

No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

ABEL HERIBERTO FABIAN-BALTAZAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

On Petition for Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

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QUESTION PRESENTED

The question of whether the “presumption of prejudice” recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) applies when a defendant who has waived certain appellate rights in his plea agreement instructs his attorney to file a notice of appeal and his attorney refuses to do so is currently pending in a writ of certiorari before this Court in *Garza Jr. v. Idaho* (No. 17-1026).

The question presented here is when an attorney in a criminal case refuses to file a notice of appeal thereby usurping his client’s Sixth Amendment-secured autonomy right to decide whether to pursue a counselled direct appeal, can the defendant who has agreed to a collateral attack waiver that is limited to challenges involving his conviction and/or sentence bring a motion under 28 U.S.C. § 2255 to enforce the fundamental legal principle that he be allowed to make his own choice about the proper way to protect his liberty either because the “presumption of prejudice” recognized in *Roe v. Flores-Ortega* applies or because a structural error occurred under *McCoy v. Louisiana*, No. 16-8255, slip op. (U.S. May 14, 2018)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Abel Heriberto Fabian-Baltazar respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit in this case.



OPINIONS BELOW

The December 14, 2017 Memorandum of a panel of the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at A1-A2. The Ninth Circuit's order denying rehearing and rehearing en banc are unpublished and are reproduced in the appendix at C1.

The order of the United States District Court for the Eastern District of California denying petitioner's motion to correct, vacate or set aside his sentence pursuant to 28 U.S.C. § 2255 is reproduced in the appendix at B1-B9.



JURISDICTION

Petitioner Abel Heriberto Fabian-Baltazar seeks review of the December 14, 2017 decision of the Ninth Circuit Court of Appeals affirming the district court's summary dismissal of his 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel based on his trial counsel's refusal to file the notice of appeal that he had requested. A timely petition for rehearing and rehearing en banc was filed, which the Ninth Circuit Court of Appeals denied on February 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides that: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

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INTRODUCTION

The Ninth Circuit’s decision below perpetuates a circuit split and is in sharp tension with the long line of this Court’s decisions safeguarding a criminal defendant’s Sixth Amendment right to decide whether to pursue a counselled direct appeal. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963). Guidance from this Court is critically important to achieving fair and consistent outcomes in the lower courts with respect to protecting every defendant’s Sixth Amendment right to a counselled direct appeal.

The right to counsel on direct appeal is essential to ensuring equal justice for all, thus a court cannot deny a defendant counsel on direct appeal *even if* the court is firmly convinced that the defendant has no meritorious issue that he will be able to raise on his direct appeal. *Douglas v. California*, 372 U.S. 353, 357 (1963). “Mere speculation that counsel would not have made a difference is no substitute for

actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process." *Penson v. Ohio*, 488 U.S. 75, 87 (1988). Records can be dense and errors often hidden, and thus a defendant who is left to fend for himself without "the benefit of counsel's examination into the record, research of the law and marshalling of arguments on his behalf. . . has only the right to a meaningless ritual." *Douglas*, 372 U.S. at 357-58.

Defendants such as Fabian-Baltazar who have limited education and do not speak English largely lack the ability to identify viable appellate issues let alone effectively present them. *Rodriguez v. United States*, 395 U.S. 327, 330 (1969). Indeed, "[e]ven the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This Court, therefore, has repeatedly held that a defendant's right to a counselled direct appeal cannot be made contingent on the defendant identifying viable appellate issues; to do so effectively deprives such defendants "of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one." *Rodriguez*, 395 U.S. at 330 (overturning a series of Ninth Circuit cases requiring defendants to set forth the meritorious arguments they would have raised on appeal had they been afforded appellate counsel before permitting defendants access to appellate counsel).

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STATEMENT OF THE CASE

When an attorney usurps a defendant's right to set the objectives of his defense by refusing to file a notice of appeal the result is "not a judicial proceeding of disputed reliability, but rather . . . the forfeiture of a proceeding itself." *Flores-Ortega*, 528 U.S. at 483. Courts "cannot accord any 'presumption of reliability,' . . . to judicial proceedings that never took place." *Id.* It does not matter, therefore, that the defendant's only hope of success at that forfeited proceeding is "that something unexpected and unpredictable might occur." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). It may be that the defendant has a meritorious appeal buried deep in the record that will be ferreted out and effectively presented upon careful review by appellate counsel, or it may not be. That is not the concern here. The issues presented here are twofold.

First, there is the "constitutional requirement of substantial equality and fair process" for all defendants, which "can only be attained where counsel acts in the role of an active advocate on behalf of his client" instead of abandoning his client during the appellate process. *Anders v. California*, 386 U.S. 738, 744 (1967). "Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court" – all defendants who wish to exercise their right to direct appeal are entitled to "a diligent and thorough review of the record and an identification of any arguable

issues revealed by that review.” *McCoy v. Court of Appeals*, 486 U.S. 429, 438-39 (1988). Accordingly, “Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time.” ABA Standards for Criminal Justice 21-2.2 (1980); see *United States v. Cronin*, 466 U.S. 648, 656 (1984); *Anders*, 386 U.S. at 745. Therefore, “when counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal had merit.” *Peguero v. United States*, 526 U.S. 23, 28 (1999) (citing *Rodriguez v. United States*); *Flores-Ortega*, 528 U.S. at 484 (same). The fact that the defendant has waived his right to appeal certain issues thereby significantly curtailing his chance of success on the merits of any direct appeal is, therefore, not part of the analysis.

The second issue raised by an attorney’s refusal to file a notice of appeal requested by his client was just clarified by this Court’s recent decision in *McCoy v. Louisiana*, No. 16-8255, slip op. (U.S. May 14, 2018). When an attorney refuses to file the notice of appeal he “usurp[s] control of an issue within [the defendant’s] sole prerogative,” and by so doing violates “a defendant’s Sixth Amendment-secured autonomy” to be “master of his own defense.” *Id.* at 11 (internal quotes omitted). As this Court explained, some decisions are reserved for the client, such as whether to plead guilty, whether to assert innocence at trial and whether to “forgo an

appeal.” *Id.* at 6; *see* ABA Standards for Criminal Justice 21-2.2 (“the decision whether to appeal, like the decision whether to plead guilty, must be the defendant’s own choice”). Such decisions “are not strategic choices about how best to *achieve* a client’s objective; they are choices about what the client’s objectives *are*,” and “[w]ith individual liberty . . . at stake, it is the defendant’s prerogative, not counsel’s to decide on the objective of his defense.” *Id.* at 2, 6-7 (emphasis in original). Accordingly, the choice to waive the assistance of counsel on direct appeal belongs to the defendant, not his counsel. *Faretta v. California*, 422 U.S. 806, 834 (1975).

Because the issue here is a defendant’s autonomy to be able “to make his own choices about the proper way to protect his own liberty,” the error here is structural. *McCoy*, No. 16-8255, slip op. at 7, 11 (internal quotations omitted). In other words, whether we are using the “presumption of prejudice” analysis from *Flores-Ortega* or the structural error analysis from *McCoy*, the end result is the same – the defendant should be entitled to the proceeding his attorney forfeited “without any need first to show prejudice.” *Id.* at 12. While the decision to appeal notwithstanding appellate waivers in a plea agreement “will often increase the likelihood of an unfavorable outcome,” that is the client’s choice to make, and thus when “[p]resented with express statements of the client’s will . . . counsel may not steer the ship the other way.” *Id.* at 7, 9.

Here, when presented with an express statement of his desire to appeal, Fabian-Baltazar alleges that his counsel steered the ship the other way when he

refused to file the requested notice of appeal and thereby forfeited his client's right to a counselled direct appeal.

On January 31, 2013, the government filed a one-count indictment against Fabian-Baltazar charging him with possessing at least 50 grams of methamphetamine with the intent to distribute the controlled substance. Fabian-Baltazar was appointed counsel at his first appearance on February 2, 2013. Three months later private counsel was hired to represent him.

On August 23, 2013, the government filed a signed plea agreement. Pursuant to the plea agreement, the government agreed that (1) if U.S. Probation determined that Fabian-Baltazar qualified for a three-level reduction under U.S.S.G. § 3E1.1 based on his timely acceptance of responsibility, it would not oppose the reduction and (2) if Fabian-Baltazar qualified for a safety valve reduction under U.S.S.G. § 2D.1(b)(16), it would recommend the reduction to which he was entitled to receive under the U.S. Sentencing Guidelines. In exchange for these "concessions," Fabian-Baltazar agreed to plead guilty to the one-count indictment.¹ Additionally, he agreed to waive certain appellate and collateral attack rights. Specifically, he waived his right to bring a direct appeal challenging "his conviction or any sentence (or the manner in which that sentence was determined) which is in accordance with the maximum provided in Title 21, United

¹ Given that the government did not agree to do anything it was not already obligated to do under the U.S. Sentencing Guidelines, it is unclear what concessions the government actually made. *C.f.*, *Maynard v. Durham & S.R. Co.*, 365 U.S. 160, 163 (1961) ("A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right.").

States Code, Sections 841(a)(1) and (b)(1)(A), on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever.” He also waived his right to bring a § 2255 motion to the extent said motion challenged “his conviction, sentence or the manner in which it was determined.”

In lieu of filing a sentencing memorandum, Fabian-Baltazar’s counsel filed a one page document setting forth a proposed sentencing guideline calculation without any support or justification. The proposed calculation resulted in a guideline range of 70 to 87 months, and counsel requested a 70-month sentence without discussing any of the applicable factors under 18 U.S.C. § 3553(a) and asserted that he did “not believe any further upward or downward variance is appropriate.” The government filed a sentencing memorandum in response in which it rejected defense counsel’s application of the sentencing guidelines, endorsed U.S. Probation’s guideline calculation, which included reductions under U.S.S.G. §§ 3E1.1 and 2D.1(b)(16) for acceptance of responsibility and safety valve respectively, and recommended that Fabian-Baltazar be sentenced to a low-end guideline sentence of 135 months.

On December 16, 2013, the court sentenced Fabian-Baltazar to 10 years in custody.² After the court imposed the sentence, it inquired of Fabian-Baltazar

² Pursuant to Amendment 782 enacted by the United States Sentencing Commission, which was made retroactive on July 18, 2014 (79 Fed. Reg. 44,973), Fabian-Baltazar’s offense level under the sentencing guidelines was lowered by two levels, which changed the low-end guideline recommendation in his case to 108 months. The parties agreed through a joint stipulation that Fabian-Baltazar’s

whether he understood his sentence. Fabian-Baltazar responded “Yes, but I would like to see if there is any way that I could be helped in any other way, someone that could help me more because I don’t feel that this is fair,” to which the court responded “Okay. I do note that you have waived your right to appeal.”

Six months later Fabian-Baltazar filed a § 2255 motion alleging, among other things, that his trial counsel had rendered ineffective assistance of counsel when he refused to file a notice of appeal. In addition to his request for an appeal made on the record at his sentencing hearing, Fabian-Baltazar alleged in his motion that he first informed his counsel that he wanted to appeal when his counsel advised him prior to sentencing that U.S. Probation was recommending a sentence of 140 months and counsel had advised him that his sentence would not exceed eight years. He further alleged that two days after the court imposed a sentence of ten years, he contacted his attorney’s office and asked to speak with his attorney about his appeal. Fabian-Baltazar alleges that his call was not put through to his attorney. Instead, his attorney’s secretary spoke with the attorney and came back on the line to inform Fabian-Baltazar that his attorney would not be filing a notice of appeal on his behalf, and his attorney did not file the requested notice of appeal.

On March 31, 2015, without seeking a response from the government, the district court denied Fabian-Baltazar’s § 2255 motion. The district court read Fabian-Baltazar’s collateral attack waiver that was explicitly limited to challenges

sentenced should be reduced to 108 months, and the court issued an amended judgment on December 3, 2015 reducing his sentence accordingly.

to “his conviction, sentence or the manner in which it was determined,” to include his claim that his Sixth Amendment right to pursue a counselled direct appeal was violated when his counsel refused to file the notice of appeal. Based on that assumption, and the fact that Fabian-Baltazar had not alleged that he had entered into the limited collateral attack waiver unknowingly or involuntarily, the district court held that Fabian-Baltazar was without a remedy to enforce his right to decide whether to pursue a counselled direct appeal which had been allegedly usurped by his attorney.

On May 31, 2016, the Ninth Circuit issued a Certificate of Appealability with respect to whether the district court erred in summarily dismissing Fabian-Baltazar’s § 2255 motion alleging that his trial counsel had rendered ineffective assistance by failing to file a notice of appeal. While the Ninth Circuit spent much of oral argument seemingly perplexed as to what issue Fabian-Baltazar might raise should the court grant him his right to a counselled direct appeal that his trial counsel had forfeited,³ it affirmed the district court in an unpublished opinion on the basis that Fabian-Baltazar did not challenge the voluntariness of his collateral attack waiver that was limited to challenges concerning “his conviction, sentence or the manner in which it was determined.”

Fabian-Baltazar petitioned for rehearing en banc, and was supported by an amicus brief filed by the Federal Public Defender for the District of Arizona, which

³ A transcription of the oral argument in the Ninth Circuit is reproduced in the appendix to this petition at D1-D12.

explained that it was not uncommon in the District of Arizona for judges to do exactly what both the district court and the Ninth Circuit did in Fabian-Baltazar's case – broadly apply a collateral attack waiver that is explicitly limited to the fact of conviction and/or sentencing to also preclude a defendant's ability to enforce his Sixth Amendment right to a counselled direct appeal thereby raising serious equal protection concerns for the indigent defendant whose counsel forfeits his right to a counselled direct appeal and by so doing his right to appellate review to ensure that his change of plea was knowing and voluntary. On February 20, 2018, the Ninth Circuit denied Fabian-Baltazar's request for rehearing en banc.



REASONS FOR GRANTING THE WRIT

A. Where Today's Criminal Justice System Is Defined By Plea Agreements Replete With Waivers, This Court's Long Line of Cases Protecting the Indigent Defendant's Right to a Counselled Direct Appeal Is Effectively Being Unraveled By Decisions Like This One From the Ninth Circuit.

Notwithstanding the broadest of appellate waivers, a defendant retains the right to appellate review to assess on the record whether the defendant was competent to enter into the plea agreement and whether his decision to do so was knowing and voluntary rather than the product of ineffective assistance of counsel. Given the reality that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system,” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation omitted; emphasis in original), urgent attention is needed by

this Court to ensure that meaningful appellate review is available to all defendants to safeguard these critical, non-waivable constitutional rights. Notably, this Court currently has pending a writ of certiorari in *Garza Jr. v. Idaho* (No. 17-1026), which asks whether the right identified in *Flores-Ortega* – the right to a counselled direct appeal that cannot be forfeited by an attorney’s refusal to file a notice of appeal – applies to the vast majority of criminal cases that are resolved by plea agreements in which the defendant waives his right to appeal his conviction and sentence.

Where our criminal justice system “is for the most part a system of pleas, not a system of trials,” over ninety-seven percent of federal convictions are secured through plea agreements that in the vast majority of cases contain waivers of certain rights pertaining to direct appeals and post-conviction litigation. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); see Nancy J. King and Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212-13 (2005). Indeed, in the Ninth Circuit where this case originates, it is the rare plea agreement . . . that lack[s] a waiver clause.” King & O’Neill, 55 Duke L.J. at 231.

If attorneys can usurp a defendant’s right to pursue a counselled direct appeal and a defendant with a plea agreement can only regain said right if he is able to prove, without the benefit of counsel, that he has a meritorious appeal, we are effectively returning to a regime similar to the one this Court struck down in 1963 in *Douglas v. California*, which denied a defendant his right to a counselled direct appeal where the appellate court was of the opinion that the defendant lacked a meritorious appellate issue.

Because the “methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged,” *Coppedge v. United States*, 369 U.S. 438, 449 (1962), this Court has repeatedly emphasized the importance of protecting a defendant’s right to the effective assistance of counsel on direct appeal. “To prosecute [an] appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake.” *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). This Court, therefore, established more than three decades ago that a “first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.” *Id.*

From *Douglas* through *Flores-Ortega* this Court has reaffirmed time and again that a defendant forced to fend for himself cannot be required “to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.” *Flores-Ortega*, 528 U.S. at 486. While the chance that a defendant with an appellate waiver will prevail on direct appeal is slim, it is not impossible and “we do not cut corners when Sixth Amendment rights are at stake.” *Campusano v. United States*, 422 F.3d 770 (2d Cir. 2006) (Sotomayor, J.). “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of advocate on behalf of his client,” *Anders*, 386 U.S. at 744, as opposed to

the current situation where lower courts are pre-judging the merits of an indigent defendant's hypothetical appeal and declaring a defendant's waiver knowing and voluntary when the defendant has not been afforded counsel to examine the issue and advocate on his behalf.

Action is needed from this Court to address the reality that courts today are imposing exactly the type of "additional hurdle" that this Court sought to abolish in *Rodriguez*, 395 U.S. at 330 when they force indigent defendants to identify, without the benefit of counsel, that they have a meritorious issue on direct appeal *before* they are provided access to an attorney who will review the record in search of a meritorious appellate issue.

B. The Decision Below Perpetuates a Circuit Split and Guidance From This Court is Necessary to Ensure that Defendants With Collateral Attack Waivers Limited to Conviction and/or Sentence Are Not Precluded From Enforcing Their Sixth Amendment Rights to a Counselling Direct Appeal and to the Autonomy to Decide the Objectives of Their Own Defense.

Given the fundamental Sixth Amendment rights at stake, and relying on basic principles of contract interpretation, six circuits permit defendants with § 2255 waivers limited to challenges concerning conviction and/or sentencing to enforce their right to the counselling direct appeal they had requested but their attorney squandered.

In *United States v. Garrett*, 402 F.3d 1262 (10th Cir. 2005), the petitioner had waived his right to appeal or collaterally attack (1) his "guilty plea and any other aspect of his conviction" and (2) the "sentence as imposed by the court and the

manner in which the sentence is determined.” *Id.* at 1263 n.2. In other words, the limited § 2255 waiver at issue in *Garrett* is substantively identical to the one Fabian-Baltazar signed. A year after his judgment and sentence, Garrett filed a § 2255 motion alleging that he had requested his attorney to file a notice of appeal and his attorney had refused to do so. *Id.* at 1264. The *Garrett* court noted that the defendant had waived his right to bring certain § 2255 motions but that the government was not invoking the waiver in response to the specific § 2255 motion that the defendant had brought. *Id.* at 1266 n.5. The court went on to suggest that the government’s decision not to argue waiver was sound given that “the plain language of the waiver does not address the type of claim he has raised.” *Id.* (observing that the court “will strictly construe appeal waivers and any ambiguities in these agreement will be read against the Government and in favor of a defendant’s appellate rights”); *c.f.*, *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-63 (1995) (“Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.”); *United States v. Seckinger*, 397 U.S. 203, 210 (1970) (invoking “the general maxim that a contract should be construed most strongly against the drafter, which in this case was the United States”).

Reaching the merits, the court observed that even though Garrett had an appellate waiver and “from the limited perspective of collateral review” it might appear the forfeited direct appeal has no merit, citing *Flores-Ortega* the court held

that if Garrett “actually asked counsel to perfect an appeal, and counsel ignored the request, he will be entitled to a delayed appeal.” *Id.* at 1267. As the court explained, “[a]llowing the defendant to proceed in spite of unpersuasive pro se arguments is not a matter of formalistic compliance with a technical rule merely postponing the inevitable denial of relief on the merits. . . . Rather, it serves to safeguard[] important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel.” *Id.* at 1265-66 (internal quotations omitted).

Similarly, in *Campusano v. United States*, the defendant had a § 2255 waiver that precluded him from challenging any sentence within or below a stipulated Guideline range. 422 F.3d at 722 n.1. Neither the court nor the government believed that the defendant’s § 2255 waiver precluded him from bringing a § 2255 motion alleging that his trial counsel had refused to file a notice of appeal. *Id.* at 771-72. The court reached the merits, and, citing *Flores-Ortega*, ordered the matter remanded to the district court to conduct an evidentiary hearing to determine whether the defendant had in fact instructed his attorney to file an appeal notwithstanding the fact that the defendant had agreed to an appellate waiver. *Id.* at 777. In so holding, the court stressed the importance of vigilantly protecting a defendant’s right to a counselled direct appeal, noting that “a waiver does not signal an end to our concern for a defendant’s right to participate fully in decisions about whether to appeal.” *Id.* at 775. The court emphasized that the procedures put in place by *Anders* are not empty formalities to be cavalierly dispensed with. *Id.* at

776-77. While, “[t]here will not be many cases in which a defendant whose attorney fails to file a notice of appeal after a plea agreement and a waiver of appeal, and whose hypothetical appeal seems meritless during ineffective-assistance habeas review, eventually prevails. But rare as they might be, such cases are not inconceivable, and we do not cut corners when Sixth Amendment rights are at stake.” *Id.* at 777. *C.f., United States v. Poindexter*, 492 F.3d 263, 272 (4th Cir. 2007) (observing that when a defendant agrees to an appellate waiver that precludes him from challenging his sentence, “it cannot be said that . . . [the defendant] was agreeing to waive the right to the effective assistance of counsel in pursuing an appeal. To hold otherwise, we would have to conclude that, at the time he executed the plea agreement, [the defendant] was agreeing to forego an appeal altogether. Obviously, we are not at liberty to intimate such a conclusion, which would undermine the Supreme Court’s holdings in *Flores-Ortega* and *Anders*.”).

Like the Second (*Campusano*) and the Tenth (*Garrett*) Circuits, the Fifth, Sixth, Eighth and Eleventh Circuits have issued decisions safeguarding a defendant’s Sixth Amendment-secured autonomy right to make the critical decision whether to forgo a counselled direct appeal even where the defendant has agreed to both appellate and collateral attack waivers precluding him from challenging his conviction and/or sentence. *See Witthar v. United States*, 793 F.3d 920 (8th Cir. 2015) (remanding for a hearing to determine whether the defendant had instructed her attorney to file a notice of appeal notwithstanding that she had a collateral attack waiver precluding her from challenging her conviction or sentence);

Campbell v. United States, 686 F.3d 353 (6th Cir. 2012) (same)⁴ ; *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007) (same, except the collateral attack waiver was limited to the sentence); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005) (same).

Contrary to the six circuits that have held a defendant retains the ability to bring a § 2255 motion to enforce his right to decide whether to elect a counselled direct appeal notwithstanding having agreed to a collateral attack waiver precluding challenges to his conviction and/or sentence, the Third Circuit, like the Ninth Circuit in this case, has held that the *pro se* defendant is not entitled to seek relief unless he first establishes that he did not knowingly and voluntarily entered into the collateral attack waiver that bars challenges to his conviction and sentence. *United States v. Marby*, 536 F.3d 231, 241 (3d Cir. 2008). As an initial matter, contrary to the Ninth Circuit in *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196 (9th Cir. 2005), the Third Circuit questioned whether *Flores-Ortega* even applies in cases where the defendant agreed to an appellate waiver, observing that

⁴ Notably, in an unpublished decision out of the Sixth circuit where a defendant had a collateral attack waiver that precluded him from attacking both his conviction and sentence, and where he had explicitly waived his right to bring a claim of ineffective assistance of counsel, the government argued that the collateral attack waiver precluded defendant from enforcing his right to pursue a counselled direct appeal that his attorney had allegedly usurped. *Hamilton v. United States*, 566 F. App'x 440, 443 (6th Cir. 2014) (unpub.). The court rejected the government's argument, holding that notwithstanding its broad language, the plain language of the collateral attack waiver did not preclude the defendant from enforcing his right to decide whether to pursue a counselled direct appeal. *Id.* As the court explained, the defendant was “not using this procedure to attack or contest the merits of his sentence; it is the only procedural vehicle through which he can enforce his right to a direct appeal.” *Id.* at 444.

“[s]urely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel’s duty to his client with respect thereto. This distinction has been ignored by those courts of appeals adhering to *Campusano*’s analysis.” *Id.* at 242.

The court recognized that appellate waivers are only enforceable “provided that they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice.” *Id.* at 237. The court, however, appeared entirely untroubled by the fact that by definition the defendant had his right to a counselled direct appeal usurped by his attorney and thus never had counsel review the record to assess whether there was evidence that would call into question whether the defendant knowingly and voluntarily entered into the plea agreement. *Id.* at 236-37.

Just like occurred in the Ninth Circuit in Fabian-Baltazar’s case, in order to win back his right to decide whether to take a counselled direct appeal, the *pro se* defendant in the Third Circuit must first demonstrate on his own that the collateral attack waiver is invalid because he did not knowingly and voluntarily enter into the plea agreement. In other words, the defendant must first demonstrate success on the very issue that if he is successful, he will then receive the assistance of counsel to help him assess.

That is an exceptionally heavy burden to place on the indigent defendant and it is in sharp tension with a long line of this Court’s cases beginning with *Douglas*, 372 U.S. at 356 (observing that where the indigent defendant is left to fend for

himself in order to obtain his counselled direct appeal, “[a]ny real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required”) to *Rodriquez*, 395 U.S. at 330 (observing that indigent defendants with limited education might not “even be aware of errors which occurred at trial” and if required to point them out as a prerequisite to pursuing a counselled direct appeal, they “would be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one”) to *Anders*, 386 U.S. at 741 (reaffirming the principle that “this Court has consistently held invalid those procedures ‘where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent. . . is forced to shift for himself’”) (quoting *Douglas*, 372 U.S. at 358) to *Flores-Ortega*, 528 U.S. at 486 (holding that it “is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal) to this Court’s recent decision in *McCoy v. Louisiana* in which the Court held that when an attorney usurps a defendant’s right to decide on the objectives of his defense, including whether to forgo an appeal, it is structural error requiring that the defendant be afforded the judicial proceeding forfeited by his counsel. No. 16-8255, slip op. at 11-12.

Notably, the Seventh Circuit has indicated that it would follow the minority position held by the Third Circuit and the Ninth Circuit in this case, and require an indigent defendant with a collateral attack waiver limited to challenges pertaining to the sentence to prove that the collateral attack waiver was involuntary before being allowed access to counsel to review the record to assess whether the plea agreement containing said waiver was entered into knowingly and voluntarily. *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008). In *Nunez*, however, the government took the position that the collateral attack waiver did not preclude the defendant from enforcing his right to decide whether to take a counselled direct appeal and added that a “defendant has a constitutional right to have a lawyer file a notice of appeal on his behalf” notwithstanding an appellate waiver. *Id.* Given the government’s position, the court reached the merits and conclusively determined based on its own review of the record, without the benefit of counsel, that the plea agreement was entered into knowingly and voluntarily and therefore *Flores-Ortega* was inapplicable. *Id.* at 454-55. In so holding, the Seventh Circuit, like the Third and Ninth Circuits, appear to disregard the long line of this Court’s cases protecting the indigent defendant from being placed in the Catch-22 of having to prove he has a meritorious issue on appeal before being afforded access to the counsel he was denied and on whom he is dependent to identify any meritorious issues for appeal that may be hidden in the record. Moreover, the Seventh Circuit’s elevation of judicial efficiency over “a defendant’s Sixth Amendment-secured autonomy” to decide on the objectives of his defense, *McCoy*, 2018 U.S. LEXIS 2802, at 20, is in

sharp tension with this Court's recent decision in *McCoy*. *Nunez*, 546 F.3d at 455-56.

Clarity is needed from this Court as to whether *Flores-Ortega* and *McCoy* are really two sides of the same coin. Where counsel usurps a defendant's Sixth Amendment right to decide whether to forgo a counselled direct appeal, does the defendant need to establish on his own without the benefit of counsel that if he had been afforded counsel on direct appeal he would have had a meritorious appeal? While they get there in different ways (one through a presumption of prejudice under *Strickland* and one through structural error), *Flores-Ortega* emphatically answers the questions in the negative and *McCoy* seems to as well. If that is correct, then it would seem to follow that an indigent defendant with an appellate waiver does not need to establish on his own that he has a meritorious appellate issue prior to being appointed the counsel he should have been afforded on appeal. In other words, viewing *Flores-Ortega* through the lens of this Court's recently issued decision in *McCoy*, there should be no doubt that where an attorney usurps control of a defendant's decision whether to forgo a counselled direct appeal, the defendant is entitled to the proceeding forfeited by his counsel against his wishes "without any need first to show prejudice," *i.e.*, without first showing that he has a viable issue that could be raised on direct appeal. Accordingly, this Court should grant certiorari, vacate and remand in light of *McCoy*.

C. If, As Eight Circuits Have Held, An Appellate Waiver Limited to Challenges Pertaining to Conviction and Sentence Does Not Strip a Defendant of His Sixth Amendment Right to Decide Whether to Take a Counselling Direct Appeal, the Fact that the Defendant Also Agreed to a Collateral Attack Waiver Limited to Conviction and Sentence Is a Distinction Without a Difference.

Under the plain language of the plea agreement, Fabian-Baltazar did not waive his ability to enforce his right to decide whether to pursue a counselling direct appeal. He is not challenging either his conviction or his sentence. He is challenging the loss of an entire judicial proceeding to which he was entitled.

As this Court has explained, when the issue is counsel's failure to file a requested notice of appeal, that is something entirely different from a situation where a defendant alleges that his counsel "made specific errors in the course of representation" that impacted his conviction or sentence. *Flores-Ortega*, 528 U.S. at 482-83. Where the issue is counsel's failure to file a requested appeal, "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Id.* at 483. Precisely because the defendant is not alleging attorney errors pertaining to his conviction or sentence, which would necessitate him establishing that those errors prejudiced him, but is instead alleging the loss of an entire judicial proceeding, the attorney's failure to file a requested notice of appeal "demands a presumption of prejudice." *Id.*

Similarly, in *McCoy*, this Court clarified that when an attorney usurps control of an issue within a defendant's sole prerogative, such as the decision

whether to forgo an appeal, that is a structural error. *McCoy*, No. 16-8255, slip op. at 6-7, 11-12. The right at issue here is not designed to protect the defendant “from erroneous *conviction* but instead protects . . . the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” *Id.* at 12 (internal quotations omitted) (emphasis added).

In other words, a defendant’s challenge to his attorney’s performance that resulted in his conviction and sentence is fundamentally different from an allegation that his attorney forfeited his right to decide whether to forgo a counselled direct appeal; each is governed by its own set of legal rules, burdens and presumptions. The waiver of one challenge is not the waiver of the other. Here Fabian-Baltazar waived only his right to collaterally challenge his conviction and his sentence, not his ability to enforce his Sixth Amendment-autonomy right to make his own choices about the proper way to protect his liberty such as whether to forgo a counselled direct appeal. Certainly the grounds for a direct appeal should the government elect to invoke the appellate waiver in the plea agreement would be limited, but whether Fabian-Baltazar ultimately has a meritorious issue for a direct appeal is not the issue here. If Fabian-Baltazar’s counsel usurped his client’s right to decide whether to forgo a counselled direct appeal by refusing to file a notice of appeal as his client directed, the fact that Fabian-Baltazar waived his right to collaterally attack his conviction and sentence has no bearing on his ability to enforce his right to make fundamental choices about the objectives of his defense.

As the U.S. Attorney's Manual cautions, the scope of a waiver "will depend on the precise language used." U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, Criminal Resource Manual § 626. When the government wants to secure a broad § 2255 waiver, and has the leverage to do so, it knows how to do so. For example, in a recent case the government negotiated for an exceptionally broad waiver that "expressly 'waive[d] the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255.'" *Cox v. United States*, 695 F. App'x 851, 853 (6th Cir. 2017) (unpub.). And in a case a year earlier, the government secured a waiver barring the defendant from bringing a § 2255 motion challenging not only his conviction and his sentence but also "his attorney's alleged failure or refusal to file a notice of appeal." *Davis v. United States*, 817 F.3d 319, 324 (7th Cir. 2016). Here there was no such waiver.

Notably, the government has a history in this Court of cautioning against broadening the scope of a negotiated collateral attack waiver beyond the plain language of the waiver. In *Nunez v. United States*, 554 U.S. 911 (2008), the Solicitor General filed a response requesting that this Court grant certiorari, vacate and remand for further proceedings where the lower court had interpreted a collateral attack waiver that precluded the defendant from challenging his sentence and the manner in which it was determined to also preclude the defendant from enforcing his right to decide whether to forgo a counselled direct appeal that his attorney deprived him of when he refused to file a notice of appeal. Brief for the United States, *Nunez v. United States*, No. 07-818, (U.S. May 12, 2008), 2008 WL 2050805, at 17-18. The Solicitor General cautioned that there was a problem, at

least in the Seventh Circuit, with courts transforming limited collateral attack waivers, into a waiver of the right to bring *any* collateral challenge, including a defendant's claim that an attorney had forfeited his right to a counselled direct appeal by refusing to file a notice of appeal. *Id.* at 9-10, 12-13. Pursuant to the Solicitor General's request, this Court remanded for further proceedings. *Nunez*, 554 U.S. at 911. On remand the government reaffirmed its position that the collateral attack waiver did not cover the defendant's claim that as a result of his attorney's refusal to file a notice of appeal he was denied his right to decide whether to forgo in its entirety a judicial proceeding to which he was entitled. *Nunez*, 546 F.3d at 451.

Accordingly, the fact that Fabian-Baltazar had a collateral attack waiver limited to his conviction and his sentence is not relevant here. Under the plain language of his plea agreement Fabian-Baltazar did not waive his ability to enforce his right to a counselled direct appeal that was forfeited by his attorney when he allegedly refused to file the notice of appeal requested by his client.

D. This Case Is an Excellent Vehicle for this Court to Provide Much Needed Clarification on Whether a Defendant's Right to Decide Whether to Forgo a Counselled Direct Appeal Can Be Usurped by His Attorney Where the Defendant Has Entered Into a Plea Agreement in Which He Waived His Right to Appeal His Conviction and Sentence.

The issue is squarely presented here. At his sentencing hearing Fabian-Baltazar expressed his desire to appeal on the record. Additionally, in his *pro se* § 2255 motion he alleges that he informed his attorney that if his sentence exceeded eight years he wanted to appeal, and that two days after he was sentenced to ten

years he called his attorney to remind him that he wanted to appeal and was informed that his attorney was refusing to file a notice of appeal for him. Six months later, Fabian-Baltazar filed a timely motion under § 2255 asserting that his counsel had denied him his right to a counselled direct appeal when he refused to file the notice of appeal that he had requested. Pursuant to the plain language of his plea agreement Fabian-Baltazar only waived his right to bring a § 2255 motion challenging his conviction, sentence or the manner in which his sentence was imposed; he did not waive his right to bring any other § 2255 motion, including his right to bring a § 2255 motion alleging his counsel usurped his right to decide whether to forgo a counselled direct appeal. Nevertheless, both the district court and the Ninth Circuit construed Fabian-Baltazar's limited collateral attack waiver to preclude him from bringing *any* § 2255 motion thereby stripping him of his ability to enforce his fundamental Sixth Amendment right to set the objectives of his defense and make his own choices about the proper way to protect his own liberty.

Were this Court to hold that a defendant who enters into a limited collateral attack waiver does not relinquish his ability to seek protection from the courts when his attorney refuses to file a notice of appeal, Fabian-Baltazar will be entitled to an evidentiary hearing in district court to establish that he did inform his attorney he wished to appeal and his attorney refused to file the requested notice of appeal. Should Fabian-Baltazar prevail at his hearing, he will be entitled to review of the record by counsel to assess whether he entered into his plea agreement knowingly

and voluntarily, and the record evinces serious concerns on that front. This is not a case where the defendant clearly gained something by entering into a plea deal. Indeed, based on a cold review of the record it is not clear Fabian-Baltazar received anything from the government in exchange for entering into the various waivers contained in the plea agreement, and thus whether he entered into those waivers knowingly and voluntarily merits further review by the assistance of counsel – the very assistance he was denied by his trial counsel. Where an attorney whose performance potentially fell below constitutional standards is able to foreclose judicial review into whether he stripped his client of his Sixth Amendment right to the effective assistance of counsel by refusing to file a notice of appeal, this case raises the specter of the very concerns underlying the constitutional principles at stake here that are designed to ensure the fair administration of justice for all defendants.

◆

CONCLUSION

Mr. Fabian-Baltazar respectfully requests that this Court grant his petition for writ of certiorari, vacate the Ninth Circuit’s decision and remand in light of *McCoy v. Louisiana*, No. 16-8255, slip op. (U. S. May 14, 2018) for the independent reasons set forth herein, or, in the alternative, hold his petition pending resolution in *Garza Jr. v. Idaho*, No. 17-1026.

Dated: May 21, 2018

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