

NOTE: NEITHER A "MOOSE" NOR A "PUPPET": DEFINING A LAWYER'S ROLE WHEN DIRECTED TO PURSUE AN APPEAL NOTWITHSTANDING A VALID WAIVER OF APPELLATE RIGHTS

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+ Juris Doctor Candidate, Ave Maria School of Law, 2009. In the satirical film Thank You For Smoking, when asked by his young son what makes the American government the best government, the protagonist facetiously replies, "because of our endless appeals system." One cannot be sure that this is the most remarkable aspect of our country - the shining city on a hill - but without it, and without the ingenuity of the American litigators who were able to secure appeals for those without appellate rights, this Note certainly would not have been possible. Otherwise, the author gratefully acknowledges the assistance of, and inspiration derived from, his colleagues and Ave law professors, especially Stephen Safranek who taught him the fundamental principle of contracts: promises made, promises kept.

Highlight

When counsel utterly frustrates that right [to counsel] by failing to appeal on his client's request, counsel's performance is automatically ineffective. A lawyer who does not show up for trial might as well be a moose, and giving the defendant a moose does not satisfy the sixth amendment. The same understanding applies when the lawyer does not show up for appeal.

We confess to some doubt about the constitutional reasoning of the circuits that have located in the sixth amendment a rule that a lawyer is the client's puppet.

Chief Judge Easterbrook, *Nunez v. United States* ¹

Text

[*265] Introduction

Jose Maria Sandoval-Lopez probably knew that it was not going to be a good day, or year, or couple of years, when federal narcotics officers uncovered over fifteen pounds of heroin from his truck. Assuredly confirming this understanding, Sandoval-Lopez would **[*266]** soon learn that he had not only unknowingly confessed this crime to

¹ [495 F.3d 544, 546, 547 \(7th Cir. 2007\)](#) (citation omitted), cert. granted, vacated and remanded mem., **128 S. Ct. 2990 (2008)**, aff'd, [546 F.3d 450 \(7th Cir. 2008\)](#).

an undercover government agent, but had also boasted that he regularly transferred narcotics from Mexico to Washington and Oregon. By his own good fortune, Sandoval-Lopez found himself with a skillful-enough defense attorney and sympathetic-enough federal prosecutor that a deal was soon reached. In exchange for his guilty plea and forfeiting his ability to challenge his conviction on appeal, Sandoval-Lopez would be sentenced to seven years in prison for crimes that potentially carried a much steeper punishment. Of course Sandoval-Lopez accepted the offer; it was not until much later that he decided his generous plea bargains would not suffice. When his defense counsel refused to file an appeal at his request, Sandoval-Lopez filed a petition for habeas corpus alleging ineffective assistance of counsel.²

A surprising number of criminal defendants, having voluntarily pled guilty and waived their appellate rights, wish to overturn what are often favorable sentences.³ These actions necessarily disturb prosecutors who obtained the plea bargains, often in return for serious concessions. They disrupt the judicial process by recommencing that which has been decided. And most notably, defendants' own actions threaten the benefit of the bargain that they [*267] obtained by promising not to do that which they are presently doing: appealing their voluntary plea bargains. Perhaps what has fallen under the radar is the ethical conundrum in which the defendant's attorney may find himself, torn between the desires of his client and his duty to the legal process. This dilemma has blossomed into a controversy of potentially constitutional magnitude throughout the federal courts.

While courts have widely upheld clauses in plea bargains in which defendants relinquish their right to appeal, how judicial actors need to respond when a defendant wishes to appeal remains an open debate. Ultimately, the question is: what is the proper function for a lawyer when confronted with a client who wishes to appeal his plea bargain that contains an otherwise valid appellate waiver?⁴ The first seven federal circuit courts of appeal to rule on this issue found that controlling authority mandates that lawyers file appropriate motions and appeals even

² [United States v. Sandoval-Lopez, 409 F.3d 1193, 1194 \(9th Cir. 2005\)](#).

³ No commentator has yet undertaken an in-depth survey explaining what motivates defendants to appeal that to which they voluntarily agreed. Anecdotal evidence from case law tends to suggest that once a sentence is passed down, prison affords its guests a plethora of time to consider, through non-legally trained lenses, perceived prosecutorial weaknesses in one's case. In other words, an endless amount of time combined with uninformed legal advice can play tricks on the mind. While an eighty-four month sentence may be generous when faced with the prospect of something much longer, nothing quite solidifies the enormity of that sentence like beginning to serve the first of many months in prison. Further, criminal defendants feeling that they are often coerced by the judicial system or even their own lawyers probably does not inspire confidence in the system. Undoubtedly, the ability to pursue a jailhouse appeal provides at least one outlet to express outrage often over minor factors that ultimately would not have made the slightest difference, yet are advanced as reversible error.

The difficulty is that these weak appeals are often contrary to both logic and the defendant's best interest. For example, Sandoval-Lopez argued that he thought the evidence against him was insufficient and that his lawyer never advised him that he could be deported if he took the plea. [Id. at 1195](#). However, his understanding of the case did nothing to change the fact that prosecutors had a confession and fifteen pounds of heroin from his truck, and chances are Sandoval-Lopez would have been deported upon release even if his case had gone to trial. His plea was both legally and logically sound, and as such, the underlying psychological reasons that compelled him to appeal that favorable sentence can probably never be fully understood. While certainly not all criminal appeals - even those taken after a plea bargain - are frivolous, there is a sense that many of these defendants will be hoisted by their own legal petard if they are actually successful in challenging their pleas.

⁴ Although generally accepted by federal courts, see *infra* note 23 and accompanying text, waiver-of-appeal clauses remain controversial. See, e.g., Steven L. Chanenson, Guidance from Above and Beyond, [58 Stan. L. Rev. 175, 182-83 \(2005\)](#); Nancy J. King & Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, [55 Duke L.J. 209, 256-60 \(2005\)](#); David E. Carney, Note, Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government, [40 Wm. & Mary L. Rev. 1019, 1024-25 \(1999\)](#); Jack W. Campbell IV & Gregory A. Castanias, Sentencing-Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges, *Champion*, May 2000, at 34, 34-35. However, this Note recognizes that, despite normative preferences, such clauses are widely popular tools for prosecutors as well as a useful means for defendants to achieve leverage, and therefore are extensively employed. Thus, while this Note will address some of the reasoning and principles underlying their use, a general discussion or debate concerning whether they should be used at all or what alternatives could be used in their place is beyond the scope of this Note.

where the litigation may be frivolous and the defendant may lose his bargain.⁵ Under this framework, a lawyer's rationed inaction renders him constitutionally deficient and ineffective. Two federal circuit courts of appeal, however, have broken from this reasoning. Neither the Seventh Circuit in *Nunez v. United States*, nor the Third Circuit in *United States v. Mabry*, felt compelled to come to the same conclusion as their sister circuits.⁶ Essentially, this minority position recognizes that defendants deserve more than the equivalent of a "moose" during the appellate stage,⁷ but also that a lawyer's **[*268]** function is not that of a "puppet."⁸ The function of a lawyer is not to do that which his client demands when the law dictates otherwise, especially when those instructions contravene other legal duties and responsibilities.

Ultimately, the skepticism expressed originally in *Nunez* and then in *Mabry* concerning the circuits' majority position is well founded. Counsel should not be regarded as ineffective for refusing to comply with a client's directive not based on law, and which, if taken, breaks the benefit of the client's bargain and perpetrates frivolous legal action on the courts. This stance not only conforms to current Supreme Court dictates, but also represents the better legal and policy position. This Note substantiates the Seventh Circuit's increasingly accepted alternative position, thus helping develop a more nuanced debate on this important facet of criminal law.

Part I of this Note provides the background necessary to understand the breadth of the debate, including the origin and current standing of appellate waivers, the principles used to interpret them, and pertinent case law from the Supreme Court. Part II delves into the heart of this controversy by examining the majority and minority positions as developed by the federal courts, including the legal and policy arguments, and interpretations of precedent upon which each rely. Finally, Part III sets out a defense of the minority position, arguing its comparative worth and superiority to the majority's per se rule of ineffective counsel. It demonstrates that this position not only aligns with the Supreme Court's effective counsel jurisprudence, but also coincides with general doctrines of contract law, waiver principles, and an attorney's duties to his client and the judicial system.

I. Benefit of the Bargain: Waiver-of-Appeal Clauses in Plea Bargains

In order to appreciate the current controversy regarding a lawyer's duties when directed to pursue an appeal notwithstanding a valid waiver of appellate rights, one must first understand how appellate waivers originated, how they have developed, how the federal courts generally interpret them, and how the Supreme Court **[*269]** established a framework for reviewing claims of ineffective assistance of counsel. These areas necessarily form the building blocks for a solution to this controversy, and thus that is where this Note begins.

A. History, Prevalence, and Utility of Appellate Waivers in Plea Bargains

Appellate review of criminal sentences emerged during the 1970s and 1980s as a tool to provide more consistent sentences among similarly situated defendants.⁹ While the Constitution does not give a defendant the right to

⁵ See *infra* note 63.

⁶ *United States v. Mabry*, 536 F.3d 231, 242 (3d Cir. 2008) (explicitly breaking from the rule expressed by the majority of circuit courts); *Nunez*, 495 F.3d at 547 (confessing doubt in the reasoning and conclusions of other circuit courts).

⁷ *Nunez*, 495 F.3d at 546. Debating over an attorney's role, and making analogies to one's position in order to conceptualize one's point, are not unique to the *Nunez* opinion. For example, in one of the most famous retorts, upon being told to let his client, Lt. Col. Oliver North, object for himself at the Iran-Contra hearings, attorney Brendan Sullivan quipped "Well, sir, I am not a potted plant. I'm here as the lawyer." Behind the Accusatory Outbursts, Sullivan Has a Protective Purpose, Wash. Post, July 10, 1987, at A14.

⁸ *Nunez*, 495 F.3d at 547.

⁹ D. Randall Johnson, Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed Under the Sentencing Reform Act, 71 Neb. L. Rev. 694, 698-700 (1992); King & O'Neill, *supra* note 4, at 213-14, 219. However, there exist many means for circumventing the constraints and thus uniformity of sentences that the new guidelines were designed to

appeal as a matter of right,¹⁰ the Sentencing Reform Act of 1984 established a statutory right of appellate review.¹¹ With the deluge of appeals that flowed out of this newly minted right, the desire to limit the multitude of issues that defendants could appeal inspired a corollary creation: appellate waivers.

Justice Department estimates indicate that plea bargains resulting in guilty pleas account for approximately 95% of all federal convictions.¹² Plea agreements represent an efficient system that allows for a bargained-for understanding between the government and a criminal defendant in which each side forgoes certain rights and assumes certain risks in exchange for a mutually beneficial outcome.¹³ The government utilizes appellate waivers in order to add [*270] a degree of finality and closure to this process.¹⁴ The Justice Department has issued internal policy guidelines both approving the use of such waivers as well as mandating their use by federal prosecutors in certain circumstances to promote greater efficiency.¹⁵ Indeed, a comprehensive study concerning appellate waivers found that a significant majority of federal plea bargains contain waiver-of-appeal clauses.¹⁶

As with bargained-for contracts generally, appellate waivers further distinct goals and help each side achieve a more satisfactory end. For the government, appellate waivers preserve the finality of judgments and sentences, and

provide. See, e.g., Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, [58 Stan. L. Rev. 293, 307-08 \(2005\)](#) (raising the concern that "negotiated sentences" reduce sentencing consistency).

¹⁰ [Jones v. Barnes](#), 463 U.S. 745, 751 (1983); [McKane v. Durston](#), 153 U.S. 684, 687 (1894).

¹¹ Sentencing Reform Act of 1984, [Pub. L. No. 98-473, 98 Stat. 1987](#), 2011 (codified as amended at [18 U.S.C. § 3742](#) (2000)) (allowing parties to file a notice of appeal in district court for review of an otherwise final sentence). The new statutory section provided not just for review of a sentence "imposed in violation of law," id. § 3742(a)(1), but also for review of a sentence "imposed as a result of an incorrect application of the sentencing guidelines," id. § 3742(a)(2), a sentence "greater than the sentence specified in the applicable guideline range," id. § 3742(a)(3), or a sentence "plainly unreasonable" when "imposed for an offense for which there is no sentencing guideline," id. § 3742(a)(4). Of note, in [United States v. Booker](#), 543 U.S. 220, 259 (2005), the Supreme Court held as unconstitutional various sections of the Federal Sentencing Guidelines, thus eliminating the mandatory nature of the Guidelines.

¹² See Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 416 (Kathleen Maguire & Ann L. Pastore eds., 2002) (reporting that in 2000, approximately 64,500 of the 68,000 federal convictions were obtained by guilty pleas).

¹³ See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 308-22 (1983) (describing plea bargaining as a desirable, efficient component of the greater criminal market system). See generally George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2003).

¹⁴ See Johnson, *supra* note 9, at 709-10 (discussing how early federal appellate courts ruling on this issue cited the finality of sentences and judgments, and their accompanying systemic benefits, as public policy reasons to support appellate waivers).

¹⁵ See U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-16.330 (1997) ("Some districts incorporate waivers of sentencing appeal rights and post-conviction rights into plea agreements. The use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues."); Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), reprinted in *Vera Inst. of Justice*, 16 Fed. Sent'g Rep. 134, 134-35 (2003) (instructing, among other requirements, that defendants must waive their rights to appeal and collaterally attack their sentences in order to qualify for the Department's "fast-track" program designed to expedite federal prosecutions and thus save the government "significant and scarce resources"). Attorney General Ashcroft's policy more specifically implemented the practice hesitantly urged by the Clinton Administration as appellate waivers became more widespread and upheld by federal courts when challenged. See Memorandum from John C. Keeney, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys (Oct. 4, 1995), reprinted in *Vera Inst. of Justice*, 10 Fed. Sent'g Rep. 209, 209 (1998) ("[The Department] believes that the use of these waivers [in plea agreements] can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues.").

¹⁶ King & O'Neill, *supra* note 4, at 209, 212 (finding that defendants waived their appellate rights in approximately two-thirds of cases settled by plea agreements). At present, Professors King and O'Neill's article represents the best (and perhaps only) published scholarly attempt to quantify the effects of appellate waivers on the criminal process.

alleviate the burden of costly and time-consuming appeals.¹⁷ At the time it was introduced, the right to appeal sentences was said to have "more than doubled the criminal appellate workload of the federal courts."¹⁸ In spite of this, since the [*271] 1990s the number of appeals has grown slower than the number of convictions, and appellate waivers represent a significant factor in this slowing process.¹⁹ In promising to forgo their important appellate rights, defendants obtain leverage to achieve reductions in charges, propitious stipulations, or favorable sentencing recommendations. Again, research has revealed that "the government appears to provide some sentencing concessions more frequently to defendants who sign waivers than to [those] who do not."²⁰ Together, each side receives benefits that promote their self-interest and the interests they are entrusted to represent.²¹ Despite some social costs,²² appellate waivers provide benefits to the judicial system generally: increased judicial efficiency, non-litigated resolutions of conflicts in which each side bargains for its just desserts, an improved ability for public defenders to focus their energies and resources where they are most needed, and a decrease in frivolous appeals.

Although widely controversial at their inception, the federal circuit courts of appeal have legitimized the use of appellate waivers over time through general approval in each circuit.²³ Absent action by [*272] Congress or the Supreme Court,²⁴ these rulings have created appellate waiver jurisprudence to regulate their use throughout each respective circuit.

¹⁷ The court in *United States v. Poindexter*, 492 F.3d 263, 270 (4th Cir. 2007), makes this precise point. Indeed, some courts refuse to mask their irritation with defendants who do not live up to the promises contained in their bargains, thus resulting in "unnecessary" expenditures of resources. See, e.g., *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005) (lamenting that the "Court and the parties have unnecessarily devoted substantial time and resources on this appeal," and providing a roadmap to the government for quick disposition of similar cases in the future).

¹⁸ Johnson, *supra* note 9, at 710-11.

¹⁹ King & O'Neill, *supra* note 4, at 227-30. The "rate of appeals per conviction peaked in 1994" and has consistently declined since that time; although other factors help explain this trend, the general timing of decline in appeals "coincides with the increased enforcement of waivers by the courts of appeals." *Id.* at 227-28 (emphasis omitted).

²⁰ *Id.* at 209-10, 232-42 (finding that defendants who waived appellate rights statistically received concessions from the government that included: downward departures (half as more likely with the waiver); sentencing stipulations as to sentence ranges, caps, and criminal history; and a greater likelihood that the government would enter into a binding sentence stipulation per *Federal Rule of Criminal Procedure 11(c)(1)*). The research also makes a noteworthy point that judges were more likely to accept these stipulations and downward departures when a waiver was present. *Id.* at 235.

²¹ Johnson, *supra* note 9, at 712-14. The mutuality of advantage that each side realizes in plea bargaining has been favorably acknowledged by the Supreme Court. E.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978).

²² See, e.g., King & O'Neill, *supra* note 4, at 238, 248, 256-59 (noting some of the costs of appellate waivers uncovered by their research, including: a bargaining scheme that produces inconsistent results in sentencing; an increased risk of sentences not in compliance with the law, which cannot be reviewed; and a lack of comity between rights given up by defendants and the benefits they receive).

²³ See, e.g., *In re Sealed Case*, 283 F.3d 349, 355 (D.C. Cir. 2002); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 21-26 (1st Cir. 2001); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998); *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 192 (7th Cir. 1995); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993); *United States v. Salcido-Contreras*, 990 F.2d 51, 51 (2d Cir. 1993); *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), overruled on other grounds by *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990).

²⁴ While the Supreme Court has not directly ruled on the issue, its holding in *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), that "statutory provisions are subject to waiver by voluntary agreement of the parties" lends a great deal of credence to the argument that the Supreme Court would sanction the tool unanimously upheld in the circuits.

B. Justice by Consent: Applying Contract and Waiver Principles to Appellate Waivers

The ability to contract exists as a basic premise of American political, economic, and legal society,²⁵ as well as a key ethical component of man's dignity and freedom.²⁶ American courts have long recognized the importance of contracting in civil society, yet as any first-year law student knows, the ability to contract is not without limits. Plea bargains and especially waivers of fundamental rights (whether natural, constitutional, or statutory) involve a precarious balancing of due process considerations with respect for an individual's liberty to contract.²⁷ To this end, appellate waiver jurisprudence utilizes both traditional contract principles as well as special due process formulations designed to ensure that a [*273] defendant's rights remain protected.²⁸ Federal courts will enforce appellate waivers only when they comport both with general contract principles and satisfy the higher scrutiny designed by the circuits. While not uniform, these principles share common elements and thus can be generally described here.

First and foremost, waivers must be voluntary; they must be knowing, informed, and intelligent.²⁹ A waiver ordinarily requires an intentional relinquishment or abandonment of a known right or privilege.³⁰ Thus, a waiver or a plea may be involuntary if the defendant does not understand the nature of the constitutional rights he is waiving, or unintelligent if the defendant does not understand the charge against him.³¹

Second, courts enforce appellate waivers where the issue appealed falls within the scope of the waiver. Like any legal consideration, the promises exchanged by either side vary greatly by situation; thus, appellate waivers also vary depending on a multitude of factors, including the crime charged, the parties negotiating, the defendant's level of cooperation, and public policy.³² As a result, appellate waivers range from ones limited in scope that include a variety of exceptions, to expansive waivers that functionally eliminate almost all avenues of appellate review.³³

²⁵ See generally Charles Fried, *Contract as Promise* (1981) (defending the classical theory that contract law is premised on the "promise principle" that persons are free to impose on themselves new obligations).

²⁶ See Catechism of the Catholic Church P P 2410-11 (2d ed. 1997) ("Promises must be kept and contracts strictly observed to the extent that the commitments made in them are morally just... . Contracts are subject to commutative justice which regulates exchanges between persons and between institutions in accordance with a strict respect for their rights." (emphasis omitted)).

²⁷ See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, [101 Yale L.J. 1969, 1974-75 \(1992\)](#) ("The analogy between plea bargains and contracts is far from perfect... .Plea bargains are preferable to mandatory litigation - not because the analogy to contract is overpowering, but because compromise is better than conflict."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, [101 Yale L.J. 1909](#) passim (1992) (describing how classical contract theory, properly understood, supports the freedom to bargain over criminal punishment, yet the stiff opposition this practice faces from academics in light of the broad support among practitioners and courts points to inherent problems and conflicts in the system). American courts also recognize the special treatment that these contracts must be accorded. See, e.g., [United States v. Herrera, 928 F.2d 769, 773 \(6th Cir. 1991\)](#) ("Although the plea agreement is contractual in nature, it is by no means an ordinary contract."); [United States v. Ataya, 864 F.2d 1324, 1329 \(7th Cir. 1988\)](#) ("This Court has long recognized that a plea agreement is a contract, but a contract in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." (citations omitted)).

²⁸ See generally Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, [53 U. Kan. L. Rev. 727, 742-51 \(2005\)](#) (describing the mixed contract-due process standard for reviewing plea bargains and appellate waivers, and ultimately arguing against it in favor of a purely contractual basis of review).

²⁹ Cf. [Brady v. United States, 397 U.S. 742, 748 \(1970\)](#) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

³⁰ [Johnson v. Zerbst, 304 U.S. 458, 464 \(1938\)](#).

³¹ [Henderson v. Morgan, 426 U.S. 637, 645 & n.13 \(1976\)](#).

³² By definition, consideration is a bargained-for exchange. Regardless of the differences among waivers, in contractual terms, all appellate waivers essentially involve the prosecution giving present consideration for a promise of future consideration.

Defendants can achieve a great deal of bargaining power - or at least a great deal more than they would otherwise have - by cooperating and agreeing to limit the legal process through waivers.³⁴ Like contracts generally, the terms of a [*274] waiver will be enforced in order to effectuate the intent of the parties and sustain the reciprocal rights and obligations upon which they originally agreed.

Further, appellate courts construe waivers narrowly, and where ambiguity exists, the defendant receives the benefit of the doubt. As a customary rule of interpretation, courts generally "indulge every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights."³⁵ This standard follows closely the contractual principle that contracts are interpreted against the drafting party given that the drafting party has the best opportunity to shape the language and influence the contract's scope.³⁶ Here, prosecutors presumably have the upper hand in negotiations because defendants have more to lose (often their personal liberty), and thus defendants assume the benefit of having the bargain's language interpreted in their favor.

Finally, courts refuse to enforce appellate waivers where a serious "miscarriage of justice" would result. A miscarriage of justice cannot be equated with general notions of fairness,³⁷ but rather arises only [*275] when sustaining a waiver would offend a deeply held constitutional belief. Although the criteria and phrasing varies by circuit,³⁸ the Tenth Circuit represents a typical model for providing relief when a defendant can establish at least one of four circumstances:

(1) reliance by the court upon an impermissible factor such as race in imposition of the sentence [offending the Fourteenth Amendment's guarantee of equal protection and due process]; (2) ineffective assistance of counsel in

³³ See, e.g., U.S. Dep't of Justice, Criminal Resource Manual § 626, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.htm (describing some of the differences, pros, and cons between expansive and limited appellate waivers).

³⁴ One common critique of appellate waivers is that they represent a type of adhesion contract and therefore should not be enforced as a per se rule. However, as King and O'Neill discovered in their review of federal cases and interviews with federal prosecutors and defenders, appeal waivers are not a form of adhesion contract:

The prediction that defendants have neither power to avoid signing agreements with unlimited waivers, nor leverage to negotiate benefits in return for signing them, has proved demonstrably untrue, at least in some districts. Defense attorneys ... report that they have had the ability ... to avoid these waivers, to limit them, or, alternatively, to obtain significant concessions in return for signing them.

King & O'Neill, *supra* note 4, at 230-31.

³⁵ *Johnson*, 304 U.S. at 464 (internal quotation marks omitted) (quoting, respectively, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937)).

³⁶ The contract doctrine contra proferentem governs that, as a last resort or "tie breaker," the disputed meaning operates against the person who supplied the words. See, e.g., Margaret N. Kniffin, 5 *Corbin on Contracts* § 24.27, at 282-83, 297 (Joseph M. Perillo ed., rev. ed. 1998).

³⁷ For example, in *United States v. Ruiz*, 536 U.S. 622, 630 (2002), the Court stated that a trial court may "accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Cf. *Brady v. United States*, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."). Similarly, after the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220, 266 (2005), the latter of which effectively deemed the Federal Sentencing Guidelines advisory rather than mandatory, many defendants who waived their appellate rights have unsuccessfully attempted appeals arguing a change in the law. See, e.g., *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005) (finding "no indication that the parties intended for the appeal waiver not to apply to issues arising after, as well as before, the waiver" and reasoning that "the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements").

³⁸ See Teeter, *supra* note 28, at 742-48.

connection with the negotiation of the waiver [offending the Sixth Amendment's guarantee of counsel]; (3) the sentence exceeds the statutory maximum [offending the Eighth Amendment's right to due process and prohibition against cruel and unusual punishment]; or (4) the waiver is otherwise unlawful and seriously affects the fairness, integrity, or public reputation of judicial proceedings [a catch-all, but only implicating values so fundamental that they may never be waived without discrediting the federal courts].³⁹

The broad latitude provided by circuits in their review standards generally ensures, at minimum, that legitimate claims will be reviewed notwithstanding a waiver. While this introduces a greater degree of uncertainty into a process designed to ensure finality, it also recognizes that a fundamental mistake or injustice will be reviewed.

The Federal Rules of Criminal Procedure similarly play a role in ensuring that a defendant knows his rights and waives them intelligently.⁴⁰ Federal Rule 11 requires hearings wherein the judge questions the defendant to determine whether he understands and agrees to be bound by his plea and recognizes that by pleading guilty he will forgo fundamental constitutional and statutory rights.⁴¹ Rule [*276] 11, amended in 1999 after the rise of appellate waivers, specifically provides that "the court must inform the defendant of, and determine that the defendant understands ... the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence."⁴²

A lawyer fulfills his role throughout this process by serving as counselor to his client and advocate on behalf of his client, thus comporting with the demands of the Sixth Amendment.⁴³ Because the waiver standards and methods of review vary by circuit, the waiver and appellate review processes necessarily depend on appellate attorneys' knowledge and ability to recognize error. Similarly - and fundamental to this debate - an attorney's ability to recognize the converse (that is, the absence of appealable error) should be reflected in law as well by not retrospectively finding such attorneys constitutionally ineffective.

C. Setting Standards: The Supreme Court and the Right to Counsel

³⁹ [United States v. Porter](#), 405 F.3d 1136, 1143 (10th Cir. 2005); see also [United States v. Mezzanatto](#), 513 U.S. 196, 204 (1995) (describing non-waivable rights as ones "so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts" (brackets omitted) (internal quotation marks omitted)).

⁴⁰ See [Fed. R. Crim. P. 11](#); see also [Kercheval v. United States](#), 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.").

⁴¹ [Fed. R. Crim. P. 11](#). Such hearings are commonly known as "Rule 11 hearings." If the court is unsatisfied that any of these elements have been properly met at the Rule 11 hearing, the judge may reject the plea pursuant to [Federal Rule of Criminal Procedure 11\(c\)\(5\)](#). Chief Judge Easterbrook has characterized the operation of Rule 11 as analogous to a statute of frauds because the rule requires the parties to disclose the terms of any agreement before the defendant adopts the terms personally. This recorded exchange "serves the same function as written and signed instruments for important or long-term contracts" and prevents against having to re-open closed criminal cases - a costly process. Easterbrook, *supra* note 13, at 317-18.

⁴² [Fed. R. Crim. P. 11\(b\)\(1\)\(N\)](#). Depending on the circuit, the appellate waiver may stand or fall on the issue of whether the judge questioned the defendant about his understanding of the waiver during the Rule 11 hearing. Compare [United States v. Bushert](#), 997 F.2d 1343, 1351 (11th Cir. 1993) ("In most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court must have specifically discussed the sentence appeal waiver with the defendant during the Rule 11 hearing."), with [United States v. DeSantiago-Martinez](#), 38 F.3d 394, 395 (9th Cir. 1992) ("[A] Rule 11 colloquy on the waiver of the right to appeal is not a prerequisite to a finding that the waiver is valid; rather, a finding that the waiver is knowing and voluntary is sufficient.").

⁴³ See *infra* Part I.C.

The Supreme Court has never directly ruled on the issue of appellate waivers or a lawyer's duty when instructed by his client to appeal notwithstanding an appellate waiver. However, several cases from the high Court provide necessary precedential background for understanding the legal claims on either side of the current controversy. The central concern for the Supreme Court when considering the adequacy of counsel is ensuring a defendant's Sixth [*277] Amendment right to counsel at all critical stages of the trial process, and his due process right to counsel on appeal.⁴⁴

The Court first addressed the requirements for counsel who wishes to withdraw while fulfilling the duty as an advocate for his client in *Anders v. California*.⁴⁵ After defendant Anders was convicted of a felony drug offense, appointed appellate counsel met with him and independently determined that he did not have a meritorious appeal.⁴⁶ In considering the case, the Court's primary concern centered around an economic disparity in criminal law whereby indigent defendants are often not afforded equal access to appellate courts due to their inability to pay for the services of a dedicated attorney.⁴⁷ The Court held that if counsel makes a good faith finding that his client's appeal is frivolous, he may request permission to withdraw.⁴⁸ However, in order to protect the indigent, that request must be accompanied by "a brief referring to anything in the record that might arguably support the appeal" so that the court may ultimately decide whether the appeal is actually "wholly frivolous."⁴⁹ Taking on its namesake, the "Anders brief" has become one of the threshold tools by which courts control frivolous litigation while attempting to preserve defendants' rights.

In *Strickland v. Washington*,⁵⁰ the Court established the now-canonical two-step test to govern claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, that this deficient performance prejudiced [*278] the defendant.⁵¹ One of the threshold issues for determining ineffectiveness centers around the duties an attorney owes to his client, and whether his performance is reasonable considering all the circumstances.⁵² In an appellate context, the Court in *Peguero v. United States*

⁴⁴ See *U.S. Const. amend. VI* ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (noting that the right to counsel on appellate review is provided where due process demands it); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (extending the right to assistance of counsel to include appeal as a matter of right for equal protection reasons); see also *Gideon v. Wainwright*, 372 U.S. 335, 342, 345 (1963) (making the Sixth Amendment's guarantee of counsel absolute and applicable to the states through the Fourteenth Amendment). But cf. *Martinez v. Court of Appeal*, 528 U.S. 152, 159-60 (2000) (stating that the Sixth Amendment does not extend to appellate proceedings); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (finding that criminal defendants have no constitutional right to an attorney on collateral review).

⁴⁵ [386 U.S. 738, 744 \(1967\)](#).

⁴⁶ [Id. at 739](#). The attorney advised the court by letter of his determination, and the court allowed him to withdraw, whereupon Anders proceeded pro se, eventually receiving certiorari after the California Supreme Court denied his writ of habeas corpus. [Id. at 739-41](#).

⁴⁷ [Id. at 741-44](#). Drawing an analogy, the Court stated that "substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." [Id. at 744](#).

⁴⁸ [Id. at 744](#).

⁴⁹ *Id.*

⁵⁰ [466 U.S. 668 \(1984\)](#).

⁵¹ [Id. at 687](#). As to the first prong, the Court held that an examination would have to produce a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The showing of prejudice would have to find that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

later clarified that an attorney who disregards a defendant's specific instruction to file a notice of appeal acts in a way that is professionally unreasonable.⁵³ Since it was decided, Strickland has emerged as the touchstone case for discussing and analyzing ineffective counsel claims; however, what standards governed when an appellate waiver exists remained an open question.

Sixteen years after Strickland, the Court considered its guidelines in light of appellate counsel's failure to appeal in *Roe v. Flores-Ortega*.⁵⁴ The question facing the Court in *Flores-Ortega* concerned whether counsel's performance was deficient when the defendant neither expressed an explicit desire to appeal nor expressed an explicit desire not to appeal.⁵⁵ Designing another two-part analysis, the Court held that counsel has a

constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular [*279] defendant reasonably demonstrated to counsel that he was interested in appealing.⁵⁶

Even in cases where the defendant pleads guilty, courts must "consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights."⁵⁷ While appearing unequivocal, the Court declined to adopt the Ninth Circuit's ruling that a failure to appeal is per se deficient performance of counsel and per se prejudice, electing instead to retain Strickland's totality-of-the-circumstances analysis.⁵⁸ Notably, although a concurrence adopted by three Justices would have imposed a higher standard on attorneys, the language repeatedly used indicates that such a standard should be imposed when defendants are entitled to appeal as a matter of right.⁵⁹

⁵² [Id. at 688](#). In a non-exhaustive list, the Court outlined several of the primary duties, including the "overarching duty to advocate," a duty of loyalty and assistance, a duty to consult with the defendant on important decisions, and a duty to bring to the process such skill and knowledge so as to render it "a reliable adversarial testing process." *Id.* The lack of either a dedicated or knowledgeable attorney, particularly for indigent defendants, represents a primary concern for most of the courts considering these issues, particularly the Supreme Court when it examines such issues with an eye toward public policy, as seen for example in *Anders*.

⁵³ [Peguero v. United States, 526 U.S. 23, 28 \(1999\)](#) ("When counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit."); see also [Rodriguez v. United States, 395 U.S. 327, 330 \(1969\)](#) (holding that a prisoner's failure to specify what errors he would raise on appeal did not justify the appellate court's rejection of his application for vacation of conviction); cf. [Hill v. Lockhart, 474 U.S. 52, 58 \(1985\)](#) (holding that Strickland's test for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges based on ineffective assistance of counsel).

⁵⁴ [528 U.S. 470 \(2000\)](#).

⁵⁵ [Id. at 477](#).

⁵⁶ [Id. at 480](#).

⁵⁷ *Id.* In other words, the Court implied that the relevant inquiries in cases where the defendant pleads guilty are whether he received the benefit of his bargain and what, if any, appellate rights he has intact.

⁵⁸ [Id. at 480, 484](#).

⁵⁹ In his concurrence, Justice Souter stated (as the majority acknowledged in its opinion, [id. at 480](#)) that the Court essentially imposed an "almost" bright-line rule that counsel almost always has a duty to consult with a defendant concerning an appeal. [Id. at 488](#) & n.1 (Souter, J., concurring in part and dissenting in part). In framing the question as to whether a lawyer has a duty to consult with his client about an appeal, Justice Souter answered that the "majority's conclusion is sometimes; mine is, almost always in those cases in which a plea of guilty has not obviously waived any claims of error." [Id. at 488](#) (emphasis added). In support, Justice Souter summarized that where "appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer." [Id. at 489](#) (emphasis added) (citing [Jones v. Barnes, 463 U.S. 745, 751 \(1983\)](#)). Applying

Discussing the prejudice prong, the Court found that when counsel's failure to perfect a notice of appeal denied the defendant an appeal altogether, the "even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice."⁶⁰ Further evidence that the Court did not fully consider **[*280]** the issues surrounding appellate waivers in this case derives from the Court's statement that filing a notice of appeal "is a purely ministerial task," a failure of which "cannot be considered a strategic decision."⁶¹ As has been noted previously (and will be discussed in greater detail in Part III), the opposite of the Court's statement holds true when defendants have signed appellate waivers: defendants often have everything to lose if their attorneys were to perfect an appeal pursuant to their demands.

Under the Court's jurisprudence, the Federal Constitution imposes one overarching requirement when evaluating counsel effectiveness: "that counsel make objectively reasonable choices."⁶² Thus, in the various tests designed by the Court, the general requirement is one of reasonableness. The utility of Flores-Ortega for this analysis does not come in the form of the issue decided by the Court - after all, the circuit split cases all involved explicit directions to appeal by the defendant, and thus the second ground of Flores-Ortega's test was automatically met. Rather, because the decision represents the most recent decision by the High Court on the issue of appellate rights and claims of ineffective counsel, it provides the most current basis for analyzing how the Court views these issues generally.

Although relevant inasmuch as they provide some precedential guidance, the Supreme Court's cases fail to set out specific guidelines or requirements as to a lawyer's duty when a defendant has waived his right to appeal. The holdings in Anders and Flores-Ortega in particular default for more protections for defendants, especially for the purpose of preserving the appellate rights of indigent defendants. In fact, the cases seem to leave little room for debate. They found that there are almost never instances where a lawyer may be excused from consulting with his client about an appeal, and thus imposed a presumption of deficient performance and prejudice if counsel actually fails to file an appeal. It was from this understanding and on the basis of the aforementioned cases that the majority of circuits developed their theory that Supreme Court precedent and policy requires an attorney to pursue an appeal upon a client's demand. However, a minority position may be equally developed with consideration of not only applicable case law, but also overarching theories of contract law, waiver principles, and lawyers' duties.

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II. The Circuit Split: Two Reasonable Interpretations

As with most instances where a legislature or high court has not set down direct standards to govern a controversy, reasonable arguments may be made for rules that produce directly contradictory results. Considering the debate as to what duties a lawyer has when directed to pursue an appeal notwithstanding a valid waiver of appellate rights, a split among the circuits and differences between federal trial and appellate courts highlight that this issue is no different. This Part examines first the majority position adopted in seven circuits, and then the minority position outlined by the Seventh Circuit in Nunez, and how these various appellate courts came to disparate conclusions.

that concept to the case at hand, Justice Souter again emphasized that "there is no claim here that Flores-Ortega waived his right to appeal as part of his plea agreement" *Id. at 488 n.1*. Thus, although the concurrence authored by Justice Souter and joined by Justices Ginsburg and Stevens would hold attorneys to a higher standard of when an attorney's duty to consult attaches (that is, "almost always"), there is certainly a gray area in Justice Souter's concurrence, inasmuch as every time he framed the issue, he argued from the perspective that the defendant had his appellate rights intact.

⁶⁰ *Id. at 483* (majority opinion) (emphasis added). The Court also stated that "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making [the prejudice] determination." *Id. at 485*. However, the defendant is under no obligation "to demonstrate that his hypothetical appeal might have had merit." *Id. at 486*.

⁶¹ *Id. at 477*.

⁶² *Id. at 479*.

A. Majority Position: Finding a Mandatory Appeal upon Demand Regardless of Appellate Waivers

Beginning in 2005, the federal courts of appeal started addressing whether attorneys were ineffective when refusing to pursue appeals where no appellate right existed. The first seven circuits to rule on the issue developed the position that the failure of a defense attorney to file a notice of appeal or perfect an appeal when his client requests one constitutes ineffective assistance of counsel, regardless of whether the defendant has any right to appeal.⁶³ The courts utilized three primary arguments to justify their conclusion: Supreme Court case law demands their outcome, contract and other legal policy supports their position, and public policy reinforces the wisdom of their opinion.

[*282] Each of these cases involved essentially the same or similar sets of facts. Each defendant was arrested and charged with possession of illegal narcotics, intent to distribute such narcotics, or drug trafficking.⁶⁴ Each defendant accepted a plea bargain with an appellate waiver in exchange for a favorable sentencing recommendation or downward departure.⁶⁵ At some point subsequent to the guilty plea, each defendant consulted with his attorney, and informed that attorney of his desire to appeal his plea. Because of the applicable appellate waivers, however, the attorneys failed to perfect appeals or motions for leave to appeal.⁶⁶ Each defendant then moved pro se, either collaterally attacking the sentence or moving for habeas corpus relief, claiming (among other things) ineffective assistance of counsel for the failure to appeal.⁶⁷ Ultimately, each appellate court provided relief

⁶³ These cases, presented in the order decided, were: [United States v. Garrett, 402 F.3d 1262, 1266-67 \(10th Cir. 2005\)](#); [United States v. Sandoval-Lopez, 409 F.3d 1193, 1198-99 \(9th Cir. 2005\)](#); [Gomez-Diaz v. United States, 433 F.3d 788, 793-94 \(11th Cir. 2005\)](#); [Campusano v. United States, 442 F.3d 770, 777 \(2d Cir. 2006\)](#); [United States v. Poindexter, 492 F.3d 263, 273 \(4th Cir. 2007\)](#); [United States v. Tapp, 491 F.3d 263, 266 \(5th Cir. 2007\)](#); [Watson v. United States, 493 F.3d 960, 964 \(8th Cir. 2007\)](#). For the purposes of this Part, instead of discussing each case and its reasoning in detail, this Note presents the overarching themes and interpretation of precedents - including how the later courts relied and built upon the decisions of the earlier circuits - by which these decisions developed the majority position. The only other circuits to rule on this issue in published opinions - the Seventh Circuit breaking with the majority position in [Nunez v. United States, 495 F.3d 544, 546 \(7th Cir. 2007\)](#), cert. granted, vacated and remanded mem., **128 S. Ct. 2990 (2008)**, aff'd, [546 F.3d 450 \(7th Cir. 2008\)](#), and the Third Circuit explicitly creating a split in [United States v. Mabry, 536 F.3d 231, 242 \(3d Cir. 2008\)](#) - will be discussed in Part II.B, infra.

⁶⁴ That all seven cases dealt with underlying drug offenses does not surprise: immigration and drug trafficking compose the two offense categories with the highest incidence of waivers. King & O'Neill, supra note 4, at 254-55 (explaining that this may be partially accounted for given the government's willingness to "fast-track" these types of cases - a process that requires appellate waivers). Indeed, one defender interviewed in the King and O'Neill study states that appellate waivers were first used in his district to prosecute "drug mule" cases:

These are cases where you have very low level drug couriers... . Our district adopted a policy because of volume, and maybe because everybody recognized the sentences were inappropriate for these people, who are more like victims themselves, that let you plead to an amount that carried a sentence of zero to twenty rather than the ten to life.

[Id. at 220 n.48](#) (interview with "Defender #9") (alteration in original).

⁶⁵ As the Ninth Circuit noted on the facts of its case, "this is about as solid a waiver of the right to appeal as can be imagined," [Sandoval-Lopez, 409 F.3d at 1195](#), and probably rightfully so, as the court also noted, since defense counsel "managed to obtain a remarkably favorable agreement," [id. at 1194](#). The scope of the defendants' respective appellate waivers varied in each case, and thus the claim that each defendant brought also varied somewhat among the cases. Compare [id. at 1195](#), with [Poindexter, 492 F.3d at 272](#) (noting that the scope of the appellate waiver only dealt with sentences, and thus left the door open to appellate review on other issues).

⁶⁶ Cf. [Tapp, 491 F.3d at 264](#) (noting that the defendant's attorney filed an untimely notice of appeal); this distinction in fact is relevant when considering the issue at hand (that is, counsel's duty to appeal), but the government's arguments against the appeal and the Fifth Circuit's holding relied on the same understanding of law and policy to make Tapp sufficiently analogous for our purposes.

⁶⁷ Understandably, the government opposed granting relief to each defendant in an effort to preserve their bargain. However, in Watson, the government attorney assigned to argue the case abandoned the position taken in its brief prior to arguments. Citing

to the defendants, thus establishing rules in their [*283] circuits that counsel must act on a client's request to appeal regardless of whether that client has any actual right to appeal.

These courts primarily relied on their interpretation of the Supreme Court's mandates in Strickland and Flores-Ortega to decide whether counsel was ineffective and if the defendants should thus obtain relief. Flores-Ortega created a "bright-line rule[] for evaluating an ineffective-assistance claim" that counsel has a duty to file an appeal if, after consulting with the defendant, the defendant so requests.⁶⁸ A lawyer who disregards specific instructions to appeal acts in both a professionally unreasonable and presumptively prejudicial manner under a Strickland analysis.⁶⁹ In applying this rule to situations where the defendant no longer retains appellate rights,⁷⁰ the courts found that Flores-Ortega still applied with equal force.⁷¹ Ignoring the issue of whether the defendant had retained an appeal as a matter of right, the courts instead offered that even where the defendant would likely be unsuccessful in his appeal, counsel's duty remained intact.⁷² Summing up the reasoning behind this position, the Second Circuit stated that a "defendant who executes a waiver may sign away the right to appeal, but he or she does not sign away the right to the effective assistance of counsel."⁷³ And although the Ninth Circuit confessed some doubt as to the wisdom of establishing a rule that "may amount to saying "it is ineffective assistance of counsel to refuse to file a notice of appeal when your client tells you [*284] to, even if doing so would be contrary to the plea agreement and harmful to your client," the court nonetheless required attorneys to file the notice.⁷⁴

In addition to their reliance on case law, several of the circuits found that the mandatory appeal rule provided the better legal policy when considering the broader contractual framework of appellate waivers and plea bargains. Even with a contractual basis for a plea agreement, a defendant should not subject himself to being "sentenced entirely at the whim of the district court."⁷⁵ One court concluded that the government receives the benefit of its bargain under the majority approach because it "is free to argue that the district court's consideration of the issues

the holdings in Campusano and Garrett as at least two circuits that had held contrary to its position, the government conceded the issue because "it did not wish to urge a circuit split." [Watson, 493 F.3d at 963](#).

⁶⁸ [Garrett, 402 F.3d at 1265](#). But see [Sandoval-Lopez, 409 F.3d at 1198](#) ("Mere expression of interest in appealing would not lead to the same result as telling defense counsel to appeal.").

⁶⁹ E.g., [Gomez-Diaz v. United States, 433 F.3d 788, 790 \(11th Cir. 2005\)](#).

⁷⁰ The courts often first completed an analysis - similar to the procedures described above in Part I.B - in order to ascertain whether the waiver should be enforced. See, e.g., [Garrett, 402 F.3d at 1266](#) (describing the three-prong test applied before considering a defendant's arguments when a waiver is in force: determining whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and if a miscarriage of justice would result).

⁷¹ See, e.g., [United States v. Poindexter, 492 F.3d 263, 273 \(4th Cir. 2007\)](#) (noting the consistency with the previous circuits, the Fourth Circuit held "that an attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instruction to file a notice of appeal even though the defendant may have waived his right to appeal"); [Tapp, 491 F.3d at 265](#) ("The Government contends that Flores-Ortega does not apply in the instant case because the defendant in Flores-Ortega did not waive his right to appeal or to seek collateral relief... [Yet we have] applied the rationale set forth in Flores-Ortega in cases where there is an appeal waiver.").

⁷² [Tapp, 491 F.3d at 266](#) & n.2 ("The viability of Tapp's potential appellate claims is irrelevant."); [Sandoval-Lopez, 409 F.3d at 1197](#) (relying on the Supreme Court's holdings in Rodriguez and Peguero stating that a claim does not have to be meritorious for the duty of the attorney to arise).

⁷³ [Campusano v. United States, 442 F.3d 770, 777 \(2d Cir. 2006\)](#).

⁷⁴ [Sandoval-Lopez, 409 F.3d at 1197](#). The court also stated that "as contrary to common sense as it seems, we are compelled by the law to reverse the district court[s]' denial of the defendant's habeas petition. [Id. at 1196](#).

⁷⁵ [Garrett, 402 F.3d at 1266](#). The Tenth Circuit, the first to address this issue, found that balancing the twin interests of enforcing plea agreements and ensuring appellate review for sentencing decisions mandated a procedure that erred (at least initially) toward allowing for appellate review, regardless of the presence of a waiver. *Id.*

are covered by the appeal waiver or that it is no longer bound by the plea agreement because the defendant is raising issues covered by the waiver." ⁷⁶ The courts similarly relied on the Supreme Court's Anders requirements as the means by which attorneys may signal that their clients do not have a meritorious claim to appeal. ⁷⁷ The Anders brief ensures that courts make the final decision as to a claim's merit, and even if an attorney believes that his client lacks a meritorious claim, the client has the best possible arguments supporting his appeal. ⁷⁸ Also, without filing at least a notice to appeal a waived right, which can then be followed by an Anders brief, the valuable opportunity to appeal is forever lost. ⁷⁹

Finally, many of the courts believe that the mandatory appeal rule offers the more just policy arguments. The Tenth Circuit stated that this rule helps preserve the "broader values embodied in and implemented by the criminal appellate process" ⁸⁰ - a point later **[*285]** adopted by other circuits. ⁸¹ The Second Circuit argued that the Sixth Amendment does not permit courts to "cut corners," and that defendants do not "sign away the right to the effective assistance of counsel" by waiving their right to appeal. ⁸² Despite these arguments, the Ninth Circuit again betrayed its feeling that the mandatory appeal rule may not be the best policy, and certainly does not advance the interests of the defendant:

This result is troubling... .

An appeal would most probably have been dismissed because it had been waived. Had it not been dismissed, we are in the dark about how Sandoval-Lopez could have prevailed... . So, supposing that he is telling the truth and his lawyer simply refused when he said "I want to appeal," he was probably lucky to have a lawyer who exercised such wise judgment. ⁸³

⁷⁶ [Poindexter, 492 F.3d at 271](#). This argument is similar to contract law's frustration of purpose doctrine: if, after the formation of a contract "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made," the injured party's contractual duties are discharged. Restatement (Second) of Contracts § 265 (1981).

⁷⁷ See [Poindexter, 492 F.3d at 271](#); [Campusano, 442 F.3d at 776](#).

⁷⁸ [Campusano, 442 F.3d at 776](#).

⁷⁹ See *infra* notes 137-38 and accompanying text.

⁸⁰ [Garrett, 402 F.3d at 1265](#) (internal quotation marks omitted) (quoting [United States v. Snitz, 342 F.3d 1154, 1156 \(10th Cir. 2003\)](#)). The court argued that rather than a "technical rule merely postponing the inevitable," the majority rule serves to safeguard "important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel." [Id. at 1265-66](#) (internal quotation marks omitted) (quoting [Snitz, 342 F.3d at 1157](#)).

⁸¹ See, e.g., [Campusano, 442 F.3d at 776](#).

⁸² [Id. at 777](#).

⁸³ [United States v. Sandoval-Lopez, 409 F.3d 1193, 1196-97 \(9th Cir. 2005\)](#). The court again marked its bewilderment at the defendant's choices as well as the lack of prudence the majority rule allows:

The case at bar is a particularly plain instance where "ineffective assistance of counsel" is a term of art that does not mean incompetence of counsel... . Nevertheless the client has the constitutional right, under Flores-Ortega and Peguero, to bet on the possibility of winning the appeal and then winning an acquittal, just as a poker player has the right to hold the ten and queen of hearts, discard three aces, and pray that when he draws three cards, he gets a royal flush.

[Id. at 1198-99](#).

Although the courts expressed mixed views as to the overall prudence of the approach they developed in each of the seven circuits, these decisions combined to create a strong presumption in favor of their approach.

B. Minority Position: Say What You Mean Because Courts Will Hold You to What You Say

When Armando Nunez presented the Seventh Circuit with the opportunity to review the issues and precedent by which seven other [*286] circuits had ordained a mandatory appeal rule, the court used the occasion to draft the foundation for an alternative principle.⁸⁴ Nunez, charged with multiple cocaine offenses, negotiated a plea whereby he would receive a sentence at the lowest end of the Sentencing Guidelines' range, resulting in a 160-month sentence.⁸⁵ In consideration for the favorable recommendation, Nunez waived his appellate rights and ability to collaterally attack the judgment.⁸⁶ Yet after sentencing, he told his lawyer that he wished to appeal.⁸⁷ Nunez moved to collaterally attack his conviction when his lawyer "balked" at the request to appeal; the district court denied relief.⁸⁸ The Seventh Circuit affirmed, holding that where a defendant fully understands a plea bargain's terms and the plea is voluntary, an accompanying waiver must be enforced.⁸⁹ The waiver therefore preempted Nunez's ineffective assistance claim.

[*287] The Seventh Circuit gave due credit to the majority position,⁹⁰ but ultimately explained how an alternative position that does not mandate an automatic appeal fits within current appellate waiver jurisprudence and provides

⁸⁴ Although the Seventh Circuit went to great lengths to explain why the majority position is not the proper interpretation to adopt for waiver issues, it stopped just short of adopting this rationale as controlling in Nunez. Instead, the court held that, given the facts of Nunez's case immediately before the court, it "need not decide whether these arguments are a sufficient response to the mandatory-appeal-notwithstanding-the-waiver-of-appeal approach that our colleagues in other circuits have derived from *Roe* [*v. Flores-Ortega*]" because ultimately "ineffective assistance after the plea (indeed, after the sentence's imposition) cannot retroactively make the plea invalid." *Nunez v. United States*, 495 F.3d 544, 548 (7th Cir. 2007), cert. granted, vacated and remanded mem., 128 S. Ct. 2990 (2008), aff'd, 546 F.3d 450 (7th Cir. 2008). Thus, if the plea (and waiver) is valid, ineffective assistance of counsel is "among the foreclosed theories" and therefore the appeal is blocked. *Id.* Despite its language, Nunez has been recognized by other courts and the media as effectively creating a circuit split, and at least potentially a new method of interpretation for waivers of appeal. See, e.g., *Herrmann v. United States*, No. 3:05CV3277, 2007 WL 2700161, at 1 (C.D. Ill. Sept. 10, 2007) (noting that Nunez signaled a break from the approach of other circuits); Pamela A. MacLean, 7th Circuit: A Waiver of Appeal Says What It Means: A Break with Six Other Circuits Alarms Counsel, Nat'l L.J., Aug. 13, 2007, at 6 (reporting that the Seventh Circuit has "chart[ed] its own course on when criminal lawyers may forgo appeals").

⁸⁵ *Nunez*, 495 F.3d at 545. The sentence, far below the statutory maximum, resulted from the prosecutor's recommendation, as well as the agreement by the government to drop all but one of the cocaine offenses. *Id.* Nunez's case provides another empirical example of the benefits that often accompany entering into a plea bargain with an appellate waiver. See *supra* note 20 and accompanying text.

⁸⁶ *Nunez*, 495 F.3d at 545. Two exceptions in his waiver provided that he could appeal if "the sentence exceeded the statutory maximum or the waiver clause itself should be deemed invalid." *Id.* Neither of these exceptions came to pass, and therefore Nunez's right to appeal was never reinstated.

⁸⁷ *Id.*

⁸⁸ *Id.* at 545-46.

⁸⁹ *Id.* at 546 (holding that the "waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal" and that a "claim of post-sentencing ineffective assistance falls squarely within the waiver").

⁹⁰ The court candidly acknowledged:

There is much to be said for [the majority] position, because waivers of appeal are not airtight... .

... Simplicity is a virtue, and a mechanical rule ("On request, file a notice of appeal") could be a good addition to the Federal Rules of Criminal Procedure whether or not the Constitution demands this outcome.

better legal and policy arguments. The court first noted that the Supreme Court could not have meant to include attempted appeals notwithstanding appellate waivers in its constitutional directive protecting the right to counsel. In Flores-Ortega, the Court described filing the notice of appeal as a "ministerial task" that is not by its nature a "strategic decision."⁹¹ The Seventh Circuit demonstrated how the opposite is true when the defendant has executed an appellate waiver: Usually "an appeal can help but not harm the defendant. But filing cannot be called 'ministerial' when the defendant has waived any entitlement to appeal."⁹² Further, a duty can hardly be called "ministerial" when fulfilling it could lead to extreme results detrimental to one's client: attempting to break the waiver costs the defendant the substantial benefits of the plea bargain⁹³ and potentially exposes him to renewed criminal charges.⁹⁴ The Seventh Circuit also distinguished the requirement established in Anders, relying on previous holdings that "the Anders procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate on appeal)."⁹⁵

In addition, the Seventh Circuit took the position that an alternative to the majority rule not only retains and reinforces [*288] traditional contract principles, but also supplies the better policy prescriptions by focusing on a lawyer's duties. The court, aware that it must enforce plea bargains made within its circuit's waiver jurisprudence, approached this case as an opportunity to emphasize contract principles underlying the legal system, and the duties that transpire as a result. These duties include the obligation a lawyer has to best advocate for his client. The court reasoned: "The sort of appeal that the Supreme Court considered in Roe [v. Flores-Ortega] is one where the defendant can gain but not lose. The sort of appeal that Nunez wanted to take was one by which he could lose but not gain."⁹⁶ Without the right or ability to withdraw from his contractual commitment, the "lawyer's duty is to do what's best for the client, which usually means preserving the benefit of the plea bargain."⁹⁷ Lawyers also owe a duty to the judiciary to avoid frivolous litigation, "and an appeal in the teeth of a valid waiver is frivolous."⁹⁸

With the aid of top counsel, Nunez filed a petition requesting certiorari and ultimately review of the meaning of Flores-Ortega in cases involving appellate waivers.⁹⁹ The government argued that plenary review was inappropriate in light of the fact that the Seventh Circuit, despite its dicta, declined to resolve the issue Nunez asked

[Id. at 547](#). Nota bene: although continuing the trend of circuits adopting the majority approach, the Eighth Circuit's decision in Watson - published less than two weeks before Nunez - was not included in the Seventh Circuit's discussion of the issue, presumably because of the close proximity in time when each case was decided.

⁹¹ [Roe v. Flores-Ortega, 528 U.S. 470, 477 \(2000\)](#).

⁹² [Nunez, 495 F.3d at 547](#).

⁹³ [Id. at 548](#) ("If it did nothing else, an appeal would have demonstrated that Nunez had not accepted responsibility and would have entitled the judge to rescind the [statutory] discount.").

⁹⁴ Id. ("When a defendant violates a plea agreement by appealing despite a promise not to do so, the prosecutor may withdraw concessions made as part of the bargain... . [An appeal could allow] the prosecutor to reinstate the two dismissed charges or ask the district court to increase the sentence on the existing conviction.").

⁹⁵ Id.

⁹⁶ Id. This argument further lends support to the notion that Flores-Ortega is distinguishable, and that the Supreme Court will not necessarily impose a per se rule should it rule on the issue.

⁹⁷ Id. (stating also that "Nunez had made a personal decision - a decision not to appeal" - and that "a lawyer faced with inconsistent instructions by his client" is not obliged to blindly follow one or the other instruction, but rather must act in the client's best interest).

⁹⁸ [Id. at 547](#).

⁹⁹ See Brief for the Petitioner at ii, **Nunez v. United States, 128 S. Ct. 2990 (2007)** (No. 07-818), 2007 WL 4466866; see also Reply Brief in Support of Certiorari at 10, **Nunez, 128 S. Ct. 2990 (2008)** (No. 07-818), 2008 WL 2277969.

the Court to review.¹⁰⁰ The government also argued that the Seventh Circuit read the waiver too broadly, and thus urged the Court to grant the writ for the limited purpose of vacating the judgment and remanding the case for reconsideration (Grant-Vacate-Remand or "GVR") using a narrower reading of the scope of the waiver.¹⁰¹ In the final days of its 2007 Term, the Supreme Court granted the government's request to GVR with instructions that the Seventh Circuit give the case "further consideration in light of the position [*289] asserted [in the government's brief]." ¹⁰² The only signed opinion in the disposition came in the form of a dissent by Justice Scalia, joined by Chief Justice Roberts and Justice Thomas. Justice Scalia argued that, without finding the Seventh Circuit to be in error, the Supreme Court cannot vacate that court's judgment, particularly on the say-so of the government's unconvincing and "dubious" argument.¹⁰³

The case's remand forced the Seventh Circuit to reconsider its decision as the controversy continued to grow and the position it outlined in Nunez continued to gain traction: nearly a month after the GVR, the Third Circuit decided *United States v. Mabry*, in which it explicitly rejected the majority's reasoning and endorsed the approach urged in Nunez.¹⁰⁴ The court expanded the analysis of Nunez, holding that the majority position "curiously[] focuses not on the waiver but on the importance of the right to appeal," and by doing so, "applies Flores-Ortega to a situation in which it simply does not "fit."¹⁰⁵ The court continued, "surely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client with respect thereto."¹⁰⁶ Like Nunez, the Third Circuit argued for evaluation of waivers and counsel's actions based on the knowing and voluntary basis of the original act; unlike Nunez, though, the [*290] Third Circuit unequivocally rejected the majority's approach as "not well-reasoned,"¹⁰⁷ and by doing so, created a genuine circuit split.

The minority position was further strengthened by the Seventh Circuit on remand from the Supreme Court where the same panel affirmed and reinforced the intellectual basis of its original disposition in an opinion largely duplicative of the first.¹⁰⁸ Again stressing that the attorney's duty to act concerns what is in the best interest of the

¹⁰⁰ Brief for the United States at 9, *Nunez*, 128 S. Ct. 2990 (2008) (No. 07-818), 2008 WL 2050805.

¹⁰¹ [Id. at 18-21.](#)

¹⁰² *Nunez v. United States*, 128 S. Ct. 2990 (2008) (mem.). On the same day, the Court similarly entered a GVR order on another ineffective assistance of counsel claim in an appellate waiver context, again accompanied by a similar dissent by Justice Scalia. See [Stephenson v. United States](#), 128 S. Ct. 2991, 2992 (2008) (mem.).

¹⁰³ *Nunez*, 128 S. Ct. at 2991 (Scalia, J., dissenting) ("The Government's brief is entirely agnostic on the correctness of the Court of Appeals' judgment ... The Government's suggestion that the Court of Appeals erred in construing the scope of the petitioner's waiver is not even convincing ... In my view the Court of Appeals' reading is better.").

¹⁰⁴ [United States v. Mabry](#), 536 F.3d 231, 242 (3d Cir. 2008). The Mabry court was unfazed by the fact that the Nunez decision - upon which it relies so heavily - had just been vacated by the Supreme Court. Noting that the Supreme Court vacated the case on the government's belief that the Seventh Circuit misconstrued the extent of the original waiver, the Mabry court stated that the concern that the Seventh Circuit read Nunez's waiver too broadly "is not present here given the broader waiver in this case and the nature of the issues Mabry would raise on appeal." [Id. at 241.](#) Consequently, the Third Circuit saw the underlying reasoning of the Seventh Circuit's decision as both remaining untouched by the GVR and ultimately superior in analysis, and therefore readily applicable to its case. [Id. at 242.](#)

¹⁰⁵ [Id. at 233, 241.](#) On the majority's use of precedent, the court commented that, "notably, Flores-Ortega did not address whether this principle [presuming prejudice in an ineffective assistance claim] has any force, let alone controls, where the defendant has waived his right to appellate and collateral review." [Id. at 240.](#)

¹⁰⁶ [Id. at 242.](#)

¹⁰⁷ *Id.*

¹⁰⁸ See [Nunez v. United States \(Nunez II\)](#), 546 F.3d 450 (7th Cir. 2008).

client, Nunez II emphasizes the importance of the waiver, and thus is unwilling to find constitutionally ineffective counsel where a lawyer chooses to abide by the formal waiver as opposed to the non-supported later demand to appeal.¹⁰⁹ Perhaps most important, though, unlike the original case, in Nunez II the Seventh Circuit explicitly rejected the argument (curiously made by both Nunez and the U.S. Attorney) that "a defendant has a constitutional right to have a lawyer file a notice of appeal on his behalf even after formally waiving that right."¹¹⁰ Cognizant of the split among the circuits, Chief Judge Easterbrook, again writing for the panel, stated: "To the extent that other circuits disable counsel from making such a professional judgment, we disagree with them."¹¹¹

The Seventh Circuit has provided a plausible, fully supported basis for rejecting the majority's appeal-upon-demand rule. Although the Supreme Court's non-merits vacatur of the case temporarily complicated matters, it certainly did not moot the argument; if anything, action following the grant - especially the decisions in [*291] Mabry and Nunez II - evidences a deepening divide on the issue.¹¹² Each side marshals case law, legal theory, and public policy in a legitimate way to support these contradictory positions, yet ultimately the Seventh Circuit's approach is more sensible. Part III uses the reasoning of Nunez as a springboard - drawing upon but expanding the court's compendious analysis - to demonstrate the legal soundness and wisdom of the minority approach.

III. The Minority Position: An Apology

Rather than adopt a per se rule requiring an attorney to advance an appeal for a client who lacks appellate rights, basic construction of American law and important policy interests demand an alternative. A better standard would enforce the bargain crafted by the parties without running through a gambit of frivolous litigation. It would reinforce the Supreme Court's mandate for effective consultation and advisement, without punishing attorneys for abiding by what remedies are (and are not) allowed. This is the standard urged by the reasoning of Nunez, adopted as operative in Mabry, and argued here.

¹⁰⁹ [Id. at 455](#). Chief Judge Easterbrook specifically stated,

Nunez had made a personal decision - a decision not to appeal. That's what the waiver was about. As we've stressed, a defendant has no right to countermand such a formal choice, and a lawyer faced with inconsistent instructions by his client does not have a "ministerial" duty to follow one rather than the other. When deciding which of the contradictory directions to implement, a lawyer should do what's best for the client, which usually means preserving the benefit of the plea bargain.

Id.

¹¹⁰ [Id. at 451-52](#); see also [id. at 456](#) ("Once a defendant has waived his right to appeal not only in writing but also in open court under Rule 11(b)(1)(N), the sixth amendment does not require counsel to disregard the waiver.").

¹¹¹ [Id. at 456](#). Additionally, the opinion notes that prior to release, the draft opinion had been circulated to all active judges on the Seventh Circuit and no judge favored a hearing en banc. Id.

¹¹² See, e.g., *United States v. Shaw*, No. 08-3078, 2008 WL 3893824, at 3-4 (10th Cir. Aug. 25, 2008) (O'Brien, J., concurring) (arguing for an adoption of the Nunez-line of reasoning where the defendant waived both his rights of appeal and collateral attack, notwithstanding the Tenth Circuit's published decision in *Garrett*). Moreover, district courts both inside and outside the Seventh Circuit have relied on Nunez in decisions not finding ineffective assistance when counsel fails to execute an appeal due to the presence of a broad waiver. Several decisions, for example, from courts in the Sixth Circuit - which has yet to rule on the issue in a published decision - highlight the increasingly broader acceptance of the minority position. See, e.g., *Riley v. United States*, No. 03-20049, 2008 WL 2937831, at 6-7 (E.D. Mich. July 24, 2008) (denying relief as a result of petitioner's failure to timely file the appeal, yet otherwise noting that there "is some question whether counsel even has a constitutional duty to file an appeal as directed when the appeal has been waived by a plea agreement"); [United States v. Walls, No. 05-92\(WOB\), 2008 WL 927926, at 8 \(E.D. Ky. Apr. 4, 2008\)](#) ("Mindful of the fact that I go against the weight of both the unpublished *Carrion* [v. [United States](#), 107 Fed. Appx. 545 (6th Cir. 2004)] decision and published case law from a majority of the courts of appeals, I would adopt the reasoning of the Seventh Circuit in Nunez and hold that a complete waiver of appeal rights removes this case from the scope of *Flores-Ortega*. Alternatively, I would hold that the presumption of prejudice in *Flores-Ortega* is rebutted in this case by the existence of a valid waiver of appeal rights.").

A. The Minority Position Fits Within Supreme Court Case Law

The Supreme Court's guidance on the issue of appeals and effective counsel may not only be distinguished when appellate waivers are in play, but needs to be distinguished in order to fulfill [*292] underlying legal goals. In Flores-Ortega and other prior relevant cases, the defendants wishing to appeal had their appellate rights fully intact. In the cases now before the circuits, the impediment to the appeals urged by the defendants was not representation by incompetent attorneys, but rather the defendants' own prior decisions to give up their appellate rights.¹¹³ As such, a bright-line rule like that advocated by the majority seems inappropriate and superfluous.¹¹⁴ In Flores-Ortega, the Supreme Court rejected a bright-line rule stating that counsel is ineffective for not filing an appeal unless a client specifically says not to file such an appeal.¹¹⁵ Indeed, Strickland's holding that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"¹¹⁶ on its face eschews bright-line rules. Thus, the proposition that the Court would require a bright-line rule where no appellate rights remain intact seems dubious.

Additionally, there does not appear to be any actual prejudice to these defendants resulting from their attorneys' inaction. In ineffective counsel claims, Strickland's prejudice prong presupposes that attorney error actually adversely affects the client.¹¹⁷ Yet where no right to appeal exists, post-sentence failure to file an appeal cannot have an adverse effect. If anything, the opposite may be true, and only by filing an appeal will the defendant's position be damaged.¹¹⁸ [*293] Indeed, the Court instructed lower courts to consider "whether the defendant received the sentence bargained for as a part of the plea and whether the plea expressly reserved or waived some or all appeal rights."¹¹⁹ Each time the Court - including the Justices in concurring opinions - discussed the constitutionally mandated duties of counsel, it did so under the assumption that the defendant wished to appeal as

¹¹³ Cf. [United States v. Sandoval-Lopez](#), 409 F.3d 1193, 1198-99 (9th Cir. 2005) ("The case at bar is a particularly plain instance where "ineffective assistance of counsel" is a term of art that does not mean incompetence of counsel.").

¹¹⁴ See supra text accompanying notes 91-94, 105.

¹¹⁵ [Roe v. Flores-Ortega](#), 528 U.S. 470, 478 (2000).

¹¹⁶ [Strickland v. Washington](#), 466 U.S. 668, 688 (1984).

¹¹⁷ Similarly, actions of counsel after the sentence took effect cannot be said to have prejudiced the defendant at the prior proceedings. Cf. Douglas A. Morris, *Waiving an Ineffective Assistance of Counsel Claim: An Ethical Conundrum*, *Champion*, Dec. 2003, at 34, 35 (examining the ethical considerations that are raised when prosecutors persuade defendants to waive their right to appeal, including their right to appeal ineffective assistance of counsel). Ineffective counsel in the proceedings that led to the adjudication (prior to or during the plea bargaining stage) are treated differently, ergo many courts provide relief, notwithstanding appellate waivers, for such claims. See also [Hill v. Lockhart](#), 474 U.S. 52, 58 (1985) (holding that the Strickland test for evaluating ineffective assistance of counsel claims applies to guilty plea challenges that raise issues related to ineffective counsel).

¹¹⁸ The courts in Nunez and Sandoval-Lopez both make this point. See [Nunez v. United States](#), 495 F.3d 544, 548 (7th Cir. 2007), cert. granted, vacated and remanded mem., 128 S. Ct. 2990 (2008), aff'd, 546 F.3d 450 (7th Cir. 2008); [Sandoval-Lopez](#), 409 F.3d at 1197; see also supra text accompanying note 96. Chief Judge Easterbrook elaborates on this point in Nunez II:

Roe [v. Flores-Ortega] is a modest exception to Strickland's approach. Unless the lawyer simply doesn't show up, it is essential to establish deficient performance and prejudice. Roe concludes that failure to appeal is a form of not showing up for duty. But Roe's rationale presumes that the defendant has contested the charges; when a defendant not only pleads guilty but also waives the right to appeal, it is hard to classify the absence of appeal as the lawyer taking a vacation.

[Nunez v. United States \(Nunez II\)](#), 546 F.3d 450, 454 (7th Cir. 2008).

¹¹⁹ [Flores-Ortega](#), 528 U.S. at 480.

a matter of right.¹²⁰ To state the proposition differently: a defendant simply cannot be prejudiced if his lawyer failed to do that which the defendant has no right to do in the first place.

For cases in the federal system where appeals are not waived, Anders provides the proper standards requiring counsel to act where no meritorious claim exists.¹²¹ However, the Supreme Court's holding in Anders may only be inappositely applied to the current controversy since those protections may be invoked only when there is a right to appeal, and thus a right to appellate counsel. In other words, where - as here - a defendant has waived that right to appellate review, the Anders procedures do not apply.¹²² This proposition can be better understood with the knowledge that none of the Supreme Court's cases safeguarding the rights of indigent appellants has placed reliance on the Sixth Amendment's right to counsel, but rather on due process and equal protection concerns.¹²³ Thus, where the government provides a certain type of appellate review to all defendants, it must also provide counsel if to not do so **[*294]** would offend equal protection and due process values.¹²⁴ But, where the defendant has waived appellate rights, the minority position does not infringe upon the due process or equal protection rights of defendants.

The Supreme Court's rulings govern a lawyer's responsibilities to a client with or without appellate rights both prior to conviction, as well as directly following conviction if the client so requests. The lawyer owes a duty to help his client navigate the legal process, understand what exactly he is relinquishing, what he can gain, and - in the plea bargain context - avoid the need to appeal in the first place. Once such agreements are in force, however, courts will not allow defendants to un-ring the bell, and thus lawyers must consult and counsel with their clients per the holding in Flores-Ortega.¹²⁵ The holding in Nunez and the proposition of this Note in no way call for an abandoning of this constitutionally-imposed duty on attorneys. To wit, the minority position more strongly enforces the goals underlying the Sixth Amendment and the right to effective counsel by allowing attorneys to serve as more than mere "puppets" for their clients by taking responsible legal action. Again, Flores-Ortega does not mandate action, but rather calls on attorneys to make themselves available to defendants in order to discuss what options - if any - are available. Indeed, if upon counseling, a lawyer discovers a non-frivolous claim in accordance with that circuit's appellate waiver jurisprudence, then that appeal should be pursued. In those circumstances, a lawyer would not be relieved of his duty to continue as appellate advocate.¹²⁶ As will often be the case, though, the best

¹²⁰ See supra notes 56-59 and accompanying text.

¹²¹ See supra Part I.C.

¹²² This is but one example of a time when the right to counsel does not apply to a legal proceeding. Analogously, the Supreme Court has held that there exists no per se rule where the state must provide counsel at a proceeding revoking a person's probation unless, on a case-by-case determination, due process concerns would require an attorney's presence for an indigent person. [Gagnon v. Scarpelli, 411 U.S. 778, 790 \(1973\)](#). As with cases where a defendant has waived his appellate rights, both the alleged probation violator and a defendant without appellate rights can make a case-by-case showing that they need counsel: in the probation context, with a showing that the alleged violator did not violate or had some mitigating reason for doing so, see id.; in the latter context, with a showing that a colorable appellate issue not subject to the waiver exists.

¹²³ See [Martinez v. Court of Appeal, 528 U.S. 152, 155, 160-61 \(2000\)](#). The Sixth Amendment is a trial right, and thus the Supreme Court has refused to apply it as a right of defendants either on appeal or collateral review. Id.; see also supra note 44.

¹²⁴ See [Halbert v. Michigan, 125 S. Ct. 2582, 2586-88, 2590 \(2005\)](#) (holding as unconstitutional a state statute that did not require the government to supply counsel to defendants wishing to file a discretionary appeal where, in the state-specific form of appellate review, a discretionary appeal represented the only tenable form of appellate review available to defendants, because indigent defendants specifically were improperly disarmed of their rights); [Douglas v. California, 372 U.S. 353, 357-58 \(1963\)](#) (holding that equal protection of the law requires the government to provide the indigent with counsel in the initial appeal from a criminal conviction if the affluent are permitted to appeal with the assistance of counsel).

¹²⁵ [Roe v. Flores-Ortega, 528 U.S. 470, 479-80 \(2000\)](#) ("The better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal.")

[*295] course of action for defendants and what the law requires may mitigate against further action. ¹²⁷ Courts should permit attorneys - like those in the above cases - to recognize and embrace the full array of their duties, and how their clients and the judicial system are best served.

B. The Minority Position Provides the Better Legal Argument

Despite continued objection to their use, contemporary case law throughout the circuits reasonably enforces appellate waivers. ¹²⁸ These waivers and the plea bargains of which they are a part are based on both traditional contract principles as well as special rules of interpretation that the courts have developed. It stands to reason, then, that a position adopted to address a lawyer's role when directed to pursue an appeal when no right to appeal exists must take account of, and should be in concordance with, these principles.

First, basic contract principles hold that contracts freely made should be enforced, and as a colloquy, the benefit of the bargain must remain intact. ¹²⁹ The majority position stands as an affront to this notion, and all parties ultimately lose: the defendant loses the benefit of his favorable bargain, and the government must reopen what was **[*296]** closed and expend resources it had not otherwise allocated. ¹³⁰ It is insufficient to argue, as courts in the majority have, that the benefit of the bargain is maintained because the government can later withdraw the plea or use the plea as a sword to litigate. ¹³¹ This argument necessarily ignores the government's intent in entering into a plea bargain generous to the defendant. ¹³² Market forces dictate that parties enter contracts, often giving up the

¹²⁶ The assistance of counsel is essential to the defendant during the short time frame following a conviction (ten days) allowed for appeal, because it is through the assistance of counsel that the defendant can make an informed decision concerning whether there are viable issues to raise on appeal. See *infra* notes 137-38 and accompanying text. Certain claims and cases, especially those where waivers are not all-encompassing, lend themselves to developing an appellate strategy, regardless of whether it is one with a possibility for success or, at minimum, an Anders situation. Rule 11 hearings have gone a long way toward eliminating many potential issues for appeal by ensuring competency, voluntariness, satisfactory assistance from counsel, and so forth. However, these other types of claims are by their nature more difficult, first of all, to recognize that an issue may exist, and secondly, to classify as either frivolous or meritorious. Such a claim, therefore, would clearly bring the judgment and skill of the attorney into play regardless of whether he believes it would actually prevail.

¹²⁷ David Hoffman's Eleventh Resolution in his Resolutions in Regard to Professional Department reads:

If, after duly examining a case, I am persuaded that my client's claim or defence (as the case may be,) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.

David Hoffman, Resolutions in Regard to Professional Department, in *2 A Course of Legal Study, Addressed to Students and the Profession Generally* 752, 754 (2d ed. 1836).

¹²⁸ See *supra* note 23 and accompanying text.

¹²⁹ Courts enforce the benefit of the bargain "by protecting the expectation that the injured party had when making the contract by attempting to put that party in as good a position as it would have been in had the contract been performed, that is, had there been no breach." E. Allan Farnsworth, *Contracts* § 12.1, at 755-56 (3d ed. 1999); see also Arthur Linton Corbin, 1 *Corbin on Contracts* § 1.1 (Joseph M. Perillo ed., rev. ed. 1993) (maintaining that a central purpose of contract law is to protect reasonable expectations induced by promises, which in turn promotes reliance on agreements).

¹³⁰ See King & O'Neill, *supra* note 4, at 230 (statements of interviews with three prosecutors) (noting that appeal waivers not only have been "wildly successful" in reducing the number of briefs written, but have also contributed to the conservation of resources and the focusing and narrowing of the issues appealed after voluntary pleas). The Ninth Circuit also recognizes (albeit implicitly) the additional burden placed on the government as a result of the majority position, stating that "the government may choose not to oppose Sandoval-Lopez's petition and to let him appeal. The government might choose this alternative to free itself from the restraint of the plea bargain, or because getting the appeal dismissed would be less work than an evidentiary hearing." *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (9th Cir. 2005).

¹³¹ See *supra* text accompanying note 76.

full pursuit of a right, because such bargains are seen as beneficial. When the government makes this choice, the Supreme Court has stated that the judiciary owes deference to that decision.¹³³ Courts, then, should not be quick to design rules that undermine the purpose and benefit sought in doing so. Similarly, the defendant made a cognizant decision prior to allocution of accepting a plea that included a waiver; his prerogative and choice to appeal no longer exists. Ultimately, the plea system and waiver of rights therein recognizes contractual autonomy given to all citizens: one may exercise a right by waiving it.¹³⁴

The majority position likewise implicates important constitutional theory. To construe Supreme Court precedent as demanding that attorneys file claims where no claim is permitted would create a constitutionally mandated rule encouraging frivolous litigation and injudicious expenditures to protect abandoned rights. Such a [*297] directive in the federal appellate process, then, is untenable and clearly not in accord with legal policy. Indeed, several Justices of the Supreme Court have approvingly recognized the difference between frivolous and meritorious appeals and the desire to funnel resources from the former to the latter.¹³⁵ Additionally, the Supreme Court has recognized that an attorney is not ineffective if he refuses to press every non-frivolous issue, even at his client's insistence.¹³⁶ To take this point to its logical conclusion, an attorney should likewise not be held ineffective for refusing to press frivolous appeals.

Several analogies may be drawn between the legal policies supporting the minority positions and well-established legal doctrines. For example, federal defendants have ten days in which to file a notice of appeal;¹³⁷ if a defendant fails to do so, absent some limited circumstances, he forgoes the benefit of appellate review.¹³⁸ Yet, under the majority's interpretation, why should federal defendants who have the same amount of legal right to an appeal - none - be permitted special constitutional protections in order to pursue an appeal? By similar analogy, courts have universally upheld the right of defendants to waive constitutional and statutory rights, and yet the courts will not later provide relief if a defendant decides he is not satisfied with his earlier decision.¹³⁹ Parties can [*298] similarly

¹³² See supra Part I.A.

¹³³ See [Town of Newton v. Rumery, 480 U.S. 386, 396 \(1987\)](#) (recognizing that courts must ordinarily "defer to prosecutorial decisions as to whom to prosecute"). The Court further stated:

Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.

Id. (citation omitted); see also Easterbrook, supra note 13, at 299 (noting that prosecutors have "absolute discretion," far exceeding all other public officials and most participants in the private markets).

¹³⁴ See Easterbrook, supra note 13, at 317; Scott & Stuntz, supra note 27, at 1913-17.

¹³⁵ See [Halbert v. Michigan, 125 S. Ct. 2582, 2596 \(2005\)](#) (Thomas, J., dissenting) (concluding that Michigan, by enacting a state policy whereby one who pleads guilty does not receive the right to appellate counsel, "has done no more than recognize the undeniable difference between defendants who plead guilty and those who maintain their innocence, in an attempt to divert resources from largely frivolous appeals to more meritorious ones").

¹³⁶ [Jones v. Barnes, 463 U.S. 745, 751 \(1983\)](#) ("Neither Anders nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.").

¹³⁷ **Fed. R. App. P. 4(b)(1)(A)**. However, this deadline may be extended by thirty days at the discretion of the district court "upon a finding of excusable neglect or good cause." **Fed. R. App. P. 4(b)(4)**.

¹³⁸ See, e.g., [Brainerd v. Beal, 498 F.2d 901, 903 \(7th Cir. 1974\)](#) (holding that procedural rules, such as notice of appeal timing requirements, ""must be mechanically applied in order to avoid [the] uncertainties' that arise when exceptions are made." (alteration in original) (quoting [United States v. Indrelunas, 411 U.S. 216, 222 \(1973\)](#))).

forfeit claims simply by failing to raise the issue during trial, in writing, in a brief, and so forth,¹⁴⁰ and in limited circumstances can even surrender appeals altogether without voluntary relinquishment.¹⁴¹ Parties who never had or lost rights in the above circumstances are not specially provided counsel or access to the courts; similarly, courts should not develop a rule to provide access to appellate review for defendants who have no right to such access. To use a non-legal analogy, professional medical standards would not regard a doctor as ineffective for refusing to perform harmful or reckless surgery; likewise, attorneys should not be punished for failing to undertake actions harmful to their clients and without legal basis.¹⁴²

C. The Minority Position Provides the Better Policy Argument

A comparison of both positions must include a prudential analysis to determine which position presents better policy in terms of carrying out overall goals of the criminal justice system. When considering how lawyers interact within the judicial system, one area ripe for discussion and pertinent to this debate concerns the vast array of standards and duties that guide lawyers. Whereas the majority position compromises these duties, the minority rule advocated in [*299] this Note fashions a procedure more in accord with these fundamental standards. One must also consider the systemic benefits, including judicial economy and overall service to indigent defendants, as primary factors warranting reflection.

The unique and intimate role that lawyers play in society at large has long been recognized as requiring both a high degree of skill and a particularized knowledge of the duties imposed upon members of the legal profession.¹⁴³ These obligations flow to one's client, to the court, and to the legal profession itself.

¹³⁹ For example, through the Sixth Amendment, the Constitution provides an absolute right to counsel at critical stages of the criminal process. *U.S. Const. amend. VI*. As a matter of fact, the Supreme Court found this right to be so important that police must apprise a suspect of this specific right prior to any custodial interrogation as the necessary predicate for the introduction at trial of any inculpatory or exculpatory statements. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Yet suspects, for whatever reason, can and do waive this constitutional right all the time, provided that the waiver is knowing and voluntary. Once they do so, they cannot un-ring the bell and later retract statements made to police if they say something that they later regret on the basis that counsel was not present. Thus the "absolute right" to counsel is not only not absolute, but may be freely waived to the detriment or benefit of he who chooses to waive it. See, e.g., *Patterson v. Illinois*, 487 U.S. 285, 300 (1988) (holding that a defendant's confession to murder may be used against him where police informed him of his rights and his waiver was thus "knowing and intelligent"); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("An accused may waive the [Sixth Amendment] right to counsel"). For other examples of readily waivable rights by a defendant, see, e.g., 28 Am. Jur. 2d Estoppel and Waiver § 219 (2000).

¹⁴⁰ See 7 Wayne R. LaFare et al., *Criminal Procedure* § 27.5(c), at 83 (3d ed. 2007) (noting that perhaps "no standard governing the scope of appellate review is more frequently applied than the rule that an error not raised and preserved at trial will not be considered on appeal" (internal quotation marks omitted) (quoting *State v. Green*, 621 P.2d 67, 68 (Or. Ct. App. 1980))); see also *Fed. R. Crim. P. 51* (relating that a party must, at appropriate times, "make[] known to the court the action which [he] desires the court to take or [his] objection to the action of the court and the grounds therefore"); *Fed. R. Evid. 103* (providing the rules for objecting to the admission of evidence). In some instances, therefore, through no fault of his own, a defendant or client must forgo relief at a later date, and courts will not provide additional relief or protections.

¹⁴¹ See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239, 247 (1993) (stating that long-settled law includes a fugitive "disentitlement doctrine" whereby "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal").

¹⁴² Although based on common sense, the Ninth Circuit in *Sandoval-Lopez* summarily rejects this analogy given the court's interpretation of what precedent requires. See *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005).

¹⁴³ Various guidelines and sets of rules have provided ethical standards to lawyers throughout American legal history and before it in Western legal traditions. Although these histories are long ones, the core concepts have remained remarkably similar. See generally Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 *SMU L. Rev.* 1385 (2004). To assist in examining the many legal duties imposed on lawyers relevant to this discussion, this Note references three highly regarded legal codes of ethics: (1) Hoffman's Resolutions, published in 1836; (2) the ABA's 1908 Canons of Professional Ethics;

A lawyer's primary fiduciary duty flows to his client.¹⁴⁴ Of his many obligations, the duties to counsel a client and advocate as that client's informed representative are dominant. Yet, the role of counselor can often be undervalued when compared against the role of advocate. Popular culture and the cut-throat perception of American litigators often trump the image of lawyer-as-counselor, and as a result, lawyers are often valued on their win-loss ratio, regardless of the cost.¹⁴⁵ This debate, however, necessarily implicates a broader, more nuanced reflection on the many ethical duties owed to a client and how those are best carried out. As this Note demonstrates, a client's best interest may not lay in filing an appeal.¹⁴⁶ **[*300]** The majority position overvalues lawyer-as-advocate to the detriment of much greater considerations; it ignores what is in the best interest of defendants in place of focusing on fulfilling an immediate desire. Honest legal advice often involves "unpleasant facts and alternatives that a client may be disinclined to confront."¹⁴⁷ What is immediately best for a defendant - avoiding prison - may simply not be achieved legally; why the majority position seeks to further this interest without recognizing the limits of legal advocacy is unclear.¹⁴⁸ The encouraged rule should not be one that criticizes lawyers based on whether - like cogs in a machine - they assume an ignorant argument and advance it in court, without deference to other legal effects.

The minority position also provides several noteworthy systemic benefits. From lawyers to judges, the judiciary functions best when its players devote the requisite energy and resources to each claim. To that end, policymaking bodies and judicial commentators can and should recognize the legitimate goal of creating an efficient system where claims are judged on merit while protecting individual rights.¹⁴⁹ Again, a proper understanding of lawyers'

and (3) the contemporary Model Rules of Professional Conduct. See generally Model Rules of Prof'l Conduct (2003), reprinted in 2008 Selected Standards on Professional Responsibility (Thomas D. Morgan & Ronald D. Rotunda eds., Foundation Press 2008) [hereinafter Selected Standards]; Canons of Prof'l Ethics (1908); Hoffman, *supra* note 127.

¹⁴⁴ A fiduciary relationship represents a power-sharing arrangement where a lawyer acts as his client's agent and has the duty to act for the benefit of his client on all matters within the scope of their relationship. A lawyer owes his client duties of good faith, trust, confidence, and candor. For a discussion of how courts have typically approached the division of roles between defendants and counsel, see generally Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, [28 Cardozo L. Rev. 1213, 1217-46 \(2006\)](#).

¹⁴⁵ Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence ... than does the false claim ... that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause." Canons of Prof'l Ethics Canon 15 (1908).

¹⁴⁶ Cf. [Campusano v. United States, 442 F.3d 770, 774 n.4 \(2d Cir. 2006\)](#) ("Arguably, a lawyer does less damage to his or her client by declining to file a notice of appeal than by withdrawing once an appeal is initiated, because declining to file a notice of appeal does not signal as loudly to the court that counsel believes the appeal to be frivolous.").

¹⁴⁷ Model Rules of Prof'l Conduct R. 2.1 cmt. 1 (2003), reprinted in Selected Standards, *supra* note 143, at 73.

¹⁴⁸ See Canons of Prof'l Ethics Canon 16 (1908) ("A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts ..."). Hoffman's Nineteenth Resolution reads:

Should my client be disposed to compromise, or to settle his claim, or defence; and especially if he be content with a verdict, or judgment, that has been rendered; or, having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interests. The further prosecution, therefore, of the claim, or defence, (as the case may be) will be recommended by me only when, after mature deliberation, I am satisfied that the chances are decidedly in his favour; and I will never forget that the pride of professional opinion on my part, or the spirit of submission, or of controversy (as the case may be) on that of my client, may easily mislead the judgment of both, and cannot justify me in sanctioning, and certainly not in recommending, the further prosecution of what ought to be regarded as a hopeless cause... .However willing my client may be to pursue a phantom, and to rely implicitly on my opinion, I will terminate the controversy as conscientiously for him, as I would were the cause my own.

Hoffman, *supra* note 127, at 758-59.

duties recognizes [*301] this fact: lawyers have a responsibility to avoid non-meritorious litigation, meaning that only issues that have a basis in law and fact should be advanced.¹⁵⁰ In essence, lawyers have the responsibility of ensuring a just and equitable system that promotes truth.¹⁵¹ Where guilty defendants plead their cases and accept responsibility for their actions, courts need not go out of their way to undo what has been appropriately settled. The Supreme Court in Flores-Ortega recognized an analogous argument to this, finding that what constitutes reasonable action and what duties a lawyer and the courts have to a defendant will depend on a variety of factors, including whether an appeal waiver was signed.¹⁵² To be sure, due process and other systemic safeguards should never be sacrificed for the sake of efficiency, but the minority rule provides the peripheral benefit of efficiency under a sound legal framework.

Public defenders and well-meaning defense attorneys who take court appointments are also served by the minority rule. A wealth of literature and anecdotal evidence makes pellucidly clear the dearth of resources and everyday burdens under which public defenders' [*302] offices operate.¹⁵³ The concept that the government will provide counsel to those who cannot afford it supplies an example of the egalitarian principles underlying the American system of justice. While both constitutional and moral principles demand effective representation, there also comes a point where it is absurd to require counsel to act when there is no legitimate opportunity to prevail. This, after all, is the purpose of the Anders brief: where a right to appeal exists, counsel may withdraw if there are no non-frivolous grounds on which to appeal. Similarly, where no right to appeal exists, there would be little sense in requiring already overburdened defense offices to attempt an appeal when there is no probability of success. Preparing an appeal or Anders brief is not an insubstantial task.¹⁵⁴ Forcing public defense attorneys to gamble with their time

¹⁴⁹ See [Santobello v. New York, 404 U.S. 257, 260-61 \(1971\)](#) (noting that the government enters into plea bargains for a number of legitimate reasons, including increasing the efficiency of the criminal process). In *Griffin v. Illinois*, Justice Frankfurter reasoned:

If [the State] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity... . But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.

[351 U.S. 12, 24 \(1956\)](#) (Frankfurter, J., concurring in the judgment) (emphasis added).

¹⁵⁰ Model Rules of Prof'l Conduct R. 3.1 & cmt. 2 (2003), reprinted in *Selected Standards*, supra note 143, at 78; Hoffman, supra note 127, at 754 ("Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me."). The ABA rule simply requires a good faith basis for bringing a claim, which is notably different from a requirement that a lawyer must believe that his client's action is likely to prevail. Model Rules of Prof'l Conduct R. 3.1 & cmt. 2 (1992), reprinted in *Selected Standards*, supra note 143, at 78. Also of note, the ABA rules recognize that a lawyer's obligations "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel." Model Rules of Prof'l Conduct R. 3.1 cmt. 3, reprinted in *Selected Standards*, supra note 143, at 78. As this Note demonstrates, however, constitutional and other legal arguments militate against a finding that would require a lawyer to set aside his duty against frivolous litigation in these cases.

¹⁵¹ See, e.g., Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, [41 Val. U. L. Rev. 1, 66 \(2006\)](#) ("As both truth and justice are necessary for the fulfillment of the human person and, therefore, are required for an ordered society, they share an indispensable relationship to the common good.").

¹⁵² See supra note 57 and accompanying text.

¹⁵³ See, e.g., Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 *Harv. BlackLetter L.J.* 33, 33-34 (1991) (discussing the excessive caseloads and systemic resource deprivation that combine to severely burden the ability and quality of public defenders, often to the point of denying many defendants effective representation).

and energy on a case where no legal right demands action, especially when they are already overworked and underpaid makes for a poor, wasteful policy. Moreover, it places public appellate offices generally in a difficult position, both financially and in terms of resource allocation, and operates to the detriment of other indigent defendants.¹⁵⁵ Ultimately, these scarce resources could be used to assist those with legitimate claims, thereby ensuring due process to the scores of defendants who rely on public defenders to serve as guides in the legal system.

Finally, as the Seventh Circuit asseverated in Nunez:

Protecting a client from a lay-person's folly is an important part of a lawyer's job. It will not do to reply, along the lines of *Roe v. Flores-Ortega*, that whether to appeal is a decision entrusted to the [*303] defendant personally, on which the lawyer may give advice but not act unilaterally.¹⁵⁶

The majority approach seems content with allowing defendants to win the battle (that is, perfect an appeal) even if they lose the war (that is, the benefit of their original bargain). Lawyers cannot escape their obligations by hiding behind a client's ill-conceived directive.¹⁵⁷ Rather, a lawyer's utility lies in his ability to ensure the rights of his client, and he can better protect his client's rights by not permissively filing papers with the court that could undo the defendant's bargain.¹⁵⁸ If an attorney can ensure that the defendant's due process and other rights were protected at the earlier relevant stages, it serves both the defendant and his counsel to avoid the negative repercussions that could come from filing an appeal.

D. Other Alternatives, Should They Be Needed

The strongest challenge to the minority rule arises in the understanding that - even when defense attorneys act in the objectively best interests of their clients - the legal system likely will not tolerate defense attorneys acting as "courthouse guards." For this reason, alternative remedies that both respect the law's dictates and due process rights should be developed so that a defendant is not required to languish in the unknown. Therefore, should future courts find that the minority rule needs a method to bring closure to a case without the costs of the majority rule, this

¹⁵⁴ See *United States v. Poindexter*, 492 F.3d 263, 271 (4th Cir. 2007) ("If a notice of appeal is ultimately filed, an attorney has yet other duties owing to his client. These duties include examining the trial record and identifying and weighing potential issues for appeal.").

¹⁵⁵ Cf. *Halbert v. Michigan*, 125 S. Ct. 2582, 2598 (2005) (Thomas, J., dissenting) (arguing that overturning Michigan's state policy that provided no appellate counsel to defendants who did not have a right to appeal does "no favors for indigent defendants in Michigan - at least, indigent defendants with nonfrivolous claims[- because] defendants who admit their guilt will receive more attention, [while] defendants who maintain their innocence will receive less").

¹⁵⁶ *Nunez v. United States*, 495 F.3d 544, 548 (7th Cir. 2007), cert. granted, vacated and remanded mem., 128 S. Ct. 2990 (2008), aff'd, 546 F.3d 450 (7th Cir. 2008).

¹⁵⁷ Canons of Prof'l Ethics Canon 31 (1908) ("The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.").

¹⁵⁸ Relating back to the confusion as to why defendants appeal voluntary convictions in the first place, see supra note 3, it stands to reason that much of the confusion and uncertainty concerning the legal process can be explained and better understood if counsel are willing to sit down and talk frankly with their clients. A system that encourages lawyer-as-counselor should itself be encouraged. It would be unsurprising if many of the frivolous appeals arising out of plea bargains cease as a result of the knowledge that the defendant's attorney is dedicated to his cause and willing to work to help him understand the full nature of what is occurring, even if that means forgoing dubious litigation.

Note briefly proposes two options: extend Anders or Anders-like protection to defendants who [*304] have waived appellate rights; and provide information as to options provided from habeas corpus relief.¹⁵⁹

First, Anders could be extended as a universal post-conviction right, regardless of whether the defendant still maintains any appellate rights. Alternatively, a less demanding standard than the Anders test could be employed. These "Anders-lite" protections could be extended specifically for defendants who lack appellate rights in order to use judicial resources more effectively, thus advancing many of the policy benefits of the minority position described above. If courts were to adopt Anders protections (with all the implications of the other ineffective counsel decisions), defense attorneys would be required to file a notice of appeal, and then either perfect the appeal if there exists a meritorious issue, or file an Anders brief if none exists.¹⁶⁰ This system has the benefit of ensuring the opportunity to appeal and may be the option most closely in line with Supreme Court dictates, but it also requires an injudicious use of resources. Under an "Anders-lite" regime, after consulting with their clients, if no meritorious claims exist, attorneys could file a short form explaining the terms of the waiver and why it precludes any appellate relief. This system enforces the terms of the plea bargain, preserves the benefit to the government, and minimizes the opportunity costs to defense attorneys and the courts, all while providing a definitive outcome whereby attorneys are required to do more than simply forsake their clients' desires.

The second option, habeas corpus review, although not innovative, serves as a remedy of last resort to ensure the constitutional rights of citizens. For "overbearing conduct by counsel," the long-standing remedy of habeas corpus is always available to defendants.¹⁶¹ Thus, if a defendant has an honest belief that he is entitled to relief, notwithstanding the advice of his attorney, collateral [*305] review provides the means by which a claim may be advanced.¹⁶² Even moving pro se, a constitutional claim may be summarily reviewed by a court for merit.¹⁶³

These options are, by design, limited in nature, and ultimately may not provide any new form of relief for a defendant. Such a design is both purposeful and desirable because it promotes accountability and sustains the foundational contract principles to which the defendant agreed, while at the same time recognizing that defendants should have greater access than that which a "moose" could provide. The bottom line remains that if there exists a legitimate issue, the attorney should flush it out and act as an advocate pursuant to Flores-Ortega. Where this is not the case, as it appears in the cases described above, one or more of these proposed remedies would provide a means to summarily dispose of the issue while preserving the government's bargain and not forcing defense counsel to misuse his time or act contrary to his duties.

¹⁵⁹ These options are nonexclusive; indeed, other courts or commentators may develop better tests or alternatives over time. Consider also that the Seventh Circuit in Nunez off-handedly stated that one swift way to resolve this entire controversy would be through adopting a mechanical rule (essentially, "appeal upon request") into the [Federal Rules of Criminal Procedure. Nunez, 495 F.3d at 547](#). This suggestion, although unwise in some regards, could itself later be used as the simple, definitive solution. Here, the objective with these options is to draw attention to possible means of ensuring Sixth Amendment rights as well as protecting traditional contract, waiver, fiduciary, and other legal doctrines.

¹⁶⁰ See supra text accompanying notes 45-49 (discussing the Anders process).

¹⁶¹ [Jones v. Barnes, 463 U.S. 745, 755 \(1983\)](#) (Blackmun, J., concurring in the judgment) (internal quotation marks omitted).

¹⁶² Although many waivers include a waiver of the ability to collaterally attack a sentence, an attack on one's conviction or the way in which the conviction was determined must be distinguished from the general right to ensure that one is not otherwise being held in contravention of federal law. The latter contention implicitly requires courts to make the intellectual distinction between those cases where appellate rights remain intact and those cases where appellate rights have been forfeited by the waiver.

¹⁶³ On a related note, for those worried that moving pro se would deprive a defendant of vital assistance of counsel, one should be aware that courts of appeal do not hold pro se habeas petitioners and counsel-assisted habeas petitioners to the same standard. E.g., [United States v. Sandoval-Lopez, 409 F.3d 1193, 1198 \(9th Cir. 2005\)](#). Thus, when considering pro se petitioners, courts are willing to take into account their circumstances - often limited resources, limited fluency in English, limited understanding of the criminal justice system, and so on.

Conclusion

In the seminal case *Griffin v. Illinois*, the Supreme Court reiterated an important constitutional principle when it opined that there can be no justice where the kind of trial or quality of appellate review depends on the amount of money a defendant has.¹⁶⁴ However, as Justice Frankfurter - relying on de Tocqueville - admonished: future courts should not confuse the familiar with the necessary.¹⁶⁵ The right to appeal, while embedded in American due process jurisprudence, is not absolute, and may be waived by defendants of any stripe. Constitutional standards demand that even when a waiver is present, counsel must "show up" to a client's appeal; he has a legal (and [*306] moral) obligation to advise and counsel his client. Nevertheless, counsel does not have a duty to perpetrate litigation that flies in the face of what would be legally permitted.

When faced with the issue of a defense attorney's obligations when directed to pursue an appeal where no right to one exists, the majority rule developed throughout the federal circuits relies on that which is familiar, rather than that which is necessary. And it does so with various social costs to traditional legal principles, judicial efficiency, and the duties lawyers owe to the system and their clients. The minority approach - outlined in *Nunez*, adopted in *Mabry*, and advocated in this Note - accommodates this atypical group of cases by reinforcing traditional and contemporary contractual standards, and emphasizing how a client is best served by his attorney.

The minority rule presents courts with a superior alternative because it protects a defendant's substantive rights and enforces contemporary "effective counsel" standards without extending protections beyond what is reasonably necessary. If a showing existed that indigent defendants were being deprived of due process or equal protection, then this rule - or any rule - would be untenable. On the other hand, where defendants find it in their interest to make a bargain one day, they cannot repudiate it without cause the next. Ultimately, a lawyer should not be deemed ineffective for abiding by this legally enforceable bargain and acting in accord with his long-standing and widely recognized duties. Similarly, other federal courts and the Supreme Court (should it conduct a merits-review of *Nunez*, *Mabry*, or a similar case) would be well-advised to consider the wisdom of this minority approach when facing this issue in the future.

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¹⁶⁴ [Griffin v. Illinois, 351 U.S. 12, 19 \(1956\)](#) (plurality opinion).

¹⁶⁵ [Id. at 20](#) (Frankfurter, J., concurring in the judgment).