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1 notice of an appeal forfeits the entire direct
2 appeal and because the attorney then usurps a
3 fundamental decision that rests with the client
4 alone.

5 JUSTICE GINSBURG: Mr. Ali, when you
6 just described the relief that you seek, am I
7 right that you -- what you're seeking is
8 reinstatement of the right to appeal?

9 MR. ALI: That's correct, Your Honor.
10 I think it -- I think that's a really critical
11 point because it shows that what Mr. Garza is
12 requesting here, what Petitioner is requesting,
13 is simply to restore the bargain that the
14 parties struck before his trial counsel usurped
15 his fundamental decision to appeal. So all he
16 is seeking --

17 JUSTICE GINSBURG: But what -- but
18 what happens -- what happens to the plea --
19 plea bargain? The plea bargain was conditioned
20 on waiving the right to appeal. So I could see
21 one argument that says all we're seeking is
22 right to appeal, we recognize that the plea
23 bargain goes by the boards because it was
24 conditioned on no appeal.

25 MR. ALI: So, no, that is not

1 Mr. Garza's argument. The argument would be
2 that the appeal would be reinstatement. All
3 the parties before the Court agree that, even
4 though Mr. Garza signed an appeal waiver, that
5 certain fundamental claims survive that appeal
6 waiver.

7 So, when the appeal is reinstated, the
8 plea agreement will remain intact. The appeal
9 waiver will remain intact. To succeed on an
10 issue that is waived, Mr. Garza would have to,
11 and we think he actually has, a colorable claim
12 in this record that his appeal waiver was
13 involuntary. And so all he is seeking to do --
14 maybe this is the better way to describe this.

15 Consider two similarly situated
16 defendants, okay? Both sign a plea agreement.
17 Both plea agreements contain an appeal waiver.
18 Both defendants instruct their counsel to go
19 ahead and perfect -- to notice an appeal.

20 In the first defendant's situation,
21 counsel follows that client's autonomous
22 choice. He files a notice of appeal. All
23 parties before the court agree that an appeal
24 would be perfected, he will be appointed
25 counsel, he will get access to the record,

1 which would be required to identify issues for
2 appeal and make sure that the plea proceedings
3 proceeded in a way that is lawful and -- and --
4 and legal and that the plea is valid, and then
5 there will be judicial review, either of the
6 merits of the claims raised or if counsel's --
7 appellate counsel believes that there is no
8 meritorious issues, the process in Anders will
9 be followed and there will still be judicial
10 review.

11 JUSTICE ALITO: Well, I thought that
12 --

13 JUSTICE GINSBURG: But he -- he gets
14 keep the -- I mean, this -- this was a plea
15 agreement that gave him fewer years than he
16 could have been subjected to under the law.
17 And so you're -- you're -- you say -- there was
18 one judge who said he wants his cake and eat it
19 too. That is, he keeps what's good about the
20 plea bargain and discards what's not good; that
21 is, no right to appeal.

22 MR. ALI: Well -- so, Your Honor, I
23 think a couple points in response. It's --
24 it's important to recognize that simply
25 noticing an appeal or, in this case,

1 reinstating an appeal, it's hard to see how
2 that alone breaches the plea agreement.

3 And so the way this happens in
4 practice is that when an -- an appeal waiver is
5 signed, the government gains what is
6 effectively an affirmative defense that it can
7 raise on appeal. It can choose to raise it.
8 It's not jurisdictional. It's not
9 self-executing. The government chooses to
10 raise it and satisfies the court of appeals
11 that the issue that appellate counsel has
12 actually raised on appeal is, in fact, within
13 the appeal waiver, then the government will
14 succeed and there will be consequences,
15 potentially, depending on what the -- the plea
16 agreement says the consequences should be.

17 All of that is what we're saying this
18 direct appeal is required to do.

19 JUSTICE ALITO: Yeah, and if it's
20 determined -- I -- I think this -- I thought
21 this was the thrust of Justice Ginsburg's
22 question. If it is ultimately determined that
23 the appeal was in violation of the appeal
24 waiver, then the plea bargain has been broken
25 by the defendant.

1 MR. ALI: That's correct, Your Honor,
2 yes.

3 JUSTICE ALITO: And -- and it may be
4 void.

5 MR. ALI: That's right. And -- and --
6 and let me just make a --

7 JUSTICE KAGAN: And what -- what --

8 JUSTICE SOTOMAYOR: Whose choice is
9 that?

10 JUSTICE KAGAN: -- what breaches the
11 appeal waiver? In other words, you said it's
12 not the notice. What is it?

13 MR. ALI: It is raising an issue that
14 is, in fact, within the scope of the appeal
15 waiver. So everyone agrees -- I believe that
16 it was never disputed -- that there are certain
17 claims that survive, those going to the
18 validity of the plea and enforceability of the
19 plea. There are certain constitutional
20 limitations on the circumstances in which the
21 plea will or will not be enforced by a court of
22 appeals: for instance, if the defendant is
23 challenging the -- that the sentence was
24 imposed on certain unconstitutional
25 considerations. And then, of course, there are

1 the issues that are outside the scope of the
2 appeal waiver, which can be certainly raised by
3 the defendant without any sort of consequence.

4 CHIEF JUSTICE ROBERTS: What if the --

5 JUSTICE KAGAN: Are there any
6 states --

7 CHIEF JUSTICE ROBERTS: -- what if the
8 issue that the defendant wants to raise is
9 clearly within the scope of the appeal waiver?
10 You know, he comes to a lawyer and says, I want
11 to appeal because I'm not guilty.

12 MR. ALI: So --

13 CHIEF JUSTICE ROBERTS: In other
14 words, I -- I think, you know, it was voluntary
15 and all that, and the -- it's not beyond the
16 constitutional limits. I just am not guilty.
17 So I -- I want to appeal.

18 MR. ALI: So, Your Honor, a few
19 responses. I think the -- the first response I
20 have is, clear in whose view? This Court has
21 always recognized that there's a role for the
22 court in that sort of distinction.

23 And that's always been a possibility
24 whether there's an appeal waiver, whether it's
25 Flores-Ortega and it's just a guilty plea. The

1 guilty pleas waives all non-jurisdictional
2 claims. So it's -- that's always a
3 possibility, and courts have dealt with that,
4 you know, for over 50 years under Anders. And
5 it hasn't been a problem, and what it's
6 provided is the protections that that decision
7 was all about and has been applied by this
8 Court several times since.

9 The second response I have is --

10 JUSTICE SOTOMAYOR: I think you're --
11 you're going a little too fast --

12 MR. ALI: Okay.

13 JUSTICE SOTOMAYOR: -- because I'm
14 breaking that down.

15 MR. ALI: Okay.

16 JUSTICE SOTOMAYOR: All right? A
17 defendant comes to you, you're a competent
18 attorney, and says I want to appeal. What does
19 a defense attorney generally do first? He
20 consults, correct? He tells the client:
21 You -- this is what the law says. You have a
22 waiver in here. You shouldn't appeal. You run
23 the risk of breaching the agreement, and the
24 government could go back and rescind the
25 agreement and put you into jail for a lot

1 longer. Do you really want to do this?

2 Now the client -- isn't the client the
3 one who has the right to appeal? Isn't that
4 what we've said for dozens of cases?

5 MR. ALI: That's correct, Your Honor.

6 JUSTICE SOTOMAYOR: The attorney can
7 decide what to appeal. And so, if the client
8 tells you appeal, you put in your notice of
9 appeal. And if you don't think there's a
10 viable issue, you file an Anders brief and you
11 tell the court there isn't.

12 The defendant then has -- is invited
13 to tell the court what it thinks, right?

14 MR. ALI: That's right.

15 JUSTICE SOTOMAYOR: And then the court
16 makes the decision, correct?

17 MR. ALI: That's correct.

18 JUSTICE SOTOMAYOR: With the client
19 deciding whether he wants to rescind the plea
20 agreement? Nothing prohibits a defendant from
21 rescinding a contract, correct?

22 MR. ALI: That's right, Your Honor,
23 although I don't think that our argument --

24 JUSTICE SOTOMAYOR: You suffer
25 consequences --

1 MR. ALI: -- is contingent on that,
2 that -- this idea of -- of autonomous right to
3 breach. I think that is correct, though.
4 And --

5 CHIEF JUSTICE ROBERTS: I understood
6 that to be your position. You said you had two
7 answers to my question.

8 MR. ALI: Yeah, and --

9 CHIEF JUSTICE ROBERTS: What was the
10 second one?

11 MR. ALI: Sure. And -- and Justice
12 Sotomayor touched on them, but let me just
13 repeat them. So -- in a slightly different
14 way. So the second answer is why what the
15 defendant has identified as the issue matters,
16 because a defendant doesn't make the decision
17 what issues will be raised on appeal. He makes
18 the decision whether his objective is to
19 appeal.

20 And so what we would say is that when
21 a defendant articulates to his attorney, his
22 agent, if you will, that his objective is to
23 show that the plea proceedings that just took
24 place were unlawful, the attorney has no place
25 telling that defendant that he would prefer to

1 just substitute his own view that the defendant
2 go off, cede defeat, and go to prison. That is
3 our position.

4 And -- and that's why, as the Court
5 recognized in Jones v. Barnes, the person who
6 makes the decisions as to what issues will be
7 raised is the appellate attorney. And so it
8 would be illogical to say that a defendant's
9 right to appeal, as the United States' argument
10 -- argues here, turns on his ability to
11 articulate certain issues.

12 And -- and remember, Your Honor, we're
13 talking about the notice of appeal stage here,
14 so the record typically hasn't been ordered
15 here. It certainly wouldn't have been ordered
16 in Idaho because that's triggered by the notice
17 of appeal.

18 So you're asking an -- generally a
19 defendant with limited education, his exposure
20 to the legal system might be minutes, maybe
21 hours, to potentially specify certain issues
22 that might be in or outside the scope of his
23 waiver, and then you're asking his agent to
24 basically play judge and forfeit his appeal if
25 he alone thinks that the words that came out of

1 the defendant's mouth happen to fall within the
2 waiver.

3 JUSTICE ALITO: But I think your
4 argument does ultimately depend on the
5 proposition that the defendant has this
6 categorical right based on autonomy to insist
7 on an appeal and have an attorney perfect the
8 appeal, file the notice of appeal, even if
9 there is zero chance that the appeal will be
10 found not to have been waived.

11 I think -- and maybe that's right, but
12 I -- I do think your argument depends on that.
13 And I wonder how that is consistent with the
14 way Flores-Ortega analyzed the question of
15 whether the attorney was deficient in that
16 situation.

17 If there is such a right, then why
18 wouldn't the attorney have the right to -- have
19 the obligation to consult with the -- with the
20 client and to tell the client that the client
21 has that right? But, instead, it went through
22 a very complicated fact-bound inquiry into
23 whether what the attorney did or called for
24 such an inquiry into whether what the attorney
25 did was deficient.

1 MR. ALI: So I think there are two
2 parts to your question. So, first, as to
3 whether our position is that -- so let me
4 answer this way.

5 Our position is that the determination
6 of whether there are non-frivolous or
7 meritorious decisions doesn't take place. It
8 may take place in a preliminary fashion during
9 the notice of appeal phase, but that's an issue
10 for appellate counsel.

11 And that risk, as I mentioned, that
12 there would be no meritorious issue that is to
13 be raised on appeal was, of course, present in
14 Flores-Ortega as well. Mr. Flores-Ortega had
15 waived all non-jurisdictional claims that he
16 had, and so there was very much a possibility
17 of that there as well.

18 And -- and to answer the second part
19 of your question about what the Court said in
20 Flores-Ortega, the Court specifically
21 acknowledged there that pleading guilty
22 substantially reduced the number of claims that
23 Mr. Flores-Ortega could bring.

24 And in the very next sentence, it
25 acknowledged the possibility of what we have

1 here. It said that a defendant may also
2 expressly waive some claims in addition to
3 that.

4 And the relevance that it recognizes,
5 what we believe the relevance should be here,
6 which is that the act of signing -- of pleading
7 guilty and of signing an appeal waiver
8 represents a -- a -- an indication of finality,
9 an interest in finality on the part of the
10 defendant. And that's why few defendants will
11 plead guilty, sign an appeal waiver, and then
12 instruct their attorney to appeal in the first
13 place.

14 And on top of that, in addition to
15 acting as a -- an indication of finality on the
16 part of the defendant, as the State and the
17 United States acknowledge and, in fact,
18 represent throughout their briefs, pleading
19 guilty, signing an appeal waiver, and then
20 having appellate counsel raise an issue that
21 even might fall within the appeal waiver can
22 have serious consequences for a defendant.

23 And so it acts and has acted as a sort
24 of natural check. And that's why there really
25 is no evidence or certainly we would have

1 expected the United States to provide evidence
2 to support its idea that there would be
3 frivolous appeals, for instance, following a
4 trial.

5 JUSTICE ALITO: I think we have to --

6 JUSTICE SOTOMAYOR: Mr. Ali --

7 JUSTICE ALITO: -- understand the
8 nature of the right that you're asserting, if I
9 could just come back to the Chief Justice's
10 question and perhaps embellish it a little.

11 So you have the -- you have a
12 defendant who is an expert on plea bargains and
13 plea waivers and knows everything about it.
14 This is a highly intelligent, educated person,
15 and signs a plea -- a plea agreement waiving
16 Issue A and then, as soon as the defendant is
17 sentenced, says to his attorney: I want to
18 appeal Issue A.

19 And -- and I think your answer has to
20 be that the -- that that is the right of the
21 defendant and the obligation of the attorney to
22 carry out that -- the client's wishes. Am I
23 right?

24 MR. ALI: I think --

25 JUSTICE ALITO: That has to be your

1 position.

2 MR. ALI: -- I think that's right,
3 Your Honor. I think it's largely an
4 unrealistic scenario for most defendants.

5 JUSTICE SOTOMAYOR: Mr. Ali, what do
6 you do with the jurisdictions that permit a
7 defense attorney to tell a client: I don't see
8 there's a meritorious issue, but I'm going to
9 give you the instructions on how to file your
10 own notice of appeal?

11 There are other jurisdictions -- I
12 think the majority -- who require the attorney
13 to file the notice of appeal and then an Anders
14 brief. But what do we do with those that say:
15 When you're instructed by your client to file a
16 notice of appeal and you can't do it because
17 it's an ethical obligation -- an ethical
18 violation, you tell the client how to do it.

19 MR. ALI: Right. So let me just --

20 JUSTICE SOTOMAYOR: Is that enough for
21 you?

22 MR. ALI: Can I just clarify, this
23 particular record, Idaho does specifically
24 provide that if a attorney withdraws before the
25 notice of appeal is -- is filed, that the

1 defendant will be provided with new counsel.

2 And, of course, it was the very
3 representation of the defendant here that
4 prevented the defendant under -- under
5 procedural rules from filing a notice of appeal
6 himself. So that's why we know it caused a --

7 JUSTICE SOTOMAYOR: Yeah, the error
8 here was the attorney did nothing and ignored
9 -- claims to have done nothing --

10 MR. ALI: That's right.

11 JUSTICE SOTOMAYOR: -- and ignored --

12 MR. ALI: And so --

13 JUSTICE SOTOMAYOR: -- repeated
14 inquiries about the appeal.

15 MR. ALI: And, of course, we agree
16 that counsel should have a conversation with
17 the defendant and say: We think -- you know, I
18 believe -- I don't have the record yet, he
19 should caveat it, I don't have the record yet,
20 this is a preliminary assessment during the
21 short window, but I think it's going to be very
22 difficult for you to argue around your appeal
23 waiver to raise this issue that Justice Alito
24 was describing, but he should still perfect the
25 appeal, because what we're asking the attorney

1 to do is a ministerial task here once the
2 defendant has made its decision.

3 And we know that -- the United States
4 knows that better than anybody. Title 2 of the
5 U.S. Attorney's manual tells U.S. Attorneys:
6 Line Attorney, if you have not heard back from
7 the Solicitor General's office, you may have
8 recommended that there is no plausible ground
9 for appealing in this case, but if you don't
10 hear back from the appellate section or the
11 Solicitor General's office, file that
12 protective notice of appeal.

13 And the reason is --

14 JUSTICE ALITO: But what are the
15 practical differences between the consequences
16 of the position you're advocating and what
17 would happen if you were to lose this case?

18 If you win in the situation where the
19 attorney thinks there's no non-frivolous claim
20 to be raised on appeal, after the plea waiver,
21 the attorney, you say, will file an Anders
22 brief, right?

23 MR. ALI: That's right. So -- so --

24 JUSTICE ALITO: Okay. That's --
25 that's one side of it. And then the other

1 side, if you were to lose, then the defendant
2 would not be entirely precluded from trying to
3 take an appeal with respect to issues that the
4 defendant thinks are outside of the plea
5 waiver, the defendant could bring a collateral
6 proceeding and argue that his attorney was
7 ineffective for failing to take an appeal based
8 on a plea waiver that didn't cover the issue.

9 And the only difference I can see
10 depends on state law; namely, whether -- and
11 maybe there are other differences and you'll
12 tell me if I'm overlooking something -- whether
13 an attorney will be appointed for the defendant
14 in the post-conviction proceeding and whether
15 there will be a more stringent standard of
16 review.

17 But if state law didn't -- if state
18 law provided an attorney and didn't provide a
19 more stringent standard of review, what is the
20 practical difference?

21 MR. ALI: So, Your Honor, of course,
22 92 percent of post-conviction defendants across
23 the country don't get counsel on
24 post-conviction review.

25 But I think that one very important

1 collateral consequence was left out, in
2 addition to -- I think the difference in -- in
3 burdens is a significant one here. We're
4 talking about not just civil burdens, but this
5 Court's well aware of the added hurdles that
6 goes along with habeas proceedings that a
7 defendant would now have to go through, not
8 because he made any mistake, but because his
9 agent failed to undertake a ministerial task.

10 But, sorry, to get to the other very
11 significant consequence, the failure to
12 preserve issues in -- before a conviction
13 becomes final by raising them on direct appeal
14 can forever prevent a defendant from raising
15 those issues collaterally.

16 So, in the federal system, as this
17 Court decided in Bousley, to raise a
18 voluntariness claim in a 2255 position, you
19 have to have first asserted that on direct
20 appeal. So, I mean, to make a very blunt
21 example, if a defendant believes he has
22 evidence that he could introduce on habeas to
23 show involuntariness, okay, to show that his
24 counsel misled him, et cetera, outside of the
25 direct appeal record, if he doesn't get the

1 direct appeal in order to preserve that issue,
2 he will be prevented, unless he can prove
3 actual --

4 JUSTICE ALITO: Well, I guess what I
5 left out is that the issue -- the claim in the
6 -- in the collateral proceeding would be
7 ineffective assistance of counsel.

8 MR. ALI: Well, so then we're
9 attaching an additional burden, just for him to
10 assert his -- his -- his involuntariness claim,
11 he's now going to have to show that it would
12 have been -- I take it to -- you to be saying
13 that he could assert that it was ineffective
14 not to raise involuntariness in the direct
15 appeal.

16 So now he has to show that it was
17 unreasonable for counsel not to file it in the
18 direct appeal, and then it would have
19 prejudiced him, and we suddenly are back to
20 getting to the -- all of the merits, all of
21 what should have happened in the direct appeal
22 in the first instance, and shouldn't have
23 prevented the defendant from simply arguing
24 these issues in his post-conviction petition
25 without having procedurally defaulted it simply

1 because his state-appointed counsel, his agent,
2 didn't undertake a ministerial task.

3 And that is --

4 JUSTICE GINSBURG: I would like to
5 understand better what happens, what are the --
6 so the -- so the attorney is obliged to file
7 the notice of appeal. Then, as you said in
8 most states, there is no right to an attorney
9 on appeal. So that's it. The attorney files
10 the notice of appeal, and then the defendant is
11 just left there unrepresented?

12 MR. ALI: Oh, I'm sorry, no, Your
13 Honor. An attorney has a constitutional right
14 to counsel on direct appeal. In virtually all
15 instances, when he's sent to post-conviction by
16 virtue of his counsel's failure to notice the
17 appeal, he will not have counsel. So that's
18 very much a direct consequence of not filing
19 the appeal.

20 If, as we think the Court should, the
21 -- the bargain struck by the parties here is
22 restored and Mr. Garza's appeal is reinstated,
23 he will be appointed counsel under state law
24 and as is required by the federal constitution,
25 and counsel will put forward arguments. And we

1 think in this record that there are --

2 JUSTICE GINSBURG: But you -- you want
3 to -- this is a question I started out with.
4 You want to reinstate his right to appeal and
5 you still -- it's still not clear to me what
6 remains of the plea bargain.

7 MR. ALI: So --

8 JUSTICE GINSBURG: Because if -- if he
9 had a right to appeal, he would not have had a
10 -- a plea bargain that says I'm not going to
11 appeal.

12 MR. ALI: So, Your Honor, when
13 Mr. Garza signed this plea bargain with the
14 State of Idaho, all -- both parties understood
15 that Mr. Garza was waiving his right to raise
16 certain issues, you know, a scope defined by
17 the language in the plea waiver -- the appeal
18 waiver, but was -- could still raise several
19 issues which my friends do not contest he can
20 raise on direct appeal.

21 So he would notice the appeal. He
22 would still be bound by the terms of his plea
23 bargain, meaning the appeal waiver would still
24 apply in that appellate proceeding, but he can
25 still raise, of course, any claim outside the

1 scope of the waiver, and that would be a
2 determination for the court with the assistance
3 of appellate counsel. And he can challenge,
4 for instance, the voluntariness of it, whether
5 the government honored its -- its commitments
6 under the plea agreement.

7 All of those are issues that Idaho,
8 all the federal courts conclude can be raised
9 in a direct appeal proceeding, even when you
10 have signed an appeal waiver.

11 JUSTICE KAVANAUGH: Because the appeal
12 would -- an appeal waiver never precludes any
13 and all possible appeals?

14 MR. ALI: That is what is undisputed
15 on this record.

16 JUSTICE KAVANAUGH: Right.

17 MR. ALI: And that -- that's what the
18 federal courts have concluded, that they're not
19 categorical.

20 And -- and I think it's important to
21 recognize that -- to think about how
22 unrecognizable the conception of trial counsel
23 we're dealing with when we applied the United
24 States or the State's test here.

25 Essentially, what their tests would

1 have trial counsel do is listen to the words of
2 the client and determine whether the words were
3 the right words to be outside the scope of the
4 waiver, and give up that client's best chance,
5 simply because during the notice of appeal
6 window, trial counsel can't come up with an
7 issue or doesn't think the client said the
8 right things, give up his best chance of
9 proving his conviction unlawful -- is unlawful,
10 which is the implication of him having
11 instructed trial counsel to notice the appeal.

12 JUSTICE KAGAN: Could -- could I --

13 JUSTICE SOTOMAYOR: Mr. --

14 JUSTICE KAGAN: -- get your take on
15 the question of when you're in breach. You
16 said you're not in breach when the notice of
17 appeal is filed. And is that true no matter
18 what the notice of appeal says?

19 In other words, suppose the notice of
20 appeal is an opportunity to lay out your claims
21 and you lay out claims that are within the
22 waiver. Does that still, in your view, not
23 breach the agreement?

24 MR. ALI: Yes, I think so, Your Honor,
25 because, in Idaho, for instance, the rules are

1 very clear that even with respect to the issues
2 you specify -- and generally speaking, in
3 federal court, we're talking about identifying
4 the order you're appealing from. Parties
5 aren't required to specify issues. In Idaho,
6 insofar as you specify issues, it's very clear
7 that you're not bound once the appeal is begun.

8 So the way that would play out is that
9 a notice of appeal would be filed. There
10 wouldn't be a strong claim of breach then
11 because, as all agree, there are claims that
12 could be raised which would not be breached --
13 breached even if they were resolved on the
14 merits, and the government would move to
15 dismiss the claim with the expedient procedures
16 that are available in Idaho and federal courts.

17 And if, at that point, no particular
18 issue can be raised that's outside the scope of
19 the waiver, what happens in some of these cases
20 is the defendant just decides to dismiss the
21 appeal altogether. So no harm done.

22 But, if the only issues the defendant
23 can identify are within the scope of the
24 waiver, you've got a claim of breach. And --
25 and the next question would be whether --

1 JUSTICE KAGAN: In -- in other words,
2 if -- if there's -- if the defendant files a
3 brief that raises issues within the scope of
4 the waiver?

5 MR. ALI: That's right. And that
6 would be determined by the court of appeals,
7 whether it's within the scope of the waiver.

8 JUSTICE KAGAN: And how about if
9 there's an Anders brief that -- that raises
10 issues within the scope of the waiver? Does
11 that breach the defendant's bargain?

12 MR. ALI: Well, the way that Anders
13 plays out is that counsel is required to -- to
14 file a brief, as -- as I think Your Honor's
15 question is suggesting, and -- and the pro se
16 litigant is also given an opportunity to file a
17 brief under Anders. And those are viewed by
18 the court.

19 You know, I think it's -- if -- if the
20 pro se litigant himself in his brief is
21 asserting claims that are in the scope of the
22 waiver, I think there would be a strong claim
23 of breach in that instance.

24 If counsel is not actually pressing
25 claims within the scope of the waiver, and --

1 and the government's generally not required to
2 respond to Anders briefs, right, so it's the
3 attorney raising issues that are pointing the
4 court in a very important way to potential
5 issues in the case but isn't actually asserting
6 issues, I don't think that would be a breach.

7 I don't think our position turns one
8 way or the other on that position. But --

9 JUSTICE GORSUCH: Counsel --

10 JUSTICE SOTOMAYOR: Are you -- I'm
11 sorry.

12 JUSTICE GORSUCH: No, please, go
13 ahead.

14 JUSTICE SOTOMAYOR: Are -- are -- just
15 to go through this, are you aware of whether
16 the federal system or state system would deny a
17 defendant another attorney if, under
18 Flores-Ortega, it's found that an attorney was
19 directed to file an appeal, didn't do it;
20 hence, he was ineffective under Flores-Ortega?
21 When the defendant went back down, would he or
22 would he not get another attorney?

23 MR. ALI: I think he probably would.
24 In this case, factually speaking, he -- he
25 would because, on appeal, Idaho provides that

1 the state appellate defender comes in.

2 JUSTICE SOTOMAYOR: I -- I'm just
3 asking because I'm not aware, at least from my
4 old circuit --

5 MR. ALI: Yeah.

6 JUSTICE SOTOMAYOR: -- that we would
7 have not appointed a new attorney once one has
8 been found ineffective. Now that new attorney
9 could file an Anders brief, could do anything
10 permissible under the rules. But my point is I
11 don't know enough about the other
12 jurisdictions. I'd be sorely surprised that
13 most wouldn't.

14 MR. ALI: I think that's right. And I
15 just would add one thing, which is that these
16 claims actually could go very well to that
17 attorney's conduct, the attorney who is
18 usurping his client's decision to appeal. So,
19 if we're talking about the voluntariness,
20 counsel's performance at the plea hearing, et
21 cetera, could be tied up in those. And that's
22 all the more reason in this instance not to
23 allow an attorney to override his client's
24 autonomous decision to appeal.

25 And if I could, Mr. Chief Justice --

1 JUSTICE GORSUCH: Counsel -- if I
2 might.

3 CHIEF JUSTICE ROBERTS: Sure.

4 JUSTICE GORSUCH: Thank you. One
5 quick question.

6 You rely a lot on the autonomy of the
7 client, and we certainly have a lot of cases
8 saying, you know, a decision whether to appeal
9 or make a major decision like that belong to
10 the client.

11 Here, though, we have a complicating
12 factor that the autonomy's already been
13 expressed through the plea waiver and it's
14 presumptively correct given that it's a final
15 judgment of a trial court at that moment at
16 least.

17 What do we do about that? So autonomy
18 runs both ways here in this particular
19 instance, and presumed prejudice in this
20 circumstance, is there some tension between
21 that and the fact that we don't presume
22 prejudice even when lawyers make really bad,
23 obviously wrong strategic, tactical decisions
24 in cases all the time?

25 How do we reconcile that where even --

1 even in obvious circumstances we don't presume
2 prejudice? And, here, most of these cases are
3 going to be non-prejudicial, right? So what do
4 we do about those problems?

5 MR. ALI: So let me -- I think there
6 are two separate questions there. Let me try
7 to answer them. So the State and the United
8 States make the first argument you suggested,
9 which is that autonomy has been exercised at
10 time 1 when the waiver of appeal is signed.

11 Now, of course, one can't claim to
12 respect autonomy without looking at the actual
13 autonomous decision that is made.

14 JUSTICE GORSUCH: But looking at it as
15 a whole, we've -- it's complicated. It's
16 muddled, right?

17 MR. ALI: Well, I think --

18 JUSTICE GORSUCH: Time 1 and time 2
19 are complicated.

20 MR. ALI: At time 1, the autonomous
21 decision is to waive certain claims.

22 JUSTICE GORSUCH: Yeah.

23 MR. ALI: At time 2, the decision
24 is --

25 JUSTICE GORSUCH: Yeah.

1 MR. ALI: -- go file a notice of
2 appeal because I still have other claims. And
3 to answer the second point really quickly, when
4 this Court looks at a situation in which a
5 proceeding has been provided to the defendant
6 and there are certain errors, a client's not
7 entitled -- or a defendant is not entitled to a
8 perfect proceeding, then, yes, in that
9 circumstance, to presume prejudice, you look
10 for those circumstances where prejudice is so
11 likely that, you know, it should be presumed.

12 Now the United States all but concedes
13 that that doesn't apply in this circumstance.
14 If you look at the bottom of page 12, top of
15 page 13, after they do all of the posturing,
16 saying you should be identifying the most
17 likely circumstances, they say: Oh, but the
18 Court has also recognized that when you forfeit
19 an entire proceeding, a proceeding which is a
20 contingency -- or is an important part of
21 reaching finality, that that's not the inquiry
22 the court goes through.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Jorgensen.

1 ORAL ARGUMENT OF KENNETH K. JORGENSEN
2 ON BEHALF OF THE RESPONDENT

3 MR. JORGENSEN: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 My friend keeps referring to a waiver
6 of issues, but there was no waiver of issues in
7 this case. There was a waiver of a procedure.
8 There was an appellate waiver.

9 Thus, in similar situations like this
10 where there is an appeal waiver, there has been
11 a waiver of a proceeding, not just of those
12 issues. And I think this case actually
13 provides a very good example of that.

14 The plea agreement in this case that
15 was signed by Mr. Garza contains many
16 provisions. Some of those provisions include
17 that he would plead guilty to certain charges,
18 that the State would not then bring -- bring
19 other charges and would dismiss an enhancement.
20 Mr. Garza agreed to the particular sentence he
21 would receive.

22 The plea agreement lists many of the
23 -- lists the rights that are required to be
24 given under Idaho's Rule 11, which is the
25 substantive equivalent to Federal Rule 11.

1 Thus, even without the appeal waiver, the State
2 had basically assured itself of victory on
3 appeal.

4 It had -- it had already secured the
5 waiver of many, many, many issues, in fact, all
6 of the reasonable issues that could be tried.

7 CHIEF JUSTICE ROBERTS: Well, many but
8 certainly not all.

9 MR. JORGENSEN: Not all.

10 CHIEF JUSTICE ROBERTS: They haven't
11 -- they didn't assure themselves of victory on
12 appeal since there were arguments outside the
13 scope of the agreement, including some that
14 have to be available outside the scope of the
15 agreement --

16 MR. JORGENSEN: That's correct.

17 CHIEF JUSTICE ROBERTS: -- that could
18 have been the basis for an appeal.

19 MR. JORGENSEN: Well, that's correct
20 insofar as it goes, and that's one of the
21 reasons why this has to be a fact-by-fact
22 analysis.

23 In this case, Mr. Garza clearly did
24 waive the appellate procedure to all of those
25 issues that he could conceivably waive it to.

1 So he waived appellate procedure to
2 address his sentences. He had no right to any
3 appellate procedure to address his sentences.

4 Had he filed the appeal, he had his
5 attorney file the notice of appeal, and raise
6 the issues Mr. Garza wanted, a challenge to his
7 sentence, the only thing he would have gotten
8 was a -- a preliminary proceeding to determine
9 whether he was asserting a waived procedure.

10 JUSTICE SOTOMAYOR: Would you have --
11 could you address Flores-Ortega?

12 MR. JORGENSEN: Certainly.

13 JUSTICE SOTOMAYOR: Because the way it
14 approached the issue was pretty clear. It
15 said, in deciding whether counsel is
16 ineffective, first you determine whether a
17 defendant would have appealed.

18 And it said there's two ways to make
19 that determination. A, was there a plea
20 waiver? If yes, then he wouldn't have
21 appealed. Or, second, did he tell the attorney
22 he wanted to appeal?

23 And this is the second of those. But
24 I can't square your position with Flores-Ortega
25 because Flores-Ortega seemed to accept as a

1 working proposition that given that there is
2 even, in a guilty plea, there are waivers of
3 some issues but not others, that the question
4 of whether a defendant would have appealed
5 takes into account the plea waiver at that
6 stage, but once a defendant tells an attorney
7 to appeal, that's his choice.

8 I don't know how to get around Ortega,
9 Flores-Ortega.

10 MR. JORGENSEN: Well, first off,
11 Flores-Ortega does not address that
12 circumstance where there are both. It clearly
13 says there's no duty to consult where there is
14 a waiver. It also says that there is a duty to
15 provide the appeal if it's requested.

16 And there is no duty to provide the
17 appeal if the client says that he or she does
18 not want an appeal. So Flores-Ortega does not
19 address the fundamental question.

20 JUSTICE SOTOMAYOR: I don't know
21 what's both here. This is the second part of
22 Flores-Ortega.

23 MR. JORGENSEN: Well, I would submit
24 it's the first --

25 JUSTICE SOTOMAYOR: The attorney --

1 no, the first part says there's a plea waiver.
2 If the defendant doesn't ask you for one, you
3 don't have to consult. But, once he asks you
4 for one, you have to file a notice of appeal.

5 This is just the second situation.

6 MR. JORGENSEN: I -- I respectfully,
7 Your Honor, I would say that where the -- where
8 the client has given this type of conflicting
9 guidance -- in other words, this was a waiver
10 that was secured through the direction of
11 counsel. Counsel was involved with this.

12 So counsel had some idea of what Mr.
13 Garza's intent was at the time he signed the
14 plea agreement. That Mr. Garza decided to
15 change his mind, to have his cake and eat it
16 too or to game the system or however you want
17 to phrase it, doesn't necessarily --

18 JUSTICE SOTOMAYOR: How about totally
19 not understand the system? You don't think
20 that a defendant who has a right to appeal has
21 a right, I mean, to even an Anders brief,
22 because that tells you why you can't appeal.

23 And -- and my experience, again, and I
24 don't know if it's typical or not, Anders
25 briefs are filed and most defendants don't

1 respond, but occasionally you get a few who do.

2 If you forfeited that right to have
3 someone explain to you the whys, you can't get
4 it back.

5 MR. JORGENSEN: Well --

6 JUSTICE SOTOMAYOR: Under your --
7 under your position that you're not -- you've
8 forfeited your right to appeal altogether.

9 MR. JORGENSEN: Our position is that
10 in post-conviction, where we are evaluating the
11 conduct of counsel in making this choice, that
12 we have to look at the totality of the
13 circumstances.

14 And in this case, the totality
15 includes the waiver. The totality includes the
16 specific instruction of the client. The
17 totality includes the scope of the waiver and
18 counsel's determination that his client was
19 specifically asking him to seek an appeal that
20 would address an issue within the scope.

21 JUSTICE KAGAN: Mr. Jorgensen, so on
22 what you just said, I guess I was a little bit
23 confused in your brief as to the scope of your
24 argument.

25 Suppose that the client had, you know,

1 after doing the appeal waiver, but there are
2 some issues that you could still bring, not
3 very many, but some, and the client says: I
4 want you to -- to his attorney -- I want you to
5 appeal. And he does not give any further
6 guidance. In other words, he doesn't say what
7 particular issues or whether those issues are
8 inside or outside the scope of the appeal
9 waiver. He just thinks: I want to appeal now.

10 Does he get to -- at that point, does
11 the attorney have to take the appeal? Can you
12 presume prejudice from the fact that the
13 attorney has not taken the appeal?

14 MR. JORGENSEN: At that point, you can
15 presume neither deficient performance nor
16 prejudice because that may, for example,
17 originate a duty to consult with the client, to
18 actually ascertain whether the client wants to
19 try to vitiate the entire plea agreement, to
20 ascertain whether the client really wants to
21 just test the state and see if they will maybe
22 not act on a direct breach of the plea
23 agreement.

24 There are several different things the
25 client may be trying to achieve. And all that

1 Mr. Garza alleged that he was trying to achieve
2 at any point is an appeal of his sentence.

3 JUSTICE KAGAN: Yes. So that -- I
4 guess that I had understood your brief as
5 saying that as long as you don't specifically
6 want to appeal something that's within the
7 scope of the waiver, then the attorney does, in
8 fact, have to file a notice of appeal and you
9 can say that there is prejudice when he
10 doesn't.

11 But -- but -- but you're saying that
12 even if the client makes a kind of generalized
13 go file an appeal for me, I leave it to you,
14 what -- how, you know, I don't know the law,
15 you go do it, and the attorney doesn't file
16 anything, even then you would say that there's
17 no presumption?

18 MR. JORGENSEN: Yes. We would say
19 that there's no presumption. In other words,
20 before the attorney could actually undermine
21 the plea agreement, do something that would end
22 up with the state bringing the new charges,
23 possibly seeking to put Mr. Garza away for
24 life, the attorney would have to secure Mr.
25 Garza's approval of that course of action.

1 JUSTICE GORSUCH: But doesn't that run
2 counter to our normal division of labor between
3 clients and lawyers? Don't clients generally
4 specify the end, I wish to appeal, and leave it
5 to the lawyer to determine the means?

6 And doesn't it become incumbent at
7 that stage upon the lawyer to identify whether
8 there are any viable issues for appeal and come
9 back to the client and say there are some or
10 there are not some? And a failure to do that,
11 why isn't the failure to do that presumptively
12 prejudicial?

13 MR. JORGENSEN: The failure to do that
14 could conceivably be presumptively prejudicial
15 depending on our facts. And I guess, in -- in
16 the question you just asked, you talked about
17 the end.

18 And I would suggest that the end is
19 not the filing of the notice of appeal but the
20 ultimate goal of the client. If the client
21 wishes to ultimately keep his agreement and he
22 only wants his sentences possibly reduced, and
23 that just simply cannot be achieved because of
24 the waiver's existence --

25 JUSTICE BREYER: What -- what is the

1 answer? What is your answer to what I think
2 people are making a fairly simple argument,
3 very clear, very simple? There are trials
4 where there's a guilty plea.

5 Now we hope that at those trials or
6 plea proceedings there are very few errors,
7 indeed, we hope none. But a client goes to the
8 lawyer and says: Appeal. He has to appeal.

9 Now, here, we have a no appeal
10 agreement, but there are some errors that could
11 be made. We hope there are none or very few,
12 but there could be some.

13 So why shouldn't it be exactly the
14 same rule if you, client, say to the lawyer:
15 Appeal, he has to appeal. Now, if on examining
16 it he figures there's no decent issue here, he
17 writes an Anders brief.

18 Now, why draw a line? Why complicate
19 the law? Why make it more difficult for the
20 perhaps confused, unknowledgeable defendant who
21 occasionally is right? I mean, why?

22 MR. JORGENSEN: Well, first off,
23 Strickland is the general standard. It all --

24 JUSTICE BREYER: Yeah, but it's
25 exactly the same. We say, on the ordinary

1 case, no agreement, we say if the client asks
2 you, you have to do it, even without prejudice,
3 because he has been deprived of a lawyer at a
4 critical stage of the proceeding and we presume
5 prejudice.

6 Now, why not say identical thing? By
7 the way, if he doesn't ask you, well, then if
8 there really is a good reason, you should have
9 appealed anyway. But we don't have to go into
10 that because that isn't in this case. Okay?

11 So, again, same question, why draw
12 such a line?

13 MR. JORGENSEN: For a couple of
14 reasons. First off, the general Strickland
15 standard is sufficient to catch those instances
16 where there is a mistake, where -- where trial
17 counsel has not behaved in a manner that is
18 acceptable, that meets those minimum
19 constitutional requirements.

20 And, second off, generally where this
21 Court will apply a presumption, it is under the
22 expectation that applying that presumption will
23 reach the correct result in most cases, most
24 instances.

25 Here the presumption is going to lead

1 to an incorrect result in most instances,
2 simply because the waiver is ultimately going
3 to be enforced. So there's no reason to doubt
4 in this case that the waiver would have
5 ultimately been enforced.

6 And it's certainly not a -- a
7 difficult burden to put on Mr. Garza and those
8 like him, to put some reason to believe the
9 waiver would not have been enforced in relation
10 to his appeal.

11 JUSTICE BREYER: That's disheartening
12 because we would hope that in trials and in
13 guilty -- guilty plea proceedings, there are
14 also very few grounds for appeal.

15 And you're saying -- I see your point.
16 Your point is, oh, there are a lot there, but
17 there aren't many here. I hope that -- you
18 see, I -- I find that a difficult ground to use
19 as making this distinction, if for no other
20 reason that I have no idea if that's true or
21 not.

22 MR. JORGENSEN: That what's true or
23 not, Your Honor?

24 JUSTICE BREYER: That there are lots
25 of grounds for appealing a trial. There are

1 lots of grounds for appealing a guilty plea
2 proceeding. But there are only a very few
3 grounds for appealing when there is a waiver of
4 appeal. I would hope in all those cases there
5 are very few.

6 I don't know, and so I find it hard to
7 draw -- write an opinion which said the reason
8 you don't get exactly the same right is because
9 you have fewer likely grounds for appeal.

10 MR. JORGENSEN: Well, I think that the
11 right -- again, it's not just a limitation of
12 the issues you can raise on appeal. It is a
13 waiver of the actual proceeding itself, except
14 in certain limited circumstances.

15 JUSTICE ALITO: Is there any practical
16 difference in -- differences between the
17 consequences of taking a hopeless appeal when
18 there is no plea -- when there is no appeal
19 waiver and the consequences of taking a
20 hopeless appeal that is covered by a plea
21 waiver?

22 MR. JORGENSEN: Yes, there is. And
23 the reason is that, for example, had there been
24 no waiver in this case and he wanted to raise
25 his sentence, the court would have dealt with

1 it fairly summarily on the basis of: Well,
2 that's invited error; you lose. But that would
3 have been effect -- ultimately a merits
4 determination.

5 Where there is a waiver and he says I
6 want to challenge my sentence, then the court
7 applies the waiver, dismisses the case. You
8 never even have any sort of ruling on the
9 merits. You've never had a challenge to the
10 judgment. You've only had a -- a question
11 of --

12 JUSTICE SOTOMAYOR: I don't --

13 MR. JORGENSEN: -- does the waiver
14 preclude this proceeding?

15 JUSTICE SOTOMAYOR: I don't
16 understand. It's a ruling on the merits. You
17 have no case. Both of them are you have no
18 case. How you -- I don't understand there
19 being a difference between what -- I don't know
20 if it was you or the government who suggested
21 threshold -- threshold and merit issues. It's
22 a decision on the appeal. A motion to dismiss
23 is on the merits.

24 MR. JORGENSEN: Well, I think that a
25 motion to dismiss is on the applicability of

1 the waiver. In other words, is -- is -- does
2 the waiver kick in to foreclose the appeal?
3 And that's a different question than getting
4 the full panoply of plea rights or -- or of
5 appeal rights, excuse me, where you get to the
6 -- you do get to the merits -- to the briefing,
7 you can assert your issues through the briefing
8 and ultimately get a written decision that will
9 either affirm or reverse the judgment.

10 JUSTICE KAVANAUGH: Counsel, in
11 addition to Justice Breyer's question of why
12 complicate the law, or on top of that question,
13 what practical harm has there been in those
14 jurisdictions, those areas, that have applied
15 the presumption? Because I haven't seen much
16 evidence of practical problems from the
17 presumption.

18 MR. JORGENSEN: Well, it is -- it is
19 true that most courts deal with these fairly
20 quickly and summarily up front. But we would
21 argue that that's a reason why there -- there
22 shouldn't be this generalized rule, a -- a
23 bright-line rule that's going to just simply
24 get that is -- is probably not a good
25 bright-line rule.

1 JUSTICE KAVANAUGH: But -- but it's
2 very simple, I think you are agreeing --

3 MR. JORGENSEN: Yes.

4 JUSTICE KAVANAUGH: -- for the court
5 when they get an appeal, so to pick up Justice
6 Ginsburg's point, if the appeal is reinstated,
7 you get the appeal, well, most issues are
8 probably going to be within the scope of the
9 waiver and then there might be, in some cases,
10 something outside the scope of the waiver.
11 Oftentimes those are not meritorious, of
12 course, and are quickly dealt with. Sometimes
13 they are, though.

14 It's -- seems pretty simple for most
15 appellate courts to deal with that, and I'm not
16 sure there's any evidence of a problem. And if
17 there's not evidence of a problem, why
18 complicate the law, as Justice Breyer says?

19 MR. JORGENSEN: What the state gets
20 out of these types of agreements is the
21 procedure itself. In other words, there's
22 finality of judgment from the state --

23 JUSTICE KAVANAUGH: But -- but -- I'm
24 sorry to interrupt, but I think you
25 acknowledged the appeal waiver gives up the

1 appeal except in certain limited circumstances.

2 MR. JORGENSEN: Right.

3 JUSTICE KAVANAUGH: And that goes to
4 my point earlier. An appeal waiver never gives
5 up everything. It can't.

6 MR. JORGENSEN: Right.

7 JUSTICE KAVANAUGH: It can't. And
8 because it never can give up everything, you've
9 never actually forfeited the entire procedure.

10 MR. JORGENSEN: That's right. But
11 there -- but it -- it would require a minimal
12 showing to show that ultimately the appeal that
13 the defendant wanted and had a right to was one
14 of these things outside of the scope of the
15 waiver.

16 And I think that that's the crucial
17 difference here. Mr. Garza, in the
18 post-conviction case, was asked specifically
19 what issue would you raise on appeal if I
20 reinstate your appeal rights? The district
21 court asked in that decision. And Mr. Garza's
22 answer was: My sentence.

23 So it would -- it would not be an
24 onerous burden for somebody with an appeal
25 waiver challenging the decision of counsel to

1 say, you know what, I can convince this court
2 that I would have raised one of the
3 automatically excluded areas.

4 JUSTICE ALITO: I think Mr. -- I think
5 Mr. Ali said that -- that Garza would like to
6 raise the issue of the voluntariness of his
7 agreement. Is that still an open question?

8 MR. JORGENSEN: No, Your Honor. He
9 never said that in the state courts.

10 JUSTICE ALITO: Well, has there been a
11 decision on that issue by any state court?

12 MR. JORGENSEN: The district court, at
13 I believe pages 31 through 32 -- or, excuse me,
14 30 through 32a of the appendix on the -- the
15 petition, the district court specifically asked
16 Garza what issues do you wish to raise on
17 appeal? If -- if we reinstated your right,
18 what would you pursue? And he specifically
19 limited it to the sentence issue. And
20 specifically the court noted that Mr. Garza had
21 not raised any direct challenge to the waiver.

22 JUSTICE SOTOMAYOR: Counsel, I'm
23 looking at page 5 of the brief, the blue brief,
24 and so you didn't write it, but it says that,
25 "Mr. Garza promptly filed a pro se petition for

1 post-conviction relief. In it, he asserted
2 that his trial counsel rendered ineffective
3 assistance by disregarding his instruction to
4 file a notice of appeal. Mr. Garza further
5 argued that he did not knowingly and
6 voluntarily plead guilty and that he had
7 entered an involuntary plea."

8 MR. JORGENSEN: Yes. He did.

9 JUSTICE SOTOMAYOR: So let's --

10 MR. JORGENSEN: He did.

11 JUSTICE SOTOMAYOR: So may I assume
12 the following, that that's what he wanted to
13 appeal, but his attorney, by never conferring
14 with him, didn't get that information.

15 MR. JORGENSEN: No.

16 JUSTICE SOTOMAYOR: Your answer would
17 be if the attorney wasn't told that by his
18 client because the attorney never asked his
19 client, that that's not ineffective assistance
20 of counsel in this situation where the attorney
21 asked him to file a notice of appeal?

22 MR. JORGENSEN: It might have been
23 ineffective assistance of counsel if that is,
24 in fact, what he wanted and his attorney failed
25 to ascertain that through consultation.

1 If I may continue --

2 CHIEF JUSTICE ROBERTS: Just briefly,
3 one --

4 MR. JORGENSEN: Very briefly. Pages
5 30a through 31a of the appendix to the
6 petition, Garza's already dismissed claim that
7 his pleas were involuntary. Had he contended
8 he did not appreciate or understand the appeal
9 waivers when he entered his pleas, but Garza
10 has never so contended at any stage of these
11 post-conviction cases. And the footnote also
12 addresses that.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Kedem.

16 ORAL ARGUMENT OF ALLON KEDEM
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE RESPONDENT

19 MR. KEDEM: Mr. Chief Justice, and may
20 it please the Court:

21 A prejudice inquiry under Strickland
22 is the normal tool for identifying which final
23 criminal judgments should be reopened based on
24 counsel's ineffective assistance.

25 That is, cases where the harm to

1 finality is justified by increased accuracy and
2 reliability, the court should not abandon that
3 case-specific inquiry here where any benefits
4 would exist only in exceptional cases.

5 A lot of the focus of argument today
6 has been on the question whether counsel has an
7 obligation to file a notice of appeal under
8 various circumstances. That is the question of
9 deficient performance.

10 I'd like to refocus the Court, if I
11 may, on the question of prejudice, which is the
12 one that we have focused on in our brief.

13 The question there, we think, is
14 governed by Flores-Ortega. Strickland always
15 requires for a showing of prejudice that there
16 be case-specific circumstances that show that
17 the defendant was prejudiced by his counsel's
18 errors.

19 What Flores-Ortega tells us is that
20 once you know that the reason that the
21 defendant lost out on an appellate proceeding
22 to which he had a right, because of what
23 counsel did, that automatically is prejudicial.

24 You don't have to know whether he was
25 going to win his appeal.

1 JUSTICE GORSUCH: But why doesn't that
2 answer the question here?

3 MR. KEDEM: Sure.

4 JUSTICE GORSUCH: Because there's
5 undoubtedly a statutory right to appeal.

6 MR. KEDEM: That's right.

7 JUSTICE GORSUCH: And the waiver is
8 only good if it's asserted. And often the
9 government fails to assert it in a timely
10 fashion in the courts of appeals, and the court
11 of appeals just disregard the waiver all
12 together.

13 MR. KEDEM: Right.

14 JUSTICE GORSUCH: It is in the nature
15 of an affirmative defense that you'd lose if
16 you don't use.

17 So why isn't it the denial in a
18 proceeding to which the defendant is entitled
19 by law?

20 MR. KEDEM: So the question is not
21 merely whether he would have filed a notice of
22 appeal and submitted some brief that the court
23 would have read, if we know based on the
24 circumstances that the court would just have
25 thrown out the proceeding at the threshold --

1 JUSTICE BREYER: I read what it says
2 in Flores-Ortega. Maybe I only got it in part,
3 but it says, the court noted failure to file a
4 notice of appeal is "the complete denial of
5 counsel during a critical stage of a judicial
6 proceeding," a situation ordinarily requires a
7 "presumption of prejudice."

8 MR. KEDEM: That's right. But
9 elsewhere it --

10 JUSTICE BREYER: Okay. So I take that
11 to mean if your client asks you, the lawyer,
12 file a notice of appeal, you've got to do it.
13 And if you don't do it, it's automatically
14 prejudice.

15 Now, isn't -- isn't -- and my question
16 was, well, why isn't that exactly the same
17 here? Now, which part am I wrong? Am I wrong
18 that that's what Flores-Ortega says or am I
19 wrong that this is the same?

20 MR. KEDEM: So Flores-Ortega certainly
21 says what you're talking about --

22 JUSTICE BREYER: All right.

23 MR. KEDEM: -- but it also clarifies
24 elsewhere that the type of appeal to which
25 we're talking about is an appeal to which the

1 defendant has a right, which is to say, a
2 merits proceeding.

3 If a defendant, for instance, asks to
4 appeal to the wrong court, he wants to appeal
5 to the Ninth Circuit, rather than to an Idaho
6 state appellate court, no one would say that if
7 his attorney declines to file that notice of
8 appeal, knowing that it would just be tossed
9 out without any consideration of the merits of
10 his claims, that the defendant has been
11 prejudiced in the sense that -- that the Sixth
12 Amendment cares about because Strickland uses
13 the term prejudice --

14 JUSTICE GORSUCH: Because he has no
15 legal right to that kind of appeal.

16 MR. KEDEM: That's correct.

17 JUSTICE GORSUCH: But he does have a
18 legal right to appeal to the court -- relevant
19 court of appeals. That is a statutory right.

20 Now perhaps Congress could change
21 that, and say in appeal waivers cases, you
22 know, I'm sure the government can go seek that,
23 but for now, at least, there's a statutory
24 right to appeal to the right court.

25 So back to Justice Breyer's question,

1 I think we've --

2 MR. KEDEM: Sure.

3 JUSTICE GORSUCH: -- removed that
4 complication you've added.

5 MR. KEDEM: Well, let me give you
6 another example. Let's say five years after
7 his conviction, the defendant says to his
8 attorney: I want to file a notice of appeal.

9 And there is no jurisdictional defect
10 because the timing of a notice of appeal in a
11 criminal case is not jurisdictional. If the
12 attorney declines because he knows that there
13 would be no consideration of the merits --

14 JUSTICE GORSUCH: Again, I think
15 that's just evading the hypothetical,
16 respectfully, counsel. And there may be no
17 legal right in those instances.

18 I am talking about a case where it is
19 the right court and the right period of time
20 and there is a statutory right. I think that's
21 what Justice Breyer is trying to aim at. And
22 maybe you could too.

23 MR. KEDEM: So --

24 JUSTICE BREYER: And you also might
25 have some good arguments. The chances are, you

1 don't.

2 MR. KEDEM: Right.

3 JUSTICE BREYER: Let's look at the
4 Anders briefs filed in those cases where there
5 was no waiver.

6 MR. KEDEM: Sure.

7 JUSTICE BREYER: I mean --

8 MR. KEDEM: You know --

9 JUSTICE BREYER: -- none of those
10 cases did he have a really good argument, or
11 the lawyer wouldn't have failed an Anders
12 brief.

13 MR. KEDEM: So here is why we think it
14 is different in a case where the defendant just
15 has bad arguments of the sort that might get
16 asserted in an Anders brief.

17 You still know there that if a notice
18 of appeal is filed, that there will be review
19 on the merits. He may lose, but he is still
20 going to have his claims reviewed, and if the
21 court of appeals disagrees with him, it's going
22 to affirm. It's not going to dismiss the
23 appeal, which is what happens in the case of an
24 appellate waiver.

25 And so what Flores-Ortega tells us is

1 we care about the type of error that would
2 undermine our faith in the reliability of the
3 proceedings, but if all you've lost out on is
4 an opportunity to have your claims tossed out
5 without any merits review whatsoever,
6 Flores-Ortega does not tell us that that type
7 of loss counts as prejudice.

8 JUSTICE ALITO: Do you think we can
9 get anything out of the question whether the
10 defendant has a legal right to file some thing
11 there? Isn't it the case that under statutes
12 and under rules, defendants have the right to
13 do all sorts of things during a criminal
14 proceeding, but for almost all of those, the
15 decision is made by the attorney?

16 MR. KEDEM: That's correct. The
17 question is more about whether the loss of a
18 proceeding undermines our faith in the
19 reliability of the criminal judgment.

20 If the answer there is no, then the
21 defendant hasn't lost anything that the Sixth
22 Amendment was designed to protect.

23 JUSTICE BREYER: Sorry. Maybe this --
24 I don't understand.

25 We have a trial or a guilty plea. The

1 defendant says appeal; he files an Anders
2 brief.

3 MR. KEDEM: That's correct.

4 JUSTICE BREYER: And what you saying
5 is the court will read it, and he has a chance
6 to file his own, and then it will write the
7 word affirmed, all right?

8 So now what we have is this case. He
9 might have some good arguments, you know, he
10 might, but the lawyer thinks not. And the
11 lawyer says: I filed an Anders brief, I have
12 looked through it, there's nothing to it, and
13 they don't write the word affirmed?

14 MR. KEDEM: I know they don't --

15 JUSTICE BREYER: Do you know that they
16 don't write the word affirmed, rather, that
17 they write the word dismissed? I've never seen
18 that, you know. I've never seen -- that
19 doesn't mean it isn't true.

20 MR. KEDEM: Well, Justice --

21 JUSTICE BREYER: Do you know that the
22 court of appeals writes the word dismissed and
23 not the word affirmed?

24 MR. KEDEM: That's right. In our
25 brief we have a footnote citing decisions from

1 every circuit in the federal system --

2 JUSTICE BREYER: Where they'll say
3 dismissed, and not affirmed?

4 MR. KEDEM: -- in which they dismiss.

5 JUSTICE BREYER: All right. So that's
6 what the difference really comes down to in
7 your mind?

8 MR. KEDEM: It's -- it's -- that is
9 one technical difference, but I think it also
10 goes to the question: Are they reviewing the
11 claims on the merits? When there's a loss of a
12 proceeding in which no merits review occurs,
13 that doesn't undermine our faith in the
14 reliability of the proceedings.

15 It's also important to note that an
16 appellate waiver doesn't just make the
17 likelihood of success on appeal lower. It's an
18 additional obstacle that would prevent the
19 defendant's claims even from getting
20 consideration. And so if we want to rule out
21 that obstacle, we have to do some additional
22 investigation.

23 We can look either to direct evidence
24 that the defendant was on the verge of
25 appealing some claim that would have gotten

1 merits consideration, or if we don't have
2 direct evidence based on communications or
3 contemporaneous evidence, we can look to the
4 existence of some non-frivolous claim outside
5 the scope of the waiver that the defendant had,
6 which provides circumstantial evidence that had
7 a notice of appeal been filed, he would have
8 appealed some claim that got merits review.

9 JUSTICE GORSUCH: How does that fit
10 with the usual breakdown of responsibilities
11 between client and lawyer where we normally
12 assume that clients only specify objectives or
13 ends and that the lawyer has the obligation
14 under ethical rules and, mostly -- most of our
15 Sixth Amendment jurisprudence to -- to pick the
16 appropriate means?

17 So if a client says I wish to appeal
18 anything that's possible, why isn't that a
19 necessary directive to the lawyer to figure out
20 which possible things fall outside the waiver
21 or -- or those sorts of things? Why does a
22 client have to come forward and identify the
23 winning argument?

24 MR. KEDEM: So, again, we're not
25 talking about counsel's obligations or the

1 client's obligations on direct review. When
2 we're on collateral review, trying to figure
3 out why it was that the defendant either was or
4 wasn't harmed, the normal burden under
5 Strickland is that a defendant who seeks to
6 reopen an otherwise final judgment has the
7 burden in all cases to establish that he was
8 prejudiced.

9 Now, it may be that as a theoretical
10 matter, any defendant could always challenge
11 something outside the scope of his waiver. He
12 could always challenge, for instance, whether
13 his plea was voluntary, but we shouldn't start
14 with the assumption for all cases that all
15 defendants are intending to challenge, for
16 instance, the voluntariness of their pleas.

17 Not only does that invert the normal
18 burden of proof under Strickland, it's contrary
19 to experience.

20 It's also contrary to what this Court
21 has said about frivolous appeals; namely --

22 JUSTICE KAVANAUGH: In terms of
23 experience, does the federal government think
24 that the experience of those circuits that have
25 applied a presumption of prejudice has shown a

1 problem?

2 MR. KEDEM: So it's a problem only
3 that it leads to the reinstatement of
4 additional frivolous appeals. We're not saying
5 that it's such a big problem that the sky is
6 going to fall in, but it does create a couple
7 practical problems.

8 Number 1, in addition to additional
9 frivolous appeals, there are a lot of circuits
10 that don't act on motions to dismiss on the
11 basis of waivers until after full briefing on
12 the argument -- on the merits, which means the
13 government loses a lot of the benefit of its
14 bargaining.

15 The second one is that when you're on
16 collateral review, you end up focusing just on
17 the evidentiary question, the very difficult
18 evidentiary question, whether the defendant
19 actually asked for a notice of appeal, which
20 can be burdensome to prove.

21 JUSTICE SOTOMAYOR: I'm sorry. Those
22 circuits don't believe in Anders briefs?

23 MR. KEDEM: It -- the Anders brief
24 doesn't answer the question, because --

25 JUSTICE SOTOMAYOR: No, no, no, no, I

1 -- it does. I mean --

2 MR. KEDEM: So all circuits believe in
3 Anders brief, but an Anders brief requires --

4 JUSTICE SOTOMAYOR: So if an attorney
5 has filed a notice of appeal and doesn't file
6 an Anders brief, it means that he or she
7 believes they have some viable -- potentially
8 viable argument. Right?

9 So the fact that the court requires
10 briefing on that, why is that an additional
11 burden?

12 MR. KEDEM: It's an additional burden
13 to require the government to address the merits
14 when really the case should be thrown out at
15 the threshold because all of the defendants'
16 claims have been waived.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Two minutes, Mr. Ali.

20 REBUTTAL ARGUMENT OF AMIR H. ALI

21 ON BEHALF OF THE PETITIONER

22 MR. ALI: Thank you, Mr. Chief
23 Justice.

24 I just want to really make one point,
25 maybe with two parts, responding to the United

1 States' suggestion that really we're dealing
2 here with a -- a -- a formalistic or symbolic
3 appeal.

4 And I just want to do it on the
5 context of this record with the real practical
6 consequences this could have for Mr. Garza.

7 As we note on page 32 of our opening
8 brief, Mr. Garza here has a very colorable, I
9 think meritorious claim, that his appeal waiver
10 was involuntary.

11 We address the specific facts there,
12 which include shortly before his second plea,
13 indicating on a form that he was not waiving
14 his right to appeal; going into two plea
15 hearings, neither of which inquired, as
16 required under state law under Rule 11, into
17 whether he was waiving his right to appeal; and
18 then being advised three times in -- once in
19 the hearing and twice in judgments, that he had
20 a right to appeal.

21 And -- and I just want to note that
22 that claim could not be raised on
23 post-conviction. Justice Alito, you asked
24 whether it was raised and dealt with. The
25 answer is no.

1 The very pages that were referred to
2 you, that you were referred to by the State,
3 the district court says: I do not understand
4 Mr. Garza to be challenging the voluntariness
5 of his appeal waiver. I see his pro se
6 petition as only addressing the voluntariness
7 of his plea agreement as a whole.

8 So even though the lack of advice at
9 the Rule 11 hearing would seem to support his
10 claim, I will not consider it that way.

11 And if I could just finish in
12 summation by saying that the substantial
13 majority of the circuits have adopted the rule
14 Petitioner proposed in this case. Those
15 circuits account for approximately 95 percent
16 of the guilty pleas in the federal system, and
17 no problems have been shown with that rule, we
18 ask the Court to adhere to it; whereas here a
19 defendant satisfies a court that he wanted to
20 challenge the lawfulness of the proceedings he
21 got, his state-appointed attorney, his agent,
22 has no place substituting his own view that his
23 client should simply cede and go off to prison.
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:07 p.m., the case
3 was submitted.)

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