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Garza v. Idaho: Preserving the Client's Choice to Appeal

The decision to appeal a conviction always lies with the client. But what is a defense attorney to do when the client pleads guilty, signs an appeal waiver, and then wishes to appeal after sentencing? The U.S. Supreme Court recently provided the answer in *Garza v. Idaho*[1]: Obey the client and file a notice of appeal.

Gilberto Garza, Jr. signed two plea agreements containing waivers of his rights to appeal and was sentenced according to the terms of those agreements.[2] After sentencing, however, he wanted to appeal and told his attorney as much. Garza's trial counsel responded that "'an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.'"[3] He disregarded Garza's instructions and did not file a notice of appeal, forfeiting Garza's opportunity for direct appellate review.[4]

Persisting, Garza filed a petition for postconviction relief, arguing that his attorney was ineffective for failing to notice his appeal.[5] The lower courts denied the petition.[6] The Idaho Supreme Court explained that Garza's attorney was not ineffective, finding that Garza no longer had a right to appeal due to the waivers in his plea agreements.[7] That result made sense, according to the Idaho Supreme Court, because filing a notice of appeal when the defendant has waived appellate rights may risk breaching the plea agreement, entitling the prosecution to disregard the plea entirely and perhaps allowing the prosecution to pursue more serious charges or a tougher sentence.[8] Moreover, the court held, Garza could not show any prejudice from counsel's failure to notice his appeal because he had not identified any nonfrivolous issues he would have raised on appeal.[9]

The Supreme Court granted certiorari to address whether Garza was required to prove prejudice resulting from counsel's failure to notice his appeal or whether prejudice could be presumed.[10] Most cases of ineffective assistance of counsel are litigated under the *Strickland v. Washington*[11] framework, which presumes that the proceedings underlying a criminal conviction are reliable and requires a showing that a reasonable probability exists that, but for counsel's deficient performance, the outcome of the proceedings would have been different.[12] However, nearly 20 years ago, in *Roe v. Flores-Ortega*,[13] the Supreme Court held that a presumption of prejudice applies in ineffective assistance cases when a criminal defendant's counsel defies her client's express instructions to file a notice of appeal. The conclusion flowed from the logical reasoning that no "presumption of reliability" can apply "to judicial proceedings that never took place."[14] It is never professionally reasonable — and always deficient performance — for counsel to refuse to file a notice of appeal contrary to the client's directions. The Court thereby put defense counsel on notice that "filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes."[15]

The defendant in *Flores-Ortega* had pleaded guilty without waiving any appellate rights.[16] His attorney's conduct in failing to notice his appeal over his express instructions thus deprived him of an appellate proceeding to which he was indisputably entitled. In the years following *Flores-Ortega*, the federal courts of appeals split over whether the presumption of prejudice should apply to defendants who had appellate waivers in their plea agreements.[17] The majority held that the presumption of prejudice applied, notwithstanding the presence of an appeal waiver, because even the broadest waivers did not preclude all appellate review.[18] The minority — the position the Third and Seventh Circuit Courts of Appeals took along with the Idaho Supreme Court — held that when a defendant enters a valid appeal waiver it is reasonable for counsel to refuse to file a notice of appeal, which might cost the client the benefit of the plea agreement entirely.[19]

The Supreme Court sided with the majority, reversing the Idaho Supreme Court's judgment in a 6-3 decision authored by Justice Sotomayor. The Court held that — appeal waiver or no — a presumption of prejudice applies whenever counsel fails to file a notice of appeal over the client's express instructions.

The Court recognized that no matter how broad an appeal waiver purports to be, it cannot categorically bar every type of appeal: "[N]o appeal waiver serves as an absolute bar to all appellate claims."[20] Citing an *amicus* brief filed by NACDL and the Idaho Association of Criminal Defense Lawyers (drafted by the authors of this article),[21] the Court explained that

BY CRAIG DURHAM, JONAH HORWITZ, BRIAN McCOMAS, AND LAUREN M. WEINSTEIN

the term "appeal waivers" can "misleadingly suggest a monolithic end to all appellate rights."[22] But, in reality, the language of appeal waivers varies widely, leaving many types of claims outside their scope, such as challenges to the defendant's sentence or conviction, claims based on prosecutorial misconduct, or arguments based on changes in law.[23] The Court also noted that certain claims are almost universally viewed as unwaivable, including challenges to guilty pleas as unknowing or involuntary.[24] "Garza did retain a right to his appeal," the Court clarified, "he simply had fewer possible claims than some other appellants."[25] As a result, his attorney's decision not to file a notice of appeal caused him to forfeit a judicial proceeding and was presumptively prejudicial — just like in *Flores-Ortega*.

The Court reiterated the point it had made in *Flores-Ortega* that filing a notice of appeal is a "'purely ministerial task that imposes no great burden on counsel.'"[26] At the notice of appeal stage, which usually lasts only a short time, the defendant typically lacks key parts of the record, leaving the universe of potential appellate claims largely unknown. It would thus be pure speculation for an attorney to claim that the defendant had *no* claims available to pursue on appeal. And, even if it turned out there were no colorable issues to present, counsel could always file an *Anders* brief indicating as much.[27]

Key to the Court's reasoning in *Garza* is its understanding of the division of labor between a defense attorney and a client: The client decides whether to pursue an appeal, but the attorney decides what arguments to make. Justice Thomas, writing for himself, Justice Alito (in part), and Justice Gorsuch, agreed that the choice to appeal lies with the client, but argued that the client makes the choice not to appeal by entering a plea agreement that contains an appeal waiver.[28] The dissent believed that Garza no longer had appeal rights, as was his choice: "Garza's agreement to waive his appeal rights, not his attorney's actions, … caused the forfeiture of his appeal."[29] In the dissent's view, the majority had "adopt[ed] a rule whereby a criminal defendant's invocation of the words 'I want to appeal' can undo all sworn attestations to the contrary and resurrect waived statutory rights."[30]

The majority's respect for the defendant's right to a change of heart could come at great cost, the dissent argued. Garza had been sentenced according to the terms of his plea agreements. Had his attorney filed a notice of appeal as he requested, the court could have found him in breach of the plea agreements, which may have triggered resentencing, resulting in a longer sentence than he had originally received. Moreover, the State could have pursued charges it had agreed to drop during plea negotiations, and it could have used Garza's admissions from the plea hearings against him in those proceedings. Under such circumstances, the dissent urged, counsel's choice not to notice Garza's appeal should be viewed as reasonable, rather than as deficient and presumptively prejudicial.[31]

Both the majority and dissent agreed that it is ultimately the defendant's choice whether to appeal, but the majority prevailed in reasoning that the "bare decision whether to appeal is ultimately the defendant's, not counsel's, to make."[32] Defense counsel may attempt to persuade a client that filing a notice of appeal could result in severe consequences, and should outline the risks of any consequences (severe or

About the Authors

Lauren M. Weinstein is an attorney in MoloLamken's Washington, D.C. office. Her practice focuses on trial and appellate litigation, representing clients before the U.S. Supreme Court as well as federal and state courts. Her practice covers a broad array of subject matters, including antitrust law, class actions, constitutional law, business litigation, and securities suits.

Lauren M. Weinstein
MoloLamken
Washington, D.C.
202-556-2000
EMAIL lweinstein@mololamken.com

Jonah J. Horwitz is an Assistant Federal Defender with the Capital Habeas Unit of Federal Defender Services of Idaho. He exclusively represents death-row inmates in collateral challenges to their sentences and convictions. Mr. Horwitz's cases are in federal and state courts in Idaho and Nevada.

Jonah J. Horwitz
Federal Defender Services of Idaho
Boise, Idaho
208-331-5500
EMAIL jonah_horwitz@fd.org

Craig H. Durham is a founding partner of Ferguson Durham in Boise, Idaho. His practice focuses on civil rights litigation and all phases of criminal defense, including trial, appeals, post-conviction, parole, and habeas corpus matters.

Craig H. Durham
NACDL MEMBER

Ferguson Durham PLLC
Boise, Idaho
208-345-5183
EMAIL chd@fergusondurham.com

Brian C. McComas operates the Law Office of B.C. McComas, LLP, out of San Francisco and the Greater Bay Area. Mr. McComas provides representation at the trial, appellate, and post-conviction stages in state and federal court. He assists the indigent, disenfranchised, and imprisoned only.

Brian C. McComas
NACDL MEMBER

Law Office of B.C. McComas, LLP
San Francisco, California
208-320-0383
EMAIL mccomas.b.c@gmail.com

otherwise), but counsel cannot unilaterally make the choice for the client. There may well be some arguments the defendant can pursue on appeal, such as claims that are beyond the scope of the appeal waiver or challenges to the plea itself. But the choice to appeal is a fundamental decision for all defendants — not their attorneys.

Notes

1. 139 S. Ct. 738 (2019).
2. *Id.* at 742.
3. *Id.* at 751 (Thomas, J., dissenting).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Garza v. State of Idaho*, 162 Idaho 791, 796 (2017).
8. *Id.* at 798.
9. *Id.* at 797.
10. *Garza*, 139 S. Ct. at 743.
11. 466 U.S. 668 (1984).
12. *Id.* at 694.
13. 528 U.S. 470 (2000).
14. *Id.* at 483 (quotation marks omitted).
15. *Id.* at 477.
16. *Id.* at 488 n.1 (Souter, J., concurring in part and dissenting in part).
17. *Garza*, 139 S. Ct. at 743.
18. *See Campusano v. United States*, 442 F.3d 770, 773 (2d Cir. 2006); *United States v. Poindexter*, 492 F.3d 263, 268-69 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *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); *Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005).
19. *See United States v. Mabry*, 536 F.3d 231, 239-41 (3d Cir. 2008); *Nunez v. United States*, 546 F.3d 450, 455-56 (7th Cir. 2008).
20. *Garza*, 139 S. Ct. at 744.
21. Robert K. Kry and W. Alex Harris of MoloLamken LLP also participated in drafting the NACDL and IACDL brief.
22. *Garza*, 139 S. Ct. at 744.
23. *Id.*
24. *Id.* at 745.
25. *Id.* at 748.
26. *Id.* at 745.
27. *See Anders v. California*, 386 U.S. 738 (1967).
28. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting).
29. *Id.*
30. *Id.* at 752 (Thomas, J., dissenting).
31. *Id.* at 754 (Thomas, J., dissenting).
32. *Id.* at 746.

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