No. 17-1026

IN THE
Supreme Court of the United States

GILBERTO GARZA, JR.,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF OF THE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

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INTEREST OF *AMICI CURIAE*[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers ("IACDL") is a nonprofit, voluntary organization of attorneys. Currently, IACDL has over

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amicus*, its members, and its counsel made such a contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal courts, and attorneys who focus on trials, appeals, postconviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially for those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensuring that Idaho defendants receive adequate assistance of counsel at trial and that they are fully able to effectuate their rights to appeal.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys and strives to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members—up to 40,000, counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

Given the size and breadth of IACDL's and NACDL's memberships, the organizations have substantial practical expertise regarding how defense attorneys, their clients, and courts operate. IACDL and NACDL likewise have insight into how each of those actors deals with the issues implicated by this case, *i.e.*, the scope and validity of plea agreements and appeal waivers, and ineffective assistance of counsel claims.

SUMMARY OF ARGUMENT

This case arises from counsel's failure to file notices of appeal against the client's instructions in two different cases. In 2015, Mr. Garza signed guilty pleas containing waivers of his rights to appeal. Pet. App. 44a ¶7, 49a ¶6. But the trial court "advised Garza of his appeal rights anyway." *Id.* at 3a. After sentencing, Mr. Garza asked his trial counsel to file notices of appeal. See *ibid.* Counsel refused. See *ibid.*

Mr. Garza then filed petitions for postconviction relief, arguing, among other things, that his plea was involuntary and that his counsel was ineffective for failing to file notices of appeal. Pet. App. 29a-30a. The Idaho Supreme Court affirmed dismissal of the petitions, holding that Mr. Garza could not show ineffective assistance of counsel because he could not prove any prejudice from his counsel's failure to follow instructions. See *id.* at 38a-39a. That decision was wrong: Mr. Garza was entitled to a presumption of prejudice, a presumption that is appropriate in this case notwithstanding the presence of an appeal waiver.

I. An attorney's failure to file a notice of appeal badly disadvantages a defendant. As this Court held in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), that failure "demands a presumption of prejudice" because it results in the "forfeiture of a proceeding." *Id.* at 483. That remains true even where a defendant has agreed to an appeal waiver.

Appeal waivers vary dramatically in form and scope. Thus, defendants will often have viable appellate claims despite appeal waivers, simply because the claims fall outside the scope of the waiver. Moreover, one thing that all waivers have in common is that they allow defendants

to pursue at least some claims on appeal. No waiver categorically bars every type of appeal.

Given those facts, it is no surprise that defendants have often succeeded on appeal despite waivers. In some cases, defendants have prevailed on arguments that fall beyond the scope of their particular waivers. In others, they have succeeded in challenging their convictions and sentences despite even the broadest waivers, based on the involuntariness of the plea, the inadequate factual basis for the plea, or breach of the plea agreement by the government—to name only a few bases for relief.

There is thus no reason to deviate from the presumption of prejudice that applies under *Flores-Ortega* simply because the plea agreement contains a waiver. Defendants whose counsel refuse to file a notice of appeal suffer the same fate whether or not they have agreed to a waiver: They forfeit their direct appeals—appeals that may well have been successful despite the waiver. The same presumption of prejudice should therefore apply in both circumstances.

II. Although a defendant wrongfully denied an appeal could still attempt to pursue certain claims on collateral review, that review is an inadequate substitute for a direct appeal. Issues generally may not be raised for the first time in postconviction proceedings. As a result, a defendant whose attorney failed to file a notice of appeal may never have an opportunity to raise certain claims.

Even if a defendant can raise a claim in postconviction proceedings, the defendant will typically have to do so under heightened pleading standards. And the defendant will also normally have to do so without the benefit of counsel. Those obstacles create an intolerable risk that defendants who involuntarily signed guilty pleas will end up in prison.

The judgment below should be reversed.

ARGUMENT

I. A Presumption Of Prejudice Is Appropriate Because Defendants Often Succeed On Appeal Despite Waivers

This Court held in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), that prejudice should be presumed where counsel fails to notice an appeal against the client's instructions because that failure results in the "forfeiture of a proceeding." *Id.* at 483. An appeal waiver does not provide a sufficient reason to deviate from that presumption.

Appeal waivers differ dramatically in form and content across jurisdictions. See Susan R. Klein, *et al.*, *Waiving the Criminal Justice System*, 52 Am. Crim. L. Rev. 73, 122-126 (2015) (collecting examples). Some waivers apply only to direct appeals, some waive only certain errors in sentencing or trial, some permit appeals on all issues with certain exceptions, and some expressly permit defendants to bring certain substantive claims. Even the broadest waivers may be successfully challenged on the ground that the plea was involuntary, among others. See *Campbell* v. *United States*, 686 F.3d 353, 358 (6th Cir. 2012) ("[W]aiver[s] of appeal rights can be challenged on various * * * grounds * * *."); *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007) (appeal waivers "d[o] not foreclose appeal altogether"); *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) (Sotomayor, J.) (appellate relief is "not inconceivable" even if defendant seems to have "sign[ed] away the right to appeal").

As a result, defendants who agree to waivers may still bring certain claims on appeal—including claims that fall outside the scope of the waiver or challenges to the validity of the plea. Examples abound of defendants who have succeeded on such claims.

An attorney's decision, over the client's express instructions, to forfeit the client's appeal can thus have profound effects. Regardless of an appeal waiver, forfeiting an appeal can be the difference between conviction or no conviction. Or it can affect the amount of time a person spends behind bars. A presumption of prejudice is necessary to ensure that defendants do not suffer the consequences of their attorneys' unilateral decisions not to notice their appeals.

A. Defendants Often Succeed on Appeal Based on Issues Beyond the Scope of Their Particular Waivers

Many appeal waivers do not even purport to bar all potentially available claims. Often, waivers are written or interpreted to bar only certain claims, leaving others available for appellate review. The federal courts of appeals unanimously agree that "[a] valid and enforceable appeal waiver * * * only precludes challenges that fall within its scope." *United States* v. *Hardman*, 778 F.3d 896, 899 & n.2 (11th Cir. 2014) ("All eleven * * * circuits with criminal jurisdiction agree * * *.").[2] Thus, even in

[2] See also *United States* v. *Santiago-Burgos*, 750 F.3d 19, 22-23 (1st Cir. 2014) (similar); *United States* v. *Grimes*, 739 F.3d 125, 128-129 (3d Cir. 2014) (similar); *United States* v. *Droganes*, 728 F.3d 580, 586 (6th Cir. 2013) (similar); *United States* v. *Davis*, 689 F.3d 349, 354-355 (4th Cir. 2012) (similar); *United States* v. *Scallon*, 683 F.3d 680, 682 (5th Cir. 2012) (similar); *United States* v. *Lonjose*, 663 F.3d 1292, 1297 (10th Cir. 2011) (similar); *United States* v. *Chapa*, 602 F.3d 865, 868 (7th Cir. 2010) (similar); *United States* v. *Selvy*, 619 F.3d 945, 950-951 (8th Cir. 2010) (similar); *United States* v. *Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005) (similar); see, *e.g.*, *United States* v. *Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016) (permitting appeal because waiver did not "unambiguously foreclose [defendant's] challenges"); *United States* v. *Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006) (determining whether challenge "fall[s] within the scope of [defendant's] appeal waiver").

cases involving appeal waivers, defendants will often have potentially meritorious appellate claims based on issues beyond the scope of the waiver. That prospect alone forecloses any argument that a presumption of prejudice is inappropriate for cases involving appeal waivers.

1. The variations in the scope of appeal waivers are almost infinite. Certain waivers, for example, apply only to challenges to the defendant's sentence, not to the underlying conviction. See, *e.g.*, Plea Agreement ¶7, *United States* v. *Lopez*, No. 1:04-cr-00209-LY-1 (W.D. Tex. filed Sept. 20, 2004), Dkt. 73-2 ("Defendant expressly waives the right to appeal *his sentence* on any ground * * *." (emphasis added)). Those waivers necessarily leave open broad grounds for appeal.

In *United States* v. *Palmer*, 456 F.3d 484 (5th Cir. 2006), for example, the defendant signed an appeal waiver that barred appeals of the "sentence imposed" but did not expressly mention direct appeals from his conviction. *Id.* at 486-487. The defendant sought to appeal his conviction on the ground that there was no adequate factual basis for his guilty plea. *Id.* at 489. The court allowed the appeal, holding that "the language barring a sentencing appeal" did not "bar[] appeal of a conviction." *Id.* at 488. "A defendant's waiver of his right to appeal a sentence is just that," the court explained—"it does not also constitute a waiver of his right to challenge a conviction." *Ibid.* The court ultimately vacated one count, finding that the plea was "based on facts precluding conviction." *Id.* at 492.

2. Some waivers expressly allow defendants to bring certain specific substantive claims on direct appeal. Claims of prosecutorial misconduct, for example, are often expressly carved out. See, *e.g.*, Plea Agreement at 9-

10, *United States* v. *Daniels*, No. 3:11-cr-00008-WKW-CSC (M.D. Ala. filed Feb. 16, 2012), Dkt. 203 (waiver covering "any and all rights" to appeal except "the right to appeal on the ground of * * * prosecutorial misconduct"); Plea Agreement ¶9, *United States* v. *Campbell*, No. 4:16-mj-03179-JR (D. Ariz. filed Aug. 31, 2016), Dkt. 27 (similar). So are challenges based on newly discovered evidence or changes in law. See, *e.g.,* Plea Agreement ¶4, *United States* v. *Stolkner*, No. 2:15-cr-00143-JDL (D. Maine filed Mar. 29, 2016), Dkt. 116 ("waiver * * * shall not apply to appeals based on a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"); Plea Agreement ¶13, *United States* v. *Irish*, No. 1:13-cr-00142-PB (D.N.H. filed Dec. 11, 2014), Dkt. 102 (similar).

Other waivers permit defendants to raise certain errors relating to their sentencing proceedings. Many permit defendants to appeal if the sentence exceeds the applicable guidelines range. See, *e.g.*, Plea Agreement ¶15, *United States* v. *Newton*, No. 1:13-cr-00094-LPS-1 (D. Del. filed Sept. 19, 2013), Dkt. 48. Others limit review to certain issues, such as "any right [the defendant] may have * * * to appeal the sentencing court's determination of the criminal history category." Plea Agreement at 11, *United States* v. *Fortuna*, No. 1:12-cr-00636-NLH (D.N.J. filed Aug. 15, 2013), Dkt. 109. Others permit an appeal if the sentence imposed exceeds the stipulated maximum. See, *e.g.*, Plea Agreement at 9-10, *United States* v. *Flanders*, No. 2:12-cr-00363-TLN-EFB (E.D. Cal. filed Feb. 2, 2015), Dkt. 59; Plea Agreement ¶24(a)(1)-(2), *United States* v. *Montgomery*, No. 1:13-cr-00273-CG-C-1 (S.D. Ala. filed Feb. 7, 2014), Dkt. 17 (similar); see also Plea Agreement at 11, *United States* v. *Martinez*, No. 8:04-cr-00567-EAK-TGW (M.D. Fla. filed

Oct. 17, 2005), Dkt. 67 (allowing challenges on "ground that the sentence violates the Eighth Amendment").

Other waivers preserve arguments relating to rulings on motions to suppress evidence. See, *e.g.*, Plea Agreement at 11, *United States* v. *Torres*, No. 2:12-cr-00154-KJD-GWF-1 (D. Nev. filed Dec. 31, 2013), Dkt. 60 (permitting appeal based on "the District Court's denial of [defendant's] motion to suppress" as to "the inventory search of [defendant's] vehicle"). Or they preserve the defendant's "ability to appeal [certain] conditions of supervised release." See, *e.g.*, Plea Agreement at 10-11, *United States* v. *Cervantes*, No. 5:09-cr-00011-VAP (C.D. Cal. filed Mar. 31, 2010), Dkt. 127.

Some waivers expressly permit challenges to the voluntariness of the plea (claims that courts generally permit regardless of the waiver's language, see pp. 12-13, *infra*). See, *e.g.*, Plea Agreement ¶18, *United States* v. *Baxter*, No. 3:10-cr-00074 (M.D. Tenn. filed Feb. 15, 2013), Dkt. 43 (waiver "shall [not] apply to a claim of involuntariness"). Others expressly permit claims for ineffective assistance of counsel (which courts likewise normally permit regardless of the waiver's specific language, see pp. 11-12, *infra*). See, *e.g.*, Plea Agreement ¶15, *United States* v. *Brooks*, No. 1:14-cr-00209-TWP-TAB (S.D. Ind. filed July 28, 2015), Dkt. 139 ("This * * * waiver does not encompass claims that Defendant received ineffective assistance of counsel in the negotiation of the plea or plea agreement."); Plea Agreement ¶2, *United States* v. *Wong*, No. 4:11-cr-427-PJH-1 (N.D. Cal. filed Jan. 12, 2017), Dkt. 43 (similar); Plea Agreement ¶8,

United States v. *Mangels*, No. 9:16-cr-00006-DLC (D. Mont. filed June 13, 2016), Dkt. 50 (similar).[3]

3. Even seemingly broad appeal waivers have been interpreted to exclude certain claims.

In *State* v. *Straub*, 153 Idaho 882 (2013), for example, the Supreme Court of Idaho held that a challenge to a restitution order fell outside the scope of a broadly worded waiver. *Id.* at 886. The defendant "waive[d] the right to appeal any issues regarding the conviction, including all matters involving the plea or sentencing." *Id.* at 885. The defendant argued that the waiver did "not encompass his right to appeal from the district court's restitution order since restitution proceedings are not part of a defendant's sentence." *Id.* at 886 (quotation marks omitted). The court agreed, concluding that the restitution order was an abuse of discretion and vacating the order. See *id.* at 887, 890.[4]

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[3] Courts sometimes find that ineffective assistance of counsel claims "fall outside the scope" of appeal waivers, but defer them to § 2255 proceedings to allow further development of the record. See, *e.g.*, *United States* v. *Benson*, 553 F. App'x 660, 661 (8th Cir. 2014); *United States* v. *Waupoose*, 394 F. App'x 320, 322 (7th Cir. 2010); cf. *United States* v. *Pease*, 240 F.3d 938, 943 n.5 (11th Cir. 2001) (assuming *Apprendi* issue fell "outside the scope of th[e] appeal waiver").

[4] See also *In re Sealed Case*, 702 F.3d 59, 63-65 (D.C. Cir. 2012) (defendant "did not knowingly waive his right to appeal the restitution order" because appeal waiver was ambiguous); *United States* v. *Schulte*, 436 F.3d 849, 850 (8th Cir. 2006) ("A waiver limited to 'whatever sentence is imposed' does not foreclose an appeal of a restitution order * * *." (quoting *United States* v. *Sistrunk*, 432 F.3d 917, 918 (8th Cir. 2006)); *Oladimeji*, 463 F.3d at 156-157 (restitution order not covered by waiver of right to appeal "sentence"); *United States* v. *Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012) (similar); *United States* v. *Zink*, 107 F.3d 716, 717-718 (9th Cir. 1997) (similar).

Courts have identified numerous other issues as beyond the scope of appeal waivers. See, *e.g.*, *United States* v. *Jacobson*, 15 F.3d 19, 22-23 & n.1 (2d Cir. 1994) (reading "agreement narrowly" to find that challenge to court's reliance on defendant's "naturalized status as the basis for the sentence" had not been waived); *United States* v. *Parenteau*, 506 F. App'x 430, 433-434 (6th Cir. 2012) (argument that district court failed to give notice of its reliance on testimony from another proceeding at sentencing was beyond scope of waiver of right to "appeal any sentence imposed"); *United States* v. *Preston*, 598 F. App'x 465, 466 (8th Cir. 2015) ("challenge to the district court's jurisdiction [wa]s beyond the scope of the appeal waiver").[5]

B. Defendants Often Succeed on Appeal Even on Claims Within the Scope of a Waiver

Even where a claim falls within the literal scope of an appeal waiver, courts have allowed defendants to pursue certain types of claims. Many defendants have succeeded in obtaining relief on appeal based on such challenges.

1. The federal courts of appeals agree, for example, that even the broadest waivers do not bar ineffective as-

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[5] See also *State* v. *Hansen*, 156 Idaho 169, 175-176 (2014) (waiver applied only to one count of conviction); *State* v. *Holdaway*, 130 Idaho 482, 484 (1997) (denial of post-judgment motion not barred by waiver that applied only to "judgment and sentence"); *State* v. *Wicklund*, No. 38697, 2011 WL 11067224, at *1 (Idaho Ct. App. Dec. 29, 2011) (similar); *United States* v. *Hartshorn*, 163 F. App'x 325, 329 (5th Cir. 2006) ("condition of supervised release that [defendant] not be released to the Southern District of Texas [ ]or to the residence of his biological family" was "unauthorized by statute" and fell "outside the scope of [defendant's] appeal waiver"); *Hunt*, 843 F.3d at 1028 ("By waiving his right to appeal any 'term of supervised release,' [defendant] did not necessarily give up the right to appeal a condition of such release.").

sistance of counsel claims. See, *e.g.*, *Hurlow* v. *United States*, 726 F.3d 958, 966 (7th Cir. 2013) ("[A] waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel * * *."); *United States* v. *Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009) (similar); *United States* v. *Mabry*, 536 F.3d 231, 243 (3d Cir. 2008) (similar); *Washington* v. *Lampert*, 422 F.3d 864, 871 (9th Cir. 2005) (similar); *United States* v. *Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (similar); *United States* v. *Hernandez*, 242 F.3d 110, 113-114 (2d Cir. 2001) (similar); *United States* v. *Henderson*, 72 F.3d 463, 465 (5th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 732-733 (4th Cir. 1994).

The federal courts of appeals have also uniformly held that a defendant may challenge a guilty plea as involuntary or uninformed despite an appeal waiver. See, *e.g.*, *United States* v. *Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) ("[A] defendant may knowingly and voluntarily enter into a plea agreement waiving the right to a jury trial, but nonetheless fail to have knowingly and voluntarily waived other rights—including appellate rights."); *United States* v. *Teeter*, 257 F.3d 14, 18 (1st Cir. 2001) (similar); *United States* v. *Khattak*, 273 F.3d 557, 558 (3d Cir. 2001); *United States* v. *Joiner*, 183 F.3d 635, 644-645 (7th Cir. 1999). An element of any challenge to the voluntariness of a plea is whether the trial judge made it sufficiently clear that the defendant was waiving the right to appeal. See *Hardman*, 778 F.3d at 899 ("For an appeal waiver to be enforced, the government must show either that (1) the district court specifically questioned the defendant about the provision during the plea colloquy, or (2) it is manifestly clear from the record that the defendant fully understood the significance of the waiver." (quo-

tation marks omitted)); *Khattak*, 273 F.3d at 563 (similar).[6]

Courts have similarly held that a defendant can appeal a conviction as lacking an adequate factual basis under Federal Rule of Criminal Procedure 11(b)(3) despite a facially applicable appeal waiver. See, *e.g.*, *United States* v. *Spruill*, 292 F.3d 207, 215 (5th Cir. 2002).

Defendants have succeeded in obtaining relief on all those types of claims. In *United States* v. *Olson*, 880 F.3d 873 (7th Cir. 2018), for example, the Seventh Circuit refused to enforce an appeal waiver that was not knowing and voluntary, holding that "an invalid waiver cannot insulate an invalid plea." *Id.* at 880. "[B]ecause the district court never asked the right questions" during the plea colloquy, the court did "not know whether [the defendant had] entered a voluntary and intelligent guilty plea" and would not enforce the terms of the agreement. *Id.* at 875. The court thus reversed the conviction. See *id.* at 881.

Likewise, in *United States* v. *Wingo*, 789 F.3d 1226 (11th Cir. 2015), the Eleventh Circuit vacated a conviction on the basis that the district court had failed to conduct a competency hearing. *Id.* at 1228. The court rejected the argument that the sentence appeal waiver barred the defendant's "claim that he was incompetent to

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[6] See also, *e.g.*, *In re Sealed Case*, 702 F.3d at 63-65 (defendant did not "knowingly waive his right to appeal the restitution order" because Rule 11 colloquy did not make clear that waiver covered restitution order); *Teeter*, 257 F.3d at 27 (refusing to enforce waiver "[g]iven the court's failure to make inquiry into the waiver, its unfortunate contradiction of the waiver's terms, and the lack of any correction, then or thereafter"). That inquiry is particularly important here, where, although the plea agreements contained waivers, the trial court "advised Garza of his appeal rights anyway." Pet. App. 3a.

plead guilty and face sentencing," explaining that the "appeal waiver itself would be invalid if [the defendant] lacked the mental capacity to understand and appreciate the nature and consequences of the plea agreement." *Id.* at 1234 n.8.

Similarly, in *United States* v. *Aquino-De La Rosa*, 139 F. App'x 298 (1st Cir. 2005), the defendant "waive[d] the right to appeal * * * [his] guilty plea and any other aspect of [his] conviction," as well as "[t]he adoption by the District Court at sentencing of [certain specifically identified] positions." *Id.* at 299. The defendant appealed, arguing that resentencing was required under *United States* v. *Booker*, 543 U.S. 220 (2005). See *Aquino-De La Rosa*, 139 F. App'x at 299. The government "moved for summary affirmance on the grounds that defendant waived his right to appeal in his plea agreement." *Ibid.* The First Circuit "decline[d] to enforce the waiver because its terms were not clearly explained during the plea colloquy." *Ibid.* "[T]he district court failed to call defendant's attention to the appeal waiver and, instead, affirmatively sought and obtained confirmation of defendant's understanding that he had an unqualified right to appeal his sentence." *Ibid.* The court ultimately agreed with the defendant regarding the alleged *Booker* error and vacated the sentence. *Id.* at 300.[7]

Many other courts have similarly granted relief on the basis that defendants did not knowingly and voluntarily agree to appeal waivers. See, *e.g.*, *United States* v. *Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017) (holding "ap-

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[7] See also *United States* v. *Quirindongo-Collazo*, 213 F. App'x 10, 12 (1st Cir. 2007) (finding appeal waiver unenforceable because, during sentencing hearing, "there was no mention by any party of the appeal waiver, nor of any effect that waiver might have on appellant's right to appeal," and vacating sentence on basis of *Booker* error).

peal waiver * * * unenforceable" where defendant was "constructively denied her * * * right to counsel" and vacating conviction); *United States* v. *Atkinson*, 354 F. App'x 250, 252 (6th Cir. 2009) (similar); *United States* v. *Rodriguez-Perez*, 184 F. App'x 451, 453 (5th Cir. 2006) (similar); *United States* v. *Pena*, 314 F.3d 1152, 1154 n.1 (9th Cir. 2003) (similar); *United States* v. *Portillo-Cano*, 192 F.3d 1246, 1252 (9th Cir. 1999); *People* v. *Smith*, 143 A.D.3d 31, 34 (1st Dep't 2016), aff'd, 30 N.Y.3d 626 (2017); *Ex parte De Leon*, 400 S.W.3d 83, 89-91 (Tex. Crim. App. 2013).

Finally, courts have granted relief based on inadequacies in the factual basis for the plea. In *Spruill*, for example, the defendant appealed his conviction on the ground that there was an inadequate factual basis for his plea. 292 F.3d at 215. The court did not dispute that the claim fell within "the waiver of appeal provisions in [the] plea agreement," which "waived the right to appeal [the defendant's] conviction and sentence." *Id.* at 211-215. But the court nonetheless held that the waiver did not bar review because the defendant could not be "prosecuted (and imprisoned) for conduct that does not violate the law." *Id.* at 215 (quotation marks omitted). The court thus vacated the conviction. See *id.* at 221.

2. Courts also grant relief on appeal despite waivers where ordinary contract principles preclude enforcement of the waiver. Like contracts, plea agreements will be enforced (or not) according to ordinary contract principles. See *United States* v. *Scallon*, 683 F.3d 680, 682 (5th Cir. 2012) (applying "'ordinary principles of contract interpretation'" (quoting *United States* v. *Cooley*, 590 F.3d 293, 296 (5th Cir. 2009))).

In *United States* v. *Almonte-Nuñez*, 771 F.3d 84 (1st Cir. 2014), for example, the waiver "foreclosed [the de-

fendant] from appealing only if he was 'sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provisions' of the Agreement." *Id.* at 88. But the district court imposed sentences that "were not in conformity with the Agreement's sentence recommendation provisions," rendering the waiver "a dead letter." *Id.* at 88-89. Addressing the merits of the defendant's appeal, the court found that the sentence imposed on one count exceeded the statutory maximum and vacated that sentence. *Id.* at 92-93.

As in contract law, moreover, one side's breach can excuse the other side's performance. In *United States* v. *Dawson*, 587 F.3d 640 (4th Cir. 2009), for example, the Fourth Circuit recognized that "[a] defendant's waiver of appellate rights cannot foreclose an argument that the government breached its obligations under the plea agreement." *Id.* at 644 n.4. The court thus vacated the defendant's sentence on the basis that the government "breached the plea agreement when the AUSA failed to recommend to the district court at sentencing that [the defendant] receive a two-level minor participant reduction." *Id.* at 645, 648. Indeed, the government did not even "seek to enforce [the] appeal waiver" because it conceded the breach. *Id.* at 644 n.4.

Similarly, in *United States* v. *Lovelace*, 565 F.3d 1080 (8th Cir. 2009), the Eighth Circuit held an appeal waiver unenforceable where the government had "breached the [plea] agreement by advocating a higher [offense] level" than specified in the agreement. *Id.* at 1087. The court thus considered the defendant's argument that the district court abused its sentencing discretion and vacated the judgment on that basis. *Id.* at 1092-1093.

Also as in contract law, plea agreements will be construed to give effect to the parties' bargain. Following

that principle, in *United States* v. *Woltmann*, 610 F.3d 37 (2d Cir. 2010), the Second Circuit declined to enforce a waiver because doing so would have "denied the parties their bargain and reasonable expectations." *Id.* at 42. The parties had entered into an agreement providing that "'the court [wa]s required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. §3553(a),'" and that "'the defendant agrees not to . . . appeal . . . the conviction or sentence in the event that the Court imposes a term of imprisonment of 27 months or below.'" *Id.* at 39. The district court refused to consider the government's 5K1.1 letter requesting a below-Guidelines sentence because it "believed that because of the appeal waiver, *any* sentence at or below 27 months was appropriate, regardless of whether or how the 5K1.1 letter and the §3553(a) factors—if considered—would bear on the sentence." *Ibid.* The Second Circuit vacated the sentence, finding that the district court "improperly 'relied' on" and "misread" the Agreement. *Id.* at 40. "In so doing," the court explained, "the district court failed to give effect to the parties' expectations and deprived [the defendant] of the benefit that he (and the government) agreed he would receive from signing the Agreement (*i.e.*, a weighing of the 5K1.1 letter and the §3553 factors)." *Ibid.*

3. Courts have likewise refused to enforce waivers where doing so would undermine the fundamental fairness of the proceedings or result in a manifest miscarriage of justice.

In *United States* v. *Adams*, 814 F.3d 178 (4th Cir. 2016), for example, the Fourth Circuit vacated a conviction on the basis of actual innocence despite the fact that "neither party argue[d] that [the defendant's] waiver was invalid, and there [wa]s no evidence in the record to sup-

port such a conclusion." *Id.* at 182. The defendant had pleaded guilty to one count each of robbery, using and carrying a firearm during a crime of violence, and being a felon in possession of a firearm. See *id.* at 180. The plea agreement permitted him "to challenge his conviction or sentence" only on "the basis of ineffective assistance of counsel or prosecutorial misconduct." *Ibid.* The defendant later sought to vacate his felon-in-possession conviction on the basis of a new Fourth Circuit decision that rendered his prior convictions misdemeanors, not felonies. *Id.* at 181. In light of that decision, the defendant was actually innocent of the felon-in-possession count. *Id.* at 182-183. The court "conclude[d] that [his] claim of actual innocence [wa]s outside the scope of the appeal waiver" and vacated the conviction. *Id.* at 182, 185.

Similarly, in *Mathis* v. *United States*, No. 7:09-cr-139-1BO, 2012 WL 1156438 (E.D.N.C. Apr. 6, 2012), the court concluded that whether the defendant "was properly classified as a career offender" in light of a change in law was an error "the defendant could not have reasonably contemplated at the time of the plea agreement" and was thus "not barred by [the] appeal waiver, even if that waiver was knowing and voluntary." *Id.* at *5 (quotation marks omitted). Addressing the merits, the court held that the defendant was "no longer a career offender," granted his request for postconviction relief pursuant to 28 U.S.C. §2255, and vacated his sentences. *Mathis*, 2012 WL 1156438, at *6.

And in *United States* v. *Castro*, 704 F.3d 125 (3d Cir. 2013), the Third Circuit found that the defendant had entered into a "knowing and voluntary waiver" that "foreclosed[d] his appeal" from his false-statement conviction. *Id.* at 137. However, the court declined to enforce the waiver because the record was "devoid of evidence that

[the defendant] made a false statement." *Ibid.* The court thus reversed the conviction to avoid "a manifest miscarriage of justice." *Id.* at 138, 144 (quotation marks omitted).

4. Finally, a defendant may succeed on appeal despite an appeal waiver because the waiver itself can be waived.

In Idaho, for example, appeal waivers have no effect if the State chooses not to invoke them on appeal (*i.e.*, if the State waives the waiver). See, *e.g.*, *State* v. *Rendon*, No. 38275, 2012 WL 9492805, at *1 n.1 (Idaho Ct. App. May 11, 2012) (State "fail[ed] to raise" waiver); *State* v. *Rodriguez*, No. 45233, 2018 WL 700168, at *1 n.1 (Idaho Ct. App. Feb. 5, 2018) (similar). Federal courts follow the same rule. See, *e.g.*, *United States* v. *Cheney*, 571 F.3d 764, 769 (8th Cir. 2009) ("[T]he government does not contend that [defendant's] guilty plea bars him from challenging the factual basis for his plea—in effect, waiving any claim to rely on a possible waiver * * *."); *United States* v. *Obak*, 884 F.3d 934, 937 (9th Cir. 2018) (holding that "the government waived its ability to rely on [the defendant's appeal] waiver" because "the government's brief * * * did not raise the waiver issue").

Defendants have succeeded on claims that would ordinarily have been precluded precisely because the waiver was waived. See, *e.g.*, *United States* v. *Ortega-Hernandez*, 804 F.3d 447, 449, 451 (D.C. Cir. 2015) (holding that court "need not enforce an appeal waiver" barring appeals of sentence "when the government ha[d] not asked [it] to do so" and instructing district court to vacate sex-offender registration condition on remand); *United States* v. *Jones*, 667 F.3d 477, 486 (4th Cir. 2012) (declining to "sua sponte enforce" waiver and holding that district court's imposition of career offender enhancement

was error); *United States* v. *Story*, 439 F.3d 226, 229, 232-233 (5th Cir. 2006) (finding that "the government ha[d] waived" waiver of "right to appeal [defendant's] sentence on all grounds" and remanding for resentencing in light of *Booker* error).

C. The Decision Below Ignores the Potential for Meritorious Claims Even in Cases Involving Appeal Waivers

The courts below asserted that where a defendant accepts an appeal waiver in a plea agreement, no appellate relief remains available. See, *e.g.*, Pet. App. 36a ("When a defendant has waived his right to appeal in an enforceable plea agreement, dismissal—not consideration on the merits—is the fate that awaits any appeal the defendant files."); *id.* at 26a (similar); *id.* at 13a (similar). Federal courts following the minority approach have likewise claimed that "the 'presumption of prejudice'" under *Flores-Ortega* "really does not suit the situation in which a waiver is present" because the "entitlement" to pursue an appeal "disappears" once the defendant agrees to a waiver. *Mabry*, 536 F.3d at 244; see *Nuñez* v. *United States*, 546 F.3d 450, 454-456 (7th Cir. 2008) (similar). That logic is flawed.

This Court held in *Flores-Ortega* that prejudice must be presumed where counsel fails to file a notice of appeal because that decision causes "the forfeiture of a proceeding itself." 528 U.S. at 483. The same is true where the defendant has signed an appeal waiver. Regardless of the waiver, counsel's failure to file a notice of appeal invariably results in the forfeiture of a judicial proceeding. And, as shown above, the proceeding can—and often does—result in substantive relief on appeal, even in the presence of a purported waiver.

This Court has held that a presumption of prejudice is appropriate where the "consequences" of an error are "unquantifiable and indeterminate." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (quotation marks omitted). An attorney's failure to file a notice of appeal over the client's instructions is such an error, regardless of whether there is an appeal waiver. Where counsel refuses to notice an appeal, the court simply "would have to speculate" about how a hypothetical direct appeal would have played out. *Id.* at 151. That is the kind of error for which a presumption of prejudice is appropriate. See *Flores-Ortega*, 528 U.S. at 483 ("[W]e cannot accord any presumption of reliability to judicial proceedings that never took place." (quotation marks and citation omitted)).

Abandoning the presumption of prejudice for cases involving appeal waivers would not significantly reduce any burdens on the courts. With or without a presumption of prejudice, defendants will surely continue to file postconviction motions based on their attorneys' failures to file notices of appeal. And, as a result, courts addressing their ineffective assistance of counsel claims will have to determine whether the appeal waiver would have precluded their claims on appeal. Courts following the minority approach already undertake that onerous analysis. See, *e.g.*, *Mabry*, 536 F.3d at 237 (court has "an affirmative duty both to examine the knowing and voluntary nature of the waiver and to assure itself that its enforcement works no miscarriage of justice"); *United States* v. *Egwuekwe*, No. 1:14-cr-6, 2017 WL 5009100, at *6-8 (M.D. Pa. Nov. 2, 2017) (examining same); *United States* v. *Doss*, No. 1:12-cr-326, 2017 WL 1709397, at *4-6 (M.D. Pa. May 3, 2017) (similar); *United States* v. *Dunlap*,

No. 10-190, 2010 WL 4614557, at *2-4 (W.D. Pa. Nov. 5, 2010) (similar).[8]

Nor is there any basis for limiting the presumption's applicability based on the scope of the particular waiver in the case. As shown above, courts have found certain claims to be beyond the scope of even seemingly broad appeal waivers. And courts have regularly allowed defendants to pursue various types of claims on appeal even when they fall within the literal scope of a waiver.

Moreover, as shown above, waivers vary significantly in form and scope. Thus, unless this Court applies a uniform presumption of prejudice to all failures to file a notice of appeal at the client's direction, courts will inevitably be asked to address the issue for each different type of appellate waiver. There is no need to waste the courts' time and resources deciding the issue piecemeal for every different type of appellate waiver. What matters is that all waivers permit *some* form of appeal. Accordingly, all defendants who instruct their counsel to file a notice of appeal are prejudiced when counsel fails to do so.

II. Postconviction Proceedings Are Not An Adequate Substitute For Direct Appellate Review

In some cases, defendants may be able to pursue their claims in postconviction proceedings. For a number of

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[8] See also *Solano* v. *United States*, 812 F.3d 573, 576-578 (7th Cir. 2016) (refusing to presume prejudice and instead determining whether underlying claim fell within scope of appellate waiver after defendant brought ineffective-assistance claim based on counsel's failure to appeal); *United States* v. *Hull*, No. 16 C 2096, 2017 WL 6733689, at *3 (N.D. Ill. Dec. 19, 2017) (similar); *Reynolds* v. *United States*, No. 12-12-RGA, 2014 WL 6983354, at *2-3 (D. Del. Dec. 9, 2014) (similar); *Martinez* v. *United States*, No. 05-cr-123-12, 2008 WL 4889665, at *7-9 (E.D. Pa. Nov. 12, 2008) (similar).

reasons, however, those proceedings cannot adequately substitute for a direct appeal.

A. Claims That Are Not Raised on Direct Appeal Generally Cannot Be Raised in Postconviction Proceedings

Often, depriving a defendant of an appeal will result in the forfeiture of any review at all. Generally, "claims not raised on direct appeal may not be raised on collateral review." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). Thus, if an attorney decides not to file a notice of appeal because a plea agreement includes a waiver, the defendant will often be unable to challenge the validity of the plea in postconviction proceedings.

Idaho is no exception. Under Idaho law, a "claim or issue which was or could have been raised on appeal *may not be considered* in post-conviction proceedings." *Hughes* v. *State*, 148 Idaho 448, 462 (Ct. App. 2009) (emphasis added); see *ibid.* ("An application for post-conviction relief is not a substitute for an appeal." (citing Idaho Code §19-4901(b)). The Idaho courts have determined that at least some challenges to the validity of a guilty plea should be raised on direct appeal. See *State* v. *Hernandez*, 121 Idaho 114, 116 (Ct. App. 1991) ("A defendant's claim that his plea of guilty was involuntarily given is an attack on the validity of the original conviction, and must be timely raised on a direct appeal from the judgment of conviction."); cf. *State* v. *Colyer*, 98 Idaho 32, 33 (1976) (vacating judgment of conviction because "the record does not adequately show that appellant understood the consequences of a plea of guilty"); *State* v. *Cope*, 142 Idaho 492, 496-497 (2006) (determining that record showed the plea was knowing, intelligent, and voluntary). The State frequently seeks to dismiss postconviction petitions relating to the validity of guilty pleas on

the basis that the petitioner could and should have raised the claim on direct appeal. See, *e.g.*, *Workman* v. *State*, 144 Idaho 518, 524 (2007) ("[T]he State and the district court observed that many of [petitioner's] claims regarding his guilty plea either were or should have been raised on direct appeal.").

Proposing that defendants like Mr. Garza wait to raise claims until postconviction review lays an unfair trap: By that point, it may be too late to raise the claims at all.

B. Higher Pleading Standards Apply in Postconviction Proceedings

The pleading standards for a postconviction petitioner are typically far higher than they are on direct appeal. Under Idaho law, for example, a "petition for postconviction relief initiates a proceeding that is civil in nature." *Pentico* v. *State*, 159 Idaho 350, 353 (Ct. App. 2015). But, unlike the average civil complaint, a postconviction petition "must contain *much more* than a short and plain statement of the claim that would suffice for a complaint." *Id.* at 354 (emphasis added); see also *Fields* v. *State*, 155 Idaho 532, 536 (2013) (same). Instead, "a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition." *Pentico*, 159 Idaho at 354; *Fields*, 155 Idaho at 536 (citing Idaho Code §19-4903). "In other words, the petition must present or be accompanied by admissible evidence supporting its allegations or the petition will be subject to dismissal." *Pentico*, 159 Idaho at 354; see *State* v. *Payne*, 146 Idaho 548, 560-561 (2008) (similar).

The stringent pleading standards for postconviction petitioners have real teeth. Idaho courts routinely deny relief where petitioners do not submit the required evidence. See, *e.g.*, *Self* v. *State*, 145 Idaho 578, 581 (Ct. App. 2007) (dismissing petition because petitioner failed to provide affidavit or deposition testimony by expert supporting ineffectiveness claim); *Murphy* v. *State*, 143 Idaho 139, 150 (Ct. App. 2006) (dismissing petition because petitioner failed to proffer admissible evidence establishing details of how juror allegedly slept through trial); *Small* v. *State*, 132 Idaho 327, 333 (Ct. App. 1998) (dismissing petition because petitioner failed to introduce medical testimony concerning effect of medication she was on during trial).

None of those standards applies to a criminal defendant prosecuting a direct appeal. All the defendant must do to adequately present an issue on direct appeal is support it with "propositions of law, authority, or argument." *State* v. *Zichko*, 129 Idaho 259, 263 (1996); see Fed. R. App. P. 28(a)(8); Idaho App. R. 35(a)(4); *Cal. Pac. Bank* v. *FDIC*, 885 F.3d 560, 570 (9th Cir. 2018) ("arguments are waived" only where "the appellant does not present any argument to support its assertions and cites no authority" or presents only "inadequately briefed and perfunctory arguments"); see, *e.g.*, *United States* v. *Suarez*, 879 F.3d 626, 639 (5th Cir. 2018) (appellant's "brief sufficiently presented his argument" where it set out legal standard and cited record). A defendant should not have to satisfy a more challenging pleading standard just because counsel failed to notice the appeal the defendant wanted and was entitled to pursue.

C. There Is No Constitutional Right to Counsel in Postconviction Proceedings

Perhaps most importantly, "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991). By contrast, appointed counsel *must* be furnished to indigent defendants on direct appeal. See *Evitts* v. *Lucey*, 469 U.S. 387, 393-394 (1985).

Similarly, under Idaho law, a postconviction petitioner has no statutory right to postconviction counsel except in capital cases. See *Murphy* v. *State*, 156 Idaho 389, 395 (2014). In non-capital postconviction cases—*i.e.*, the overwhelming majority of such actions—the appointment of counsel "lies within the discretion of the district court." *Melton* v. *State*, 148 Idaho 339, 341 (2009).[9] Idaho appellate courts regularly affirm decisions denying counsel to postconviction petitioners. See, *e.g.*, *Nelson* v. *State*, 157 Idaho 847, 856 (Ct. App. 2014); *Gonzales* v. *State*, 151 Idaho 168, 172-173 (Ct. App. 2011); *Judd* v. *State*, 148 Idaho 22, 24-26 (Ct. App. 2009).

A postconviction proceeding where the defendant is without legal assistance cannot serve as an adequate replacement for a direct appeal where the defendant has the invaluable benefit of an attorney. In *Workman*, for example, the Supreme Court of Idaho upheld the denial of postconviction counsel while rejecting the defendant's arguments that his plea was involuntary and never formally entered. See 144 Idaho at 527-529. Those are ex-

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[9] Only a tiny percentage of Idaho prisoners are under sentence of death. See Idaho Dep't of Corr., *Supervised Population Snapshot*, https://dash.idoc.idaho.gov/ (26,044 prisoners as of Aug. 15, 2018); Idaho Dep't of Corr., *Death Row*, https://www.idoc.idaho.gov/content/prisons/death_row (9 prisoners on death row as of Aug. 15, 2018).

actly the sort of issues that can be raised on direct appeal, even with a waiver. See pp. 12-13, *supra*. The State's approach would obligate defendants whose lawyers refuse to file notices of appeal to litigate *pro se* the very same issues that they could and should have litigated on direct appeal with all the advantages of representation.

* * *

Idaho's postconviction scheme exemplifies why a presumption of prejudice is appropriate where counsel fails to file a notice of appeal. Channeling claims into postconviction proceedings forces defendants to pursue their claims without the benefit of legal representation, to overcome onerous pleading standards, and to risk losing the claims altogether. It creates an intolerable risk that defendants who involuntarily signed guilty pleas will end up in prison. When a defense attorney deprives a client of the chance for a direct appeal, the only way to ensure that risk does not materialize is by presuming prejudice.

CONCLUSION

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

Respectfully submitted.

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