No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST ROE, Warden,
Petitioner,

v.

LUCIO FLORES-ORTEGA,
Respondent.

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Filed July 29, 1999

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of over 10,000 attorneys, and another 28,000 affiliate members in 80 affiliate organizations in 50 states. NACDL is recognized by the American Bar Association ("ABA") as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*.[2]

The primary interest of *amicus* NACDL in this matter is the maintenance of standards of legal representation so as to ensure that convicted criminal defendants who choose to waive their direct appeals as of right do so knowingly and intelligently.

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[1] All parties have consented to the appearance of NACDL in this matter, and letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A search of published opinions and orders in the Westlaw SCT database yielded over 75 references to NACDL in the capacity of *amicus curiae*. The references extended over a period of nearly 25 years.

STATEMENT OF THE CASE

Amicus NACDL respectfully directs the Court to the Statement of the Case in Respondent's Brief.

SUMMARY OF ARGUMENT

As an organization of criminal defense lawyers, NACDL views this case as turning upon the standard to which its members expect to be held in counseling our clients whether to file an appeal from a criminal conviction and sentence. NACDL writes in order to supplement the parties' arguments from this important perspective.

Criminal appeals serve a crucial function in the Constitutional scheme. Even where defendants have entered pleas of guilty, appeals from the imposition of sentence have increasingly taken on a central role. The decision whether to appeal is one of a handful of trial-related decisions so fundamental that only the client, and not the attorney, may make it. And any waiver of the right to appeal must be voluntary and intelligent. Unlike other fundamental trial decisions, however, such a waiver takes place out of court, and there are no procedures to govern it. Because the decision whether to appeal is fraught with legal technicalities, it must be guided by Constitutionally adequate counsel.

The seminal case of *Strickland v. Washington* imposes a "basic duty" upon counsel to consult with the client as to "important" matters. *A fortiori,* this duty to consult applies to the "fundamental" decision whether to appeal. That decision requires familiarity with the record and with applicable law, as well the exercise of tactical judgment. Without at least some level of consultation, then,

the client's decision whether to appeal cannot be a meaningful one. An attorney therefore cannot rely upon the mere silence of an unsophisticated client to justify the failure to file an appeal. Nor can the attorney discharge even the minimal duty to abide by the client's wishes without first ascertaining what those wishes are. An attorney who fails to file an appeal, without having consulted with the client, has accordingly both usurped a decision that belongs to the client and failed to fulfill the Sixth Amendment duty of effective representation.

This Court's recent holding in *Peguero v. United States* highlighted that defendants' actual knowledge of their appeal rights is crucial to an informed decision whether to appeal. The burden of supplying that knowledge, and rendering advice as to that decision, has long been placed upon defense counsel. NACDL, on behalf of its members, welcomes the responsibility to ensure that waivers of the right to appeal are knowing and voluntary. The Court should take this opportunity to clarify counsel's Constitutional duty to consult with the client and ascertain the client's wishes before forgoing the right to appeal.

Finally, NACDL endorses the position of Respondent that "prejudice" in this context does not require the defendant to demonstrate that an appeal would have been meritorious or successful. Any defendant denied the right to control such a fundamental aspect of the case has been prejudiced. Moreover, it is impractical for trial courts to prejudge the likelihood of success of an appeal without the assistance of an advocate on defendant's behalf. In the alternative, as stated in the *amicus* brief of the United States, "prejudice" should at most require a showing that defendant would have filed an appeal absent counsel's errors.

For the reasons expressed below and in Respondent's brief, the judgment below should be affirmed.

ARGUMENT

MINIMUM SIXTH AMENDMENT STANDARDS OF PERFORMANCE REQUIRE THAT AN ATTORNEY CONSULT WITH THE CLIENT AND ASCERTAIN WHETHER THE CLIENT WISHES TO APPEAL.

A. Introduction: The importance of criminal appeals in the Constitutional scheme.

Over forty years ago, this Court observed that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Over thirty-five years ago, this Court observed that the right to appeal from a federal criminal conviction had become, "in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 440 (1962). The decision whether to take a criminal appeal is one of a handful of decisions that is so "fundamental" that only the client, not the lawyer, may make it. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

This is so because a direct appeal is the primary backstop against trial-court error. Accordingly, this Court has relied upon the primacy of direct appeal in order to justify restrictions upon the availability of Section 2255 and habeas relief -- restrictions relied upon by Petitioner here:

> Direct review is the principal avenue for challenging a conviction. 'When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of

federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. ...'

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).[3]

It is not the case, as Petitioner suggests, that the right to appeal is diminished in importance after the entry of a guilty plea. It is of course true that few grounds exist to attack guilty pleas themselves. See *United States v. Broce*, 488 U.S. 563 (1989) Nevertheless, the focus of criminal appeals has increasingly shifted to appeals from imposition of sentence. In the federal system, the Sentencing Guidelines have imposed complex legal standards upon the imposition of sentence, leading to an explosion of appellate activity.[4] Among the States, too, the trend is toward more legal standards, and more appeals, in the sentencing area.[5] Often at stake on appeal is a considerable difference in the length of time to be served in prison. That is the crucial issue for many defendants, perhaps even more so in the case of those who plead guilty. Appellate reversals, with concomitant reductions in sentence, are common under the modern Sentencing Guidelines regime. This Court's holding as to the scope of counsel's Constitutional responsibility will have wide ramifications, not only in the federal system and the States in which sentencing appeals are common today, but also in those States that will increasingly see such appeals in the future.

[3] Over a hundred years ago, this Court stated that the right to take a criminal appeal is not inherent in the notion of due process in *McKane v. Durston*, 153 U.S. 684, 687 (1894), a holding that continues to be cited in modern cases. See, e.g., *Jones v. Barnes*, 463 U.S. at 751. Providing for an appeal as of right, however, amounts to an implicit determination "that [the government] was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with the law." *Evitts v. Lucey*, 469 U.S. 387, 403-04 (1985). Moreover, where the right to an appeal exists, it must be administered in keeping with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. at 400-01. The cases before this Court have generally considered not the right to appeal *per se*, but rather the minimal restrictions or burdens that may constitutionally be attached to a statutory right to appeal. E.g., *Ross v. Moffitt*, 417 U.S. 600, 605-08 (1974) (surveying line of cases dealing with right to counsel, filing fees, access to transcripts, etc., on criminal appeals). See also *Evitts v. Lucey*, 469 U.S. at 393 (collecting cases); *Ross v. Moffitt*, 417 U.S. at 605-08 (synthesizing earlier case law, and finding no right to counsel for discretionary, second or subsequent level of appeal); *Draper v. Washington*, 372 U.S. 487 (1963) (availability of free transcript to indigent defendant seeking an appeal cannot be conditioned on trial court's finding of nonfrivolousness); *Burns v. Ohio*, 360 U.S. 252 (1959) (striking down $20 filing fee for indigents to move for leave to appeal from intermediate appellate court's affirmance of criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down requirement that appellant obtain transcript, where no provision made for indigent defendants). The right to appeal, if not Constitutional in origin, is protective of Constitutional rights and is certainly hedged about by Constitutional protections.

[4] See K. Reitz, SENTENCING GUIDELINE SYSTEMS AND SENTENCE APPEALS: A COMPARISON OF FEDERAL AND STATE EXPERIENCES, 91 NW. U. L. REV. 1441, 1492 (1997) (65% of federal criminal appellate decisions in 1993-94 were sentencing appeals); C. Goodwin, SUMMARY: 1996 COMMITTEE ON CRIMINAL LAW MEMO ON WAIVERS OF APPEAL AND ADVISEMENT OF THE RIGHT TO APPEAL, 10 FED. SENT. R. 212, at n.2 (1998)(federal criminal appeals doubled from 1987 to 1994, while overall appeals increased only 30%).

[5] See R. Lewis, THE KANSAS SENTENCING GUIDELINES ACT, 38 WASHBURN L. J. 327 (1999) (Judge of Kansas Court of Appeals notes that criminal appeals went from 23.2% to 55.1% of caseload in the period 1985-1994, and attributes difference to adoption of state sentencing guidelines).

In general, then, the right to an appeal is a bulwark of procedural and substantive fairness. A defendant's waiver of this valuable right should not be lightly inferred.

B. The decision whether to file a criminal appeal belongs to defendant alone.

The question presented here is really this: May a reasonable attorney assume that a silent client does not wish to appeal, or does the Constitution require the attorney to consult with the client and ascertain the client's wishes before presuming to waive that fundamental right on the client's behalf? One potential answer to that question is clearly wrong: The attorney may not rely solely upon his or her own judgment. Rather, the client's wishes are paramount because the decision whether to appeal is reserved to the client alone.

This Court has recognized that there are "fundamental decisions" that only the defendant, and not counsel, can make. These number only four: whether to plead guilty; whether to waive a jury; whether to testify; and whether to take an appeal. *Jones v. Barnes*, 463 U.S. at 751.[6]

These decisions are fundamental because they involve waivers of important rights. A waiver is ordinarily defined as an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The particular nature of the waiver procedure, however, varies with the context. Whether advice of counsel is required, and what procedural safeguards are

[6] At least one lower court has expressed doubt as to whether this list is exclusive. *United States v. Boigegrain*, 155 F.3d 1181, 1191 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 828 (1999).

appropriate, depend upon the nature and importance of the right being waived.

If the right is routine -- e.g., the decision to forgo an ordinary evidentiary objection, or to absent oneself from a routine trial conference -- no special protections have been required. A statement from counsel is deemed sufficient. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 527-28 (1985). For certain important Constitutional rights only an explicit affirmative waiver by the client will suffice. *E.g.*, *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to trial counsel); *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion) (judge's responsibility to ensure knowing waiver of counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required for suspect in custody to waive right to counsel and to remain silent); *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea waiving panoply of trial rights).

For some of these highly important rights, only an in-court waiver, by the client, after questioning by the court, is sufficient. Of the four "fundamental" trial decisions, two lend themselves to this treatment. The decision to plead guilty, for example, is committed to the defendant. Due process requires that the court closely question the defendant to ensure that the waiver is a fully knowledgeable one. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Similarly, the defendant alone may decide whether to waive a jury. Such a waiver is so bound up with the trial procedure that it necessarily occurs in court, and is conditioned upon the approval of the court, as well as the "express and intelligent consent of the defendant." See

Singer v. United States, 380 U.S. 24, 34 (1965); *Patton v. United States*, 281 U.S. 276, 312 (1930).[7]

Defendants' other two fundamental trial decisions, on the other hand, do not lend themselves to a formal, on-the-record waiver. This is not because the rights at stake are any less important, or because it is any less important for defendants to invoke or waive those rights in an informed manner. The difference is that the system relies upon defense counsel to ensure that the defendant personally chooses to waive those rights.

Thus, for example, the decision whether to testify unquestionably belongs to the defendant alone. Any waiver of such a fundamental trial right must be informed and intelligent. See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973); U.S. Const. amend. V. Nevertheless, for various reasons -- including the danger of invading the attorney client privilege or unintentionally coercing defendants -- this Court and the

[7] By rule, the consent of the prosecutor is required as well in the federal system. Fed. R. Crim. P. 23(a). This is an additional, not a substitute, requirement for waiver; of course waiver of a jury cannot be forced upon the defendant by the prosecutor or the court. Rule 23(a) also requires that any waiver be in writing.

Colloquy with the defendant who wishes to waive a jury is not specifically required as a matter of Constitutional law, though some courts have suggested such a practice or imposed it pursuant to their supervisory power. E.g., *Marone v. United States*, 10 F.3d 65, 67-68 (2d Cir. 1993)(suggesting colloquy procedure); *United States v. Rodriguez*, 888 F.2d 519, 526-28 (7th Cir. 1978) (supervisory power); *United States v. Anderson*, 704 F.2d 117, 118-19 (3d Cir. 1983) (waiver in writing is sufficient, though colloquy is ordinary and preferred procedure); *Wyatt v. United States*, 591 F.2d 260, 264-65 (4th Cir. 1979) (endorsing the practice to ensure intelligent waivers).

lower federal courts have never held that due process requires an in-court colloquy with the defendant who chooses not to testify. Instead, the federal courts have relied solely upon counsel to advise the defendant as to this decision. In particular, it is defense counsel's job to ensure that defendant's decision is uncoerced and knowledgeable.[8]

The fourth fundamental decision -- whether to appeal -- is the one at issue in this case. This, decision alsobelongs to defendant alone. See *Jones v. Barnes, supra*. Here, too, however, the case law has never required that the defendant place such a waiver on the record personally, because the decision does not lend itself to that treatment.

The decision whether to appeal, after all, may occur at any time before the time to appeal has run. It is almost always made some time after proceedings in the trial court have concluded. It requires some preliminary analysis of the trial record and the governing law, even where counsel was present at trial. Indeed, by the time the decision whether to appeal is made, defendant may well be in custody, far from any courtroom. See generally *Peguero v. United States*, __ U.S. __, 119 S. Ct. 961, 964 (1999). Like the decision not to testify, the decision not to appeal may be based on privileged

[8] See, e.g., *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998) ("Because the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, the burden shouldered by trial counsel is a component of effective assistance of counsel"), *cert. petition filed*, No. 98-9842 (Apr. 20, 1999); *United States v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995) (surveying Court of Appeals case law governing defendant's decision whether to testify).

Some states require or suggest that the court conduct an in-court colloquy with a defendant who wishes to waive the right to testify. The "great majority" of states do not. See *State v. Thomas*, 128 Wash. 2d 553, 558-60, 910 P.2d 475, 478-79 (1996) (survey of case law).

discussions that the defendant would rightly be reluctant to place on the record. So here, too, the waiver is not placed on the record in the trial court. The burden necessarily falls upon defense counsel to ensure that any waiver is knowing and voluntary.

The right to effective assistance of counsel is thus "required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated." *Nelson v. Peyton,* 415 F.2d 1154, 1157 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).[9]

[9] The burden that the system places upon defense counsel is highlighted by the procedures required for waivers of the right to appeal sentencing issues in connection with guilty pleas. The Courts of Appeals have carefully policed agreements to waive the right to appeal to ensure that the record shows, not only that the elaborate safeguards of Rule 11, Fed. R. Crim. P., were observed, but that the specific waiver of the right to appeal was knowing and voluntary. See *United States v. Blackwell*, 172 F.3d 129, 130 (2nd Cir. 1999) (knowing and voluntary waiver of right to appeal in connection with guilty plea must appear on the record); *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (waiver of right to appeal must be voluntary and intelligent; upholding waiver because explained to defendant on the record); *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir.), *cert. denied*, 119 S. Ct. 254 (1998); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995).

No such safeguards are in place for post-trial decisions to forgo the right to appeal. The contrast only highlights the fact that, in the post-trial context, the system relies almost entirely upon defense counsel to ensure a voluntary and intelligent waiver.

C. Although the decision is defendant's, counsel is charged with the duty of ensuring that any waiver of appellate rights is informed and voluntary.

Because waiver of the right to appeal is ordinarily accomplished only by silence, and because it takes place out of court, the role of counsel in ensuring an effective waiver is essential. Consequently, this decision lies at the intersection of the Fifth/Fourteenth Amendment guarantee of due process and the Sixth Amendment guarantee of effective assistance of counsel. Due process requires that the waiver be voluntary and informed. The Sixth Amendment requires that counsel render effective assistance in ensuring that it is so.

The accused has the right to the effective assistance of counsel at every stage of the trial proceedings. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Just as clearly, that guarantee of effective assistance of counsel extends to a direct appeal. *Evitts v. Lucey,* 469 U.S. at 393; *Douglas v. California*, 372 U.S. 353 (1963). Petitioner's brief suggests, however, that the period after sentencing, but before appeal, is a sort of Constitutional no-man's land. During this hiatus, according to Petitioner, counsel need not do anything unless the client thinks to ask.

Contrary to Petitioner's argument, the requirement of effective assistance of counsel must continue from trial through the appeal process, without a break. Indeed, counsel's advice is nowhere more crucial than in the short time allotted for filing an appeal after sentencing. In this respect, NACDL finds itself in agreement with the *amicus* brief of the Solicitor General. See *Amicus* Brief for United States at 12-13 ("Respondent's right to counsel accordingly

included the right to consult with a lawyer, at or around the time that judgment was entered against him, concerning the possibility and advisability of pursuing an appeal from his conviction or sentence.").

This Court's precedents are in accord. *Evitts v. Lucey*, *supra*, for example, impliedly held that there is no post-sentence hiatus in the duty of the attorney to furnish effective assistance. In that case, counsel had filed a notice of appeal, but the appeal was dismissed because he failed to perfect it by filing the "statement of appeal" required under state law. This Court noted that, on appeal, counsel's

> assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all--much less a favorable decision--on the merits of the case. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all.

469 U.S. at 394 n.6. The implication is clear that attorney conduct that results in the default of the client's threshold right to appeal, without the client's consent, falls short of the Constitutional minimum.

The duty to counsel the client as to whether to appeal, while reserving ultimate decision to the client, is also implicit in this Court's decision in *Anders v. California,* 386 U.S. 738 (1967). This Court overturned a procedure that

permitted appointed counsel to withdraw, over the client's objection, based on counsel's opinion that the appeal lacked merit. The attorney in *Anders* failed in his role as advocate because he usurped the client's ultimate decision to take an appeal. See also *Penson v. Ohio*, 488 U.S. 75 (1988).[10]

The federal Courts of Appeals that have dealt squarely with the issue have also held that the Sixth Amendment governs counsel's conduct in the interim between sentencing and the expiration of defendants' time to appeal.[11]

At first it appears paradoxical that, because this decision is personal to the defendant, it cannot be made without the involvement of counsel. In reality, however, there is no contradiction. The decision whether to appeal is peculiarly enmeshed in legal technicalities. It depends first upon a review of the trial record. The advocate must determine whether there have been legal errors and, if so, whether they were properly preserved. The advocate must assess the likelihood of success, given the strength of the merits and the applicable standards of review. The advocate must also consider the possibility of adverse consequences in the event of a cross-appeal or an open-ended remand. Yet the ultimate decision is committed to a lay defendant,

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[10] In *Lozada v. Deeds*, 498 U.S. 430 (1991), this Court reversed the denial of a certificate of probable cause for appeal where defendant had alleged ineffective assistance of counsel based upon counsel's failure to advise him of his right to appeal. In doing so, the Court did not cast any doubt upon the lower court's holding that this constituted deficient performance. Rather, it reversed the the denial of a certification of probable cause to appeal, finding that a reasonable appellate court might reverse the lower court's holding that defendant had not shown prejudice from the attorney's error.

[11] See, e.g., cases cited at pp. 16-17, infra.

unlearned in the law. Without adequate counsel, a defendant's personal right to decide whether to appeal simply cannot be exercised meaningfully. Counsel is therefore charged with the duty of making sure that the defendant understands the nature and ramifications of this decision.

D. Constitutionally effective counsel cannot forgo the right to appeal without first consulting with the client and ascertaining the client's wishes.

The question remains as to what duties the Constitution imposes upon counsel in the post-sentencing, pre-appeal period. This Court's cases strongly imply an answer, and the norms of the profession supply one. A reasonable attorney must, at a minimum, consult with the client and ascertain the client's informed wishes with respect to filing an appeal.[12]

Counsel, here as elsewhere, must satisfy Constitutional standards of effective assistance. A reviewing court will accordingly analyze counsel's conduct for deficient performance and prejudice, under the familiar two-pronged analysis of *Strickland v. Washington*, 466 U.S. at 687.

The Constitutional standard of attorney performance incorporates a few "basic duties":

> Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest....From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and *the more particular duties to consult with the defendant on important decisions* and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. at 688 (emphasis added; citations omitted).

At stake here is not the exercise of skill, which can present close questions of judgment for a reviewing court. Rather, this case involves the attorney's uncontroversial, "basic duty" to "consult with the client on important decisions" and, if appropriate, to file a simple notice of appeal. The decision whether to appeal, as one of the fundamental decisions reserved for the defendant alone, is *a fortiori* "important" enough to require the attorney to consult and ascertain the client's wishes.

That duty to consult implies that a reasonable attorney is required to do more than merely obey in the event that the client knows enough to ask the attorney to file a notice of appeal. *Strickland* imposes a general *affirmative* duty to consult on important issues. And the Courts of Appeals, implementing *Strickland*, have not hesitated to impose specific affirmative duties upon counsel in connection with assisting defendants with the decision whether to appeal.

[12] We do not mean to suggest that this standard exhausts the duty of counsel, even for Sixth Amendment purposes, but it is at least a minimal floor below which a reasonable advocate cannot go.

For example, in *Baker v. Kaiser,* 929 F.2d 1495 (10th Cir. 1991), the court reversed the denial of habeas relief and summarized counsel's duties as follows:

> Defense counsel must explain the advantages and disadvantages of an appeal.... The attorney should provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success.... Counsel must also inquire whether the defendant wants to appeal the conviction; if that is the client's wish, counsel must perfect an appeal.

Id. at 1499 (citations omitted). See also *Nelson v. Peyton,* 415 F.2d 1154, 1157 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); *Jackson v. Turner*, 442 F.2d 1303 (10th Cir. 1971).

Strickland requires that counsel's conduct be evaluated in light of "prevailing professional norms," including "American Bar Association standards and the like." 468 U.S. at 688-89. The American Bar Association Standards impose a duty upon defense counsel to consult with the client and to abide by the client's wishes with respect to filing an appeal. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4.82 (3d ed. 1993) ("ABA Standards"). [13]

[13] ABA Standards § 4-8.2. provides:

> (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and the defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.

Indeed the California Penal Code §1240.1(a) (West Supp. 1999) specifically requires that trial counsel "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." On the other hand, seemingly no jurist or responsible commentator takes the position that it is *not* part of counsel's function to discuss the pros and cons of taking an appeal with the client, in order to permit the client to make an informed decision. There is wide agreement in the profession that a defense attorney owes the client at least that much.

Indeed, even the parties to this appeal appear to be in partial agreement as to some matters. An attorney who adequately discussed the matter with the client, and obtained the client's informed decision not to appeal, would of course meet the Constitutional standard. Conversely, an attorney who disregarded the client's explicit request to file an appeal would clearly fall below the Constitutional standard. See *Peguero v. United States*, 119 S. Ct. at 965 (discussing *Rodriquez v. United States*, 395 U.S. 327 (1969)). Petitioner errs, in our view, by assuming that such complete and wilful dereliction is the *only* manner in which counsel can be ineffective with respect to the filing of an appeal.[14]

[14] The district court decision reversed by the decision below was informed by the view that only counsel's direct disobedience of a client's direction to file an appeal would constitute ineffective assistance. The matter was referred to the magistrate judge for an evidentiary hearing on

The issue in this case, like most ineffective assistance issues, falls between the obvious extremes. It has never been the law that a finding of ineffectiveness must be premised upon the lawyer's utter faithlessness. The fact that counsel showed up for trial or did not directly disobey the client will not defeat an ineffective-assistance claim where counsel's conduct of of the defense fell below professional standards. As in all ineffective-assistance cases, counsel's conduct with repect to filing an appeal must be evaluated with reference to an "objective standard of reasonableness." *Id.* at 687-88.

In Petitioner's view, counsel has no duty even to inform a convicted defendant of the availability of an appeal, much less to ensure that the defendant's decision to forgo an appeal is an informed one. Petitioner's Brief at 17-20. For the reasons expressed herein, *Amicus* NACDL believes that the Constitution requires defense counsel to advise the client and protect the client's interest with respect to an appeal. That is why counsel is there. In any event, however, counsel cannot fulfil even the minimal duty to abide by the client's wishes -- which Petitioner acknowledges -- unless counsel ascertains what those wishes are.

"the limited issue of the credibility of [Respondent's] assertions that [counsel] had promised to file a notice of appeal on his behalf." (JA 153) The magistrate judge found that Respondent had possessed "little or no understanding of ... what the appeal process was, or what appeal meant at that stage of the game." The magistrate judge found that respondent "did not consent" to the failure to file an appeal, but implied that he did not affirmatively request that one be filed either: he "had not met his burden of proving by a preponderance of the evidence that [counsel] had promised to file a notice of appeal on his behalf." (JA 154; *see also* JA 132-33)

Petitioner would have the courts, and defense counsel, infer waiver from silence. For the reasons expressed above, only adequately counseled silence deserves that consideration. Convicted defendants should therefore be afforded the opportunity to demonstrate that their failures to appeal were not adequately counseled. The decision whether to appeal is fraught with legal and strategic considerations far beyond the capacity of most nonlawyers to assess. Where, as here, that highly legal decision is committed by law to a lay defendant, the *actual* assistance of counsel is a minimum Constitutional prerequisite.[15] Anything less is a hollow guarantee.

[15] Petitioner raises the specter of mass revivals of procedurally defaulted appeals, and even the United States as *amicus* opines that affirmance might require collateral relief "upon a simple allegation of nonconsent...." (See Pet. Brf. at 11-12; *Amicus* Brief of United States at 15.) This argument confuses the issue with the proof. True, the attorney's advice and the client's decision not to appeal will ordinarily have taken place in private. Many, perhaps most, ineffective-assistance claims involve private advice that passed between lawyer and client. See, e.g., *Hill v. Lockhart*, 474 U.S. 52 (1985). But affirmance would not bind the court to grant a *habeas* or § 2255 petition, only to hear it. Such a court will have to consider *whether* defense counsel failed to consult with defendant and *whether* defendant consented to forgo an appeal. The proofs might, as in this case, involve testimony from defense counsel and/or defendant, which the district court might or might not choose to credit.

It hardly requires stating that the courts may expect candor from reputable defense counsel. It is also obvious that counsel who have assiduously counseled their clients as to the advisability of an appeal will have no incentive to misremember or misrepresent that fact.

E. Defense counsel's central role makes it important that this Court set the minimum Constitutional standard of legal representation in this area.

Recently this Court held that a trial court's failure to notify defendant of the right to appeal was harmless because defendant knew his rights. *Peguero v. United States*, *supra*. That case dealt not with the broad issues of waiver or effective assistance, but with the court's advice of the right to appeal required by the Federal Rules of Criminal Procedure. The *Peguero* holding, however, points up the central role of defense counsel in safeguarding the right to appeal. Defendants have nowhere else to turn for the information they need.

Above all, the discussion in *Peguero* demonstrates the need for this Court to impose a clear, Constitutionally-based minimum standard of representation in this troubled area. The period immediately following sentencing is often a fragile point in the attorney-client relationship. Some attorneys may be unwilling, or feel themselves unqualified, to handle an appeal. Court-appointed counsel are too often confused or unaware that their duties include the filing of a timely notice of appeal, or may be reluctant to file a notice of appeal that may carry with it the obligation to see the appeal through to its conclusion.

> It will often be the case that, as soon as sentence is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney. The relationship between the defendant and the attorney may also be strained after sentencing, in any event, because of the defendant's disappointment over the outcome of the case or the terms of the sentence. The attorney, moreover, concentrating on other matters, may fail to tell the defendant of the right to appeal ....

119 S. Ct. at 964. In short, as this Court has made clear, the opportunities to slip up are many, and the consequences of doing so are permanent and dire.

The court's advice that the right to appeal exists is of course an important prerequisite, but it does not in itself guarantee an informed waiver. Petitioner suggests that the court's advice is enough, but the attorney's duties are more comprehensive. Indeed, even a guilty plea accompanied by the elaborate advice required by Rule 11, Fed. R. Crim. P. and *Boykin, supra*, may nevertheless be invalid because counsel was ineffective. See *Hill v. Lockhart, supra*.

Filing a notice of appeal is a simple administrative step, but it is the bottleneck through which all appeals must pass. Failing to file a notice of appeal, therefore, is no routine omission. Because an appeal is ordinarily barred after a certain deadline,[16] the attorney's failure to file is the equivalent of a decision to waive an appeal. That decision is the client's alone to make. If a defense attorney fails to file a notice of appeal, without having obtained the client's informed consent, the attorney has not just violated the duty

[16] In California, a criminal defendant must file a notice of appeal within 60 days of sentencing. *See* Rule 31(a), Cal. Rules of Court. In the federal system, a criminal appeal must ordinarily be filed within 10 days of entry of judgment. *See* Fed. R. App. P. 4(b) (with irrelevant exceptions). Though deadlines differ, the principle is the same.

to counsel the client; the attorney has usurped a fundamental decision that rightfully belongs to the client. See *Jones v. Barnes*, 463 U.S. at 753 (Blackmun, J., concurring).

Amicus NACDL writes, on the one hand, to welcome this Court's guidance in clarifying the Constitutional obligation to consult with clients about the advisability of an appeal, and to ascertain the client's wishes with respect to filing an appeal. We also write to acknowledge that mistakes may occur, and to urge that when they do, defendants should not be penalized to the extent of sacrificing the crucial right to test the legality of their convictions and sentences on appeal.

F. *Amicus* NACDL endorses Respondent's position that *Strickland* "prejudice" does not require a showing of likelihood of success on appeal.

In conclusion, NACDL briefly endorses the position of the Respondent that the Strickland requirement of "prejudice" does not require the defendant to demonstrate that an appeal would have been meritorious or successful. See *Rodriquez v. United States*, *supra*.

In addition to the reasons stated in the other briefs, such a requirement fails to take into account the fundamental nature of the decision to appeal. Like the decision whether to testify, this decision is not merely "tactical" or "important." A small handful of fundamental decisions are reserved to the client out of respect for individual autonomy and the "inestimable worth of free choice." *Faretta*, *supra*, 422 U.S. at 834; see also *id.* at 833; *Rock, supra*.

An interpretation of "prejudice" that takes the fundamental decision whether to appeal *at all* out of the client's hands, based on a preliminary assessment of the merits, is akin to the procedure rejected in *Anders, supra*. *Anders* required at a minimum that the attorney act as an advocate to the extent possible, in order to aid the court in a determination on the merits. Respondent here, like the defendant in *Anders*, has never had the benefit of a hearing of his claims on appeal with the assistance of counsel. A preliminary determination of non-merit, by a trial-level court at that, is inherently not an adequate substitute.

In addition, it is impractical to ask the trial courts to reconstruct the possible basis for an appeal, and to handicap the defendant's chances of success. The process would require the trial court to identify meritorious issues that defendant is asserting, or that defendant could assert, if afforded the assistance of counsel. That assessment would ordinarily occur in the context of a *habeas* or Section 2255 petition, where defendants often proceed *pro se*. Such a procedure is no substitute for the assistance of an advocate dedicated to uncovering error in the defendant's conviction or sentence. Cf. *Peguero*, supra, 119 S. Ct. at 965-66 (O'Connor, J., concurring)(prejudice does not entail showing of meritorious grounds for appeal). Moreover, the trial judge is inherently handicapped in making this determination, because it is in the very nature of a successful appeal that the trial judge's view is different from that ultimately adopted by the appellate court.[17]

[17] Two other contexts where a trial court may be called upon to consider a defendant's likelihood of success on appeal are motions for bail pending appeal of a criminal conviction, see 18 U.S.C. § 3143, and certificates of appealability of the denial of *habeas corpus* relief, see 28 U.S.C. § 2253(c). They are not relevant to the issue here, i.e., the trial

Consequently, counsel's denial of the client's right to control this fundamental aspect of the defense ought to suffice to require the very minimal relief of access to the appellate process.

At the very least, "prejudice" in this context should be interpreted by analogy to the standard for advising a client whether to plead guilty. In that context, "prejudice" requires a showing, not of likelihood of success at trial, but only a "reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart, supra*, 474 U.S. at 59. That standard, which is urged by *amicus* the United States, at least has the virtue of focusing on the outcome of the process at hand -- *i.e.*, the decision whether to appeal -- rather than jumping many contingent steps ahead in order to guess the ultimate outcome of the appellate proceeding.[18]

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court's assessment of whether defendant was denied access to a direct appeal as of right as a result of ineffective assistance of counsel.

Release on bail, while important, is tangential to the merits of the case, and the grant or denial of bail does not affect defendant's access to an appeal. The requirement of a certificate of appealability is a statutory restriction on jurisdiction to hear an appeal from the denial of collateral relief. Such a restriction does not stand on the same footing as the attorney's default of the client's direct appeal as of right.

[18] In this particular case, defendant was not explicitly called upon to demonstrate whether he would have appealed absent counsel's error, but there are many indicia that he would have done so. As the factfinder below concluded, defendant did not understand his rights and did not consent to counsel's failure to file a notice of appeal. (JA 133) Defendant stated below that he intended for counsel to file a notice of appeal, and he did attempt on his own to file a notice of appeal approximately four months after his sentencing, but this appeal was denied as untimely. (JA 44)

CONCLUSION

For the reasons stated above and in petitioner's brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Dated: July 30, 1999