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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next today in Case 17-1026, Garza  
5 versus Idaho.

6 Mr. Ali.

7 ORAL ARGUMENT OF AMIR H. ALI  
8 ON BEHALF OF THE PETITIONER

9 MR. ALI: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 In Flores-Ortega, a unanimous Court  
12 held that where -- excuse me -- a unanimous  
13 Court held where -- that where a defendant  
14 pleads guilty and instructs his trial counsel  
15 to notice an appeal, disregarding that  
16 instruction renders ineffective assistance in  
17 which prejudice is presumed.

18 The Court reached that conclusion even  
19 though pleading guilty waives the vast majority  
20 of claims that could be raised on appeal and  
21 even though most defendants who plead guilty do  
22 not ultimately succeed in their direct appeal.

23 The Court correctly concluded that  
24 prejudice is presumed, both because a  
25 defendant's disregard for the instruction to

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 will be reinstatement. All the  
3 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 -- that's correct,  
2 Your Honor, yes.

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

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

7           JUSTICE KAGAN: And what -- what --

8           JUSTICE SOTOMAYOR: Whose choice is  
9 that? I'm sorry.

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 plea 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 -- the second response I have is  
10 --

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

13 MR. ALI: Okay.

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

16 MR. ALI: Okay.

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

1 agreement and put you into jail for a lot  
2 longer. Do you really want to do this?

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

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

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

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

15 MR. ALI: That's right.

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

18 MR. ALI: That's correct.

19 CHIEF JUSTICE ROBERTS: I --

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

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

1 JUSTICE SOTOMAYOR: You suffer  
2 consequences --

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

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

10 MR. ALI: Yeah, and --

11 CHIEF JUSTICE ROBERTS: What was the  
12 second one?

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

22 And so what we would say is that when  
23 a defendant articulates to his attorney, his  
24 agent, if you will, that his objective is to  
25 show that the plea proceedings that just took

1 place were unlawful, the attorney has no place  
2 telling that defendant that he would prefer to  
3 just substitute his own view that the defendant  
4 go off, cede defeat, and go to prison. That is  
5 our position.

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

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

20 So you're asking an -- generally a --  
21 a defendant with limited education, his  
22 exposure to the legal system might be minutes,  
23 maybe hours, to potentially specify certain  
24 issues that might be in or outside the scope of  
25 his waiver, and then you're asking his agent to

1 basically play judge and forfeit his appeal if  
2 he alone thinks that the words that came out of  
3 the defendant's mouth happen to fall within the  
4 waiver.

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

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

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

1 such an inquiry into whether what the attorney  
2 did was deficient.

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

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

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

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



1           And in the very next sentence, it  
2           acknowledged the possibility of what we have  
3           here. It said that a defendant may also  
4           expressly waive some claims in addition to  
5           that.

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

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

25          And so it acts and has acted as a sort

1 of natural check. And -- and that's why there  
2 really is no evidence or -- or certainly we  
3 would have expected the United States to  
4 provide evidence to support its idea that there  
5 would be frivolous appeals, for instance,  
6 following a trial.

7 JUSTICE ALITO: I think we have to --

8 JUSTICE SOTOMAYOR: Mr. Ali --

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

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

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

1 right?

2 MR. ALI: I think that's --

3 JUSTICE ALITO: That has to be your  
4 position.

5 MR. ALI: -- I think that's right,  
6 Your Honor. I think it's largely an  
7 unrealistic scenario for most defendants.

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

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

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

23 JUSTICE SOTOMAYOR: Is that enough for  
24 you?

25 MR. ALI: Can I just clarify, this

1 particular record, Idaho does specifically  
2 provide that if a attorney withdraws before the  
3 notice of appeal is -- is filed, that the  
4 defendant will be provided with new counsel.

5 And, of course, it was the very  
6 representation of the defendant here that  
7 prevented the defendant under -- under  
8 procedural rules from filing a notice of appeal  
9 himself. And so that's why we know it caused a  
10 --

11 JUSTICE SOTOMAYOR: Yeah, the error  
12 here was the attorney did nothing and ignored  
13 -- claims to have done nothing --

14 MR. ALI: That's right.

15 JUSTICE SOTOMAYOR: -- and ignored --

16 MR. ALI: And so --

17 JUSTICE SOTOMAYOR: -- repeated  
18 inquiries about the appeal.

19 MR. ALI: And, of course, we agree  
20 that counsel should have a conversation with  
21 the defendant and say: We think -- you know, I  
22 believe -- I don't have the record yet, he  
23 should caveat it, I don't have the record yet,  
24 this is a preliminary assessment during the  
25 short window, but I think it's going to be very

1 difficult for you to argue around your appeal  
2 waiver to raise this issue that Justice Alito  
3 was describing, but he should still perfect the  
4 appeal, because what we're asking the attorney  
5 to do is a ministerial task here once the  
6 defendant has made its decision.

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

17           And -- and the reason is --

18           JUSTICE ALITO: But what are the  
19 practical differences between the consequences  
20 of the position you're advocating and what  
21 would happen if you were to lose this case?

22           If you win in the situation where the  
23 attorney thinks there's no non-frivolous claim  
24 to be raised on appeal, after the plea waiver,  
25 the attorney, you say, will file an Anders

1 brief, right?

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

3 JUSTICE ALITO: Okay. That's --  
4 that's one side of it. And then the other  
5 side, if you were to lose, then the defendant  
6 would not be entirely precluded from trying to  
7 take an appeal with respect to issues that the  
8 defendant thinks are outside of the plea  
9 waiver, the defendant could bring a collateral  
10 proceeding and argue that his attorney was  
11 ineffective for failing to take an appeal based  
12 on a plea waiver that didn't cover the issue.

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

21 But if state law didn't -- if state  
22 law provided an attorney and didn't provide a  
23 more stringent standard of review, what is the  
24 practical difference?

25 MR. ALI: So, Your Honor, of course,

1 92 percent of post-conviction defendants across  
2 the country don't get counsel on  
3 post-conviction review.

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

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

20 So, in the federal system, as this  
21 Court decided in Bousley, to raise a  
22 voluntariness claim in a 2255 position, you  
23 have to have first asserted that on direct  
24 appeal. So, I mean, to make a very blunt  
25 example, if a defendant believes he has

1 evidence that he could introduce on habeas to  
2 show involuntariness, okay, to show that his  
3 counsel misled him, et cetera, outside of the  
4 direct appeal record, if he doesn't get the  
5 direct appeal in order to preserve that issue,  
6 he will be prevented, unless he can prove  
7 actual innocence --

8 JUSTICE ALITO: Well, I guess what I  
9 left out is that the issue -- the claim in the  
10 -- in the collateral proceeding would be  
11 ineffective assistance of counsel.

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

20 So now he has to show that it was  
21 unreasonable for counsel not to file it in the  
22 direct appeal, and then it would have  
23 prejudiced him, and we suddenly are back to  
24 getting to the -- all of the merits, all of  
25 what should have happened in the direct appeal



1 in the first instance, and shouldn't have  
2 prevented the defendant from simply arguing  
3 these issues in his post-conviction petition  
4 without having procedurally defaulted it simply  
5 because his state-appointed counsel, his agent,  
6 didn't undertake a ministerial task.

7 And -- and -- and that is --

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

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

24 If, as we think the Court should, the  
25 -- the -- the bargain struck by the parties

1 here is restored and Mr. Garza's appeal is  
2 reinstated, he will be appointed counsel under  
3 state law and as is required by the federal  
4 constitution, and counsel will put forward  
5 arguments. And we think in this record that  
6 there are --

7 JUSTICE GINSBURG: But you -- you want  
8 to -- this is a question I started out with.  
9 You want to reinstate his right to appeal and  
10 you still -- it's still not clear to me what  
11 remains of the plea bargain.

12 MR. ALI: So --

13 JUSTICE GINSBURG: Because if -- if he  
14 had a right to appeal, he would not have had a  
15 -- a plea bargain that says I'm not going to  
16 appeal.

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

1           So he would notice the appeal. He  
2 would still be bound by the terms of his plea  
3 bargain, meaning the appeal waiver would still  
4 apply in that appellate proceeding, but he can  
5 still raise, of course, any claim outside the  
6 scope of the waiver, and that would be a  
7 determination for the court with the assistance  
8 of appellate counsel. And he can challenge,  
9 for instance, the voluntariness of it, whether  
10 the government honored its -- its commitments  
11 under the plea agreement.

12           All of those are issues that Idaho,  
13 all the federal courts conclude can be raised  
14 in a direct appeal proceeding, even when you  
15 have signed an appeal waiver. His --

16           JUSTICE KAVANAUGH: Because the appeal  
17 would -- an appeal waiver never precludes any  
18 and all possible appeals?

19           MR. ALI: That is what is undisputed  
20 on this record.

21           JUSTICE KAVANAUGH: Right.

22           MR. ALI: And that -- that -- that's  
23 what the federal courts have concluded, that  
24 they're not categorical.

25           And -- and I think it's important to

1 recognize that -- to-- to think about how  
2 unrecognizable the conception of trial counsel  
3 we're dealing with when we apply the United  
4 States or the State's test here.

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

17           JUSTICE KAGAN: Could -- could I --

18           JUSTICE SOTOMAYOR: Mr. --

19           JUSTICE KAGAN: -- get your take on  
20 the question of when you're in breach. You  
21 said you're not in breach when the notice of  
22 appeal is filed. And is that true no matter  
23 what the notice of appeal says?

24           In other words, suppose the notice of  
25 appeal is an opportunity to lay out your claims

1 and you lay out claims that are within the  
2 waiver. Does that still, in your view, not  
3 breach the agreement?

4 MR. ALI: Yes, I think so, Your Honor,  
5 because, in Idaho, for instance, the rules are  
6 very clear that even with respect to the issues  
7 you specify -- and generally speaking, in  
8 federal court, we're talking about identifying  
9 the order you're appealing from. Parties  
10 aren't required to specify issues. In Idaho,  
11 insofar as you specify issues, it's very clear  
12 that you're not bound once the appeal is begun.

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

22 And if, at that point, no particular  
23 issue can be raised that's outside the scope of  
24 the waiver, what happens in some of these cases  
25 is the defendant just decides to dismiss the

1 appeal altogether. So no harm done.

2 But, if the only issues the defendant  
3 can identify are within the scope of the  
4 waiver, you've got a claim of breach. And --  
5 and the next question would be whether it's --

6 JUSTICE KAGAN: In -- in other words,  
7 if -- if there's -- if the defendant files a  
8 brief that raises issues within the scope of  
9 the waiver?

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

13 JUSTICE KAGAN: And how about if  
14 there's an Anders brief that -- that raises  
15 issues within the scope of the waiver? Does  
16 that breach the defendant's bargain?

17 MR. ALI: Well, the way that Anders  
18 plays out is that counsel is required to -- to  
19 file a brief, as -- as I think Your Honor's  
20 question is suggesting, and -- and the pro se  
21 litigant is also given an opportunity to file a  
22 brief under Anders. And those are reviewed by  
23 the court.

24 You know, I think it's -- if -- if the  
25 pro se litigant himself in his brief is

1 asserting claims that are in the scope of the  
2 waiver, I think there would be a strong claim  
3 of breach in that instance.

4 If counsel is not actually pressing  
5 claims within the scope of the waiver, and --  
6 and the government's generally not required to  
7 respond to Anders briefs, right, so it's the  
8 attorney raising issues that are pointing the  
9 court in a very important way to potential  
10 issues in the case but isn't actually asserting  
11 issues, I don't think that would be a breach.

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

14 JUSTICE GORSUCH: Counsel --

15 JUSTICE SOTOMAYOR: Are you -- I'm  
16 sorry.

17 JUSTICE GORSUCH: No, please, go  
18 ahead.

19 JUSTICE SOTOMAYOR: Are -- are -- just  
20 to go through this, are you aware of whether  
21 the federal system or state system would deny a  
22 defendant another attorney if, under  
23 Flores-Ortega, it's found that an attorney was  
24 directed to file an appeal, didn't do it;  
25 hence, he was ineffective under Flores-Ortega?

1 When the defendant went back down, would he or  
2 would he not get another attorney?

3 MR. ALI: I think he probably would.  
4 In this case, factually speaking, he -- he  
5 would because, on appeal, Idaho provides that  
6 the state appellate defender comes in.

7 JUSTICE SOTOMAYOR: I -- I'm just  
8 asking because I'm not aware, at least from my  
9 old circuit --

10 MR. ALI: Yeah.

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

19 MR. ALI: I -- I think that's right.  
20 And I just would add one thing, which is that  
21 these claims actually could go very well to  
22 that attorney's conduct, the attorney who is  
23 usurping his client's decision to appeal. So,  
24 if we're talking about the voluntariness,  
25 counsel's performance at the plea hearing, et



1 cetera, could be tied up in those. And that's  
2 all the more reason in this instance not to  
3 allow an attorney to override his client's  
4 autonomous decision to appeal.

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

6 JUSTICE GORSUCH: Counsel -- if I  
7 might.

8 CHIEF JUSTICE ROBERTS: Sure.

9 JUSTICE GORSUCH: Thank you. One  
10 quick question.

11 You rely a lot on the autonomy of the  
12 client, and we certainly have a lot of cases  
13 saying, you know, a decision whether to appeal  
14 or make a major decision like that belong to  
15 the client.

16 Here, though, we have a complicating  
17 factor that the autonomy's already been  
18 expressed through the plea waiver and it's  
19 presumptively correct given that it's a final  
20 judgment of a trial court at that moment at  
21 least.

22 What do we do about that? So autonomy  
23 runs both ways here in this particular  
24 instance, and presumed prejudice in this  
25 circumstance, is there some tension between

1 that and the fact that we don't presume  
2 prejudice even when lawyers make really bad,  
3 obviously wrong strategic, tactical decisions  
4 in cases all the time?

5 How -- how do we reconcile that where  
6 even -- even in obvious circumstances we don't  
7 presume prejudice? And, here, most of these  
8 cases are going to be non-prejudicial, right?  
9 So what do we do about those problems?

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

16 Now, of course, one can't claim to  
17 respect autonomy without looking at the actual  
18 autonomous decision that is made.

19 JUSTICE GORSUCH: But looking at it as  
20 a whole, we've -- it's complicated. It's  
21 muddled, right?

22 MR. ALI: Well, I think --

23 JUSTICE GORSUCH: Time 1 and time 2  
24 are complicated.

25 MR. ALI: At time 1, the autonomous

1 decision is to waive certain claims.

2 JUSTICE GORSUCH: Yeah.

3 MR. ALI: At time 2, the decision  
4 is --

5 JUSTICE GORSUCH: Yeah.

6 MR. ALI: -- go file a notice of  
7 appeal because I still have other claims.

8 And to answer the second point really  
9 quickly, when this Court looks at a situation  
10 in which a proceeding has been provided to the  
11 defendant and there are certain errors, a  
12 client's not entitled -- or a defendant is not  
13 entitled to a perfect proceeding, then, yes, in  
14 that circumstance, to presume prejudice, you  
15 look for those circumstances where prejudice is  
16 so likely that, you know, it should be  
17 presumed.

18 Now the United States all but concedes  
19 that that doesn't apply in this circumstance.  
20 If you look at the bottom of page 12, top of  
21 page 13, after they do all of the posturing,  
22 saying you should be identifying the most  
23 likely circumstances, they say: Oh, but the  
24 Court has also recognized that when you forfeit  
25 an entire proceeding, a proceeding which is a

1 contingency -- or -- or is an important part of  
2 reaching finality, that that's not the inquiry  
3 the court goes through.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Jorgensen.

7 ORAL ARGUMENT OF KENNETH K. JORGENSEN  
8 ON BEHALF OF THE RESPONDENT

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

11 My friend keeps referring to a waiver  
12 of issues, but there was no waiver of issues in  
13 this case. There was a waiver of a procedure.  
14 There was an appellate waiver.

15 Thus, in similar situations like this  
16 where there is an appeal waiver, there has been  
17 a waiver of a proceeding, not just of those  
18 issues. And I think this case actually  
19 provides a very good example of that.

20 The plea agreement in this case that  
21 was signed by Mr. Garza contains many  
22 provisions. Some of those provisions include  
23 that he would plead guilty to certain charges,  
24 that the State would not then bring a -- bring  
25 other charges and would dismiss an enhancement.

1 Mr. Garza agreed to the particular sentence he  
2 would receive.

3 The plea agreement lists many of the  
4 -- lists the rights that are required to be  
5 given under Idaho's Rule 11, which is the  
6 substantive equivalent of Federal Rule 11.  
7 Thus, even without the appeal waiver, the State  
8 had basically assured itself of victory on  
9 appeal.

10 It had -- it had already secured the  
11 waiver of many, many, many issues, in fact, all  
12 of the reasonable issues that could be tried.

13 CHIEF JUSTICE ROBERTS: Well, many but  
14 certainly not all.

15 MR. JORGENSEN: Not all.

16 CHIEF JUSTICE ROBERTS: They haven't  
17 -- they didn't assure themselves of victory on  
18 appeal since there were arguments outside the  
19 scope of the agreement, including some that  
20 have to be available outside the scope of the  
21 agreement --

22 MR. JORGENSEN: That's correct.

23 CHIEF JUSTICE ROBERTS: -- that could  
24 have been the basis for an appeal.

25 MR. JORGENSEN: Well, that's correct

1 insofar as it goes, and that's one of the  
2 reasons why this has to be a fact-by-fact  
3 analysis.

4 In this case, Mr. Garza clearly did  
5 waive the appellate procedure to all of those  
6 issues that he could conceivably waive it to.

7 So he waived appellate procedure to  
8 address his sentences. He had no right to any  
9 appellate procedure to address his sentences.

10 Had he filed the appeal, he had his  
11 attorney file the notice of appeal, and raise  
12 the issues Mr. Garza wanted, a challenge to his  
13 sentence, the only thing he would have gotten  
14 was a -- a -- a preliminary proceeding to  
15 determine whether he was asserting a waived  
16 procedure.

17 JUSTICE SOTOMAYOR: Would you have --  
18 could you address Flores-Ortega?

19 MR. JORGENSEN: Certainly.

20 JUSTICE SOTOMAYOR: Because the way it  
21 approached the issue was pretty clear. It  
22 said, in deciding whether counsel is  
23 ineffective, first you determine whether a  
24 defendant would have appealed.

25 And it said there's two ways to make

1 that determination. A, was there a plea  
2 waiver? If yes, then he wouldn't have  
3 appealed. Or, second, did he tell the attorney  
4 he wanted to appeal?

5 And this is the second of those. But  
6 I can't square your position with Flores-Ortega  
7 because Flores-Ortega seemed to accept as a  
8 working proposition that given that there is  
9 even, in a guilty plea, there are waivers of  
10 some issues but not others, that the question  
11 of whether a defendant would have appealed  
12 takes into account the plea waiver at that  
13 stage, but once a defendant tells an attorney  
14 to appeal, that's his choice.

15 I don't know how to get around Ortega,  
16 Flores-Ortega.

17 MR. JORGENSEN: Well, first off,  
18 Flores-Ortega does not address that  
19 circumstance where there are both. It clearly  
20 says there's no duty to consult where there is  
21 a waiver. It also says that there is a duty to  
22 provide the appeal if it's requested.

23 And there is no duty to provide the  
24 appeal if the client says their -- that he or  
25 she does not want an appeal. So Flores-Ortega

1 does not address the fundamental question that  
2 --

3 JUSTICE SOTOMAYOR: I don't know  
4 what's both here. This is the second part of  
5 Flores-Ortega.

6 MR. JORGENSEN: Well, I would submit  
7 it's the first --

8 JUSTICE SOTOMAYOR: The attorney --  
9 the attorney -- no, the first part says there's  
10 a plea waiver. If the defendant doesn't ask  
11 you for one, you don't have to consult. But,  
12 once he asks you for one, you have to file a  
13 notice of appeal.

14 This is just the second situation.

15 MR. JORGENSEN: I -- I --  
16 respectfully, Your Honor, I would say that  
17 where the -- where the client has given this  
18 type of conflicting guidance -- in other words,  
19 this was a waiver that was secured through the  
20 direction of counsel. Counsel was involved  
21 with this.

22 So counsel had some idea of what Mr.  
23 Garza's intent was at the time he signed the  
24 plea agreement. That Mr. Garza decided to  
25 change his mind, to have his cake and eat it



1 too or to game the system or however you want  
2 to phrase it, doesn't necessarily --

3 JUSTICE KAGAN: So if --

4 JUSTICE SOTOMAYOR: How about totally  
5 not understand the system? You don't think  
6 that a defendant who has a right to appeal has  
7 a right, I mean, to even an Anders brief?  
8 Because that tells you why you can't appeal.

9 In -- in my experience, again -- and I  
10 don't know if it's typical or not -- Anders  
11 briefs are filed and most defendants don't  
12 respond, but occasionally you get a few who do.

13 If you forfeited that right to have  
14 someone explain to you the whys, you can't get  
15 it back.

16 MR. JORGENSEN: Well --

17 JUSTICE SOTOMAYOR: Under your --  
18 under your position that you're not -- you've  
19 forfeited your right to appeal altogether.

20 MR. JORGENSEN: Our position is that  
21 in post-conviction, where we are evaluating the  
22 conduct of counsel in making this choice, that  
23 we have to look at the totality of the  
24 circumstances.

25 And in this case, the totality

1 includes the waiver. The totality includes the  
2 specific instruction of the client. The  
3 totality includes the scope of the waiver and  
4 counsel's determination that his client was  
5 specifically asking him to seek an appeal that  
6 would address an issue within the scope.

7 JUSTICE KAGAN: Mr. Jorgensen, so on  
8 what you just said, I guess I was a little bit  
9 confused in your brief as to the scope of your  
10 argument.

11 Suppose that the client had, you know,  
12 after doing the appeal waiver, but there are  
13 some issues that you could still bring, not  
14 very many, but some, and the -- the client  
15 says: I want you to -- to -- to his  
16 attorney -- I want you to appeal. And he does  
17 not give any further guidance. In other words,  
18 he doesn't say what particular issues or  
19 whether the -- those issues are inside or  
20 outside the scope of the appeal waiver. He  
21 just thinks: I want to appeal now.

22 Does he get to -- at -- at that point,  
23 does the attorney have to take the appeal? Can  
24 you presume prejudice from the fact that the  
25 attorney has not taken the appeal?

1           MR. JORGENSEN: At that point, you can  
2 presume neither deficient performance nor  
3 prejudice because that may, for example,  
4 originate a duty to consult with the client, to  
5 actually ascertain whether the client wants to  
6 try to vitiate the entire plea agreement, to  
7 ascertain whether the client really wants to  
8 just test the state and see if they will maybe  
9 not act on a direct breach of the plea  
10 agreement.

11           There are several different things the  
12 client may be trying to achieve. And all that  
13 Mr. Garza alleged that he was trying to achieve  
14 at any point is an appeal of his sentences.

15           JUSTICE KAGAN: Yes. So that -- I  
16 guess that I had understood your brief as  
17 saying that as long as you don't specifically  
18 want to appeal something that's within the  
19 scope of the waiver, then the attorney does, in  
20 fact, have to file a notice of appeal and you  
21 can say -- say that there is prejudice when he  
22 doesn't.

23           But -- but -- but you're saying that  
24 even if the client makes a kind of generalized  
25 go file an appeal for me, I leave it to you,

1 what -- how -- you -- you know, I don't know  
2 the law, you go do it, and the attorney doesn't  
3 file anything, even then you would say that  
4 there's no presumption?

5 MR. JORGENSEN: Yes. We would say  
6 that there's no presumption. In other words,  
7 before the attorney could actually undermine  
8 the plea agreement, do something that would end  
9 up with the state bringing the new charges,  
10 possibly seeking to put Mr. Garza away for  
11 life, the attorney would have to secure Mr.  
12 Garza's approval of that course of action.

13 JUSTICE GORSUCH: But doesn't that run  
14 counter to our normal division of labor between  
15 clients and lawyers? Don't clients generally  
16 specify the end, I wish to appeal, and leave it  
17 to the lawyer to determine the means?

18 And doesn't it become incumbent at  
19 that stage upon the lawyer to identify whether  
20 there are any viable issues for appeal and come  
21 back to the client and say there are some or  
22 there are not some? And a failure to do that,  
23 why isn't the failure to do that presumptively  
24 prejudicial?

25 MR. JORGENSEN: The failure to do that

1     could conceivably be presumptively prejudicial  
2     depending on our facts.  And I guess, in -- in  
3     the question you just asked, you talked about  
4     the end.

5             And I would suggest that the end is  
6     not the filing of the notice of appeal but the  
7     ultimate goal of the client.  If the client  
8     wishes to ultimately keep his agreement and he  
9     only wants his sentences possibly reduced, and  
10    that just simply cannot be achieved because of  
11    the waiver's existence --

12            JUSTICE BREYER:  What -- what is the  
13    answer?  What is your answer to what I think  
14    people are making a fairly simple argument,  
15    very clear, very simple?  There are trials  
16    where there's a guilty plea.

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

21            Now, here, we have a no appeal  
22    agreement, but there are some errors that could  
23    be made.  We hope there are none or very few,  
24    but there could be some.

25            So why shouldn't it be exactly the

1 same rule if you, client, say to the lawyer:  
2 Appeal, he has to appeal. Now, if on examining  
3 it he figures there's no decent issue here, he  
4 writes an Anders brief.

5 Now why draw a line? Why complicate  
6 the law? Why make it more difficult for the  
7 perhaps confused, unknowledgeable defendant who  
8 occasionally is right? I mean, why?

9 MR. JORGENSEN: Well, first off,  
10 Strickland is the general standard. And all  
11 we're arguing --

12 JUSTICE BREYER: Yeah, but it's  
13 exactly the same. We say, on the ordinary  
14 case, no agreement, we say if the client asks  
15 you, you have to do it, even without prejudice,  
16 because he has been deprived of a lawyer at a  
17 critical stage of the proceeding and we presume  
18 prejudice.

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

24 So, again, same question, why draw  
25 such a line?

1           MR. JORGENSEN: For a couple of  
2 reasons. First off, the general Strickland  
3 standard is sufficient to catch those instances  
4 where there is a mistake, where -- where trial  
5 counsel has not behaved in a manner that is  
6 acceptable, that meets those minimum  
7 constitutional requirements.

8           And, second off, generally, where this  
9 Court will apply a presumption, it is under the  
10 expectation that applying that presumption will  
11 reach the correct result in most cases, most  
12 instances.

13           Here, the presumption's going to lead  
14 to an incorrect result in most instances,  
15 simply because the waiver is ultimately going  
16 to be enforced. So there's no reason to doubt  
17 in this case that the waiver would have  
18 ultimately been enforced.

19           And it's certainly not a -- a  
20 difficult burden to put on Mr. Garza and those  
21 like him, to put some reason to believe the  
22 waiver would not have been enforced in relation  
23 to his appeal.

24           JUSTICE SOTOMAYOR: Is there --

25           JUSTICE BREYER: That's disheartening,

1 because we would hope that in trials and in  
2 guilty -- guilty plea proceedings, there are  
3 also very few grounds for appeal.

4 And you're saying -- I see your point.  
5 Your point is, oh, there are a lot there, but  
6 there aren't many here. Hmm. I hope that --  
7 you see, I -- I -- I find that a difficult  
8 ground to use as making this distinction, if  
9 for no other reason that I have no idea if  
10 that's true or not.

11 MR. JORGENSEN: That what's true or  
12 not, Your Honor?

13 JUSTICE BREYER: That there are lots  
14 of grounds for appealing a trial. There are  
15 lots of grounds for appealing a guilty plea  
16 proceeding. But there are only a very few  
17 grounds for appealing when there is a waiver of  
18 appeal. I would hope in all those cases there  
19 are very few.

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

24 MR. JORGENSEN: Well, I think that the  
25 right -- again, it's not just a limitation of



1 the issues you can raise on appeal. It is a  
2 waiver of the actual proceeding itself, except  
3 in certain limited circumstances.

4 JUSTICE ALITO: Is there any practical  
5 difference in -- differences between the  
6 consequences of taking a hopeless appeal when  
7 there is no plea -- when there is no appeal  
8 waiver and the consequences of taking a  
9 hopeless appeal that is covered by a plea  
10 waiver?

11 MR. JORGENSEN: Yes, there is. And  
12 the reason is that, for example, had there been  
13 no waiver in this case and he wanted to raise  
14 his sentence, the court would have dealt with  
15 it fairly summarily on the basis of: Well,  
16 that's invited error; you lose. But that would  
17 have been effect -- ultimately a merits  
18 determination.

19 Where there is a waiver and he says I  
20 want to challenge my sentence, then the court  
21 applies the waiver, dismisses the case. You  
22 never even have an -- any sort of ruling on the  
23 merits. You've never had a challenge to the  
24 judgment. You've only had a -- a question  
25 of --

1 JUSTICE SOTOMAYOR: I don't --

2 MR. JORGENSEN: -- does the waiver  
3 preclude this proceeding?

4 JUSTICE SOTOMAYOR: -- I don't  
5 understand. It's a ruling on the merits. You  
6 have no case. Both of them are you have no  
7 case. How you -- I don't understand there  
8 being a difference between what -- I don't know  
9 if it was you or the government who suggested  
10 threshold -- threshold and merit issues. It's  
11 a decision on the appeal. A motion to dismiss  
12 is on the merits.

13 MR. JORGENSEN: Well, I think that a  
14 motion to dismiss is on the applicability of  
15 the waiver. In other words, is -- is -- does  
16 the waiver kick in to foreclose the appeal?  
17 And that's a different question than getting  
18 the full panoply of plea rights where -- or of  
19 appeal rights, excuse me, where you get to the  
20 -- you do get to the merits -- to the briefing,  
21 you can assert your issues through the briefing  
22 and ultimately get a written decision that will  
23 either affirm or reverse the judgment.

24 JUSTICE KAVANAUGH: Counsel, in  
25 addition to Justice Breyer's question of why

1     complicate the law, or on top of that question,  
2     what practical harm has there been in those  
3     jurisdictions, those areas, that have applied  
4     the presumption? Because I haven't seen much  
5     evidence of practical problems from the  
6     presumption.

7             MR. JORGENSEN: Well, it is -- it is  
8     true that most courts deal with these fairly  
9     quickly and summarily up front. But we would  
10    argue that that's a reason why there -- there  
11    shouldn't be this generalized rule, a -- a  
12    bright-line rule that's going to just simply  
13    get that is -- is probably not a good  
14    bright-line rule.

15            JUSTICE KAVANAUGH: But -- but it's  
16    very simple, I think you're agreeing --

17            MR. JORGENSEN: Yes.

18            JUSTICE KAVANAUGH: -- for the court  
19    when they get an appeal, so if to pick up  
20    Justice Ginsburg's point, if the appeal is  
21    reinstated, you get the appeal, well, most  
22    issues are probably going to be within the  
23    scope of the waiver and then there might be, in  
24    some cases, something outside the scope of the  
25    waiver. Oftentimes those are not meritorious,

1 of course, and are quickly dealt with.

2 Sometimes they are, though.

3 It seems pretty simple for most  
4 appellate courts to deal with that, and I'm not  
5 sure there's any evidence of a problem. And if  
6 there's not evidence of a problem, why  
7 complicate the law, as Justice Breyer says?

8 MR. JORGENSEN: What the state gets  
9 out of these types of agreements is the  
10 procedure itself. In other words, there's  
11 finality of judgment from the state is true --

12 JUSTICE KAVANAUGH: But -- but -- I'm  
13 sorry to interrupt, but I think you  
14 acknowledged that the appeal waiver gives up  
15 the appeal except in certain limited  
16 circumstances.

17 MR. JORGENSEN: Right.

18 JUSTICE KAVANAUGH: And that goes to  
19 my point earlier. An appeal waiver never gives  
20 up everything. It can't.

21 MR. JORGENSEN: Right.

22 JUSTICE KAVANAUGH: It can't. And  
23 because it never can give up everything, you've  
24 never actually forfeited the entire procedure.

25 MR. JORGENSEN: That's right. But

1     there -- but it -- it would require a minimal  
2     showing to show that ultimately the appeal that  
3     the defendant wanted and had a right to was one  
4     of these things outside of the scope of the  
5     waiver.

6             And I think that that's the crucial  
7     difference here. Mr. Garza, in the  
8     post-conviction case, was asked specifically,  
9     what issue would you raise on appeal if I  
10    reinstate your appeal rights? The district  
11    court asked in that decision. And Mr. Garza's  
12    answer was: My sentence.

13            So it would -- it would not be an  
14    onerous burden for somebody with an appeal  
15    waiver challenging the decision of counsel to  
16    say, you know what, I can convince this court  
17    that I would have raised one of the  
18    automatically excluded areas.

19            JUSTICE ALITO: I think Mr. -- I think  
20    Mr. Ali said that -- that Garza would like to  
21    raise the issue of the voluntariness of his  
22    agreement. Is that still an open question?

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

25            JUSTICE ALITO: Well, has there been a

1 decision on that issue by any state court?

2 MR. JORGENSEN: The district court at  
3 I believe pages 31 through 32 -- or, excuse me,  
4 30 through 32a of the appendix on the -- the  
5 petition, the district court specifically asked  
6 Garza, what issues do you wish to raise on  
7 appeal? If -- if we reinstated your right,  
8 what would you pursue? And he specifically  
9 limited it to the sentence issue. And,  
10 specifically, the court noted that Mr. Garza  
11 had not raised any direct challenge to the  
12 waiver.

13 JUSTICE SOTOMAYOR: Counsel --  
14 counsel, I'm looking at page 5 of the brief,  
15 the blue brief, and so you didn't write it, but  
16 it says that, "Mr. Garza promptly filed a pro  
17 se petition for post-conviction relief. In it,  
18 he asserted that his trial counsel rendered  
19 ineffective assistance by disregarding his  
20 instruction to file a notice of appeal. Mr.  
21 Garza further argued that he did not knowingly  
22 and voluntarily plead guilty and that he had  
23 entered an involuntary plea."

24 MR. JORGENSEN: Yes, he did.

25 JUSTICE SOTOMAYOR: So let's --

1 MR. JORGENSEN: He did.

2 JUSTICE SOTOMAYOR: May I assume the  
3 following: that that's what he wanted to  
4 appeal, but his attorney, by never conferring  
5 with him, didn't get that information?

6 MR. JORGENSEN: No.

7 JUSTICE SOTOMAYOR: Your answer would  
8 be if the attorney wasn't told that by his  
9 client because the attorney never asked his  
10 client, that that's not ineffective assistance  
11 of counsel in this situation where the attorney  
12 asked him to file a notice of appeal?

13 MR. JORGENSEN: It might have been  
14 ineffective assistance of counsel if that is,  
15 in fact, what he wanted and his attorney failed  
16 to ascertain that through consultation.

17 If I may continue?

18 CHIEF JUSTICE ROBERTS: Just briefly,  
19 one sentence --

20 MR. JORGENSEN: Very briefly. Pages  
21 30a through 31a of the appendix to the  
22 petition, Garza's already dismissed claim that  
23 his pleas were involuntary. Had he contended  
24 he did not appreciate or understand the appeal  
25 waivers when he entered his pleas, but Garza

1 has never so contended at any stage of these  
2 post-conviction cases. And the footnote also  
3 addresses that.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Kedem.

7 ORAL ARGUMENT OF ALLON KEDEM  
8 FOR THE UNITED STATES, AS AMICUS CURIAE,  
9 SUPPORTING THE RESPONDENT

10 MR. KEDEM: Mr. Chief Justice, and may  
11 it please the Court:

12 A prejudice inquiry under Strickland  
13 is the normal tool for identifying which final  
14 criminal judgments should be reopened based on  
15 counsel's ineffective assistance.

16 That is, cases where the harm to  
17 finality is justified by increased accuracy and  
18 reliability, the court should not abandon that  
19 case-specific inquiry here, where any benefits  
20 would exist only in exceptional cases.

21 A lot of the focus of argument today  
22 has been on the question whether counsel has an  
23 obligation to file a notice of appeal under  
24 various circumstances. That is the question of  
25 deficient performance.



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

4 The question there, we think, is  
5 governed by Flores-Ortega. Strickland always  
6 requires for a showing of prejudice that there  
7 be case-specific circumstances that show that  
8 the defendant was prejudiced by his counsel's  
9 errors.

10 What Flores-Ortega tells us is that  
11 once you know that the reason that the  
12 defendant lost out on an appellate proceeding  
13 to which he had a right, because of what  
14 counsel did, that automatically is prejudicial.

15 You don't have to know whether he was  
16 going to win his appeal.

17 JUSTICE GORSUCH: But why doesn't that  
18 answer the question here? Because --

19 MR. KEDEM: Sure.

20 JUSTICE GORSUCH: -- there's  
21 undoubtedly a statutory right to appeal.

22 MR. KEDEM: That's right.

23 JUSTICE GORSUCH: And the waiver is  
24 only good if it's asserted. And often the  
25 government fails to assert it in a timely

1 fashion in the courts of appeals, and the  
2 courts of appeals just disregard the waiver all  
3 together.

4 MR. KEDEM: Right.

5 JUSTICE GORSUCH: It is in the nature  
6 of an affirmative defense that you'd lose if  
7 you don't use.

8 So why isn't it the denial in a  
9 proceeding to which the defendant is entitled  
10 by law?

11 MR. KEDEM: So the question is not  
12 merely whether he would have filed a notice of  
13 appeal and submitted some brief that the court  
14 would have read, if we know based on the  
15 circumstances that the court would just have  
16 thrown out the proceeding at the threshold --

17 JUSTICE BREYER: I read what it says  
18 in Flores-Ortega. Maybe I only got it in part,  
19 but it says the court noted failure to file a  
20 notice of appeal is "the complete denial of  
21 counsel during a critical stage of a judicial  
22 proceeding," a situation ordinarily requires a  
23 "presumption of prejudice."

24 MR. KEDEM: That's right. But  
25 elsewhere it specifies --

1 JUSTICE BREYER: Okay. So I take that  
2 to mean if your client asks you, the lawyer,  
3 file a notice of appeal, you've got to do it.  
4 And if you don't do it, it's automatically  
5 prejudice.

6 Now isn't -- isn't -- and -- and my  
7 question was, well, why isn't that exactly the  
8 same here? Now which part am I wrong? Am I  
9 wrong that that's what Flores-Ortega says, or  
10 am I wrong that this is the same?

11 MR. KEDEM: So -- so Flores-Ortega  
12 certainly says what you're talking about --

13 JUSTICE BREYER: All right.

14 MR. KEDEM: -- but it also clarifies  
15 elsewhere that the type of appeal to which  
16 we're talking about is an appeal to which the  
17 defendant has a right, which is to say a merits  
18 proceeding.

19 If a defendant, for instance, asks to  
20 appeal to the wrong court, he wants to appeal  
21 to the Ninth Circuit rather than to an Idaho  
22 state appellate court, no one would say that if  
23 his attorney declines to file that notice of  
24 appeal, knowing that it would just be tossed  
25 out without any consideration of the merits of

1 his claims, that the defendant has been  
2 prejudiced in the sense that -- that the Sixth  
3 Amendment cares about, because Strickland uses  
4 the term prejudice --

5 JUSTICE GORSUCH: Because he has no  
6 legal right to that kind of appeal?

7 MR. KEDEM: That's correct.

8 JUSTICE GORSUCH: But he does have a  
9 legal right to appeal to the court -- relevant  
10 court of appeals. That is a statutory right.

11 Now perhaps Congress could change that  
12 and say in appeal waivers cases, you know, I'm  
13 sure the government can go seek that, but for  
14 now at least, there's a statutory right to  
15 appeal to the right court.

16 So back to Justice Breyer's question,  
17 I think we've --

18 MR. KEDEM: Sure.

19 JUSTICE GORSUCH: -- removed that  
20 complication you've added.

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

25 And there's no jurisdictional defect

1 because the timing of a notice of appeal in a  
2 criminal case is not jurisdictional. If the  
3 attorney declines because he knows that there  
4 would be no consideration of the merits --

5 JUSTICE GORSUCH: Again, I think  
6 that's just evading the hypothetical,  
7 respectfully, counsel. And there may be no  
8 legal right in those instances.

9 I'm talking about a case where it's  
10 the right court and the right period of time  
11 and there is a statutory right. I think that's  
12 what Justice Breyer is trying to aim at. And  
13 maybe you could too.

14 MR. KEDEM: So -- so --

15 JUSTICE BREYER: And you also might  
16 have some good arguments. The chances are you  
17 don't.

18 MR. KEDEM: Right.

19 JUSTICE BREYER: Let's look at the  
20 Anders briefs filed in those cases where there  
21 was no waiver.

22 MR. KEDEM: Sure.

23 JUSTICE BREYER: I mean --

24 MR. KEDEM: You know --

25 JUSTICE BREYER: -- none of those

1 cases did he have a really good argument, or  
2 the lawyer wouldn't have filed an Anders brief.

3 MR. KEDEM: So -- so here is why we  
4 think it is different in a case where the  
5 defendant just has bad arguments of the sort  
6 that might get asserted in an Anders brief.

7 You still know there that if a notice  
8 of appeal is filed, that there will be review  
9 on the merits. He may lose, but he is still  
10 going to have his claims reviewed, and if the  
11 court of appeals disagrees with him, it's going  
12 to affirm. It's not going to dismiss the  
13 appeal, which is what happens in the case of an  
14 appellate waiver.

15 And so what Flores-Ortega tells us is  
16 we care about the type of error that would  
17 undermine our faith in the reliability of the  
18 proceedings, but if all you've lost out on is  
19 an opportunity to have your claims tossed out  
20 without any merits review whatsoever,  
21 Flores-Ortega does not tell us that that type  
22 of loss counts as prejudice.

23 JUSTICE ALITO: Do you think we can  
24 get anything out of the question whether the  
25 defendant has a legal right to file some thing

1     there?  Isn't it the case that, under statutes  
2     and under rules, defendants have the right to  
3     do all sorts of things during a criminal  
4     proceeding, but for almost all of those, the  
5     decision is made by the attorney?

6             MR. KEDEM:  That's correct.  The  
7     question is more about whether the loss of a  
8     proceeding undermines our faith in the  
9     reliability of the criminal judgment.

10            If the answer there is no, then the  
11    defendant hasn't lost anything that the Sixth  
12    Amendment was designed to protect.

13            JUSTICE BREYER:  Sorry.  Maybe this I  
14    just -- I don't understand.

15            We have a trial or a guilty plea.  The  
16    defendant says appeal; he files an Anders  
17    brief.

18            MR. KEDEM:  That's correct.

19            JUSTICE BREYER:  And what you're  
20    saying is the court will read it, he has a  
21    chance to file his own, and then it will write  
22    the word affirmed, all right?

23            So now what we have is this case.  He  
24    might have some good arguments, you know, he  
25    might, but the lawyer thinks not.  And the

1 lawyer says: I filed an Anders brief, I've  
2 looked through it, there's nothing to it, and  
3 they don't write the word affirmed?

4 MR. KEDEM: Usually they --

5 JUSTICE BREYER: Do you know that they  
6 don't write the word affirmed, rather, that  
7 they write the word dismissed? I've never seen  
8 that, you know. I've never seen -- that  
9 doesn't mean it isn't true.

10 MR. KEDEM: Well, Justice -- Justice  
11 Breyer --

12 JUSTICE BREYER: Do you know that the  
13 court of appeals writes the word dismissed and  
14 not the word affirmed?

15 MR. KEDEM: That's right. In our  
16 brief, we have a footnote --

17 JUSTICE BREYER: Yeah.

18 MR. KEDEM: -- citing decisions from  
19 every circuit in the federal system --

20 JUSTICE BREYER: Where they'll say  
21 dismissed and not affirmed?

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

23 JUSTICE BREYER: All right. So that's  
24 what the difference really comes down to in  
25 your mind?



1           MR. KEDEM:  It's -- it's -- that is  
2           one technical difference, but I think it also  
3           goes to the question:  Are they reviewing the  
4           claims on the merits?  When there's a loss of a  
5           proceeding in which no merits review occurs,  
6           that doesn't undermine our faith in the  
7           reliability of the proceedings.

8           It's also important to note that an  
9           appellate waiver doesn't just make the  
10          likelihood of success on appeal lower.  It's an  
11          additional obstacle that would prevent the  
12          defendant's claims even from getting  
13          consideration.  And so, if we want to rule out  
14          that obstacle, we have to do some additional  
15          investigation.

16          We can look either to direct evidence  
17          that the defendant was on the verge of  
18          appealing some claim that would have gotten  
19          merits consideration, or, if we don't have  
20          direct evidence based on communications or  
21          contemporaneous evidence, we can look to the  
22          existence of some non-frivolous claim outside  
23          the scope of the waiver that the defendant had  
24          which provides circumstantial evidence that had  
25          a notice of appeal been filed, he would have

1 appealed some claim that got merits review.

2 JUSTICE GORSUCH: How -- how does that  
3 fit with the usual breakdown of  
4 responsibilities between client and lawyer  
5 where we normally assume that clients only  
6 specify objectives or ends and that the lawyer  
7 has the obligation under our ethical rules and,  
8 mostly -- most of our Sixth Amendment  
9 jurisprudence to -- to pick the appropriate  
10 means?

11 So, if a client says I wish to appeal  
12 anything that's possible, why isn't that a  
13 necessary directive to the lawyer to figure out  
14 which possible things fall outside the waiver  
15 or -- or those sorts of things? Why does a  
16 client have to come forward and identify the  
17 winning argument?

18 MR. KEDEM: So, again, we're not  
19 talking about counsel's obligations or the  
20 client's obligations on direct review. When  
21 we're on collateral review, trying to figure  
22 out why it was that the defendant either was or  
23 wasn't harmed, the normal burden under  
24 Strickland is that a defendant who seeks to  
25 reopen an otherwise final judgment has the

1 burden in all cases to establish that he was  
2 prejudiced.

3 Now it may be that, as a theoretical  
4 matter, any defendant could always challenge  
5 something outside the scope of his waiver. He  
6 could always challenge, for instance, whether  
7 his plea was voluntary. But we shouldn't start  
8 with the assumption for all cases that all  
9 defendants are intending to challenge, for  
10 instance, the voluntariness of their pleas.

11 Not only does that invert the normal  
12 burden of proof under Strickland, it's contrary  
13 to experience.

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

16 JUSTICE KAVANAUGH: In terms of  
17 experience, does the federal government think  
18 that the experience of those circuits that have  
19 applied a presumption of prejudice has shown a  
20 problem?

21 MR. KEDEM: So it's a problem only  
22 that it leads to the reinstatement of  
23 additional frivolous appeals. We're not saying  
24 that it's such a big problem that the sky is  
25 going to fall in, but it does create a couple

1 practical problems.

2           Number one, in addition to additional  
3 frivolous appeals, there are a lot of circuits  
4 that don't act on motions to dismiss on the  
5 basis of waivers until after full briefing on  
6 the argument -- on -- on the merits, which  
7 means the government loses a lot of the benefit  
8 of its bargaining.

9           The second one is that when you're on  
10 collateral review, you end up focusing just on  
11 the evidentiary question, the very difficult  
12 evidentiary question, whether the defendant  
13 actually asked for a notice of appeal, which  
14 can be burdensome to prove.

15           JUSTICE SOTOMAYOR: I -- I'm sorry.  
16 Those circuits don't believe in Anders briefs?

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

19           JUSTICE SOTOMAYOR: No, no, no, no, I  
20 -- it does. I -- I mean --

21           MR. KEDEM: So all circuits believe in  
22 Anders briefs, but an Anders brief requires --

23           JUSTICE SOTOMAYOR: So, if an attorney  
24 has filed a notice of appeal and -- and doesn't  
25 file an Anders brief, it means that he or she

1 believes they have some viable -- potentially  
2 viable argument, right? So the fact that the  
3 court requires briefing on that, why is that an  
4 additional burden?

5 MR. KEDEM: It's an additional burden  
6 to require the government to address the merits  
7 when really the case should be thrown out at  
8 the threshold because all of the defendant's  
9 claims have been waived.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Two minutes, Mr. Ali.

13 REBUTTAL ARGUMENT OF AMIR H. ALI

14 ON BEHALF OF THE PETITIONER

15 MR. ALI: Thank you, Mr. Chief  
16 Justice.

17 I just want to really make one point,  
18 maybe with two parts, responding to the United  
19 States' suggestion that really we're dealing  
20 here with a -- a -- a formalistic or symbolic  
21 appeal. And I just want to do it on the  
22 context of this record with the real practical  
23 consequences this could have for Mr. Garza.

24 As we note on page 32 of our opening  
25 brief, Mr. Garza here has a very colorable, I

1 think meritorious claim, that his appeal waiver  
2 was involuntary.

3 We address the specific facts there,  
4 which include shortly before his second plea,  
5 indicating on a form that he was not waiving  
6 his right to appeal; going into two plea  
7 hearings, neither of which inquired, as  
8 required under state law under Rule 11, into  
9 whether he was waiving his right to appeal; and  
10 then being advised three times in -- once in  
11 the hearing and twice in judgments, that he had  
12 a right to appeal.

13 And -- and I just want to note that  
14 that claim could not be raised on  
15 post-conviction. Justice Alito, you asked  
16 whether it was raised and dealt with. The  
17 answer is no.

18 The very pages that were referred to  
19 you -- that you were referred to by the State,  
20 the district court says: I do not understand  
21 Mr. Garza to be challenging the voluntariness  
22 of his appeal waiver. I see his pro se  
23 petition as only addressing the voluntariness  
24 of his plea agreement as a whole.

25 So even though the lack of advice at

1 the Rule 11 hearing would seem to support his  
2 claim, I will not consider it that way.

3 And if I could just finish in  
4 summation by saying that the substantial  
5 majority of the circuits have adopted the rule  
6 Petitioner proposed in this case. Those  
7 circuits account for approximately 95 percent  
8 of the guilty pleas in the federal system, and  
9 no problems have been shown with that rule, we  
10 ask the Court to adhere to it where, as here, a  
11 defendant satisfies a court that he wanted to  
12 challenge the lawfulness of the proceedings he  
13 got, his state-appointed attorney, his agent,  
14 has no place substituting his own view that his  
15 client should simply cede and go off to prison.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, at 12:07 p.m., the case  
20 was submitted.)

21  
22  
23  
24  
25

## Official

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