Catholic University Law Review

Volume 64
Issue 2 *Winter 2015*

Article 10

4-21-2015

Following Orders: *Campbell v. United States*, the Waiver of Appellate Rights, and the Duty of Counsel

Jacob Szewczyk

Follow this and additional works at: http://scholarship.law.edu/lawreview

Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Jacob Szewczyk, *Following Orders: Campbell v. United States, the Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489 (2015).
Available at: http://scholarship.law.edu/lawreview/vol64/iss2/10

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Following Orders: *Campbell v. United States*, the Waiver of Appellate Rights, and the Duty of Counsel

Cover Page Footnote
J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.S., 2010, George Mason University. The author would like to thank Professor Cara Drinan for her expertise and hours of assistance and guidance that allowed him to write this Comment. In addition, the author would like to thank his parents, William and Christine Szewczyk, as well as his siblings and the rest of his family, for their endless support. The author would like to thank his fiancée, Christina Lee, for her love, support, edits, and suggestions for this Comment. Last, but not least, the author would like to thank the staff and editors of the Catholic University Law Review for their outstanding and tireless work on this, and every, article.

This comments is available in Catholic University Law Review: http://scholarship.law.edu/lawreview/vol64/iss2/10

FOLLOWING ORDERS: *CAMPBELL V. UNITED STATES*, THE WAIVER OF APPELLATE RIGHTS, AND THE DUTY OF COUNSEL

Jacob Szewczyk[+]

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[1]

On April 23, 2008, the state charged Robert Campbell with participating in a mortgage fraud conspiracy.[2] Campbell pleaded guilty in return for a favorable plea agreement.[3] As part of the agreement, he waived his right to appeal his conviction.[4] On September 20, 2010, pursuant to his plea agreement, Campbell was sentenced.[5] After sentencing, Campbell changed his mind and asked his attorney to file an appeal, but "[n]o notice of appeal was filed."[6]

Less than two months later, Campbell asked the court "to vacate, set aside, or correct [his] sentence," premised on Campbell's attorney's failure to file a notice of appeal, which Campbell alleged he had ordered his attorney to do.[7] The district court dismissed "all . . . of Campbell's claims."[8] Subsequently, the United States Court of Appeals for the Sixth Circuit agreed to hear Campbell's appeal on one issue: "whether Campbell was denied effective assistance of

---

+ J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.S., 2010, George Mason University. The author would like to thank Professor Cara Drinan for her expertise and hours of assistance and guidance that allowed him to write this Comment. In addition, the author would like to thank his parents, William and Christine Szewczyk, as well as his siblings and the rest of his family, for their endless support. The author would like to thank his fiancée, Christina Lee, for her love, support, edits, and suggestions for this Comment. Last, but not least, the author would like to thank the staff and editors of the *Catholic University Law Review* for their outstanding and tireless work on this, and every, article.

1. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

2. Campbell v. United States, 686 F.3d 353, 355 (6th Cir. 2008). Campbell's participation in the fraud consisted of "falsifying mortgage documents, covertly paying borrowers' closing costs, and 'flip[ping]' properties bought by a straw purchaser and resold to Campbell at an inflated price." *Id.* (alteration in original).

3. *Id.*

4. *Id.*

5. *See id.* at 356.

6. *Id.*

7. *Id.* at 355–56. Campbell's motion to vacate was made pursuant to 28 U.S.C. § 2255. *Id.* at 356. 28 U.S.C. § 2255 is the federal habeas corpus statute that allows a federal prisoner to challenge the constitutionality of his conviction, sentence, or any other collateral attack. *See* 28 U.S.C. § 2255 (2012).

8. *Campbell*, 686 F.3d at 356.

counsel when his attorney failed to file a requested notice of appeal."[9] The court, ultimately, answered in the affirmative, joining the majority of its sister circuits.[10]

The Supreme Court of the United States recognized the concept of ineffective assistance of counsel in *Strickland v. Washington*.[11] In *Strickland*, the Court established a two-pronged test to determine whether an attorney provided deficient representation to his client during trial.[12] Under the Court's two-pronged test, "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."[13]

Since the *Strickland* decision, the Supreme Court has expanded the scope of the ineffective assistance of counsel test to encompass a variety of factual scenarios.[14] Whether counsel's failure to file a requested appeal, after a defendant has waived his right to appeal through a plea bargain, constitutes ineffective assistance of counsel remains unanswered by the Supreme Court. Because of this open question, a circuit split has developed with the majority of circuits holding that under such circumstances there is a valid ineffective

---

9. *Id.*

10. *Id.* at 360; *see* Tamar Kaplan-Marans, *An Appealing Split: Filing an Appeal After a Plea Bargain: Is Counsel Obliged to File a Meritless Appeal?*, 74 BROOK. L. REV. 1183, 1184–85 (2009) ("Even though a defendant's waiver renders an appeal futile and therefore frivolous, counsel is still required to file one under the Sixth Amendment." (footnote omitted) (citing United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007); Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); Campusano v. United States, 442 F.3d 770, 777 (2d Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 794 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1199 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1267 (10th Cir. 2005))).

11. 466 U.S. 668, 687–92 (1984).

12. *See id.* (discussing the test for ineffective assistance of counsel).

13. *Id.* at 687; *see also id.* at 686–91 (providing the reasoning behind the test as well as the requirements for establishing a claim of ineffective assistance of counsel).

14. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (holding that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (determining that, to meet the prejudice prong of the *Strickland* test in the context of ineffective assistance of counsel resulting in the rejection of a plea-bargain, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court [,] . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"); Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (holding that defense counsel has an obligation to inform a defendant of potential immigration-related consequences of a guilty plea); Roe v. Flores-Ortega, 528 U.S. 470, 474 (2000) (addressing a claim that defense counsel provided ineffective assistance of counsel by failing to file a notice of appeal).

assistance of counsel claim, regardless of whether or not the defendant has waived his right to appeal.[15] This Comment will address the circuit split.

This Comment begins with the background and an analysis of *Strickland* and the expansion of the *Strickland* test. Next, it analyzes the circuit courts' split opinions.[16] This Comment argues that the majority approach is in accord with Supreme Court precedent and is the most effective approach for protecting the rights of defendants in criminal cases. Finally, this Comment advocates that courts should adopt the Tenth Circuit's test in *United States v. Garrett* to balance the essential constitutional rights of criminal defendants with the need for judicial efficiency.

I. INEFFECTIVE ASSISTANCE OF COUNSEL: A TOUGH ROAD FOR CRIMINAL DEFENDANTS IN CRIMINAL CASES

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence [sic]."[17] The right to the assistance of counsel is so essential that it justifies "withhold[ing] from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty."[18] In the seminal 1963 case, *Gideon v. Wainwright*,[19] the Supreme Court deemed the Sixth Amendment right to the assistance of counsel so fundamental that it held that the right applied to the states through the Fourteenth Amendment.[20] Since

---

15. *See Campbell*, 686 F.3d at 355; *Poindexter*, 492 F.3d at 266; *Tapp*, 491 F.3d at 266; *Watson*, 493 F.3d at 963–64; *Campusano*, 442 F.3d at 771–72; *Gomez-Diaz*, 433 F.3d at 790; *Sandoval-Lopez*, 409 F.3d at 1198; *Garrett*, 402 F.3d at 1267.

16. *See e.g.*, United States v. Mabry, 536 F.3d 231 (3d Cir. 2008).

17. U.S. CONST. amend. VI.

18. Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (footnote omitted). If not afforded the assistance of counsel, the accused would face a substantial risk of conviction based solely on the fact that he lacks the education needed to prove his innocence. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932). The essentiality of the assistance of counsel was addressed again in *Cronic*, where the court stated:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

United States v. Cronic, 466 U.S. 648, 653–54 (1984) (footnotes omitted) (quoting United States v. Ash, 413 U.S. 300, 307–08 (1973); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *Powell*, 287 U.S. at 69).

19. 372 U.S. 335 (1963).

20. *Id.* at 341–45; *see also* Bruce R. Jacob, *Memories of and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 288–89 (2003) (discussing the important contributions to criminal defendants' rights made by the decision in *Gideon*).

Gideon, the Court has repeatedly expanded the Sixth Amendment's guarantee of the right to assistance of counsel.[21]

A. When Has Counsel Failed His Duty?

The Constitution requires more than the appointment of counsel.[22] In 1970, the Supreme Court, in *McMann v. Richardson*,[23] stated that criminal "defendants . . . are entitled to the effective assistance of *competent* counsel."[24] The Court developed the meaning of efficacy in its *Strickland* line of cases.

In *Strickland*, the Court established the standard for determining whether a defendant's sentence may be overturned because of ineffective assistance of counsel.[25] The defendant in *Strickland*, David Washington, turned himself in after a ten-day crime spree that left three people dead.[26] The defendant confessed in detail to the third homicide and was subsequently indicted for kidnapping and murder.[27] An experienced attorney was appointed to represent the defendant, but the attorney felt the case was hopeless, because, "against [the attorney's] specific advice, [Washington] . . . confessed to the first two murders."[28] Ultimately, the defendant pleaded guilty to three homicide charges and a kidnapping charge.[29]

In preparing for the sentencing hearing, Washington's attorney neither sought out character witnesses other than Washington's wife and mother, nor did he prepare any evidence regarding Washington's mental or emotional state.[30]

---

21. *See In re* Gault, 387 U.S. 1, 41 (1967) (holding that the Fourteenth Amendment dictates that the Sixth Amendment's right to counsel applies to juvenile proceedings); Douglas v. California, 372 U.S. 353, 357 (1963) (determining that the Fourteenth Amendment requires the state to provide counsel to an indigent defendant who has an appeal as of right).

22. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel.").

23. 397 U.S. 759 (1970).

24. *Id.* at 771 (emphasis added). According to the American Bar Association (ABA), the duty of defense counsel "is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION 4-1.2, at 120 (3d ed. 1993). *See also* Bruce Andrew Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1057–58 (1980) (discussing the Court's holding that "recognized that the [S]ixth [A]mendment 'right to the effective assistance of counsel' precludes not only impediments to counsel's performance imposed by a state or court, but also an inadequate performance by counsel unimpaired by state action").

25. Strickland v. Washington, 466 U.S. 668, 686, 671 (1984).

26. *Id.* at 671–72.

27. *Id.* at 672.

28. *Id.* In addition to ignoring this advice, Washington also "waived his right to a jury." *Id.*

29. *Id.*

30. *Id.* at 672–73. According to the Court, the decision not to pursue these avenues "reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of [Washington's] confessions." *Id.* at 673.

Following the defense attorney's arguments, the judge sentenced the defendant to death.[31]

Subsequent to the Florida Supreme Court upholding Washington's convictions, he filed a writ of habeas corpus in federal court alleging that he had received "ineffective assistance of counsel."[32] After the U.S. Court of Appeals for the Fifth Circuit granted partial relief, the State of Florida filed for, and was granted, a writ of certiorari.[33]

Specifically, the Court "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[34] The Court, in recognizing the important role of defense counsel in criminal proceedings, created a two-prong test to analyze ineffective assistance of counsel claims: (1) "the defendant must show that counsel's performance was deficient," and (2) "the defendant must show that the deficient performance prejudiced the defense."[35]

The first prong requires a showing that counsel's performance was so severely "deficient" that the defendant did not receive the "'counsel' guaranteed the defendant by the Sixth Amendment."[36] This requires a determination of whether, under the circumstances, the counsel's conduct was reasonable.[37] Further, the defendant must overcome the strong presumption that counsel provided adequate assistance.[38]

Conduct rising to the level of deficient performance includes failing to investigate and present mitigating factors in a sentencing proceeding,[39] as well as "failing to examine court files on [a client's] prior conviction."[40] Conversely, an attorney's conduct does not rise to the level of deficient performance when

31. *Id.* at 674–75. The judge found multiple aggravating circumstances to justify the death sentence. *Id.* at 674.

32. *Id.* at 678.

33. *See id.* at 683 (discussing the cases prior history).

34. *Id.* at 684.

35. *Id.* at 687.

36. *Id.*

37. *Id.* at 688. In *Strickland* and subsequent cases, the Court stated that it uses American Bar Association (ABA) standards to determine what constitutes reasonable performance. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .'" (quoting *Strickland*, 466 U.S. at 688)).

38. *See Strickland*, 466 U.S. at 691 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying *a heavy measure of deference* to counsel's judgment." (emphasis added)).

39. *See* Porter v. McCollum, 130 S. Ct. 447, 453 (2009) (per curiam) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)) ("Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment.").

40. *See* Rompilla v. Beard, 545 U.S. 374, 383 (2005) ("[T]he lawyers were deficient in failing to examine the court file on [the client's] prior conviction.").

an attorney advises his client to withdraw his insanity defense, because the Court is highly deferential to trial counsel's strategic choices.[41] But, the reasonableness of the attorney's conduct is only one part of the Court's analysis.

The second prong requires the defendant to show that counsel's "deficient performance prejudiced the defense."[42] To fulfill the second prong, the defendant must prove that, but-for the attorney's poor performance, "the factfinder [sic] would have had a reasonable doubt respecting guilt."[43] For example, prejudice exists when counsel fails to examine prior court documents that contained mitigating evidence,[44] but not when counsel fails to provide mitigating evidence that was mostly duplicative.[45] The Court does not often make a determination on prejudice, and will typically remand the case to the lower court to make such a determination.[46]

B. Expansion of the Strickland *Test*

Since creating the rigid *Strickland* test, the Supreme Court has heard a variety of ineffective assistance of counsel cases.[47] This analysis will focus on cases that apply the *Strickland* test in the plea context.

---

41. *See, e.g.*, Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009) (holding that counsel did not provide deficient performance by recommending that the client withdraw a defense that he would be unable to establish). *See also Strickland*, 466 U.S. at 689 (stating that reviewing courts must give deference to counsel's strategy and method of conducting the trial).

42. *Id.* at 687.

43. *Id.* at 695.

44. *Rompilla*, 545 U.S. at 390 ("If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up.").

45. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1409 (2011) (explaining that "[t]here is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict"). Another example of a lack of prejudice is when counsel failed to provide his own expert witness but was able to extract the same testimony from the state's expert. *See, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 791–92 (2011) (explaining that an independent expert witness for defense would not have provided any addition benefit to the defendant's case other than a "theoretical possibility" that the crime was committed by a separate party).

46. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (remanding the case to the state court for a determination of the prejudice prong); Kimmelman v. Morrison, 477 U.S. 365, 390 (1986) (stating that an evidentiary hearing was required to determine if defendant was prejudiced, and deferring that determination to the lower courts).

47. *See, e.g.*, Porter v. McCollom, 130 S. Ct. 447, 449 (2009) (addressing defense counsel's failure to perform a thorough investigation for mitigating evidence); Mickens v. Taylor, 535 U.S. 162, 164 (2002) (allegation that attorney had a conflict of interests at trial); Kimmelman v. Morrison, 447 U.S. 365, 368–69 (1986) (failure to file a motion to suppress evidence allegedly obtained in violation of the Fourth Amendment).

1. Ineffective Assistance in the Plea Process

The first extension of *Strickland* to the plea process occurred in 1985 in the case of *Hill v. Lockhart*.[48] In *Hill*, the defendant alleged he was provided ineffective assistance of counsel because he pleaded guilty based on erroneous advice regarding his parole eligibility under the plea.[49] For the deficient performance prong, the Court reasoned that a plea must be voluntary, therefore, a defendant must receive competent advice from his attorney regarding his plea.[50]

Applying the *Strickland* test's "prejudice" prong to the plea process, the *Hill* Court determined that "in order to satisfy the 'prejudice' requirement, the defendant must show that there [was] a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[51] In *Hill*, the Court only addressed the standards of attorney conduct prior to a plea being entered. However, in a 2000 case, *Roe v. Flores-Ortega*,[52] the Court addressed the application of the *Strickland* test to plea agreements that had already been accepted.[53]

2. Failing to File a Notice of Appeal After a Plea Agreement Is Reached

In *Roe v. Flores-Ortega*, the question presented was whether a valid claim of ineffective assistance of counsel existed when an attorney failed to file a notice of appeal as requested by the defendant after a plea agreement was reached.[54]

---

48. 474 U.S. 52, 58 (1985). In a later case, the Court explicitly stated the importance of plea agreements: "plea bargains have become . . . central to the administration of the criminal justice system." *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); *see also* 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 180 (4th ed. 2008) ("In a typical year roughly 85% of the federal criminal cases filed end in a guilty plea. Because defendants often have little to gain by simply admitting guilt to the charges as filed, and because there are far more cases filed than could possibly be resolved by a full-blown trial, prosecutors routinely offer inducements to a defendant to plead guilty.").

49. *Hill*, 474 U.S. at 53 ("[The defendant] sought federal habeas relief on the ground that his court-appointed attorney had failed to advise him that, as a second offender, he was required to serve one-half of his sentence before becoming eligible for parole.").

50. *Id.* at 56 (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).

51. *Id.* at 59; *see also* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 549 (1988) (stating that *Hill* created a new, difficult rule to win an ineffective assistance of counsel case regarding the plea process). Richard Klein further explained that the "[j]ustification for tolerating plea bargaining relies on the assumption that a knowledgeable defendant with the advice of competent counsel rationally compares the punishment he would receive if he pleads guilty with that he would be likely to receive if convicted." *Id.*

52. 528 U.S. 470 (2000).

53. *Id.* at 473 ("In this case we must decide the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent.").

54. *Id.*

The defendant in *Flores-Ortega* had pleaded guilty to second-degree murder.[55] Despite his attorney making a note to herself about preparing appellate documents, no notice of appeal was ever filed.[56]

Upon review, the Court held that ineffective assistance of counsel could be established "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."[57] The Court recognized the long-standing rule that disregarding a defendant's instructions to file a notice of appeal is "professionally unreasonable" conduct because the defendant "reasonably relies upon counsel to file the necessary notice."[58] Additionally, because filing a notice of appeal is a "ministerial task," the "failure to file reflects inattention to the defendant's wishes,"[59] and it cannot be justified as a "strategic decision."[60]

For the prejudice prong, the Court, in *Flores-Ortega*, introduced a new exception to the presumption that counsel has provided effective assistance.[61] Previous exceptions were recognized where the defendant was denied *any* assistance of counsel,[62] when the assistance of counsel was actually or constructively denied,[63] and when counsel had a conflict of interest.[64] *Flores-Ortega* involved the denial of the defendant's right to a proceeding.[65] Denying the defendant an opportunity to appeal when the defendant wanted to appeal and had the right to appeal created a presumption of prejudice.[66] In such cases, the Court held, the defendant need only "demonstrate that there is a reasonable

---

55. *Id.* at 473.

56. *Id.*

57. *Id.* at 484.

58. *Id.* at 477.

59. *Id.* On the other hand, "a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). The Court also stated that defense counsel is not required to "always consult with the defendant regarding appeals." *Id.* at 480. Instead, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.*

60. *Id.* at 477.

61. *See id.* at 484 ("[W]e hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about appeal, he would have timely appealed.").

62. *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (holding "that a trial is unfair if the accused is denied counsel at a critical stage of his trial").

63. *See* Lockhart v. Fretwell, 506 U.S. 364, 378 (1993) (Stevens, J., dissenting) (citing *Cronic*, 466 U.S. at 659 & n.25) (explaining the Court's exceptions to *Strickland*'s prejudice prong).

64. Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)).

65. *Flores-Ortega*, 528 U.S. at 483 (recognizing that the case resulted in the "forfeiture of a proceeding itself" rather than the usual concern for the reliability of the outcome of a proceeding).

66. *Id.* at 482.

probability that . . . he would have timely appealed" had it not been for his lawyer's "deficient" performance.[67]

Flores-Ortega, although not explicitly stated by the Court, can be understood to reaffirm the long-standing proposition that there are certain decisions that belong to the defendant in a criminal trial, and trial counsel must further, not inhibit, these decisions. The Court has recognized that the criminal defendant has the right to waive a jury trial, regardless of counsel's personal opinion.[68] The choice to waive the assistance of counsel also belongs to the defendant,[69] as does the decision to waive a trial all together.[70] The decision that counsel provides ineffective assistance of counsel when he fails to file a requested appeal is a logical affirmation of the distinction between the rights of defendants and the obligations of counsel.

3. Collateral Consequences Stemming from Plea Agreements

The Supreme Court in *Padilla v. Kentucky*[71] addressed whether counsel's failure to inform his client about collateral consequences of a plea can constitute ineffective assistance of counsel.[72] In *Padilla*, the defendant alleged that his attorney failed to inform him of the potential immigration consequences of his guilty plea.[73] While the Court chose not to make a decision on whether *Strickland* applied to all collateral consequences, it determined that deportation was so critical to a plea that an *effective* attorney must advise his client of such consequences.[74] The Court held that an attorney's failure to inform clients about the effects of a guilty plea on the possibility of deportation was professionally unreasonable.[75]

4. Recent Expansion of the Strickland *Test's Applicability in the Plea Process*

In 2012, the Supreme Court held in *Missouri v. Frye*[76] that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea

67. *Id.* at 484.

68. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279–80 (1942).

69. Faretta v. California, 422 U.S. 806, 834 (1975).

70. McCarthy v. United States, 394 U.S. 459, 466 (1969).

71. 130 S. Ct. 1473 (2010).

72. *Id.* at 1481.

73. *Id.* at 1478 ("Padilla claims that his counsel . . . told him that he 'did not have to worry about immigration status since he had been in the country so long.'" (quoting Kentucky v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) (internal quotation marks omitted)).

74. *Id.* at 1481–82.

75. *See id.* at 1486 ("Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

76. 132 S. Ct. 1399 (2012).

on terms and conditions that may be favorable to the accused."[77] In *Frye*, the defendant was charged with driving with a revoked license.[78] The prosecutor sent Frye's counsel two plea offers, but counsel never communicated the plea offers to Frye.[79] Without a plea bargain in place, Frye pleaded guilty and was sentenced to three years in prison.[80]

On review, the Court restated its assertion from *Padilla* "that 'the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.'"[81] Because plea negotiations are a "critical phase," the Court found that "defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[82] Thus, failing to communicate a formal plea offer to a client is deficient performance under the first prong of the *Strickland* test.[83]

In *Frye*, the Court stated that in order to satisfy the prejudice prong, the defendant must show that there was a high probability that he would have accepted the plea bargain if his attorney had presented it to him, and that the offered plea bargain would have resulted in a "more favorable" outcome than the results of a criminal trial.[84] The defendant must also demonstrate a "reasonable probability" that both the prosecutor and the judge would have accepted the plea bargain and would have implemented its terms.[85] Although *Frye* provided a new ground for defendants to prevail under *Strickland*, it also created a new difficulty. Judges must now read the minds of the prosecutor and trial judge, at the time the plea bargain was offered, to determine whether both parties would have approved and accepted the plea.[86]

In *Lafler v. Cooper*,[87] the Supreme Court addressed the requirements to prove prejudice when a defendant rejected a plea bargain based on erroneous "advice

---

77. *Id.* at 1408.

78. *Id.* at 1404. Frye was charged as a felon because he had three previous convictions for the same crime. *Id.*

79. *Id.* No explanation was given in the decision as to why counsel did not provide Frye with the prosecutor's offers. *Id.*

80. *Id.* at 1404–05.

81. *Id.* at 1406 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010)).

82. *Id.* at 1407.

83. *Id.* at 1409.

84. *Id.*

85. *See id.* at 1410 ("In order to complete a showing of *Strickland* prejudice . . . [defendant] must also show that . . . there is a reasonable probability neither the prosecution nor the trial court would have prevented the [plea] offer from being accepted or implemented.").

86. *See id.* at 1413 (Scalia, J., dissenting) (explaining the majority's opinion as requiring the "process of retrospective crystal-ball gazing posing as legal analysis").

87. 132 S. Ct. 1376 (2012).

of counsel."[88] Anthony Cooper, the defendant, was charged with multiple felonies.[89] Cooper was offered a plea bargain on three separate occasions and, relying on the advice of counsel, rejected all three.[90] At trial, Cooper "was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment."[91]

On review, the Supreme Court did not address the first prong of the *Strickland* test because both sides agreed that defense counsel's advice to reject the plea bargains was deficient performance.[92] The Court's analysis of the prejudice prong was dissected into multiple components, which required the defendant to show:

> [1] but for the ineffective advice of counsel there [was] a reasonable probability that the plea offer would have been presented to the court . . . [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.[93]

The Court determined that a fair trial does not eliminate the possibility of prejudice under *Strickland* because ineffective assistance of counsel at the plea bargain stage may result in a more severe punishment than would have been received by accepting the offer.[94] While a defendant has no right to be offered a plea,[95] once a plea is offered, the defendant is entitled to the effective assistance of counsel when determining whether or not to accept the offer.[96]

---

88. *See id.* at 1383 (distinguishing the facts of *Frye* from the facts at issue in *Lafler* and noting "[t]he instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment"). In both *Frye* and *Lafler*, the Supreme Court "recognize[d] that the choice between constitutional modes of adjudication matters . . . so a missed opportunity to accept a plea discount . . . is a constitutionally cognizable injury." Darryl K. Brown, Lafler*,* Frye *and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G REP. 131, 131 (2012).

89. *Lafler*, 132 S. Ct. at 1383. "[Cooper] was charged . . . with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender." *Id.*

90. *Id.* Cooper alleged that he refused to accept the plea offers, because "his attorney convinced him that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist." *Id.*

91. *Id.*

92. *Id.* at 1384.

93. *Id.* at 1385. This wide-range of factors show that "even if unconstitutional representation led to a defendant losing the prosecutor's proffered plea bargain, the court on remand has the discretion to impose the same, more severe sentence as the defendant was given after trial." Brown, *supra* note 88, at 132.

94. *Lafler*, 132 S. Ct. at 1386.

95. Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

96. *Lafler*, 132 S. Ct. at 1387.

C. Strickland *and Appellate Waivers*

1. The Majority Approach

The United States Courts of Appeal for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that defense counsel provides ineffective assistance of counsel by failing to file a notice of appeal when instructed to do so, despite the existence of an appellate waiver.[97] The Sixth Circuit's discussion in *Campbell v. United States*[98] and the Tenth Circuit's analysis in *United States v. Garrett*[99] are demonstrative of the rationale behind the holding.

In *Campbell*, Robert Campbell "pleaded guilty . . . [to] conspiracy to commit wire and mail fraud."[100] As part of his plea bargain, Campbell waived his right to appeal with several very narrow exceptions.[101] In a motion to vacate his sentence, Campbell alleged that he ordered his counsel to file a notice of appeal, but his attorney failed to file the notice.[102] After reviewing Supreme Court precedents and the rulings of its sister circuits, the Sixth Circuit held that "even when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has . . . provided ineffective assistance of counsel."[103] The court determined that Campbell's right, as a criminal defendant, to the effective assistance of counsel was not diminished by his initial acceptance of a plea bargain from the state.[104] The same question was presented in *United States v. Garrett*.[105]

---

97. *See* Campbell v. United States, 686 F.3d 353, 355 (6th Cir. 2012); United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 265 (4th Cir. 2007); Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); Campusano v. United States, 442 F.3d 770, 771–72 (2d Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 790 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1197 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1266 (10th Cir. 2005).

98. 686 F.3d 353 (6th Cir. 2012).

99. 402 F.3d 1262 (10th Cir. 2005).

100. *Campbell*, 686 F.3d at 355.

101. *Id.* at 355 & n.1 (stating that Campbell could only appeal "any punishment in excess of the statutory maximum; . . . any sentence to the extent it exceeds the maximum of the sentencing range. . . . Nothing . . . shall act as a bar to the defendant perfecting any legal remedies defendant may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel, voluntariness of this plea and accompanying waivers, or prosecutorial misconduct" (internal quotation marks omitted)). Campbell was not sentenced until two years after his plea, so that he could sell several properties he owned in order to pay restitution. Telephone Interview with Thomas Karol, Assistant U.S. Attorney, United States Dep't of Justice (Sept. 18, 2013).

102. *Campbell*, 686 F.3d at 355–56.

103. *Id.* at 359–60.

104. *Id.*

105. 402 F.3d 1262, 1263 (10th Cir. 2005).

In *Garrett*, the defendant pleaded guilty to possession with intent to distribute crack cocaine, and waived his right to appeal with limited exceptions.[106] A year after sentencing, Garrett alleged that he had instructed his counsel to file a notice of appeal, which his attorney failed to file, and, therefore, Garrett received ineffective assistance of counsel.[107] Similar to the Sixth Circuit's holding in *Campbell*, the Tenth Circuit found that ineffective assistance of counsel could be established by counsel's failure to file a requested notice of appeal.[108]

2. *The Minority Approach: A Focus on Judicial Efficiency*

The Seventh Circuit addressed whether counsel's failure to file a requested appeal, after a defendant waived his right to appeal, was ineffective assistance of counsel in *Nunez v. United States*.[109] In *Nunez*, the defendant was "[c]harged with multiple [drug] offenses."[110] The prosecutor offered the defendant a plea bargain, which he accepted.[111] As part of the plea bargain, the defendant agreed to waive his right to appeal.[112] Nunez challenged his sentence, under 28 U.S.C. § 2255, alleging that after sentencing he instructed his attorney to file an appeal, and that his attorney's failure to file it constituted ineffective assistance of counsel.[113] The court held that the defendant's counsel did *not* provide deficient performance by respecting the terms of the plea agreement, and, therefore, the defendant could not prevail under the *Strickland* test.[114] Likewise, the Third Circuit reached the same conclusion in *United States v. Mabry*.[115]

In *Mabry*, James Mabry, the defendant, was charged with multiple felonies.[116] Subsequent to impanelling the jury, "Mabry entered into a written plea agreement pursuant to which he pleaded guilty to . . . possession with intent to distribute . . . cocaine," and waived his right to appeal without any exception.[117] Eventually, Mabry filed a collateral attack of his sentence, under 28 U.S.C. §

---

106. *Id.* The exceptions included any sentence above the statutory maximum and any collateral challenge based on a change in Tenth Circuit or Supreme Court precedent. *Id.* at 1263 n.2.

107. *Id.* at 1264.

108. *Id.* at 1266; *see also Campbell*, 686 F.3d at 359.

109. 546 F.3d 450, 451–52 (7th Cir. 2008).

110. *Id.* at 453.

111. *Id.*

112. *Id.* The waiver only allowed Nunez to appeal if "the sentence exceeded the statutory maximum or the waiver clause itself should be deemed invalid." *Id.*

113. *Id.* at 451–53.

114. *See id.* at 456 ("[E]ven if Nunez asked his lawyer to file an appeal, counsel did not transgress the Constitution by honoring his client's considered written choice (the waiver) rather than his client's oral second thoughts. Nunez's contention flunks both the conduct and the prejudice components of ineffective-assistance doctrine.").

115. 536 F.3d 231, 241 (3d Cir. 2008) ("We, therefore, will part ways with the approach taken by the majority of courts of appeals. . . . [T]he *Nunez* opinion of the Court of Appeals for the Seventh Circuit presents the proper focus, namely giving effect to the waiver.").

116. *Id.* at 233.

117. *See id.* (describing the conditions of Mabry's plea agreement with the government).

2255, arguing that his attorney failed to file an appeal at his instruction.[118] As opposed to the court in *Nunez*, the Third Circuit did not find that Mabry failed to meet the requirements of *Strickland*. Rather, the Third Circuit determined that the *Strickland* test, even though it applies to counsel's failure to file an appeal, "does not apply when there [was] an appellate waiver."[119]

II. STRICKLAND'S APPLICABILITY TO APPELLATE WAIVERS

The development of the applicability of *Strickland* to the plea process presented a new question following *Flores-Ortega*: whether defense counsel provides ineffective assistance of counsel for failing to file a notice of appeal where the defendant has waived his right of appeal pursuant to a plea agreement.[120] The majority of circuits faced with this new question have answered in the affirmative.[121] Only the *Nunez* and *Mabry* courts chose not to follow the majority position.[122]

A. The Majority-Approach Circuits Properly Focus Their Analysis on Defendants' Rights

The majority of the circuits, including the Sixth and Tenth, rely on the logic of *Strickland* and *Flores-Ortega*.[123] Despite the fact that *Flores-Ortega* involved a defendant who did not waive his right to appeal,[124] the majority of the circuits found the decision applicable to appellate waiver cases, and supported this position with persuasive reasoning.[125] *Campbell* demonstrates that the reliance on *Flores-Ortega* is based on sound logical comparisons and the similarity of constitutional rights at stake.

In *Campbell*, the Sixth Circuit determined that *Flores-Ortega*'s analytical structure could be applied to *Campbell*'s facts.[126] The *Campbell* court paid

---

118. *See id.* at 235, 239 (stating the procedural history of Mabry's appeal, as well as the arguments he put forward in support of his claim).

119. *Id.* at 241–42, 242 n.14 (discussing the applicability of *Strickland* to the facts of *Mabry*).

120. *See id.* at 241–42 (discussing the courts' application of *Flores-Ortega* to appellate waivers).

121. *See supra* note 97 and accompanying text.

122. *See supra* Part I.C.2 (discussing the minority position).

123. *See, e.g.*, Watson v. United States, 493 F.3d 960, 963 (8th Cir. 2007) (stating that the presumption of prejudice found in *Flores-Ortega* was applicable to appellate waivers); United States v. Sandoval-Lopez, 409 F.3d 1193, 1196 (9th Cir. 2005) (determining "[t]he *Flores-Ortega* framework helps with [the present] case"); Gomez-Diaz v. United States, 433 F.3d 788, 792 (11th Cir. 2005) ("The reasoning in *Flores-Ortega* applies with equal force where, as here, the defendant has waived many, but not all, of his appellate rights.").

124. *See* Roe v. Flores-Ortega, 528 U.S. 470, 488 n.1 (Souter, J., concurring in part and dissenting in part) (stating that the government did not "claim . . . that Flores-Ortega waived his right to appeal as part of his plea agreement").

125. *See supra* notes 97 & 123 and accompanying text.

126. Campbell v. United States, 686 F.3d 353, 357–58 (6th Cir. 2012) ("In light of the specific propositions of law outlining the obligations of a criminal defense attorney at the appeal stage, and

particular attention to the time-honored rule "that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[127] Under this rule, "for the purpose of the *Strickland* analysis, 'prejudice *must* be presumed,'" because the failure to file an appeal, after the defendant requested the appeal, "[was] a *per se* violation of the Sixth Amendment."[128] This "*per se*" determination eliminates the need to discuss the *Strickland* test's deficient performance prong because the defendant has already been completely "deprive[d] . . . of any counsel."[129] Therefore, a complete deprivation equates to absolute prejudice.

The *Campbell* court further supported its analysis by addressing the appellate waiver.[130] Despite the fact that a defendant "waive[d] [his] right to an appeal by executing a plea agreement," the court found that such a waiver was not an absolute bar to all appeal rights.[131] The court further elucidated on instances where a defendant's appellate rights cannot be waived under a plea agreement: (1) when the plea "was not [made] knowing[ly] and voluntarily," (2) when the plea did not follow Federal Rule of Criminal Procedure 11, (3) when the plea "was the product of ineffective assistance of counsel," (4) "an appeal asserting that the sentence exceed[ed] the statutory maximum, or [(5)] a challenge claiming that the sentence was based on constitutionally impermissible criteria like race."[132]

The majority circuits also focused on the duty of defense counsel to his client. As the *Campbell* court stated, "[T]here nevertheless are some instances in which defendants seeking an appeal are still entitled to their day in court. Thus, even where an appeal appears frivolous, an attorney's obligations to his or her client do not end at the moment the guilty plea is entered."[133] Indeed, the Supreme Court in *Flores-Ortega* recognized as much.[134]

---

assuming, as Campbell claims in his brief, that he did direct his attorney to file a notice of appeal, we conclude that *Flores-Ortega* largely governs this case." (footnote omitted)).

127. *Id.* at 357 (quoting *Flores-Ortega*, 528 U.S. at 477) (internal quotation marks omitted). *Accord* United States v. Poindexter, 492 F.3d 263, 269 (4th Cir. 2007) (stating that counsel's failure to file a notice of appeal was "professionally unreasonable" according to *Flores-Ortega*); *Sandoval-Lopez*, 409 F.3d at 1196 (using the Court's reasoning in *Flores-Ortega* to establish that the attorney acted in a professionally unreasonable manner).

128. *Campbell*, 686 F.3d at 358 (quoting Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998)).

129. *Id.*

130. *Id.* at 358–60.

131. *Id.* at 358.

132. *Id.* (quoting United States v. Toth, 668 F.3d 374, 377 (6th Cir. 2012); United States v. Caruthers, 458 F.3d 459, 471 & n.5 (6th Cir. 2006)) (internal quotation marks omitted).

133. *Id.*

134. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000) ("[W]hen counsel's . . . deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim . . . .").

In *Garrett*, the Tenth Circuit aptly recognized that *Flores-Ortega* "provided [a] bright-line rule[] for evaluating an ineffective-assistance claim based on the performance of an attorney who has consulted with a criminal defendant about an appeal."[135] As such, under the Sixth and Tenth Circuits' interpretations, the standard *Strickland* test is unnecessary because *Flores-Ortega* established an analysis specific to when an attorney fails to file a notice of appeal after being instructed to do so.[136]

The Tenth Circuit anticipated the argument regarding the potential effect its holding would have on the efficacy of the criminal justice system, and prudently provided guidance on maintaining judicial efficiency without placing an absolute bar to defendants who agreed to appellate waivers as part of their plea.[137] While plea agreements and appellate waivers play a necessary role in the legal system and often are enforced, it does not mean that a defendant is completely at the mercy of the court when he is sentenced.[138] The Tenth Circuit implemented an efficient three-pronged test to determine the applicability of a defendant's plea agreement appeal waiver.[139] The test analyzes "(1) whether the disputed appeal falls within the scope of [the] defendant's waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice."[140] If the court determines the plea agreement is enforceable, the court "will summarily dismiss the appeal without considering its underlying merits."[141] If the waiver is found to be unenforceable, then the defendant, whose attorney failed to file an appeal, is entitled to a delayed direct appeal.[142] The courts in *Garrett* and *Campbell* did not distinguish *Flores-Ortega*, even though the defendant in *Flores-Ortega* had not waived his right to appeal, while the defendants in both *Garrett* and *Campbell* had.[143] Both courts analyzed the

---

135. United States v. Garrett, 402 F.3d 1262, 1265 (10th Cir. 2005) (citing *Flores-Ortega*, 528 U.S. at 477–78).

136. *See Campbell*, 686 F.3d at 358 (analyzing the impact of *Flores-Ortega* on the *Strickland* test); *Garrett*, 402 F.3d at 1265 (reviewing an ineffective assistance of counsel claim based on counsel's failure to file notice of appeal, using the *Flores-Ortega* standard rather than the *Strickland* test).

137. *See Garrett*, 402 F.3d at 1266 (discussing the "enforcement test" to determine whether a plea agreement should be enforced).

138. *Garrett*, 402 F.3d at 1266 (quoting United States v. Hahn, 359 F.3d 1315, 1318 (10th Cir. 2004)) ("[A] defendant does not subject himself to being sentenced entirely at the whim of the district court." (internal quotation marks omitted)).

139. *Id.*

140. *Id.* (citing *Hahn*, 359 F.3d at 1325).

141. *Id.* (quoting *Hahn*, 359 F.3d at 1328) (internal quotation marks omitted) (stating that the dismissal of an appeal brought subsequent to an enforceable plea agreement appeal waiver "preserves the benefit of the government's bargain" (internal quotation marks omitted)).

142. *Id.* at 1263.

143. *See* Campbell v. United States, 686 F.3d 353, 357–58 (6th Cir. 2012) ("In light of the specific propositions of law outlining the obligations of a criminal defense attorney at the appeal stage . . . we conclude that *Flores–Ortega* largely governs this case."); *Garrett*, 402 F.3d at 1265

constitutional right placed at risk, rather than ignoring the fundamental issue by relying on the absence of a factually similar case.

B. The Minority Approach Sacrifices Defendants' Constitutional Rights in the Name of Public Policy

The Third and Seventh Circuits focused on distinguishing their respective cases from *Flores-Ortega*.[144] The Seventh Circuit, in *Nunez*, acknowledged that the Court in *Flores-Ortega* stated that "filing a notice of appeal [was] a purely ministerial task, and the failure to file reflect[ed] inattention to the defendant's wishes."[145] However, the *Nunez* court determined that "[f]iling an appeal [was] not 'ministerial' when the defendant has waived that entitlement."[146] The *Nunez* court failed to explain *why* the waiver made the notice of appeal any less of a ministerial task than it would be without the waiver.[147]

Likewise, the Third Circuit, in *Mabry*, asserted that the *Strickland* test "d[id] not apply when there [was] an appellate waiver."[148] As for the courts that have analogized *Flores-Ortega* to appellate-waiver cases, the *Mabry* court rejected the majority approach, believing that those courts ignore the existence of the appellate waiver.[149] While the *Nunez* and *Mabry* courts used the guise of

---

(using *Flores-Ortega* to analyze the issue before the court). The court in *Campbell* recognized that the defendant in *Flores-Ortega* did not waive his right to counsel, but the court dispensed with that factual distinction by determining that the legal theory behind the *Flores-Ortega* holding was applicable to the case at bar. *Campbell*, 686 F.3d at 357–58. In *Garrett*, the Tenth Circuit's analysis made no mention of the fact that Flores-Ortega had not waived his right to appeal. *See Garrett*, 402 F.3d at 1264–67 (finding that the district court's focus on the defendants waiver "cannot be reconciled with the Supreme Court's holding in *Flores-Ortega*").

144. *See* Nunez v. United States, 546 F.3d 450, 454 (7th Cir. 2008) (discussing the minor exception to *Strickland* that *Flores-Ortega* created and the fact that there was no waiver of appellate rights in *Flores-Ortega*); United States v. Mabry, 536 F.3d 231, 240 (3d Cir. 2008) (noting that the Supreme Court in *Flores-Ortega* did not state whether the same rationale that gave merit to the argument in *Flores-Ortega* applied to a case "where the defendant has waived his right to appellate and collateral review").

145. *Nunez*, 546 F.3d at 454 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)) (internal quotation marks omitted). Ministerial is defined as "[o]f or relating to an act that involves *obedience to instructions* or laws *instead of discretion, judgment, or skill*," BLACK'S LAW DICTIONARY 1086 (9th ed. 2009) (emphasis added), and an order to file a notice of appeal meets that definition. However, the *Nunez* court stated, without any explanation, that the waiver of an appeal suddenly converts an otherwise ministerial task into a non-ministerial task. *See Nunez*, 546 F.3d at 454. The plain definition of ministerial, combined with the lack of a cogent explanation in *Nunez*, leaves this argument with little merit.

146. *Id.*

147. *Id.* (analogizing filing an appeal after waiving the right to appeal to an attorney preparing for trial after his client has pleaded guilty).

148. *Mabry*, 536 F.3d at 241.

149. *See id.* at 242 (stating that the majority courts "fail to address, let alone explain, that there even [was] a waiver of collateral attack"). *But see* Campbell v. United States, 686 F.3d 353, 357–60 (recognizing that Campbell's plea bargain contained an appellate waiver and discussing why the *Flores-Ortega* reasoning applied even when a waiver existed).

enforcing appellate waivers to refute claims of ineffective assistance of counsel, neither court applied a thorough analysis of the *Strickland* test in reaching its decision.[150]

Although the Seventh Circuit in *Nunez* agreed partially with the extension of the holding in *Flores-Ortega*,[151] the court ignored the fundamental constitutional issue and focused on the fact that Nunez entered the plea knowingly.[152] In addition, the court determined that Nunez's allegation met neither prong of the *Strickland* test.[153] As to deficient performance, the court focused on the faulted premise that adhering to the *plea* and ignoring the client's *order* was objectively reasonable.[154] In applying the prejudice prong, the court illogically determined that, had an appeal been filed, and despite not knowing the basis for any probable argument, the court would have dismissed the appeal.[155] This *ex ante* determination led the court to believe that the failure to file an appeal was not prejudicial.[156]

In *Mabry*, the Third Circuit also chose not to follow the majority approach.[157] The court narrowly interpreted *Flores-Ortega* and relied on the fact that *Flores-Ortega* did not explicitly state the scope of its holding.[158] The *Mabry* court believed that applying *Flores-Ortega* to appellate waiver cases "simply does not 'fit.'"[159] The court effectively ignored the actual question presented: whether defense counsel rendered ineffective assistance of counsel.[160] Instead, it focused on the validity of the waiver, namely, "whether enforcing the waiver . . . would work a miscarriage of justice."[161] The court justified this approach based on the idea that "[w]ithout a waiver, the recognition of a defendant's right to an appeal

---

150. *See Nunez*, 546 F.3d at 454–55 (discussing defense counsel's role in protecting the benefits that his client received through the plea bargain and, therefore, not providing ineffective assistance of counsel when not filing a waived appeal); *Mabry*, 536 F.3d at 240–41 (stating that waivers of appellate rights are constitutional and that an attempt to appeal when one has waived said right does not merit the attention that is given to appeals where the defendant has not waived his right).

151. Nunez v. United States, 546 F.3d 450, 454 (7th Cir. 2008) ("There may well be practical benefits to the other circuits' extension of [*Flores-Ortega*], because waivers of appeal are not airtight.").

152. *See id.* at 452 ("In obtaining Nunez's assent to these terms on the record, the judge stated that the waiver covers every issue other than the voluntariness of the plea. Asked whether he understood this, Nunez replied 'yes.'").

153. *Id.* at 456.

154. *Id.* at 453.

155. *Id.* at 456. The court also stated that Nunez, based on his layman understanding of the law, never provided a sufficient ground upon which he would have based his appeal. *Id.*

156. *Id.*

157. United States v. Mabry, 536 F.3d 231, 241 (3d Cir. 2008).

158. *See id.* at 240 (discussing the limitations of the Court's decision in *Flores-Ortega*).

159. *Id.* at 241.

160. *See id.* at 233, 242 (deciding to focus on the "validity of the collateral waiver as a threshold issue," prior to the defendant's ineffective assistance of counsel claim).

161. *Id.* at 242.

[was] paramount and counsel's ineffectiveness clear, for the defendant was entitled to an appeal."[162] Therefore, under the Third Circuit's analysis, the right to appeal is essential to an ineffective assistance of counsel analysis.[163] The court also recognized that an appellate waiver made the viability of an ineffective assistance of counsel claim "*less than clear*," but the court *did not* explicitly hold such a claim would not survive.[164]

The *Nunez* court's justification also relied on contract law principles.[165] According to the Seventh Circuit, there is a difference between the reasoning in *Flores-Ortega* that "presume[d] that the defendant ha[d] contested the charges" and a situation where the defendant "plead[ed] guilty [and] also waive[d] [his] right to appeal."[166] The court reasoned that where the defendant waived his right to appeal, his attorney has a duty to protect the benefits of the plea bargain, which trumps any duty to file an appeal.[167] The Seventh Circuit was primarily referring to the government's leniency that the client may be putting in jeopardy if his attorney filed the requested notice of appeal.[168] However, an analysis of Supreme Court precedent quickly reveals the faults in the Seventh Circuit's reasoning.

Although the *Nunez* court presented an argument with some merit, the Supreme Court in *Flores-Ortega* held that whether or not to appeal (or attempt to appeal) was ultimately the defendant's decision.[169] Although the Court admitted that a defendant's guilty plea was a *relevant* factor when analyzing a claim of ineffective assistance of counsel, such a factor was not determinative.[170] The argument that the attorney has the final say when the *defendant* chooses to file a notice of appeal is contrary to fundamental Supreme Court precedent that dictates that such decisions are left to the defendant.[171]

---

162. *Id.* at 244.

163. *Id.*

164. *See id.* (emphasis added) (finding the defendant's appellate waiver enforceable, and, therefore, declining to analyze the defendant's ineffective assistance of counsel claim).

165. Nunez v. United States, 546 F.3d 450, 452–53 (7th Cir. 2008)

166. *Id.* at 454.

167. *See id.* at 455. Filing an appeal when the defendant has waived his right to do so may allow the prosecutor to withdraw the plea bargain. *Id; see also* United States v. Whitlow, 287 F.3d 638, 640 (7th Cir. 2002) ("The only potentially effective remedy when a defendant breaks a promise not to appeal is to allow the prosecutor to withdraw some concessions.").

168. *Nunez*, 546 F.3d at 455 ("[A] defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless."). *Cf.* United States v. Sandoval-Lopez, 409 F.3d 1193, 1199 (9th Cir. 2005) ("It may be very foolish to risk losing a seven-year plea bargain on an appeal almost sure to go nowhere . . . . [n]evertheless the client has the constitutional right . . . .").

169. Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000).

170. *See id.* at 480 (discussing the relevance of a defendant's guilty plea in the Court's analysis of the defendant's ineffective assistance of counsel claim).

171. *See id.* at 485 ("Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice . . . might have caused the defendant to forfeit a judicial proceeding which he was otherwise entitled.").

The *Mabry* court briefly discussed counsel's duty to protect the benefits of his client's plea, but the court focused its discussion on the constitutionality of appellate waivers.[172] The court stated that the waiver of appellate rights foreclosed the ability to bring an ineffective assistance of counsel claim.[173] The only way the defendant could bring such a claim, in the Third Circuit's opinion, would be to challenge the waiver.[174] This challenge would require an analysis of whether the plea was entered into "knowing[ly] and voluntary[ily]," and whether enforcing the waiver would constitute a "miscarriage of justice."[175] The *Mabry* court further supported its position by recognizing that "both [the Third Circuit]" and "the Supreme Court have upheld the validity of *waivers* of rights to appeal."[176]

While the Third Circuit cleverly skirted around the ineffective assistance issue with some rational arguments, it ignored the actual claim presented.[177] The fact that the *waiver* is constitutional is not dispositive of whether counsel's *performance* met constitutional requirements.[178] It is also important to distinguish this case from *Campbell*, *Garrett*, and even *Nunez*. The waiver Mabry accepted "waived *any* right to appeal any conviction and sentence."[179] Mabry also waived his right "to challenge any conviction or sentence or the

172. *See* United States v. Mabry, 536 F.3d 231, 240–42 (3d Cir. 2008) (deciding that the Third Circuit will "consider the validity of the collateral waiver as a threshold issue . . . [and] whether enforcing the waiver . . . would work a miscarriage of justice").

173. *See id.* at 241 ("While a defendant may be entitled to habeas relief if his attorney ineffectively fails to file a requested appeal because it is presumed to be prejudicial under *Flores-Ortega*, if the same defendant has effectively waived his right to habeas, he cannot even bring such a claim . . . .").

174. *See id.* at 241–42 (stating that the key determination is the waiver's validity).

175. *See id.* at 241 (explaining the test the courts use to decide if an appellate waiver "pass[es] muster").

176. *Id.* at 242. In addition, the Third Circuit believed that "the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client." *Id.*

177. *Id.* at 233 (reasoning that the real issue was the validity of the waiver and "giving effect to the waiver," as opposed to addressing the ineffective counsel issue).

178. *See* Campbell v. United States, 686 F.3d 353, 358 (6th Cir. 2012) ("[E]ven though a defendant is clearly entitled to waive the right to an appeal by executing a plea agreement, even the broadest waiver does not absolutely foreclose some degree of appellate review. To the contrary, our cases have repeatedly recognized that a waiver can be challenged . . . [if it] 'was the product of ineffective assistance of counsel.'" (quoting United States v. Toth, 668 F.3d 374, 377 (6th Cir. 2012)).

179. *Mabry*, 536 F.3d at 233 (emphasis added) (internal quotation marks omitted) (stating that the waiver included appeals against "a sentence imposed within the mandatory minimum, on any and all grounds set forth in [18 U.S.C. § 3742] or any other grounds, constitutional or nonconstitutional [sic]"). During the trial, the court asked Mabry if he understood that "unless there is an error that results in a miscarriage of justice, [Mabry] will have no right to challenge or appeal an incorrect or allegedly incorrect determination of the advisory sentencing guidelines imprisonment range made by the [c]ourt . . . . The defendant answered both questions affirmatively." *Id.* (citation omitted) (internal quotation marks omitted).

manner in which the sentence was determined in any collateral proceeding."[180] However, the defendants in *Campbell*, *Garrett*, and *Nunez* were provided with *some* exceptions in their respective plea agreements.[181] While this factual difference may justify the result the Third Circuit reached in *Mabry*, it is also essential to distinguish *Mabry* as an outlier case.

III. DEFENDANTS' RIGHTS SHOULD NOT BE LIMITED FOR THE SAKE OF JUDICIAL EFFICIENCY

The majority approach is based on strong constitutional arguments and the recognition that it is important to protect the Sixth Amendment's guarantees.[182] Moreover, it is in accord with recent Supreme Court decisions.[183] In *Lafler* and *Cooper*, for example, the Court indicated a willingness to extend the bounds of the *Strickland* test's protections, and the majority approach does exactly that—it broadens *Strickland*'s applicability.[184] The Sixth Amendment also supports this approach.

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel.[185] Defense counsel "is essential to ensure a fair trial."[186] ABA standards, which the Supreme Court frequently consults in ineffective assistance of counsel cases, state that "[t]he basic duty defense counsel owes . . . is to serve as the accused's counselor and advocate with *courage* and *devotion*,"[187] and advise the accused.[188] When defense counsel ignores the direct

---

180. *Id.* at 233 (internal quotation marks omitted). For a more detailed explanation of the plea bargain and appellate waiver, *see id.* at 234–35. Mabry signed a letter acknowledging that he knowingly and voluntarily agreed to the plea bargain. *Id.* at 233.

181. *Campbell*, 686 F.3d at 355 n.1 (waiving all appellate rights with the exception of challenges that the punishment that exceeds the statutory maximum, "claims of ineffective assistance of counsel," voluntariness of the plea, or "prosecutorial misconduct"); Nunez v. United States, 546 F.3d 450, 453 (7th Cir. 2008) (retaining the right to appeal if the sentence "exceeded the statutory maximum or the waiver clause itself should be deemed invalid"); United States v. Garrett, 402 F.3d 1262, 1263 & n.2 (10th Cir. 2005) (providing Garrett the opportunity to appeal if the sentence exceeded the statutory maximum or if any Tenth Circuit or Supreme Court case changes a law retroactively that applies to Garrett).

182. *See supra* Part II.A.

183. *See* Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading* Cronic *and* Strickland *in Light of* Padilla*,* Frye*, and* Lafler, 45 TEX. TECH. L. REV. 229, 238 (2012) ("Taken together, *Padilla*, *Frye*, and *Lafler* demonstrate that the Court is endorsing a new set of inquiries into counsel's actions, which opens up the range of cases in which ineffective assistance cases may be successful.").

184. *See* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1216–17 (2012) (concluding that *Lafler* and *Frye* "provide authority for a broad construction of the right to effective assistance, such that the right is increasingly regarded as valuable for its own sake, and not merely as an adjunct to the fair trial right").

185. U.S. CONST. amend. VI.

186. Faretta v. California, 422 U.S. 806, 851 (1975) (Blackmun, J., dissenting).

187. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION 4-1.2, at 120 (3d ed. 1993) (emphasis added).

188. *See id.* 4-5.1, at 197.

orders of his client, not only does he fail to be a zealous advocate for the defendant, but he also goes beyond the role of advisor to that of decision-maker.

Although the Court gives deference to counsel and their "strategic" decisions,[189] the ultimate determination of whether "to appeal rests with the *defendant*," not counsel.[190] The defendant has the power to waive a jury trial,[191] to waive the right to the assistance of counsel,[192] and to waive the right to a trial by accepting a plea bargain.[193] Even if a defendant has waived his right to appeal, it would be contrary to Supreme Court precedent to allow counsel to make the ultimate decision and refuse to file an appeal that the *defendant* wants to file.[194] Just as the defendant is the one who must ultimately suffer the consequences that may arise from breaching his plea agreement, the defendant also bears the risks of not filing an appeal, and, therefore, the defendant is the one who should have the power to take that risk.[195]

Despite this legally sound and constitutionally supported reasoning, the approach has been criticized as encouraging lawyers to file frivolous appeals.[196] Such an argument presumes that all appeals filed with an appellate waiver in

---

189. Strickland v. Washington, 466 U.S. 668, 689–91 (1984) ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

190. Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000) (emphasis added); *see also* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is . . . recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

191. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279–80 (1942) (discussing the right of the defendant to determine whether to waive the right to a jury trial and stating that "[t]o deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms").

192. *See* Faretta v. California, 422 U.S. 806, 834 (1975) (recognizing a defendant's right to waive the assistance of counsel and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law'" (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring))).

193. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (stating that a plea agreement waives the "right to a trial by jury, and . . . to confront [the] accusers").

194. *See supra* notes 189–90 and accompanying text.

195. *See* United States v. Sandoval-Lopez, 409 F.3d 1193, 1198–99 (9th Cir. 2005) (stating that, despite the potential risks of filing an appeal with an appellate waiver in place, defendants have the right "to bet on the possibility of winning the appeal and then winning an acquittal, just as a poker player has the right to hold the ten and queen of hearts, discard three aces, and pray that when he draws three cards, he gets a royal flush"); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION 4-5.2, at 199–200 (3d ed. 1993) ("Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal.").

196. *See* Kaplan-Marans, *supra* note 10, at 1204–05 (discussing the decrease in judicial efficiency that the majority approach creates).

place are without merit. The fact that some appellate waivers contain exceptions supports the proposition that there are non-frivolous grounds upon which a defendant may file an appeal after waiving that right.[197] Further, the Supreme Court has recognized that:

> although showing nonfrivilous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," will not foreclose the possibility that he can satisfy the prejudice requirement where there are *other substantial reasons to believe that he would have appealed*.[198]

The term "other substantial reasons" requires a showing that, but-for counsel's failure to file an appeal, the defendant would have appealed.[199] Thus, the presumption that all appeals filed after a defendant waived his right to appeal are frivolous is an argument unsupported by both the Supreme Court's reasoning and the form of the waivers.[200]

Similar to the frivolous lawsuits concern is the argument that the majority approach decreases judicial efficiency.[201] Judicial efficiency, however, should not be achieved at the expense of criminal defendants. Courts frequently take actions that decrease judicial efficiency to protect defendants' rights, such as suppressing coerced confessions, even if the trial would proceed more efficiently with the confession in evidence.[202] Further, seized evidence that is crucial to a case may be suppressed if obtained "in violation of the Constitution."[203] These actions are taken because of the firmly rooted notion that "[n]othing [will] destroy a government more quickly than . . . its disregard of the charter of its own existence."[204] The United States' criminal justice system is built on fundamental rights, not judicial efficiency.[205] If efficiency were the system's main concern, the Bill of Rights would become superfluous.

---

197. *See supra* note 178.

198. Roe v. Flores-Ortega, 528 U.S. 470, 486 (2000) (emphasis added) (citation omitted).

199. *Id.* at 486.

200. *See supra* Section I.B.2; *supra* notes 177–81 and accompanying text.

201. Gregory P. LaVoy, *Neither a "Moose" Nor a "Puppet": Defining Lawyer's Role When Directed to Pursue an Appeal Notwithstanding a Valid Waiver of Appellate Rights*, 7 AVE MARIA L. REV. 265, 306 (2008) ("[T]he majority rule developed throughout the federal circuits relies on that which is familiar . . . . And it does so with various social costs to . . . judicial efficiency . . . .").

202. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 460, 479 (1966) (stating that an "essential mainstay of our adversarial system" consists of protection from being compelled to self incriminate, and that if a party is not warned of his Fifth Amendment rights, "no evidence obtained as a result of interrogation can be used against him").

203. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

204. *Id.* at 659.

205. *See* Kaplan-Marans, *supra* note 10, at 1206 (recognizing that "maximizing judicial efficiency should not trump a defendant's fundamental rights to due process . . . by denying

The majority approach fails to provide an efficient process for separating defendants who have valid grounds for appeal from those who do not.[206] The Supreme Court has recognized the need for processes that protect the rights of a defendant without creating an unnecessary burden on the judicial system.[207] The three-pronged test examined in *Garrett* is the kind of test that courts should adopt because it allows them to quickly analyze and dismiss cases that lack merit.[208] This process in turn allows efficiency while still prioritizing the defendant's rights.[209] The test requires the court to analyze: "(1) whether the disputed appeal falls within the scope of defendant's waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice."[210] Implementing this test would allow a defendant to have a hearing that would vindicate his desire for an appeal and determine whether he has a valid appeal before adjudicating the merits.[211] For defense counsel, it provides a simple way to file a notice of appeal, which could quickly be dismissed if it is without merit, thereby avoiding a potential claim of ineffective assistance of counsel.

IV: CONCLUSION

The Sixth Amendment affords criminal defendants the right to the effective assistance of counsel. Accordingly, defense attorneys are integral to our judicial system, and play a significant role in the appellate system. Under the appellate system, a defendant can challenge a conviction by filing a notice of appeal, and the judiciary can "check" itself to verify that the defendant has been provided all his constitutionally guaranteed rights. When defense counsel fails to file such an appeal, even if the defendant has waived his right to appeal in a plea bargain, counsel's failure robs a defendant of this crucial proceeding. While defense counsel may have a valid argument for "protecting the benefits" a defendant received from a plea bargain, a defendant has the right to make the ultimate decision to risk those benefits by filing an appeal. It is not a defense attorney's place to *choose* what risks a defendant is willing to take. While it may strain an

---

defendants the opportunity to appeal" (footnotes omitted)); *see, e.g.*, Maxy v. State Farm Fire & Cas. Co., 569 F. Supp. 2d 720, 722 (S.D. Ohio 2008) (explaining that, in certain cases in which a defendant requests issue bifurcation, "the potential prejudice to the defendant outweighed any decrease in judicial economy or efficiency").

206. *See supra* Part II.A; *see also supra* note 140 and accompanying text (establishing a test that could increase efficiency without sacrificing fundamental rights).

207. *See* Anders v. California, 386 U.S. 738, 744 (1967) ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.").

208. *See* United States v. Garrett, 402 F.3d 1262, 1266 (10th Cir. 2005) (stating that the application of the test allows for a "summary and efficient dismissal of a waived appeal").

209. *See id.* (discussing the benefits of the appellate waiver test).

210. *Id.* (citing United States v. Hahn, 359 F.3d 1315, 1325 (10th Cir. 2004)).

211. *See Garrett*, 402 F.3d at 1266 (discussing the relevance of the appellate waiver test within the defendant's appeals process).

already over-burdened system, holding that defense counsel has provided ineffective assistance of counsel when failing to follow orders from his client to file an appeal, even if his client has waived that right, is the best way to protect defendants' rights and ability to make decisions regarding their own criminal proceedings and sentences. This approach may create risks for defendants, but, ultimately, it will protect the guarantee of effective counsel that is at the heart of the Sixth Amendment.