed squarely from *Flores-Ortega* and the fact that even the broadest appeal waiver does not deprive a defendant of all appellate claims." *Garza*, 749-50. *Garza* repeatedly mentions that a defendant may raise some claims despite a waiver, although the Court does not name them. *Id*. at 742, 744, 745-50.

Due process requires these exceptions. After all, the Due Process Clause limits a state's power to deny a protected entitlement or "liberty interest." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 67 (2009). It would be fundamentally unfair to allow courts to take away a defendant's right to appeal without process, and *Garza* expresses a necessary "procedural limitation" on their ability to strip it. *See id*. Or to use another of the due process formulations articulated in *Osborne*, *Garza* "recognized" the right to make some claims on appeal despite a waiver, and

the decision below transgresses that principle of fairness in operation. *See id*. (citing *Medina v. Cal.*, 505 U.S. 437, 446, 448 (1992)).

But *Garza* concerns effective assistance of counsel. And although *Garza* states several times that no appellate waiver is absolute, the opinion never ties the survival of appellate claims to the Constitution. Rather, the opinion represents it as a "fact" describing lower courts' treatment of appellate waivers. *See Garza*, 139 S. Ct. at 744.

But Petitioner's case is one of many examples proving that Texas courts do, in fact, treat appellate waivers as absolute. The courts rely on the same fallacious reasoning that this Court rejected in *Garza* – that a defendant who waives his right to appeal "never had a right to his appeal." Contrast *Garza*, 139 S. Ct. at 747-48, with *Marsh v. State*, 444 S.W.3d 654, 660 (Tex. Crim. App. 2014) (holding "because Appellant had validly waived his right to appeal, the court of appeals never acquired jurisdiction").

What is true of the right to appeal when discussing ineffective assistance of counsel must hold true on direct review – some appellate claims survive a waiver. *Garza*, 139 S. Ct. at 747. The lower court deprived Petitioner of his right to raise the surviving claims on appeal.

B. Due process requires a limited right to appeal in all criminal cases.

This Court should place Petitioner's right to raise certain claims on appeal within a due process right to appeal. The procedures in Texas work to deprive most defendants of the possibility of serious attack on their convictions; they are

fundamentally inadequate. When a state's appellate procedures "are fundamentally inadequate to vindicate the substantive rights provided" to defendants, they deprive them of due process and this Court may "upset" them. *Osborne*, 557 U.S. at 69. Recognizing a due process right to appeal would successfully "upset" the Texas system to ensure that every defendant will have assistance of counsel at some point after conviction, a record to work with, and a meaningful chance to present their claims.

1. The rationale of *Garza* suggests a broader right to appeal.

Garza both accepts the legitimacy of appellate waivers and restricts them by exempting certain claims. Thus, it protects interests outside the focus of the appeal (error correction) and independent of the waiver. It does so largely because leaving certain claims for post-conviction review "would be unfair and ill advised." *Garza*, 139 S. Ct. at 749. In that way, *Garza* does not strictly vindicate the right to appeal. Instead, *Garza*'s rule affirms fairness concerns while integrating them with the Court's decisions that establish the defendant's ability to challenge certain fundamental defects for the first time after trial. *See, e.g., United States v. Mezzanotto*, 513 U.S. 196, 204 (1995) ("We agree with respondent's basic premise: There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived…").

Garza's rationale applies with equal force to defendants without the right to appeal. Countless Texas defendants who plead guilty pursuant to a plea bargain have no right to appeal. As a result, they have no right to counsel or to the record –

but they do have the extra difficult burden of making their claims in a *habeas* writ. *See Garza*, 139 S. Ct. at 749 (noting defendants without appeal must raise lost claims "in the face of the heightened standards and related hurdles that attend many postconviction proceedings").

"Those whose right to appeal has been frustrated should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceeding." *Rodriquez*, 395 U.S. at 330. But the Texas system does exactly that: a defendant coerced to accept a plea bargain, for instance, faces practically insurmountable hurdles.

2. State actors deny appeals arbitrarily and in bad faith.

Recognizing the right to appeal would prevent state systems from depriving defendants of appellate review arbitrarily or nefariously. For example, take Petitioner's case. If the state had made the meaningless offer of recommending to the judge that it not impose the maximum sentence and Petitioner agreed, then he would have had no statutory right to appeal. The deprivation of the important right to appeal should not turn on such a trivial gesture.

While such an offer would be trivial to the defendant, it could be very useful to courts and prosecutors that act in bad faith. As Petitioner Buck's companion case shows, the prosecution can use an appellate waiver to cement the violations of the defendant's rights that it, the court, and defendant's own counsel perpetrated against him.[6] This result cannot comport with due process – it is grossly unfair.

[6] *See Michael Buck v. The State of Texas*, No. _____.

3. Justifications for the right to appeal outweigh *stare decisis*.

Finally, this Court has repeatedly denied a constitutional right to appeal, relying primarily on language in *McKane v. Durston*, 153 U.S. 684 (1894). But since *McKane* was decided, the importance of the appeal has grown significantly and "irretrievably altered whatever weight once may have been given to the inviolability of trial results." *See* Arkin, *supra*, at 577-78. With the appeal's role thus expanded, it is now "difficult to think of another procedural institution of such enormous practical significance that exists wholly outside the constitutional aegis." *Id*. In short, *McKane*'s claim about the constitutional right to appeal—probably dictum in the first place—is incompatible with subsequent precedent and wrong. *See id*. at 505 n.7 (citing David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518, 521 n.6 (1990)).

Special justifications for overturning *McKane* outweigh the doctrine of *stare decisis*. Clinging to *McKane* has "caused significant jurisprudential [and] real-world consequences" and will continue to produce "manifestly… unjust" outcomes until it is overruled. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part) (outlining considerations to guide inquiry for overruling prior decision). The Court should reverse *McKane* with this case.

C. *Sua sponte* dismissals to enforce appeal waivers deny due process, undermine adversarial process, and exceed courts' inherent powers.

Perhaps the most troubling aspect of the lower court's opinion is its implicit yet glaring repudiation of adversarial process. The adversarial nature of the criminal justice system "is both fundamental and comprehensive." *United States v.*

Nixon, 418 U.S. 683, 708-09 (1974). It surely ranks as a "principle of justice" so fundamental that due process guarantees it. *See Osborne*, 557 U.S. at 69. And just as surely, the court's dismissal of Petitioner's appeal "on its own motion" betrayed this bedrock principle.

Adversary process relies on the principle of party presentation. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Ct. App. 1983)). Petitioner's case and the sampling of Texas cases above show that Texas courts of appeals do precisely what this Court says adversarial courts do *not* do – at least when it comes to appeal waivers.

Another problem is that Texas courts step into the prosecution's shoes by enforcing purported waivers on their own. An appellate waiver reflects a "contract" between the defendant and the prosecution that courts should not invite themselves into. *See Garza*, 139 S. Ct. at 744, (citing *Puckett v. United States*, 556 U. S. 129, 137 (2009)). It is the prosecution's right to invoke the terms of the deal – or to choose not to. *Garza*, 139 S. Ct. at 747 n.10.

Lastly, such anti-adversarial rejections of appeals eclipse the appellate court's inherent powers. "[T]his Court has never precisely delineated the outer boundaries" of a court's inherent powers to dismiss cases. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1891-92 (2016). That said, this Court has identified some limits, and

the lower court's actions exceeded them. For example, a court's exercise of its inherent powers "cannot be contrary to any express grant of or limitation on" the court's statutory jurisdiction. *See id.* Here, the legislature gave defendants in Petitioner's position the right to appeal; the court exceeded its powers when it nullified that right by equating the record waiver with a jurisdictional bar.

III. THE QUESTIONS PRESENTED ARE SQUARELY PRESENTED.

The following facts put the questions presented squarely before this Court:

- Petitioner had a statutory right to appeal. TEX. CODE CRIM. PRO. Art. 44.02.
- In his brief, Petitioner challenged the constitutionality of the court's jurisdiction over him and argued the issue could not be waived.
- In a motion to the court, Petitioner contended the record waiver was not enforceable, and its validity should be contested during the appeal.
- The lower court dismissed the appeal "on its own motion" and without addressing Petitioner's claims, reasoning the waiver language in the plea papers "compels" the dismissal under controlling case law from the TCCA.
- Petitioner sought discretionary review of the lower court's decision on the grounds that his waiver was not enforceable, the lower court deprived him of due process by dismissing his appeal on its own motion when it had statutory jurisdiction, and that the denial of the appeal deprived him of due process.

All three questions presented are properly before the court. There is no reason to wait to decide these questions. And the cost of waiting—as borne by the myriad defendants deprived by Texas's postconviction procedures of any meaningful opportunity to present their claims—is too great to justify delay.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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