No. 17-1026

In The
Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu

Counsel for Amicus Curiae

Susan D. Reece Martyn
Stoepler Professor of Law and Values
UNIVERSITY OF TOLEDO COLLEGE OF LAW
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 530-4212
susan.martyn@utoledo.edu

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INTEREST OF *AMICUS CURIAE*[1]

The Ethics Bureau at Yale is a clinic composed of fourteen law students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted *amicus* briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Amicus has no direct interest in the outcome of this litigation. Because this case implicates a lawyer's ethical obligation to further his client's objectives by obeying his client's lawful direction, the Bureau believes it might assist the Court in resolving the important issues presented.

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[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The Ethics Bureau at Yale is a student clinic of Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School.

SUMMARY OF ARGUMENT

This Court's Sixth Amendment jurisprudence, as well as long-standing professional responsibility principles and agency law, make clear that a presumption of prejudice applies when a criminal defendant asks his lawyer to file a notice of appeal, but the lawyer fails to do so, relying for his inaction on the defendant's plea agreement that included an appeal waiver. To have this Court decide otherwise would allow lawyers to breach the most basic of fiduciary duties to their clients: the obligation of loyalty to obey a client's lawful decisions regarding the objectives of the representation.

The facts of this case are straightforward and undisputed. In 2015, Gilberto Garza, Jr. entered into two plea agreements: an *Alford* plea to aggravated assault and a guilty plea to possession of a controlled substance. Both plea agreements include a provision stating that Mr. Garza "waives his right to appeal." Pet. App. at 44a, 49a. Mr. Garza subsequently informed his lawyer via numerous phone calls and letters that he wanted to appeal his sentence. *Id.* at 3a. But despite this instruction, counsel did not file a notice of appeal, because he concluded that "Mr. Garza [had] received the sentence(s) he bargained for" and that "an appeal was problematic because [Mr. Garza] waived his right to appeal." *Id.* at 52a. Mr. Garza filed a pro se petition for post-conviction relief, alleging that his lawyer rendered ineffective assistance of counsel by refusing to file to a notice of appeal at his request. *Id.* at 3a. The Supreme Court of Idaho affirmed the District Court's and Court of Appeals' denial of relief.

Clients have the sole authority to decide whether they will file an appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)) (noting that the "accused has [the] ultimate authority to make [the] fundamental decision [of] whether to take an appeal"); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (stating that the decision to "forgo an appeal" is "reserved for the client"); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (same). It is a fundamental precept of the ethical obligations of lawyers in the American constitutional tradition that the client, not the lawyer, has the final say over the objectives of the representation. In giving meaning to that precept, this Court requires courts to presume prejudice when a lawyer fails to file a notice of appeal after the client requests that one be filed. *See Rodriquez v. United States*, 395 U.S. 327 (1969).

That presumption applies here, where counsel unilaterally decided that filing a notice of appeal would be unwise. The law protects the client's right to file an appeal, including an appeal that non-judicial actors may deem imprudent or even frivolous. *See Anders v. California*, 386 U.S. 738, 744 (1967) (describing a method for court-appointed lawyers to withdraw from an appeal they consider meritless while still zealously advocating for their clients); *see also Penson v. Ohio*, 488 U.S. 75, 81-85 (1988) (affirming the importance of *Anders* briefs). If a lawyer cannot undermine a client's appeal based on the lawyer's unilateral conclusion that the client's appeal is frivolous, then certainly the lawyer cannot make that same unilateral decision during the window to file a notice of appeal.

Contrary to a claim of the Idaho Supreme Court, requiring lawyers to file notices of appeal even if their clients entered plea agreements with appeal waivers is far from an "exercise in futility." Pet. App. at 13a (internal quotation marks omitted). Rather, it is essential that a court independently review the merits of an appeal, because all appellate waivers can only bar a subset of potential appeals. This is true even if the client, after consultation with the appellate lawyer, makes arguments on appeal that could breach the client's plea agreement. The client retains the power and right to file a notice of appeal, even though that choice risks triggering additional consequences. Mr. Garza's personal decision to exercise his right to appeal cannot be summarily blocked by his own lawyer.

Principles of agency law likewise mandate that prejudice be presumed when a lawyer ignores a client's instructions and fails to file a notice of appeal because the client agreed to an appeal waiver. Agency law prescribes that lawyers, as their clients' agents, have a clear duty to follow a client's lawful instructions. *See* Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006). Notably, the attorney-client relationship requires that the client, as the principal, maintain "ultimate autonomous dominion over the underlying claim." *Comm'r. v. Banks*, 543 U.S. 426, 436 (2005). When a lawyer fails to follow a client's express and lawful instructions, the lawyer not only violates his or her duties as an agent, but also leaves the client with no lawyer at all. *See Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring in judgment) (noting that "a litigant cannot be held constructively responsible for the conduct of an

attorney who is not operating as his agent in any meaningful sense of that word").

This assault on the attorney-client relationship is particularly striking in the post-waiver context, because by not filing a notice of appeal as instructed by the client, the lawyer robs the client of an entire judicial proceeding. This Court has concluded that such a serious denial of an appellate proceeding is per se prejudicial. *See Flores-Ortega*, 528 U.S. at 483. Prejudice should therefore be presumed here, because long-standing, basic agency law principles require lawyers to obey their clients' instructions. This obedience is a crucial aspect of lawyers' respect for protecting their client's constitutional rights, as well as their client's autonomy.

As a clinic concerned with professional responsibility issues, we think it essential that lawyers recognize that this situation is presumptively prejudicial. Lawyers need only file a notice of appeal to comply with their clients' wishes. The task of reviewing the client's case for the existence of meritorious grounds for appeal—something that the American Bar Association requires—will be undertaken by appellate counsel. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 9.1 (4th ed. 2015).

Likewise, defendants are entitled to a lawyer on appeal, but not in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Therefore, if this Court does not presume prejudice when a lawyer refuses to respect his client's decision to file a notice of appeal, the client will be left to prove,

pro se, in post-conviction proceedings that prejudice existed.

A constitutionally deficient trial lawyer who neglects a client's express instructions deprives the client of the benefit of a constitutionally competent lawyer on appeal. The outcome of a criminal proceeding should be determined in a fair and uniform way—not through a game of procedural Russian Roulette where a client's access to essential structural protections depends on the whims of an individual, disloyal lawyer.

In light of these considerations, *Amicus* urges this Court reverse the judgment of the court below.

ARGUMENT

I. A Lawyer May Not Override a Client's Decision to File a Notice of Appeal Because the Client Signed a Plea Agreement with an Appeal Waiver.

A. The Client, Not the Lawyer, Has the Authority to Decide Whether to Appeal.

The defendant's right to appeal is central to the protections provided by the Sixth Amendment, and it is one of only a handful of rights that this Court has specifically allocated to the defendant. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 ("Some decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."). This Court has also concluded that the Sixth Amendment guarantees defendants effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 686 (1984), and that a lawyer who ignores his or her client's instructions to file an appeal is presumed to have rendered ineffective assistance. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Principles of legal ethics and agency law likewise prescribe that, throughout the course of a representation, the client retains control over final decisions and, specifically, the decision to appeal. The American Bar Association, for example, in adopting standards for prosecutors and defense lawyers, has announced that "[t]he ultimate decision whether to appeal should be the client's." ABA Standards for

Criminal Justice Prosecution Function and Defense Function Standard 4-9.1(b) (4th ed. 2015); *see also id.* 4-5.2 (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused; others are for defense counsel," and providing that the decisions to be made by defendants include "whether to appeal"). The Restatement of Law Governing Lawyers likewise observes that the decision to appeal a criminal prosecution is reserved to the client. *See* Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000).

In this case, Mr. Garza clearly conveyed that he wanted to file a notice of appeal. His counsel violated the Sixth Amendment, as well as bedrock principles of legal ethics and agency law, by disregarding that direction. Counsel acknowledged that Mr. Garza instructed him to file a notice of appeal in counsel's affidavit in the District Court. *See* Pet. App. 52a. Once Mr. Garza established that as one of his objectives, his lawyer should not have deviated from that objective.

B. Because All Appeal Waivers Are Partial, the Mere Existence of a Plea Waiver Could Never Render the Filing a Notice of Appeal Frivolous.

This Court has recognized the tension between the constitutional right of defendants to have an active advocate on appeal and the professional obligation of counsel not to make frivolous arguments on appeal. *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 437 (1988). Yet its holdings have not wavered from the principle that defendants

have a right to file a notice of appeal and to have the effective assistance of counsel in doing so. Instead, this Court has addressed the problem of frivolous arguments by recommending that lawyers follow the procedure described in *Anders v. California*. 386 U.S. 738 (1967). That is, when a client asks a lawyer to file an appeal with potentially frivolous arguments, the lawyer should file the notice of appeal, submit "a brief referring to anything in the record that might arguably support the appeal," and request permission to withdraw. *Anders*, 386 U.S. at 744.[2] This procedure, requiring lawyers to file "*Anders* briefs," allows defense counsel to act "with honor and without conflict," while even more importantly preserving defendants' right to appeal. *Id.*

Principles of legal ethics strike a similar balance between defendants' constitutional right to counsel and lawyers' professional obligation not to make frivolous arguments on appeal. As a general rule, counsel may not make frivolous arguments. *See* Model R. of Prof'l Conduct r. 3.1 (Am. Bar Ass'n 1983); Restatement (Third) of the Law Governing Lawyers § 110(1). But lawyers' professional obligations "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited." Model Rules of Prof'l Conduct r. 3.1, cmt. 3; *see also* Restatement (Third) of the Law Governing Lawyers § 110 cmt. f ("[A] lawyer representing a convicted person on appeal may be

[2] The Supreme Court of Idaho has adopted its own version of the *Anders* process, requiring lawyers to brief their arguments on the merits without withdrawing. *See State v. McKenney*, 98 Idaho 551, 552 (1977).

required to file a so-called *Anders* brief in the event the lawyer concludes that there is no non-frivolous ground on which the appeal can be maintained."). In promulgating ethical rules governing the legal profession, the American Bar Association, like this Court, drew an important distinction between assisting a client on appeal—which is constitutionally required—and actively deceiving the court or opposing parties—which is prohibited. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-9.2(e) (4th ed. 2015).

Requiring lawyers to abide by their clients' wishes and file notices of appeal serves a number of vital interests. Most importantly, these procedures preserve defendants' right to appeal. As this Court has noted, "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Without a rule ensuring that counsel file such a notice, a defendant may lose not only the right to a direct appeal, but also a lawyer in that appellate review. These procedures also improve the process by which appeals go forward. *Anders* briefs, for example, "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability" and also "provide[] an independent inducement to counsel to perform a diligent review" of the case. *Penson v. Ohio*, 488 U.S. 75, 81-82, n.4 (1988) (quoting *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 439 (1988)).

This review by both counsel and the court is essential, even in the appeal waiver context. This is because this Court has held that many claims fall outside the scope of an appeal waiver, including whether the government breached the terms of the waiver, whether the plea or appeals waiver was knowing and voluntary, and whether the trial lawyer provided ineffective assistance of counsel.[3]

Regardless of any appeal waiver, the facts of this case raise several issues that could potentially have been raised on appeal. Counsel may have been able to argue that Mr. Garza did not knowingly waive his right to appeal, *see United States v. Mezzanatto*, 513 U.S. 196, 210 (1995), because Mr. Garza checked "no" to the question of whether he was waiving his right to appeal on a form that he filled out shortly before his plea. R at 97.[4] Similarly, during Mr. Garza's Rule 11 hearing, the District Court, though required to do so by state procedures, never inquired whether Mr. Garza understood that he was waiving his right to appeal, or what he meant when he checked "no" on his response form. *See* Idaho Crim. R. 11(d)(3); *see also* Fed. R. Crim. P. 11(b)(1)(N) (requiring the same). Indeed, the District Court explicitly told Mr. Garza: "[Y]ou have the right to appeal, and if you cannot afford an attorney, you can request to have one appointed at public expense." R. at 132. The court's two judgments also instructed Mr. Garza that he could appeal. *Id.* at 118, 121.

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[3] *Amicus* refers the Court to Petitioner's Brief, sec. B(1)(a), for additional amplification of this point.

[4] "R" refers to the record on appeal to the Idaho Supreme Court.

Of course, counsel's failure to file a notice of appeal prevented these potential claims from being reviewed. Instead, counsel offered only a "conclusory statement that the appeal was meritless." *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 443; *see also Smith v. Robbins*, 528 U.S. 259, 281 (2000) (noting that a "flaw with the procedures" in past cases "was that there was only one tier of review"). Counsel simply concluded that "Mr. Garza received the sentence(s) he bargained for," and told Mr. Garza that the "appeal was problematic because he waived his right to appeal" in his plea agreement, a partially untrue statement, which became unreviewable. Pet. App. at 52a.

C. The Client Retains Full Control Over the Decision to File a Notice of Appeal, Even if a Court Later Determines that an Argument Made on Appeal Breached the Plea Agreement.

Although lawyers advocate for their clients and advise them on strategy, clients are the masters of their own defense. As a result, criminal defendants' authority to decide whether to appeal is absolute. This principle is a reflection of the American legal tradition and finds particular resonance in the defendant's right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.").

Moreover, defendants have the right to represent themselves, even though doing so often

increases the likelihood of an unfavorable outcome in their cases. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (stating that self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *see also Faretta*, 422 U.S. at 834 (1975) ("[A]lthough [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (citing *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970))).

Mr. Garza did not lose his right to file a notice of appeal merely because the hypothetical arguments he might make on appeal could breach an existing plea agreement. To the extent that filing a notice of appeal puts the client's entire plea agreement at risk, that is a choice that the client—not the lawyer—is entitled to make.

This Court has recognized that a defendant chooses whether to honor or breach a plea agreement. For instance, in *Ricketts v. Adamson*, the defendant signed a plea agreement that required him to testify against his co-defendants at trial. 483 U.S. 1, 3 (1987). He did, but when his co-defendants had their convictions overturned and faced retrial, the defendant refused to testify, arguing that the plea agreement did not require him to do so. *Id.* at 4. This Court ultimately ruled against the defendant and found him in breach of his agreement, a breach whose consequences he had to accept because he made a "choice" to challenge the agreement, having "clearly appreciated and understood the consequences were

he found to be in breach of the agreement." *Id.* at 11-12.

The reasoning in *Ricketts* relies on a defendant's autonomy to make difficult decisions that impact his own defense. It would stand the rationale of *Ricketts* on its head to hold the defendant in *Ricketts* responsible for the consequences of his choice to risk breaching a plea agreement, while also depriving Mr. Garza of that same choice because he happened to have a disloyal lawyer who sabotaged his wishes.

Only a handful of exceptions allow lawyers to avoid carrying out their clients' instructions. Lawyers, not clients, have authority over decisions required by law or a court order, *see* Restatement (Third) of the Law Governing Lawyers § 23, and lawyers are not permitted to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model R. Prof'l Conduct r. 1.2(d). Neither exception applies here, where the decision to file an appeal is unequivocally granted to Mr. Garza, and filing a notice of appeal is not only permitted, but required. In all other matters, lawyers must consult with clients about "the means by which [a client's objectives] are to be pursued." Model R. Prof'l Conduct r. 1.2(a).

In this case, rules of professional responsibility would have required counsel to fully inform Mr. Garza of any risks pertaining to filing a notice of appeal. *See* Model R. Prof'l Conduct r. 2.1, cmt. 5 (A lawyer may have to offer advice "when a lawyer knows that a client proposes a course of action that is

likely to result in substantial adverse legal consequences to the client . . . ."). Obligatory ethical principles similarly required that Mr. Garza, the client, have the final say on whether to file a notice of appeal.

II. Counsel's Failure to File a Notice of Appeal, Over Mr. Garza's Express Wishes, Violated the Most Basic Principle of Agency Law and Is Presumptively Prejudicial.

A. A Lawyer Who Deliberately Disregards a Client's Instructions to File a Notice of Appeal Violates the Lawyer's Obligations of Loyalty by Disobeying the Client's Lawful Direction.

The relationship between a client and a lawyer is, at its core, "a quintessential principal-agent relationship." *Comm'r v. Banks*, 543 U.S. 426, 436 (2005). As is true of most principal-agent relationships, a defendant may rely on a lawyer's special skills and expertise to achieve a particular result. *See id.* Despite this reliance, a defendant retains "ultimate dominion and control over the underlying claim." *Id.*; *see also Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). A lawyer, as a client's agent, is obligated to act exclusively on behalf of and for the sole benefit of the client, the principal. *See Banks*, 543 U.S. at 436 (citing Restatement (Second) of Agency §§ 13, 39, 387 (Am. Law Inst.

2000)); *see also* Restatement (Third) of Agency § 8.09(2) (2006). A lawyer's failure to act within the bounds of that relationship thus runs afoul of not only Sixth Amendment jurisprudence, but also agency law.

Principles of agency law specify that a lawyer is bound to act in accordance with a defendant's wishes. The Restatement of Agency, for instance, provides that a lawyer has a duty to comply with all of a defendant's lawful instructions concerning the lawyer's actions taken on behalf of the defendant. *See* Restatement (Third) of Agency § 8.09(2) (2006). In particular, the very premise of a principal-agent relationship is that the agent's actions are consistent with the principal's manifestation of assent. *See id.* at cmt. b.

Any action taken by a lawyer over a defendant's objection "[has] the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in judgment); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) ("Presented with express statements of the client's will . . . counsel may not steer the ship the other way."). Therefore, when a lawyer acts outside the bounds of the attorney-client relationship by undermining a client's decision, that lawyer can no longer be considered the defendant's agent.

Even though Mr. Garza expressly instructed counsel to file a notice of appeal in numerous phone calls and letters, counsel failed to do so. Pet. App. At 3a. Instead, counsel pursued a strategy that was fundamentally incompatible with Mr. Garza's express

wishes. Because Mr. Garza's decision was not only lawful, but also constitutionally protected, counsel, as Mr. Garza's agent, had a duty to obey. But in overriding Mr. Garza's lawful and constitutionally protected decision, counsel defied his client and no longer served as Mr. Garza's agent. Counsel not only violated a fundamental tenet of the attorney-client relationship, he also completely deprived Mr. Garza of a direct appeal represented by counsel.

B. Counsel's Decision Not to File a Notice of Appeal Is Presumptively Prejudicial Because It Forfeited Mr. Garza's Right to an Entire Judicial Proceeding.

When a lawyer's constitutionally deficient performance causes the forfeiture of "an entire judicial proceeding," the lawyer's conduct mandates a presumption of prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). The denial of an appellate proceeding is per se prejudicial because courts can afford no "presumption of reliability" to proceedings that never occurred. *Id.* (citing *Smith v. Robbins*, 528 U.S. 259, 286 (2000)).

Additionally, in these cases, a defendant need neither show actual prejudice by "specify[ing] the points he would raise were his right to appeal reinstated," nor demonstrate the likelihood of success on appeal. *Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also Flores-Ortega*, 528 U.S. at 485. As this Court observed in *Rodriquez*, "[t]hose 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." 395 U.S. at 330. Here, Mr. Garza's situation is right on point: counsel's decision to override Mr. Garza's instructions to file an appeal robbed Mr. Garza of an entire judicial proceeding. Therefore, counsel's failure to file an appeal on behalf of Mr. Garza is presumptively prejudicial.

The policy rationale underlying *Flores-Ortega*'s and *Rodriquez*'s mandate requiring that courts presume prejudice is even more salient today, when over 97 percent of federal and 94 percent of state cases are resolved with plea agreements and their often concomitant appellate waivers. *See* Glenn R. Schmitt et al., *Overview of Federal Criminal Cases: Fiscal Year 2017*, United States Sentencing Commission 1, 5 (June 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf; *Felony Sentences*, Bureau of Justice Statistics (2006), https://www.bjs.gov/index.cfm?ty=tp&tid=233#pubs; Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss*, *Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2029 (2000); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L. Q. 127, 128-29 (1995). For instance, one study found that in nearly two-thirds of federal cases settled by plea agreement, the defendant waived the right to an appeal. *See* Nancy J. King & Michael E. O'Neil, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

Counsel's decision to blatantly defy Mr. Garza's constitutionally protected choice deprived him of a lawyer. In both *Maples v. Thomas*, 565 U.S. 266 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010), this Court relied on agency law to make a salient point that is also relevant here: a client "cannot be charged with the acts or omissions of an attorney who has abandoned him." *Maples*, 565 U.S. at 283. This is because after a lawyer severs the principal-agent relationship, a lawyer "no longer acts, or fails to act, as the client's representative." *Id.* at 281 (citing Restatement (Third) of Law Governing Lawyers § 31, cmt. f (1998)); *see also id.* at 284 (citing Restatement (Second) of Agency §§ 112, 394 cmt. a (1957)). In essence, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 560 U.S. at 659 (Alito, J., concurring in judgment); *see also Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991). *Maples* and *Holland* involved lawyers who, by completely disregarding their clients' decisions, did not operate as the clients' agents at all.

In this case, by failing to file a notice of appeal, counsel similarly severed the principal-agent relationship between Mr. Garza and himself, thus leaving Mr. Garza with no lawyer and no ability to file his own notice of appeal. Counsel here deliberately ignored Mr. Garza's repeated, lawful instructions. By blatantly disobeying his client's direction to file a notice of appeal, counsel removed himself as Mr. Garza's agent. Counsel's obvious, avoidable, and serious error demands a presumption of prejudice.

III. The Court Should Establish a Clear Rule that Prevents Lawyers from Sacrificing a Client's Clearly Expressed Desire to a Constitutional Right.

A. Lawyers Need a Clear Rule to Understand Their Obligation to Their Clients to File a Notice of Appeal.

Both the states and the federal government typically impose short time periods within which to file a notice of appeal in a criminal case. For example, this window is forty-two days in Idaho and fourteen days in federal court. *See* Idaho App. R. 14; Fed. R. App. P. 4. This makes the filing of a notice of appeal a ministerial act, which protects the client's right after notice is filed to sufficiently consider the merits of a direct appeal.

Once an appeal is noticed, appellate lawyers are ethically required to make a serious evaluation of the merits of their clients' appeal. The American Bar Association has recognized that "a defendant is entitled to more than merely a reflexive or negative reaction to the supposed errors that the convicted defendant thinks are present in the case." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993).[5] More specifically, the ABA has advised that

[5] Although the ABA released the Fourth Edition of the ABA Standards for Criminal Justice Prosecution Function and Defense Function in 2015, it has not yet published or adopted the associated comments. Therefore, this brief refers to the Third Edition when citing to comments to this publication.

"[d]efense counsel should consider engaging or consulting with an expert in criminal appeals in order to determine issues related to making a decision to appeal." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 9.1(b) (4th ed. 2015). Further, considering whether there are non-frivolous grounds for appeal is more complicated than simply reviewing the four corners of the record of conviction.

The ABA contemplates two primary categories of appellate issues for which this is true. First, and of particular relevance where a client has entered a guilty plea, the lawyer should "take up, evaluate, and pursue any question that might affect the validity of the judgment of conviction and sentence." *Id.* Second, "in some instances, even when the existing doctrine does not support a case for reversal on appeal, there may be a sound basis for arguing for an extension, modification, or reversal of existing law." *Id.* A lawyer's careful consideration of whether there is a legitimate basis for a client's desired appeal is particularly critical because most issues are forfeited if they are not raised on direct appeal. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-3.6 cmt. (3d ed. 1993). In light of the ramifications of forfeiting a client's appeal right, a client who has explicitly expressed a desire to file a notice of appeal certainly deserves a more thorough consideration of these questions.

The trial lawyer who believes that a client has no non-frivolous grounds for appeal must file a notice of appeal to protect his client's right to a consideration

of the merits. In Idaho, as in many other states, a trial lawyer who represents an indigent defendant is required to continue to represent that person after the trial or plea bargain, short of a showing of good cause for withdrawal before filing the notice of appeal. *See* Idaho App. R. 45.1(b).

The ABA Standards for Criminal Justice Defense Function recognize this friction explicitly and state, "[t]o make the right to counsel meaningful, representation must be continuous throughout the criminal process." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 cmt. (3d ed. 1993). As a result, trial counsel who will not represent a client on appeal has a special obligation to protect that client's appeal right, and thus may have to file the notice. *Id.* Alternatively, the client could represent himself in the appellate proceedings, but would only be able to file a notice of appeal pro se if not represented by counsel. Therefore, here as well trial counsel would have to withdraw, the court would have to permit the defendant to proceed without a lawyer, and the defendant would have to learn the mechanics of filing a notice of appeal on his own. This Court should not require defendants to go to such terrific lengths, because "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

There is no merit to the argument that requiring lawyers to file notices of appeal when requested by their clients will force them to make frivolous arguments on appeal. First, appellate

counsel very often differs from trial counsel. As a result, the fact that a client's trial lawyer files a notice of appeal does not mean that the trial lawyer will also file the appellate brief in the case. Second, appellate lawyers may not decline to file an appellate brief—they are instead required to file a brief under *Anders v. California* when they believe there are no non-frivolous grounds for appeal. 386 U.S. 738, 744-45 (1967). Finally, lawyers who file notices of appeal on their clients' behalf, but ultimately decide there are no non-frivolous grounds on which to appeal, may "seek to persuade the defendant to withdraw the appeal." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993).

There is a substantial risk of overlooking meritorious grounds for appeal when a lawyer has a short period to review a client's case. This brief window also affords neither lawyers nor clients time to complete the withdrawal process so that the client or a new lawyer may file such a notice of appeal instead. The ministerial function of filing a notice of appeal does not in any way resemble the task of making arguments on appeal. Thus, were this Court to permit lawyers to refuse to file an appeal, it would be depriving defendants of their constitutional right to a thorough review of the merits on appeal.

B. If This Court Does Not Presume Prejudice Here, Defendants Will Have No Choice but to Proceed Pro Se to Demonstrate Prejudice Because They Had Constitutionally Deficient Trial Counsel Who Failed to Obey Them.

It is fundamentally unfair to require defendants to proceed pro se to demonstrate prejudice simply because they had constitutionally deficient trial counsel. This Court held that every individual, regardless of wealth, has a constitutional right to access appellate counsel with whom to consult, review the record, and litigate issues on appeal. *See Douglas v. California*, 372 U.S. 353, 356 (1963). However, there is no such right in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). As a result, if this Court does not presume prejudice where a lawyer ignores a client's instructions and refuses to file a notice of appeal because the client's plea contained an appeal waiver, the client will have to demonstrate that the lawyer's constitutional deficiency resulted in actual prejudice. By virtue of being appointed a constitutionally deficient trial lawyer who ignored express instructions, the client will be deprived of the benefit of a constitutionally competent lawyer on appeal.

It is manifestly unjust to saddle those who have been deserted by counsel with the burden of showing they were prejudiced by lawyers who defied their exclusive right to direct the filing of a notice of appeal. Those who suffer from this defective counsel will be disproportionately indigent defendants, who are often

represented by lawyers with much higher case-loads than private lawyers. *See* Vida B. Johnson, *A Plea for Funds: Using* Padilla*,* Lafler*, and* Frye *to Increase Public Defender Resources*, 51 Am. Crim. L. Rev. 403, 423-26 (2014). The poor, who are already overrepresented in the criminal justice system, will also be unable to hire a lawyer for their post-conviction proceedings and, thus, will be obligated to proceed pro se. Like under California's system before *Douglas* was decided—where appellate counsel was denied to those whose cases were deemed non-meritorious by a district court—"the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot." *Douglas*, 372 U.S. at 357.

This Court has held that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* Where a defendant has already entered a guilty plea, one issue that cannot be waived is whether the plea was made knowingly, voluntarily, and competently. *See United States v. Mezzanatto*, 513 U.S. 196 (1995).

An appeal on these bases is more complex than other appellate issues in two primary ways. The first is that these may occur where a client has a diminished capacity, and thus will have a particularly difficult time representing himself. Those with mental health challenges are overrepresented in the criminal justice system. *See Criminal Justice / Mental Health Consensus Project*,

Council of State Governments (June 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf. In fact, Mr. Garza specifically indicated on his guilty plea form that he himself suffers from mental illness. *See* R. at 95, 107. Second, many claims that a plea was not knowing, intelligent, and voluntary arise from the ineffective assistance of counsel. It is both unfair and nonsensical to make a defendant's ability to press such claims dependent on the very lawyer who may have acted ineffectively. To ask a defendant who is unrepresented to independently demonstrate that these issues were present at trial, and that trial counsel prejudiced the outcome of the case, is to punish the defendant for the constitutional failings of his lawyer.

Finally, a lawyer who refuses to file a notice of appeal for a client also unfairly deprives that client of the constitutional right to appellate counsel. As discussed *infra* in Section III.a, there is only a short window during which a notice of appeal can be filed. A lawyer who independently decides not to file such a notice and runs out the clock on that period deprives a defendant of the right to an appellate counsel who might have found meritorious grounds for appeal as guaranteed in *Douglas*. The lawyer also prevents the client from exercising the right to self-representation on appeal. *See Faretta v. California*, 422 U.S. 806 (1975).

Were the Court not to presume prejudice where lawyers override their clients' decisions to appeal their cases, criminal defendants will bear the unfair burden of having to demonstrate prejudice pro se. Additionally, defendants will be denied access to

appellate counsel who might find meritorious arguments where trial counsel (looking at his or her own conduct) found none. These burdens will fall disproportionately on the poor, reopening the door to the type of invidious discrimination in appellate proceedings this Court has worked to stamp out for more than half a century.

CONCLUSION

This case raises the most fundamental of constitutional issues at the intersection of the right to counsel and a lawyer's ethical obligations. Quite simply, Mr. Garza and criminal defendants similarly situated are entitled to have any appeal they wish to file be noticed in a timely way, even if the notice follows a guilty plea by the client. Failure by counsel to file such a notice is an error of constitutional dimensions.

For these reasons, the Idaho Supreme Court's judgment should be reversed.

Respectfully Submitted,

/s/ Lawrence J. Fox
Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford Visiting
Lecturer in Law
Yale Law School
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
lawrence.fox@yale.edu

Susan D. Reece Martyn
Stoepler Professor of Law and Values
UNIVERSITY OF TOLEDO COLLEGE OF LAW
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 530-4212
susan.martyn@utoledo.edu