9-28-2016

Garza v. State Respondent's Brief Dckt. 44015

IN THE SUPREME COURT OF THE STATE OF IDAHO

GILBERTO GARZA, JR.,	)	
	)	**Nos. 44015 & 44016**
Petitioner-Appellant,	)	
	)	**Ada County Case Nos.**
vs.	)	**CV-2015-10589 & CV-2015-10597**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Gilberto Garza, Jr., appeals from the district court's order dismissing his petitions for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In January of 2015, Garza entered an Alford plea to aggravated assault in Ada County Case No. CR-FE-2014-09960. (R., pp. 246-49, 329-30.) Garza later pleaded guilty to possession of a controlled substance with intent to deliver in Ada County Case No. CR-FE-2014-18183.[1] (R., pp. 45-48, 128-30.) Both pleas were entered pursuant to binding plea agreements that contemplated a five-year sentence in the assault case, with two years fixed, and a five-year sentence in the possession case, with one year fixed. (R., pp. 45-46, 246-47.) Under this global resolution Garza's sentences were to run consecutive to one another, and to another case not part of this appeal. (R., pp. 45-46, 246-47.)

As part of the plea agreements Garza waived his rights to appeal. Both agreements state that "Defendant Gilberto Garza Jr. waives his right to appeal" and right to request ICR 35 relief. (R., pp. 47, 249.) Garza not only signed and dated the agreements, but initialed the waiver language.[2] (R., pp. 47, 249.)

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[1] The post-conviction cases stemming from both criminal cases have been consolidated on appeal. (R., p. 2.)

[2] Garza points out an inconsistency in the guilty-plea forms; in the assault-case form, where he was asked "[h]ave you waived your right to appeal your judgment of conviction and sentence as part of your plea agreement" he checked a box marked "YES." (R., p. 254; Appellant's brief, pp. 1-2.) But in the possession-case form, in response to the same question, he checked the "NO" box.

Further, Garza acknowledges that he "waived his right to appeal as part of pleas." (Appellant's brief, p. 1.)

Garza was given the agreed-upon sentence. (R., pp. 113-21, 132, 317-25, 336.) At sentencing, the district court inquired about the waiver, remarking that "[t]he plea agreement undoubtedly must include a waiver of Mr. Garza's appeal rights with respect to the sentences imposed." (R., pp. 132, 336.) The prosecutor confirmed that it did, but stated "that even though there is an effective waiver, and of course we would argue that in the future, it has been my experience the court still advises him of his rights to appeal." (R., pp. 132, 336.) The district court thus told Garza that he had a right to appeal within 42 days. (R., pp. 132, 336.)

Garza filed petitions for post-conviction relief on June 22, 2015. (R., pp. 5-11, 205-11.) The majority of his allegations were summarily dismissed for lack of evidence, save one: in both petitions he alleged that his counsel had failed to file an "appeal of sentence within [the] 42 day limit."[3] (R., pp. 7, 26-36, 62-66, 207, 226-36, 263-67.) Garza's criminal-case counsel confirmed in a post-

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(R., p. 53.) In any event, Garza does not argue on appeal that either appeal waiver was involuntary, faulty, or otherwise invalid, and he now concedes that he waived his right to appeal. (See Appellant's brief, p. 1.)

[3] Garza's other post-conviction allegations were that his pleas were involuntary, and that his counsel was ineffective for failing to raise suppression issues, failing to "enter evidence" to the court, confusing the facts of Garza's cases, and failing to call attention to alleged "harassment and threats from the leading detective." (R., pp. 5-10, 205-10.) Garza also alleged he was given insufficient credit for time served and alleged that the prosecutor "used false testimony" and "persuaded [Garza] to plead guilty." (R., pp. 6-10, 206-10.) The court found no evidence supporting any of these allegations and summarily dismissed them.

conviction affidavit that Garza "knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court." (R., pp. 147-49, 351-53.) Garza's counsel noted that "Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement," and accordingly explained that he "did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because [Garza] waived his right to appeal in his Rule 11 agreements." (R., pp. 148, 352.) As the district court noted below, these facts appear to be undisputed. (R., pp. 186-87, 381-82.)

The parties filed cross-motions for summary adjudication of Garza's petitions. (R., pp. 75-169, 273-361.) The district court ruled on those motions, noting first that the only remaining issue before the court was whether, in light of the appeal waiver, Garza's counsel was ineffective for failing to file an appeal. (R., pp. 184, 379.) With no published Idaho opinion to resolve this question, the district court turned to federal case law. (R., pp. 188-89, 383-84.) The court acknowledged that a majority of federal circuit courts would hold that counsel would be presumptively ineffective by failing to appeal, the waiver notwithstanding. (R., pp. 188-89, 383-84.) But the district court also considered a rule applied by a minority of federal circuit courts; a minority-rule court would hold that in light of a valid appeal waiver, counsel is not presumed ineffective for declining to file an appeal. (R., pp. 189, 384.)

The district court found the minority rule better reasoned, applied it, and in

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(R., pp. 26-36, 62-66, 226-36, 263-67.) Garza has not challenged the dismissal of these allegations on appeal. (See Appellant's brief, p. 6.)

light of the waiver did not presume that counsel's failure to appeal was prejudicial. (R., pp. 189-90, 384-85.) Instead, the court required Garza to show prejudice, and in particular "show non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver." (R., pp. 190-91, 385-86.) Because Garza did not show any such grounds, the district court denied his motion, and granted the state's, dismissing the petitions. (R., pp. 191-92, 194-95, 386-87, 389-90.)

Garza timely appealed. (R., pp. 196-98, 391-93.)

ISSUES

Garza states the issue on appeal as:

> Did the district court err by denying Mr. Garza's petition because, regardless of the appeal waiver in this case, Mr. Garza's attorney was ineffective by refusing to file an appeal even though Mr. Garza requested one?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Garza failed to show ineffective assistance of counsel?

ARGUMENT

Garza Has Failed To Show That His Counsel Was Ineffective For Declining To Exercise A Right That Garza Had Already Waived

A. Introduction

Garza argues on appeal that despite his appeal waiver, his criminal-case counsel was ineffective for not appealing his sentences at Garza's request. (Appellant's brief, pp. 7-13.) He challenges the ruling of the district court, which applied the rule used in a minority of federal circuit courts in concluding that in light of the appeal waiver, Garza's counsel was not ineffective. (R., pp. 189-92, 384-87.) Garza contends that this Court should instead apply the majority-jurisdiction rule, and find that regardless of the appeal waiver, Garza's counsel was ineffective for not appealing upon his request. (Appellant's brief, pp. 7-13.)

A review of the federal and state case law and competing appellate approaches affirms that the minority rule is better reasoned. The district court thus correctly concluded that because Garza waived his appeal rights, his counsel was not ineffective for declining to file an appeal.

B. Standard Of Review

Post-conviction relief proceedings "are civil in nature, rather than criminal, and the applicant must therefore prove the allegations in the request for relief by a preponderance of the evidence." State v. Dunlap, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). This Court freely reviews questions of law. Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009).

C. Because Garza Waived His Right To Appeal His Sentence, His Counsel Was Not Ineffective For Declining To File An Appeal

A criminal defendant not only has a constitutional right to counsel, but to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that counsel was ineffective, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687–95. A reviewing court's "scrutiny of counsel's performance must be highly deferential"; therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

As a general rule "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores–Ortega, 528 U.S. 470, 477 (2000). On other hand, "a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." Id. (emphasis in original). Flores–Ortega explored a middle ground, and considered an attorney's obligations where "the defendant has not clearly conveyed his wishes one way or the other" with respect to appealing. Id. There, the defendant's counsel did not file an appeal, though there was evidence to suggest that the defendant inquired with counsel about appealing. Id. at 474-76, 478. Notably, the defendant in Flores–Ortega had not waived his right to an appeal. See id. at 473-74.

Where a defendant's appeal wishes are unclear, the Flores–Ortega Court held that counsel "has a constitutionally imposed duty to consult with the defendant about an appeal" where there was reason to think a defendant would want an appeal, or where the defendant indicated to counsel he was interested in appealing. Id. at 480. The Flores–Ortega Court further held that an unjustified failure to consult about appealing was presumptively prejudicial, as it led to a "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right." Id. at 481-83.

The United States Supreme Court has not explicitly addressed the narrow question at issue here: whether an attorney performs deficiently by disregarding specific instructions to file a notice of appeal where the defendant has also waived his right to an appeal.[4] Nor has any Idaho appellate court addressed such a case in a published opinion.[5] Out of the federal courts of appeals that

[4] This question, and the current circuit split over it, could potentially be resolved by Solano v. United States 812 F.3d 573 (7th Cir. 2016), petition for cert. filed (U.S. May 10, 2016) (No. 15-9249). In Solano, the 7th Circuit Court of Appeals applied the minority rule and dismissed the appellant's claim that his counsel was ineffective for failing to file a notice of appeal. Id. at 577-78. Solano's Petition for a Writ of Certiorari is currently pending. (See https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-9249.htm.)

[5] Idaho's Court of Appeals has addressed this question in an unpublished opinion. In State v. Garcia, 2014 WL 7013214 (Ct. App. 2014), the appellant asserted his counsel erred for failing to file an appeal, despite the district court's finding that he had waived his appeal rights. The Court of Appeals affirmed the dismissal of this claim and essentially applied the minority rule: it found that "defense counsel did not provide ineffective assistance by failing to file a notice of appeal because: the plea agreement waived Garcia's right to appeal, there is no evidence that the plea agreement was breached, and the record conclusively demonstrates that Garcia's plea agreement was made knowingly, voluntarily, and intelligently." Id. at *3.

have addressed the question, eight have concluded that counsel is presumed ineffective if he or she does not file an appeal upon request, even where there is a valid appeal waiver. See United States v. Sandoval–Lopez, 409 F.3d 1193, 1196-99 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1266-67 (10th Cir. 2005); Gomez–Diaz v. United States, 433 F.3d 788, 790-94 (11th Cir. 2005); Campusano v. United States, 442 F.3d 770, 771-75 (2d Cir. 2006); United States v. Poindexter, 492 F.3d 263, 271-73 (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); Campbell v. United States, 686 F.3d 353, 356-58 (6th Cir. 2012). These jurisdictions see this rule as implicit in Flores–Ortega, and some majority-rule courts cite in particular Flores–Ortega's conclusion that the "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." See, e.g., Campbell, 686 F.3d at 357. Courts applying the majority rule therefore presume prejudice whenever counsel does not file a notice of appeal upon demand—even where the defendant has waived his right to appeal. See id.

However, two federal circuit courts and district courts within a third circuit have concluded that Flores–Ortega's general rule—that an attorney is presumed ineffective for not filing an appeal upon request—does not extend to situations where there is an appeal waiver. Nunez v. United States, 546 F.3d 450 (7th Cir. 2008); see United States v. Mabry, 536 F.3d 231 (3rd Cir. 2008)[6]; see, e.g.,

[6] It could be argued that Mabry is limited to situations where there is both a direct-appeal waiver and a collateral-review waiver, as the court there speculated that "a defendant *may* be entitled to habeas relief if his attorney ineffectively fails

Benjamin Maes v. United States, 2015 WL 9216583 at *3, n. 1 (D.N.H. Dec. 16, 2015). Minority-rule courts conclude that in light of defendants' ability to waive their appeal right, defense counsel should not be presumed ineffective for adhering to such a waiver, and declining to appeal. See, e.g., Nunez, 546 F.3d at 453-56. The Nunez Court explained why this is so:

> Ordinarily a lawyer cannot make an independent decision about whether an appeal would be frivolous but must follow the procedure outlined in *Anders v. California*, and proceed as an advocate until the judiciary agrees with counsel's belief that more litigation would be frivolous. As we explained in *United States v. Eskridge*, however, 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). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach….
>
> Protecting a client from harm is a vital part of a lawyer's job. It will not do to reply that the decision to appeal is entrusted to the defendant personally, and that counsel must do the client's bidding. Nunez *had* made a personal decision—a decision not to appeal.

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to file a requested appeal because it is presumed to be prejudicial under–Ortega," so long as that defendant has not also waived his *habeas*-relief rights. Mabry, 536 F.3d at 241 (emphasis added). The Mabry Court also frames the threshold issue as "whether the waiver of collateral review rights should preclude a petitioner from asserting a *Flores–Ortega* claim for a reinstated appeal in the first place." Id. at 242. On the other hand, the Mabry Court cites approvingly to Nunez, and concludes more generally,

> … we note that, from an analytic standpoint, the concept of a "presumption of prejudice" flowing from ineffectiveness that fits very comfortably in the *Flores–Ortega* setting where there is no waiver really does not suit the situation in which a waiver is present. Without a waiver, the recognition of a defendant's right to an appeal is paramount and counsel's ineffectiveness clear, for the defendant was entitled to an appeal. With a waiver, that entitlement disappears, and the ineffectiveness of counsel in not pursuing a waived appeal is less than clear.

Id. at 244. Given this approach, it seems that the Mabry Court would also apply the minority rule in situations where, as here, there is a direct appeal waiver but no waiver of collateral-review rights.

> 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. That this approach also honors the lawyer's duty to avoid frivolous litigation is an extra benefit.

Id. at 455 (internal citations omitted, emphasis in original).

Here, the district court concluded that the minority rule was the better reasoned of the two approaches. (R., pp. 189, 384.) Thus, instead of presuming that Garza's counsel was ineffective for declining to file a notice of appeal, the court applied the general test from Strickland and asked whether counsel's performance was deficient, and whether such performance prejudiced Garza. (R., pp. 189-91, 384-86.) Without deciding whether the performance was deficient, the court held that in any event there should be no presumption of prejudice where counsel declines to appeal, if defendant has already waived his appeal rights. (R., pp. 189-90, 384-85.) The court concluded such a defendant would need to "show prejudice" with evidence that the waiver was invalid or unenforceable, or that the claimed issues on appeal were outside the waiver's scope. (R., pp. 190-91, 385-86.) Because Garza waived his right to an appeal, and could not show the waiver was invalid, the district court concluded that his counsel was not ineffective for declining to file an appeal. (R., pp. 189-92, 384-87.)

A review of the applicable precedent shows that the minority rule is indeed better reasoned, and should be applied by this Court here. The rule itself—that

counsel will not be presumed ineffective for declining to file an appeal in light of an appeal waiver—comports with both the Strickland two-prong test, and Flores–Ortega.

With respect to Strickland's first prong, whether Garza's counsel's performance was deficient, it should be noted from the outset that the right to an appeal is a purely statutory right. I.C. § 19-2801; State v. Cope, 142 Idaho 492, 496, 129 P.3d 1241, 1245 (2006). Further, it is well settled that a defendant may waive his right to appeal as part of a valid plea bargain. Cope, 142 Idaho at 496, 129 P.3d at 1245 ("Given the fact that constitutional rights may be waived, there is no doubt that a statutory right may be waived as well."). Garza has not alleged on appeal that the waiver was invalid or unenforceable, or that the state breached the plea agreement in any way, and in fact concedes on appeal that he "waived his right to appeal." (Appellant's brief, p. 1.) Accordingly, it cannot be said that his attorney performed deficiently for choosing not to exercise a right that Garza no longer had. If anything, Garza's counsel's decision fell "within the wide range of reasonable professional assistance," given that Garza was requesting his attorney exercise a now-nonexistent right, and in the process, breach the deal that the parties entered into. See Strickland, 466 U.S. at 689. In an apparent attempt to reconcile Garza's contradictory directions and salvage the plea agreement, Garza's attorney performed within the bounds of reasonable assistance by not appealing in light of the waiver.

Alternatively, even if Garza's counsel performed deficiently for declining to file an appeal, Garza cannot show prejudice here. Prejudice is generally

presumed when counsel does not file an appeal upon request, but Garza should not be afforded that blanket presumption, because Flores–Ortega conditioned it on the loss of a judicial proceeding to which the defendant *has a right*:

> In *Cronic, Penson,* and *Robbins,* we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." 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. Put simply, we cannot accord any "'presumption of reliability,'" to judicial proceedings that never took place.

Flores–Ortega, 528 U.S. at 483 (internal citations omitted, emphasis added). Here, Garza no longer had a right to an appeal, because he waived it. And if it was no longer a judicial proceeding "to which he had a right," the failure to file an appeal would not be *presumptively* prejudicial per Flores–Ortega's plain explication of the rule.

Without a presumption of prejudice to rely on, Garza's burden is to allege prejudice above and beyond the decision not to file an appeal. Strickland, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Garza has not alleged any such prejudice, and in particular has not shown that the waiver itself was entered into involuntarily or was otherwise invalid. Because Garza's counsel was not presumptively prejudicial, and because no other prejudice has been shown, per Strickland and Flores–Ortega, this Court should find that Garza's counsel caused him no prejudice for declining to appeal, and in any event did not give ineffective assistance.

Garza offers several policy justifications for adopting the majority rule, but these are unconvincing. First, he notes that "it is a client's decision whether to appeal, regardless of whether the attorney believes it is in the client's best interest." (Appellant's brief, pp. 11-12.) Be that as it may, Garza long since made his decision whether to appeal: he waived his right to do so. (R., pp. 47, 249.) Adhering to the waiver upholds that decision—Garza's subsequent buyer's remorse notwithstanding. Because it was Garza's decision to waive his appeal rights in the first place, he cannot now argue that his counsel is ignoring his directives by complying with his initial decision to waive, rather than his belated command to act contrary to the waiver. Nor can Garza argue that it undermines client choice for his attorney to act in accordance with the waiver, given that it was Garza, the client, who chose the waiver to begin with.

Garza also argues as a policy matter that "holding an evidentiary hearing to determine whether a client in fact instructed his attorney to file a notice of appeal is less complicated and more efficient than having a collateral-review court attempt to determine the merits of every possible ground for appeal." (Appellant's brief, p. 12.) But Garza's focus on a single step in the process fails to show just how inefficient the majority rule will be, in practice.

Consider that under Garza's approach, even if a defendant has waived his appeal rights, he may still request his attorney file an appeal. (See Appellant's brief, p. 12.) If an attorney declines to file an appeal, the collateral-review court will need to hold an evidentiary hearing to determine if the request was made, and if it finds it was, the court must grant the petition and allow the appeal. (See

id.) This Court will no doubt find itself fielding appeals from defendants who have properly waived their appeal rights, and in cases such as Garza's—where he has shown no error whatsoever with the waiver—the case will undoubtedly be dismissed as a result. Defendants will end up right back where they began in district court—but only after fruitless expenditure of time and resources, with nothing but a breached plea agreement to show for it.

One strains to find the enhanced efficiency here, and even some majority-rule jurisdictions confess that this model of futility will be typical; for example, the Poindexter Court admitted that "most successful [] movants in the appeal waiver situation obtain little more than an opportunity to lose at a later date." Poindexter, 492 F.3d at 273. For majority-rule courts, the upshot is both more complicated and less efficient; for defendants, Poindexter-esque victory is pointless, and Pyrrhic.

By contrast, a minority-rule approach is sensible and simple. Under the minority rule, if a defendant has waived his rights to an appeal, his counsel will not reflexively be presumed deficient for declining to appeal. Nunez, 546 F.3d at 455-56. Rather, the defendant must *show* prejudice in light of Strickland, and point to some flaw or limitation of scope inherent in the waiver to successfully show ineffective assistance of counsel for failure to appeal, in light of the waiver. Id. (See also R., pp. 190-91, 385-86.)

Contrary to Garza's assertion, a minority-rule approach does not require that a collateral-review court determine "the merits of every possible ground for appeal." (Appellant's brief, p. 12.) Instead, as the district court concluded, a

court applying the minority rule in post-conviction proceedings simply needs to determine whether the waiver itself is valid and enforceable, and whether the issues to be appealed are within its scope. (R., pp. 190-91, 385-86); see also Nunez, 546 F.3d at 454-56.[7] A collateral-review court need not analyze every ground for appeal because in light of a valid, voluntary waiver, such a searching review would be contrary to the whole point of the waiver. See generally, Cope, 142 Idaho at 496, 129 P.3d at 1245. All told, the minority-rule approach would uphold enforceable waivers, ensure the waivers themselves are collaterally reviewed for propriety, and prevent a Sisyphean churn of appeal-waiver cases headed upward on appeal, only to go right back to where they started.

Garza's final policy argument is that under the majority rule "the State still gets the benefit of its bargain if a defendant who waived his right to appeal nevertheless files a notice of appeal." (Appellant's brief, p. 12.) This is incorrect, because beyond being inefficient, Garza's approach gives the state the opposite of what it bargained for. The state bargained for, among other things, Garza's waiver of his appeal rights. Garza agreed to this deal and this term. (R., pp. 47,

[7] The Nunez Court used a similar analytical framework as the district court here, requiring a Strickland-style showing of prejudice rather than making a Flores–Ortega presumption. 546 F.3d at 454-56. The court concluded that Nunez *could* have shown such prejudice by arguing that his sentence exceeded the statutory maximum, that the plea itself was involuntary, or that an ambiguous waiver did not "cover an issue that defendant told counsel he wanted to present on direct appeal." Id. Thus, the court there, like the district court here, did not conclude that a minority-rule court would need to review "every possible ground for appeal" to collaterally review an allegation of ineffective assistance of counsel for failure to appeal, in light of an appeal waiver.

249.) He now wishes not to honor the deal and appeal anyway, and if he does so the state will decidedly not get what it bargained for—an appeal waiver.

Garza argues more pointedly that the state "still gets the benefit of its bargain" because under his approach the state could "hold the waiver against the defendant to dismiss the appeal," or "argue that the defendant breached the plea agreement thus relieving the State of its obligations under the plea." (Appellant's brief, p. 12.) But this is akin to saying a party who purchases a defective product still gets what they bargained for because, after all, they can return the item, or sue the seller for relief. Here, the state did not bargain for the ability to seek dismissal of an appeal due to Garza's breach of the deal, or for relinquishment of its obligations after Garza's nonperformance (though it clearly would be entitled to both). What the state bargained for was Garza's waiver of his appeal rights, full stop. A breach of that deal now would neither benefit the state, nor remotely resemble the bargain the parties originally struck.

Garza's policy arguments in favor of adopting the majority rule are unconvincing, and the minority rule is better reasoned both in light of precedent and policy. This Court should adopt the minority rule and find that in light of Garza's appeal waiver, Garza's counsel was not ineffective for declining to file an appeal.

CONCLUSION

The state respectfully requests this Court affirm the judgments of the district court.

DATED this 28th day of September, 2016.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of September, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd