No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST ROE, Warden,
Petitioner,

v.

LUCIO FLORES-ORTEGA,
Respondent.

BRIEF FOR RESPONDENT

Filed August 5, 1999

QUESTION PRESENTED

Does the Sixth Amendment guarantee a criminal defendant the advice and guidance of counsel in deciding whether to exercise the right to appeal and in perfecting the appeal unless waived by the defendant?

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CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On October 13, 1993, Flores-Ortega, a popsicle vendor, entered a plea of guilty to a charge of second degree murder for a homicide occurring during a brawl outside a bar. He was represented by appointed counsel, public defender Nancy Kops. The court proceedings were conducted with the assistance of a Spanish-language interpreter.

Although Flores-Ortega denied the killing, he pleaded guilty pursuant to *People v. West*, 3 Cal.3d 595, 447 P.2d 409 (1970), which permitted him, under California law, to deny the crime to the court, but acknowledge the sufficiency of the evidence to convict him. During the course of plea proceedings, he stated repeatedly that he did not commit the crime, but was pleading guilty because his attorney had advised him to do so. J.A. 17-26.

At sentencing on November 15, 1993, Flores-Ortega's attorney urged the court to grant probation. J.A. 35-36. The court declined to do so, imposing a sentence of 15 years to life in prison and a $1,000 restitution fine. J.A. 40. After sentencing, the court said, "You may file an appeal 60 days from today's date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal." J.A. 40.

According to the findings made below, Flores-Ortega and Ms. Kops had a conversation immediately after sentencing from which Flores-Ortega inferred that Kops would be filing a notice of appeal. J.A. 133. Flores-Ortega, who speaks only Spanish, was then transported to Wasco State Prison, where he was placed in lock-up for 90 days while going through evaluation. District Court Rep.Tr. 6, 21. During this time, he was unable to communicate with counsel. District Court Rep.Tr. 6. As he explained, "you're not given any privileges at all. They just take you out to bathe, and they just lock you back up in your cell. You can't make a phone call, you're completely locked up. When you're locked up, you can't do anything." District Court Rep.Tr. 7.

After being transferred to Centinela State Prison, Flores-Ortega found out that his attorney had not filed a notice of appeal, so he filed a notice with the state court on March 24, 1994. District Court Rep.Tr. 26; Ninth Circuit E.R. 47-55. The Clerk of the Fresno County Superior Court refused to file the notice, and referred him to the Court of Appeal. Ninth Circuit E.R. 57. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. J.A. 42-44.

After the California Supreme Court denied a petition for writ of habeas corpus (J.A. 45), Flores-Ortega filed his habeas petition, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of California. J.A. 46-75. The petition alleged a claim of ineffective assistance of counsel for failing to perfect an appeal, to adequately consult with him regarding his right to appeal, or to instruct him on the means of perfecting an appeal in propria persona. J.A. 51.

The federal district court appointed the federal defender for the habeas proceedings and conducted an evidentiary hearing on January 24, 1997. The evidentiary hearing was limited to "the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf." J.A. 92.

Ms. Kops testified that at the time of Flores-Ortega's sentencing, her office did not have a policy concerning advising clients of their right of appeal. J.A. 123. She explained to the court that her "personal policy is that if a client has entered a plea and does not thereafter voice to me a change of heart, I would not discuss the right to appeal of his plea" or the right to appeal the sentence. J.A. 123-124. Ms. Kops did not recall any discussion with Flores-Ortega in court after sentencing, and she never met with him thereafter. J.A. 111, 114, 121, 124.[1] Flores-

[1] Defense counsel Kops filed a declaration, stating that she had met with Flores-Ortega one time between the guilty plea and the sentencing, for 20 minutes on the day before sentencing to review his presentence report. J.A. 95. Although she had noted in the case file that she should "bring appeal papers" to the sentencing, she did not recall why she wrote those words.

Ortega testified that immediately after sentencing, he "asked [counsel] if she was going to continue trying to fight my case, and she said, yes, that she was going to try to file an appeal." District Court Rep.Tr. 3.

At the close of the evidentiary hearing, the magistrate judge found that Flores-Ortega "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." J.A. 133. In addition, the magistrate judge found that there was a conversation between Flores-Ortega and Ms. Kops after sentencing from which Flores-Ortega inferred that she would file a notice of appeal and that it was quite clear that Flores-Ortega had not consented to counsel's failure to file a notice of appeal. J.A. 132-133. Nevertheless, the magistrate judge found that Flores-Ortega had not "proven by a preponderance of the evidence" that defense counsel had promised to file a notice of appeal. J.A. 133.

The magistrate judge concluded that lack of consent to the failure to file a notice of appeal would entitle a criminal defendant to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995). He recommended denial of the petition, however, on the ground that Flores-Ortega was barred from such relief by *Teague v. Lane*, 489 U.S. 288 (1989). J.A. 152-161. Without elaboration, the district court adopted the magistrate judge's recommendations and denied the habeas petition. J.A. 162-163.

J.A. 96. Her file notes did not reflect any conversation with Flores-Ortega on the day of sentencing or any time thereafter regarding an appeal. J.A. 96.

The court of appeals reversed and remanded on the ground that *Stearns* was not a new rule and instructed the district court to issue a conditional writ releasing Flores-Ortega from state custody unless the state trial court vacated and reentered the judgment and conviction, allowing a fresh appeal. J.A. 168. The court held that, unless the defendant consents to the failure to file a notice of appeal, it is ineffective assistance of counsel to waive the right of appeal. J.A. 166.

SUMMARY OF ARGUMENT

This Court has held that among the most "basic duties" imposed upon defense counsel by the Sixth Amendment is the duty "to consult with the defendant on important decisions." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Constitution guarantees that, when faced with critical decisions, a criminal defendant receive "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The decision whether to appeal – like the decisions whether to plead guilty, to waive jury trial or to testify – is such a decision. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Thus, counsel's basic duties in a criminal case include the duty to advise the defendant of the right to appeal and the nature of the appellate process, to explain whether there are grounds for appeal, to determine whether the defendant wishes to appeal, and to file a notice of appeal if the defendant so desires.

Judicial notification of appeal rights cannot substitute for the advice and assistance of counsel. Mere knowledge of the right to file a notice of appeal is insufficient to

permit a defendant to make an informed decision, in the context of his or her particular case, whether to pursue an appeal. Moreover, many jurisdictions do not require an advisement of appeal rights following a plea. Matters such as the nature of appeals, rules and procedures on appeal, and possible claims on appeal are beyond the knowledge of the vast majority of defendants. Without the assistance of counsel, criminal defendants, often lacking education or the ability to speak or understand English, cannot make an intelligent decision regarding the fundamental decision whether to appeal.

A defendant does not waive the right to assistance of counsel by pleading guilty; a defendant's statutory and constitutional rights are subject to violation during sentencing no less than at trial, and an appeal may be necessary to vindicate those rights. With the adoption of complex sentencing schemes in many jurisdictions, sentencing appeals are an important component of appellate jurisprudence, ensuring the legality of sentences as well as the fair and uniform application of sentencing laws. Moreover, appeals involving the change-of-plea proceedings are not uncommon. Without assistance of counsel, a defendant may not even know that fundamental constitutional deprivations are subject to further review.

Failure to advise the defendant and determine whether he wants to appeal clearly falls below accepted standards of professional practice. The failure to determine whether an incarcerated, indigent defendant wishes to appeal effectively deprives the defendant of the right to make a fundamental decision in his case.

In the absence of an informed waiver of the right to appeal by the defendant, counsel must take the steps necessary to perfect an appeal. The presumption of prejudice applicable at the trial stage when there is a denial of counsel should apply with equal force at the appellate stage. In the alternative, a defendant should be granted relief upon showing that there is a reasonable probability that, but for counsel's abandonment, he would have pursued an appeal.

ARGUMENT

MR. FLORES-ORTEGA WAS DENIED HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL REGARDING HIS RIGHT TO APPEAL

A. The Sixth Amendment Guarantees a Criminal Defendant the Right to the Advice and Guidance of Counsel Regarding the Right to Appeal

The Sixth Amendment guarantees an accused the right to effective assistance of counsel at every stage of a criminal prosecution, from commencement of the proceedings through final resolution of the charges at the trial level. U. S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984). Although the Constitution does not require an appeal of right from a criminal conviction, *McCane v. Durston*, 153 U.S. 684 (1894), where such an appeal is provided,[2] the defendant has a Sixth

[2] In forty-seven of the fifty states, the right to appeal in a criminal case exists as a matter of right. *See* Marc M. Arkin, *Rethinking the Right to a Criminal Appeal*, 39 UCLA L.Rev. 503, 513-514 (1992).

Amendment right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 388, 392 (1985). One requirement of effective assistance on appeal is that counsel take all steps necessary to carry out the client's decision to appeal. *Id.*

Whether to exercise the right of appeal is one of those critical decisions reserved for the defendant personally, rather than counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). These decisions include whether to plead guilty, to waive a jury trial, to testify in his or her own behalf, and to pursue an appeal. *Id.* While the defendant is entitled to make those decisions personally, each of them involves the potential waiver of a critical right and requires "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The "basic duties" of counsel include the duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. Criminal defendants, often illiterate and unable to speak or understand English, cannot be expected to make what the Court has termed the "fundamental decision" regarding appeal, *Jones, supra*, without the advice and assistance of an attorney, for several reasons.

First, the very existence of a right to appeal in a particular jurisdiction, particularly following a guilty plea, is not a matter of common knowledge, nor are the actions that must be taken and the deadlines that must be met in order to exercise that right. Second, although some states require the sentencing judge to advise criminal

defendants of their right to appeal in all cases,[3] in at least one-third of the states, including such populous states as California and New York, judicial advisement of appeal rights is not required following a guilty plea. *See* Appendix A. Third, bare knowledge that a right to appeal may exist does not enable a defendant to make an informed decision whether to pursue an appeal. The appeal process "is governed by intricate rules that to a lay person would be hopelessly forbidding." *Evitts*, 469 U.S. at 396. The scope of an appeal, the issues that can be raised on appeal, and the standards of appellate review vary from state to state, especially when the defendant has pleaded guilty. These "complex rules and procedures" are within the particular knowledge of attorneys, not lay clients. *Id.* at 395, n. 6.

Finally, the critical consideration for the client's decision whether to appeal will be the effect of these legal rules regarding appeals on his particular case. Even if a defendant understands he has the right to appeal, he cannot make an informed decision without professional advice on the potential for appellate relief in his case. Only an attorney can provide the necessary information and advice in this regard. *See Rodriquez v. United States*, 395 U.S. 327, 330 (1969).

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[3] *E.g.*, Michigan Court Rule 6.425(E)(1)-(2) (requiring sentencing court to advise defendants who pleaded guilty or were convicted following a trial of right to appellate review); Iowa Rule of Criminal Procedure 22 (sentencing court must advise all criminal defendants of right to appeal); New Jersey Rule of Court 3.21(h) (all criminal defendants must be advised of right to appeal after imposition of sentence).

For all of these reasons, although the decision whether to appeal is reserved for the client personally, he is entitled to the advice and assistance of a lawyer in making that decision. As the Solicitor General observes, "[g]iven that the nature of appeals, and the possible legal claims that might be advanced on appeal, are beyond the knowledge of most defendants, it would be anomalous if the defendant did not also have a right to assistance of counsel in understanding the appeal process and in making the decision whether to appeal." United States Amicus Brief at 8.

The basic duty to consult with the defendant regarding the other fundamental decisions reserved to the defendant is well established. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (effective assistance of counsel required in connection with decision to plead guilty). Contrary to the State's position (Pet. Br. at 17, 20), the Sixth Amendment right to counsel mandates similarly competent advice and consultation regarding the right to appeal. *E.g., Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (recognizing counsel's duty to advise client of "his right to appeal, the manner and time in which to appeal and whether an appeal has any hope of success"), *cert. denied*, 397 U.S. 1007 (1970); *Lumpkin v. Smith*, 439 F.2d 1084, 1085 (5th Cir. 1971) (counsel must advise defendant of right to appeal, procedure and time limits, and right to counsel on appeal); *Baker v. Kaiser*, 929 F.2d 1495, 1498-1500 (10th Cir. 1991) (counsel must give advice about whether there are grounds for appeal, the probabilities of success,

advantages and disadvantages of an appeal, and determine whether defendant wants to appeal).[4]

Failure to provide this consultation on the right to appeal to the defendant clearly falls below professional

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[4] The State relies on three circuit decisions to argue that defense counsel is required to file a notice of appeal only when requested by the defendant. Pet. Br. at 14. None of these decisions adequately addresses the issue of counsel's duty to provide the client advice and guidance regarding his right to appeal. *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) merely states in dicta, without citation or further discussion, that "[t]he Constitution does not require lawyers to advise their clients of the right to appeal." In *Morales v. United States*, 143 F.3d 94 (2d Cir. 1998), the only issue was whether "the lawyer's failure to advise Morales of his right to appeal *after sentencing* constituted a constructive denial of counsel and therefore was prejudicial *per se*." *Id.* at 94 (emphasis added). It was undisputed that Morales' lawyer had met with him between plea and sentencing, had discussed with him why the evidence did not support a two-level gun enhancement, had told him he had a right to appeal and that the sentencing judge would so advise him, and specifically advised him that if the sentencing judge imposed the enhancement he could appeal that decision. *Id.* at 95. It was nearly a year after sentencing that Morales filed a pro se motion claiming that the lawyer's failure to repeat the advice after sentencing deprived him of effective assistance. *Id.* at 96. Finally, in *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994), both defendants claimed that they had requested their counsel to file a notice of appeal, and the court of appeals remanded the case to the district court for an evidentiary hearing on that issue. *Id.* at 720. The court's dicta regarding defense counsel not having a duty to advise of the right to appeal rested upon the unsupported premise that "most defendants know about the possibility of appeal and cannot complain if they are not furnished redundant information." *Id.* at 719.

standards. The American Bar Association Standards for Criminal Justice provide:

> (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and 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.

ABA Standards for Criminal Justice, § 4-8.2 (3d Ed. 1993). The ABA standards are accepted as guidelines in determining the parameters of constitutionally required effective assistance of counsel. *Strickland*, 466 U.S. at 687; *Jones v. Barnes*, 463 U.S. at 753, n. 6.[5]

[5] This duty of advice and counsel is also fully consistent with California law. *See* Cal. Pen. Code § 1240.1(a) (Deering 1999) (trial counsel duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal"). Contrary to the State's argument (Pet. Br. at 23), section 1240.1(a) is not limited to cases in which the defendant has stood trial. Rather, the language "at trial" as used in that section refers to the attorney at the trial level, in contrast to appellate counsel. This conclusion is reinforced by the introductory phrase of that section, which makes the section applicable to "any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent." *Id.*

Likewise, the Restatement of the Law establishes a duty to consult regarding decisions to be made by the defendant: "A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Restatement (Third) of Law Governing Lawyers § 31(3) (Proposed Final Draft No. 1 1996). This need to "communicate and consult", according to the Restatement, "is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing." *Id.* cmt. b.

The State argues that requiring counsel to advise and consult regarding the right to appeal is superfluous because of an independent duty of the trial court to advise a defendant of his appellate rights. Pet. Br. at 15. However, as set forth in Appendix A, over one-third of the states do not require an advisement of appeal rights following a conviction based on a guilty plea. Moreover, a bare advisement, such as the one in this case ("You may file an appeal 60 days from today's date with this Court" (J.A. 40)), is inadequate to permit the defendant to make an intelligent decision whether to appeal. Because criminal defendants include "[t]hose whose education has been limited and those, like petitioner, who lack facility in the English language" (*Rodriquez*, 395 U.S. at 330), notwithstanding any judicial advisement, the defendant will often have, as here, "little or no understanding of what the process, what the appeal process was, or what

appeal meant at that stage of the game." J.A. 133. Therefore, "[b]y itself . . . , this advice [of a right to appeal] is insufficient to satisfy the right to counsel." *Baker*, 929 F.2d at 1499.

B. Counsel's Sixth Amendment Duty to Provide Advice and Consultation Regarding the Right to Appeal Applies when the Conviction is Based Upon a Guilty Plea

The State contends that the constitutional requirement of advice and consultation regarding the right to appeal should not apply to defendants whose convictions are based upon guilty pleas, as opposed to jury or court trial, Pet. Br. at 10-20, and that appeals are uncommon after a plea of guilty or no contest. Pet. Br. at 11. That many defendants choose not to appeal says very little about the fundamental right to make the choice. Regardless of whether the defendant has stood trial or entered a guilty plea, a decision to forego an appeal irrevocably surrenders an important right and eliminates all possibility of vindicating rights previously violated. In any event, petitioner vastly understates the frequency of post-plea appeals. Although appeals challenging the validity of the guilty plea itself may be infrequent, sentencing appeals are increasingly common.[6]

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[6] *See, e.g.*, Kevin R. 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).

The frequency of sentencing appeals is not surprising, given the complexity of modern sentencing law. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 169 (1995). Sentencing appeals raise a wide range of issues, such as whether the sentence exceeded statutory limits, whether the judge relied on prohibited factors or unreliable information, and whether sentencing enhancements were properly applied. Moreover, appeals following a guilty plea generally have a relatively high success rate. *E.g., id.* at 190 (1992-1993 study of two appellate courts shows 24% of guilty plea appeals resulting in some form of relief). Besides correcting errors in individual sentences, appeals following guilty pleas allow systematic development of the parameters of sentencing law[7] and also ensure its uniform application.[8] That the scope of appeal may be narrower

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[7] For example, in enacting the Federal Sentencing Reform Act of 1984, Congress believed that appellate review of sentencing would promote "case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the [U.S. Sentencing] Commission in refining the guidelines as the need arises." *See* S.Rep.No. 98-225, 149, 151 (1983).

Congress' hopes in this regard have not been unfulfilled. *See* United States Sentencing Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining 56-60 (1991) ("[a] body of sentencing law, notably similar among circuits in most respects, has quickly developed. The Commission has benefitted from this evolving body of appellate law.")

[8] For this reason, Minnesota, a state that pioneered in indeterminate sentencing reform, has disallowed waivers of

following conviction by plea as opposed to trial (Pet. Br. at 12) makes the need for professional advice regarding the right to appeal greater, not less. Counsel's advice is essential on such critical matters as whether the defendant can appeal the conviction or only the sentence, what issues have been waived by the guilty plea, what additional actions are necessary to take a post-plea appeal,[9] what issues are more properly raised in a habeas petition, and the advantages and disadvantages of pursuing an appeal.[10]

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appeal of sentencing error. In *Ballweber v. State*, 457 N.W.2d 215 (Minn.Ct.App. 1990), the court found that appellate review of sentences was an essential element of that state's sentencing guideline system and that "vindication of the Guidelines' stated goals . . . of reducing sentencing disparity, and providing uniformity in sentencing" required a ban on waivers of sentencing appeals.

[9] For example, Cal. Pen. Code § 1237.5 (Deering 1999) requires that a criminal appellant obtain a certificate of probable cause where the conviction is based upon a guilty plea, except when the appeal challenges only the sentence or other aspects of the proceedings occurring after the entry of the guilty plea.

[10] In the latter respect, an uncounseled defendant may be unaware that choosing to appeal may risk serious adverse consequences, such as triggering a cross-appeal by the prosecution or exposing the defendant to imposition of a more severe sentence in later proceedings. *See Wasman v. United States*, 468 U.S. 559 (1984) (greater sentence of confinement imposed following retrial after successful appeal). Similarly, in California, a claim that a sentence is unauthorized can be raised for the first time on a defendant's appeal, either by the prosecution without filing a cross-appeal or by the appellate court *sua sponte*. *E.g., People v. Dotson*, 16 Cal. 4th 547, 554, fn. 6, 66 Cal.Rptr. 2d 423 (1997); *People v. Scott*, 9 Cal.4th 331, 354, 885 P.2d 1040 (1994). As a result, it is not uncommon for a California defendant not only to have his conviction affirmed, but also to

Finally, the State argues that when a defendant pleads guilty, he manifests a desire to terminate the litigation. Pet. Br. at 13. That claim is purely speculative and is inconsistent with the frequent reservation or waiver of appeal rights in plea agreements. In this case, the plea agreement contained no such waiver. In any event, a desire to terminate litigation on the part of the defendant is generally conditioned on the absence of any legal errors in the conviction or sentence which could be redressed on appeal.

C. The Sixth Amendment Requires that, After Advising and Consulting with the Defendant Regarding the Right to Appeal, Defense Counsel Take All Steps Necessary to Preserve the Right to Appeal, Including Filing a Timely Notice of Appeal, Unless the Defendant Decides Not to Appeal

The right to appeal a criminal conviction and sentence is a fundamental right which defense counsel is obligated to preserve unless the defendant has elected to waive it. Any such waiver must be "an intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[11] In many jurisdictions,

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have his sentence increased on appeal. *E.g., People v. Davis*, 71 Cal.App.4th 1492, 84 Cal.Rptr.2d 628 (1999) (conviction affirmed; sentence raised from 30 years-life to 80 years-life); *People v. Ingram*, 40 Cal.App.4th 1397, 48 Cal.Rptr.2d 256 (1995) (convictions affirmed; sentence increased from 27 years-life to 61 years-life).

[11] Federal courts have consistently held that an in-court waiver of appeal pursuant to a plea agreement is unenforceable

the right to appeal is lost unless a notice of appeal is filed within a very short time period. *E.g.*, Fed.R.App.P. 4(b)(1)(A) (notice of appeal in a federal criminal prosecution must be filed within ten days of the entry of judgment). It will often be difficult for a defendant to make an intelligent decision on whether to appeal within such a short time. Furthermore, compliance with such jurisdictional deadlines may be complicated by the defendant's inability to communicate after sentencing. *See Peguero v. United States*, 119 S.Ct. 961, 964 (1999) ("It will often be the case that, as soon as sentencing is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney"). Therefore, counsel must be diligent in protecting the client's right to appeal.

In the course of counseling the client regarding the right to appeal, counsel must determine whether he wishes to pursue an appeal or not. *See* Restatement (Third) of Law Governing Lawyers § 31 cmt. e (Proposed Final Draft No. 1, 1996) ("When a client is to make a decision . . . a lawyer must bring to the client's attention the need for the decision to be made"). This imposes no great additional burden on the lawyer. If the defendant expressly requests an appeal, there is no question that the attorney has a duty to file the notice of appeal. *See, e.g.*, Brief of Petitioner at 14. It is also undisputed that if the

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unless "the record 'clearly demonstrates' that the waiver was both knowing . . . and voluntary." *United States v. Reading*, 82 F.3d 551, 557 (2d Cir. 1996) (citations omitted); *see also United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992). An out-of-court appeal waiver following conviction should be subject to no lesser standard.

defendant chooses to forego an appeal, the attorney need not file a notice of appeal. *See, e.g., Meeks v. Cabana*, 845 F.2d 1319 (5th Cir. 1988). The issue is what rule should govern in the small number of remaining cases, where for one reason or another the client has not communicated to his attorney his decision on whether to appeal. In such cases, counsel must preserve the client's right to appeal. *See United States v. Sterns*, 68 F.3d 328, 329 (9th Cir. 1995); *Romero v. Tansy*, 46 F.3d 1024, 1031 (10th Cir. 1995); *United States v. Tajeddini*, 945 F.2d 458, 468 (1st Cir. 1991) (per curiam); *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1992); *but see, e.g., Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998). A failure to do so would take a fundamental decision from the defendant which is his alone to make. Only when the client has been counselled regarding the right to appeal and communicated that he does not want to appeal may counsel properly forego filing a notice of appeal.

D. Where Defense Counsel Fails to Perform Her Duty to Advise and Counsel Regarding Appeal and/or to Preserve the Right to Appeal Absent a Waiver by the Client, the Criminal Defendant is Entitled to a New Appeal

In *United States v. Cronic*, 466 U.S. 648, 659 (1984), this Court held that, where there has been a "complete denial of counsel," no specific showing of prejudice is required and prejudice will be presumed. *Id.* at 659. While the Court's decision in *Cronic* focussed on denial of counsel at a critical stage of a criminal trial, in *Penson v. Ohio*, 488 U.S. 75 (1988), this Court held that the presumption of prejudice from denial of counsel was also applicable at

the appellate stage. *Id.* at 88 ("Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage [citation], the presumption of prejudice must extend as well to the denial of counsel on appeal"). Following *Penson*, several courts of appeal have held that, where trial counsel fails to protect the client's right to appeal, "[t]he convicted defendant has not obtained the benefit of any adversary presentation on appeal," and "[j]ust as prejudice was presumed in *Penson* to flow from the absence of an effective appellate advocate, so too, we think, must prejudice be presumed here." *United States v. Tajeddini*, 945 F.2d at 468; *see also United States v. Sterns*, 68 F.3d at 330; *Romero v. Tansy*, 46 F.3d at 1030; *Lozada v. Deeds*, 964 F.2d at 957-958; *Estes v. United States*, 883 F.2d 645, 649 (8th Cir. 1989).[12]

Alternatively, if a showing of prejudice is necessary under *Strickland*, it should be sufficient to show a reasonable probability that, but for counsel's deficient performance, the defendant would have directed his lawyer to pursue an appeal. As the Solicitor General points out, this standard parallels that established by the Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), for cases where the defendant claims ineffective assistance of counsel when deciding to plead guilty. United States Amicus Brief at 28-29. In each instance, the standard focuses on what the criminal

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[12] Other courts have applied a presumption of prejudice, but only where the defendant had requested that a notice of appeal be filed and counsel had failed to do so. *E.g., Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993).

defendant would have elected to do if competently counseled, and restores the defendant to the position he would have occupied if so counseled. This standard avoids penalizing the defendant for failing to take an appeal in the first instance when the failure is attributable to attorney error.

Nor should the defendant be required to show "substantial grounds for appeal," as suggested by amicus for petitioner. CJLF Amicus Brief at 17. As the Court has previously recognized, requiring such a showing would impose an undue burden on a defendant whose counsel had defaulted in her duties. "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam); *Peguero*, 119 S.Ct. at 965-966 (O'Connor, J., concurring) (noting that habeas petitioners, who are often without "a lawyer to identify and develop arguments on appeal," should not be required to show "meritorious grounds for appeal" where failure to file timely appeal is due to court's error).

In *Rodriquez*, the lower courts had held that a defendant claiming a denial of the right to appeal must show what errors he would raise on appeal and that denial of an appeal had caused prejudice. *Id.* at 329. This Court refused to impose such an onerous burden:

> Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to

> be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one.

Id. at 330.[13] Here, as in *Rodriquez*, the defendant should be afforded relief in the nature of a new appeal, without a requirement that he prove his likelihood of success on that appeal.

E. Since Flores-Ortega was Denied His Sixth Amendment Right to the Advice And Assistance of Counsel Regarding the Right to Appeal, He is Entitled to Habeas Relief

As the Solicitor General recognizes, "[r]espondent's right to counsel . . . 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." United States Amicus Brief at 13. The record is clear that respondent did not receive the professional advice and guidance required by the Sixth Amendment.[14]

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[13] *See also Evitts*, 469 U.S. at 394 n. 6 (where appeal was dismissed because counsel failed to file statement of appeal required by rule, "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.")

[14] Contrary to the suggestion of amicus for petitioner (CJLF Amicus Brief at 18-20), relief for Mr. Flores-Ortega is not barred by *Teague v. Lane*, 489 U.S. 288 (1989). The rule urged by the defendant, that counsel has a Sixth Amendment duty to advise and consult with a criminal defendant regarding his right to appeal, is dictated by long-established precedent. In *Strickland*, this Court established a "basic duty" of defense counsel to "consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688. In *Jones v. Barnes*, the Court held that the right to appeal was such a "fundamental decision" that it must be reserved to the client personally. *Jones*, 463 U.S. at 751. *A fortiori*, the "fundamental" decision to appeal, like the other personal decisions entrusted to the defendant under *Barnes*, is an "important" decision as to which counsel has a Sixth Amendment duty to provide consultation and advice under *Strickland*.

Respondent's attorney testified that her office had no policy with regard to advising clients of their right to appeal, that her personal policy was not ordinarily to discuss the right of appeal with her clients, and that she failed to visit Flores-Ortega following sentencing. J.A. 118, 123-124. At no time during the evidentiary hearing did she claim to have ever consulted with Flores-Ortega regarding his appellate rights. Flores-Ortega's testimony regarding discussion of appeal was that, immediately following pronouncement of sentence, he asked his attorney if she was going to continue fighting his case, and she said she was going to try to file an appeal.[15] The magistrate judge found that there was a conversation after sentencing from which Flores-Ortega inferred that his counsel would file a notice of appeal, but that Flores-Ortega "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." J.A. 133. The magistrate

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[15] Ms. Kops did not recall any discussion following sentencing. J.A. 126.

judge also found that while Flores-Ortega had not proven that defense counsel had promised to file a notice of appeal, it was clear that he had not consented to her failing to do so. J.A. 132, 133, 154.

Thus, it is abundantly clear that Flores-Ortega was denied his Sixth Amendment right to advice and assistance of counsel in preserving his right to appeal. Counsel's vital function was rendered meaningless by her failure to advise and consult with her client regarding appeal. The Court should order that Mr. Flores-Ortega be granted habeas relief without any further showing of prejudice. *See*, pp. 19-20, *supra*.

Alternatively, had counsel adequately consulted with Flores-Ortega regarding an appeal, it is reasonably probable that she would have understood his desire to appeal and would have filed a notice of appeal. *See*, pp. 20-21, *supra*. The most telling proof of his desire to appeal is that he did, in fact, file a notice of appeal only four months after the sentencing. The record is clear that the only reason that he did not file earlier is that he was unable to contact his lawyer for the first ninety days due to his lock-down status while going through evaluation. After being released from lock-down, he learned that a notice of appeal had not been filed and sought to make the required filing, only to have it rejected as untimely. Under these circumstances, the court of appeals was clearly correct in granting relief.

CONCLUSION

While the right to appeal is a valuable right, it is one which a criminal defendant can readily lose by default if not provided the advice and guidance of counsel. The Sixth Amendment therefore requires that a defendant's lawyer advise and consult with her client regarding the right of appeal and then take the steps necessary to preserve that right, unless the client elects not to appeal. In the present case, Flores-Ortega, a Spanish-speaker with limited education, was given no advice or counsel regarding appeal by his public defender, and she failed to protect his right of appeal by filing a notice of appeal, even though (as the lower courts found) he never consented to abandonment of his appeal rights. Under such circumstances, the Court should affirm the court of appeals ruling that Flores-Ortega is entitled to habeas corpus relief, unless provided a new state appeal.

Dated:

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