AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Juries and Lawyers: Lawyers

**Garza v. Idaho**, \_\_\_ U.S. \_\_\_ (2019).

*Gilberto Garza in 2015 agreed to a plea bargain in which, in return for a sentence of no more than ten years, he agreed to plead guilty to several felonies and waive his right to appeal. Shortly after sentencing, Garza asked his trial lawyer to appeal. The trial lawyer refused, informing Garza that he had waived the right to appeal when making the plea bargain. Garza then filed a habeas petition, claiming that he was denied his right to ineffective assistance of counsel under the Sixth and Fourteenth Amendments when trial counsel refused to file even a notice of appeal. That claim was rejected by a series of state courts in Idaho. Garza appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States by a 6-3 vote reversed the decision of the Idaho Supreme Court. Justice Sonia Sotomayor’s majority opinion held that courts should presume prejudice whenever trial counsel refused a request to appeal a criminal conviction. Why does Sotomayor think counsel must file an appeal even when a convicted defendant has signed an appeal waiver? Under what conditions would the dissenters require counsel to file an appeal after their client has signed an appeal waiver? Justice Clarence Thomas’s dissent claims that Supreme Court decisions holding that criminal defendants have a right to a state-appointed counsel are inconsistent with the original intentions of the Constitution. Is he right as a matter of constitutional originalism? Of constitutional interpretation? None of the other opinions in* Garza *bother to respond to these claims. This often happens when Thomas calls on the court to reverse longstanding precedents. Should the other justices respond to such opinions? Should Thomas no longer bother writing such opinions?*

JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)&analyticGuid=I90cb43573a8211e9bc5c825c4b9add2e) delivered the opinion of the Court.

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The Sixth Amendment guarantees criminal defendants “the right ... to have the Assistance of Counsel for [their] defence.” The right to counsel includes “ ‘the right to the effective assistance of counsel.’ Under [*Strickland*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984123336&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite))[*v. Washington* (1984)], a defendant who claims ineffective assistance of counsel must prove (1) “that counsel’s representation fell below an objective standard of reasonableness,” and (2) that any such deficiency was “prejudicial to the defense,” “In certain Sixth Amendment contexts,” however, “prejudice is presumed. . . .[M]ost relevant here, prejudice is presumed “when counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.” *Roe v. Flores-Ortega* (2000). We hold today that this final presumption applies even when the defendant has signed an appeal waiver.

. . . . [N]o appeal waiver serves as an absolute bar to all appellate claims. As courts widely agree, “[a] valid and enforceable appeal waiver ... only precludes challenges that fall within its scope.” . . . Accordingly, a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest. . . . [C]ourts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain.

. . . . “Filing such a notice is a purely ministerial task that imposes no great burden on counsel.” . . . While “the accused has the ultimate authority” to decide whether to “take an appeal,” the choice of what specific arguments to make within that appeal belongs to appellate counsel. . . In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant’s prerogative.

. . . As an initial matter, we note that Garza’s attorney rendered deficient performance by not filing the notice of appeal in light of Garza’s clear requests. . . . “We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes.” . . . While we do not address what constitutes a defendant’s breach of an appeal waiver or any responsibility counsel may have to discuss the potential consequences of such a breach, it should be clear from the foregoing that simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver’s scope. And in any event, the bare decision whether to appeal is ultimately the defendant’s, not counsel’s, to make.

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[Flores-Ortega](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000060042&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) held that, to succeed in an ineffective-assistance claim in this context, a defendant need make only one showing: “that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed. . . . [G]iven that past precedents call for a presumption of prejudice whenever “ ‘the accused is denied counsel at a critical stage,’ ” it makes even greater sense to presume prejudice when counsel’s deficiency forfeits an “appellate proceeding altogether.” After all, there is no disciplined way to “accord any ‘presumption of reliability’... to judicial proceedings that never took place.”

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That Garza surrendered many claims by signing his appeal waivers does not change things. First, this Court has made clear that when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a particular defendant seems to have had poor prospects. . . . Garza did retain a right to his appeal; he simply had fewer possible claims than some other appellants. Especially because so much is unknown at the notice-of-appeal stage, it is wholly speculative to say that counsel’s deficiency forfeits no proceeding to which a defendant like Garza has a right. . . . This Court has already rejected attempts to condition the restoration of a defendant’s appellate rights forfeited by ineffective counsel on proof that the defendant’s appeal had merit. . . . [W]hile it is the defendant’s prerogative whether to appeal, it is not the defendant’s role to decide what arguments to press. That makes it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished by deficient counsel. . . . [T]he Government’s assumption that unwaived claims can reliably be distinguished from waived claims through case-by-case postconviction review is dubious. There is no right to counsel in postconviction proceedings, and most applicants proceed pro se.[12](https://1.next.westlaw.com/Document/I90cb43573a8211e9bc5c825c4b9add2e/View/FullText.html?listSource=RelatedInfo&docFamilyGuid=I90cb43583a8211e9bc5c825c4b9add2e&originationContext=judicialHistory&transitionType=HistoryItem&contextData=%28sc.Default%29#co_footnote_B00132047644963) That means that the Government effectively puts its faith in asking “an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.”

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JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)&analyticGuid=I90cb43573a8211e9bc5c825c4b9add2e), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)&analyticGuid=I90cb43573a8211e9bc5c825c4b9add2e) joins, and with whom JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)&analyticGuid=I90cb43573a8211e9bc5c825c4b9add2e) joins [in part] dissenting.

Petitioner Gilberto Garza avoided a potential life sentence by negotiating with the State of Idaho for reduced charges and a 10-year sentence. In exchange, Garza waived several constitutional and statutory rights, including “his right to appeal.” Despite this express waiver, Garza asked his attorney to challenge on appeal the very sentence for which he had bargained. Garza’s counsel quite reasonably declined to file an appeal for that purpose, recognizing that his client had waived this right and that filing an appeal would potentially jeopardize his plea bargain. Yet, the majority finds Garza’s counsel constitutionally ineffective, holding that an attorney’s performance is per se deficient and per se prejudicial any time the attorney declines a criminal defendant’s request to appeal an issue that the defendant has waived. In effect, this results in a “defendant-always-wins” rule that has no basis in *Roe v. Flores-Ortega* (2000), or our other ineffective-assistance precedents, and certainly no basis in the original meaning of the Sixth Amendment. I respectfully dissent.

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As with most ineffective-assistance claims, a defendant seeking to show that counsel was constitutionally ineffective for failing to file an appeal must show deficient performance and prejudice. . . In my view, a defendant who has executed an appeal waiver cannot show prejudice arising from his counsel’s decision not to appeal unless he (1) identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknowing; or (3) establishes that the government breached the plea agreement. Garza has not made any such showing, so he cannot establish prejudice. Furthermore, because Garza’s counsel acted reasonably, Garza also cannot establish deficient performance.

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The Court purports to follow [*Flores-Ortega*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000060042&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), but glosses over the important factual and legal differences between that case and this one. The most obvious difference is also the most crucial: There was no appellate waiver in [Flores-Ortega](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000060042&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)). The proximate cause of the defendant’s failure to appeal in that case was his counsel’s failure to file one. Not so here. Garza knowingly waived his appeal rights and never expressed a desire to withdraw his plea. It was thus Garza’s agreement to waive his appeal rights, not his attorney’s actions, that caused the forfeiture of his appeal.

Because [*Flores-Ortega*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000060042&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) does not control cases involving defendants who voluntarily waive their appeal rights, this case should be resolved based on a straightforward application of [*Strickland*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984123336&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) [*v. Washington* (1984)] Under that framework, Garza has failed to demonstrate either (1) that his counsel was deficient or (2) that he was prejudiced in any way by that alleged deficiency.

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Counsel’s choice not to appeal Garza’s sentence—the only issue Garza asked his counsel to challenge—was not only not deficient, it was the only professionally reasonable course of action for counsel under the circumstances. That is because filing an appeal would have been worse than pointless even judging by Garza’s own express desires; it would have created serious risks for Garza while having no chance at all of achieving Garza’s stated goals for an appeal. . . . Had Garza’s counsel reflexively filed an appeal and triggered resentencing, Garza might have faced life in prison, especially in light of the trial court’s concern that the agreed-upon sentence might have been too lenient. . . .

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. . . . Garza cannot benefit from a presumed-prejudice finding since he cannot establish that his counsel caused the forfeiture of his appeal. . . . Garza knowingly and voluntarily bargained away his right to appeal in exchange for a lower sentence. If any prejudice resulted from that decision, it cannot be attributed to his counsel. It does not matter that certain appellate issues—specifically, (1) the voluntariness of the plea agreement and (2) a breach of the agreement by the State—are not waivable. Garza did not ask his counsel to appeal those issues. . . .

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Because Garza’s requested relief is categorically barred by the plea agreements, the majority offers Garza an appeal he is certain to lose. And should Garza accept the majority’s invitation, he could give up much more. If Garza appeals his sentence and thereby breaches his plea agreements, Idaho will be free to file additional charges against him, argue for a “Persistent violator” sentencing enhancement that could land him in prison for life, and refer him for federal prosecution. It simply defies logic to describe counsel’s attempt to avoid those consequences as deficient or prejudicial.

In addition to breaking from this Court’s precedent, today’s decision moves the Court another step further from the original meaning of the Sixth Amendment. 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.” That provision “as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.” Yet, the Court has read the Constitution to require not only a right to counsel at taxpayers’ expense, but a right to effective counsel. . . .

The Sixth Amendment right to the assistance of counsel grew out of the Founders’ reaction to the English common-law rule that denied counsel for treason and felony offenses with respect to issues of fact, while allowing counsel for misdemeanors. It was not until 1696 that England created a narrow exception to this rule for individuals accused of treason or misprision of treason—by statute, Parliament provided both that the accused may retain counsel and that the court must appoint counsel if requested. . . . The traditional common-law rule that there was no right to assistance of counsel for felony offenses received widespread criticism. . . . The founding generation apparently shared this sentiment, as most States adopted some kind of statutory or constitutional provision providing the accused the right to retain counsel. Read against this backdrop, the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel.

This understanding—that the Sixth Amendment did not require appointed counsel for defendants—persisted in the Court’s jurisprudence for nearly 150 years. . . . Nor evidently was there any suggestion that defendants could mount a constitutional attack based on their counsel’s failure to render effective assistance. The Court began shifting direction in 1932, when it suggested that a right to appointed counsel might exist in at least some capital cases, albeit as a right guaranteed by the Due Process Clause. . . . And in 1963, the Court applied this categorical rule to the States through the Fourteenth Amendment, stating “that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon v. Wainwright.* Neither of these opinions attempted to square the expansive rights they recognized with the original meaning of the “right ... to have the Assistance of Counsel.”

After the Court announced a constitutional right to appointed counsel rooted in the Sixth Amendment, it went on to fashion a constitutional new-trial remedy for cases in which counsel performed poorly. . . . [I]in [*Strickland*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984123336&pubNum=0000780&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), the Court crafted the current standard for evaluating claims of ineffective assistance of counsel. Without discussing the original meaning of the Sixth Amendment, the Court stated that “[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” The Court thus held that, to succeed on an ineffective-assistance claim, the defendant must show (1) “that counsel’s representation fell below an objective standard of reasonableness” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

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[O]our precedents seek to use the Sixth Amendment right to counsel to achieve an end it is not designed to guarantee. The right to counsel is not an assurance of an error-free trial or even a reliable result. It ensures fairness in a single respect: permitting the accused to employ the services of an attorney. The structural protections provided in the Sixth Amendment certainly seek to promote reliable criminal proceedings, but there is no substantive right to a particular level of reliability. In assuming otherwise, our ever-growing right-to-counsel precedents directly conflict with the government’s legitimate interest in the finality of criminal judgments. I would proceed with far more caution than the Court has traditionally demonstrated in this area.

History proves that the States and the Federal Government are capable of making the policy determinations necessary to assign public resources for appointed counsel. Before the Court decided [*Gideon*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125313&originatingDoc=I90cb43573a8211e9bc5c825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), the Court noted that “most of the States have by legislation authorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners. As to capital cases, all the States so provide. Thirty-four States so provide for felonies and 28 for misdemeanors.” It is beyond our constitutionally prescribed role to make these policy choices ourselves. Even if we adhere to this line of precedents, our dubious authority in this area should give us pause before we extend these precedents further.