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An Appealing Split: Filing an Appeal After a Plea Bargain: Is counsel Obliged to File a Meritless Appeal?

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An Appealing Split

FILING AN APPEAL AFTER A PLEA BARGAIN: IS COUNSEL OBLIGED TO FILE A MERITLESS APPEAL?[1]

INTRODUCTION

Plea bargains dominate our criminal justice system.[2] Approximately 90% of criminal defendants accept plea bargains, waiving their right to trial.[3] Two-thirds of these plea bargains also include a defendant's waiver of the right to appeal.[4] However, does a defendant's waiver of appeal in a plea bargain relieve counsel of the duty to file a notice of appeal upon a defendant's request?

A criminal defendant's right to "represent[ation] by counsel is a fundamental component of [the United States] justice system."[5] In fact, a defendant is not only guaranteed representation, but must also receive reasonably effective assistance of counsel.[6] Still, although the Constitution promises the right to the effective assistance of counsel, there is no constitutional right to an appeal.[7] Nevertheless, a criminal defendant has a statutory right to appeal.[8] While a plea bargain may

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[1] This Note is an updated version of an article previously published in the New York State Bar Association's 2008 Law Student Legal Ethics Award Compendium. *See* Tamar Kaplan-Marans, *Filing An Appeal After a Plea Bargain*, NEW YORK STATE BAR ASS'N 2008 LAW STUDENT LEGAL ETHICS AWARD COMPENDIUM, Oct. 2008, at 27. Although a student Note was recently published on the same topic, the original version of this Note was published first in the Compendium. *See* Gregory P. Lavoy, 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*, 7 AVE MARIA L. REV. 265 (2008).

[2] *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2003); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 62 (2006), *available at* http://www.albany.edu/sourcebook/pdf/t5172004.pdf; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2497 (2004).

[3] ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, at xi (1999); G. NICHOLAS HERMAN, PLEA BARGAINING 1 (1997); Jennifer L. Mnookin, Review, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005).

[4] Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005).

[5] United States v. Cronic, 466 U.S. 648, 653 (1984); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."). In criminal cases, lawyers "are necessities, not luxuries," guaranteed by the Constitution. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[6] Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[7] Jones v. Barnes, 463 U.S. 745, 751 (1983).

[8] 18 U.S.C. § 3742(a) (2006).

provide for a waiver of defendant's statutory right to appeal,[9] it does not waive a defendant's constitutional right to effective counsel.[10] Thus, after agreeing to a waiver of appeal, if a defendant asks his or her attorney to file an appeal, must counsel do so in order to meet the required standard of effective counsel dictated by the Sixth Amendment?

In *Nunez v. United States*, the Seventh Circuit broke with seven other circuit courts, holding that a plea bargain in which a defendant waives the right to appeal relieves counsel of a duty to file an appeal.[11] However, the Second, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits require counsel to file an appeal upon the defendant's request even after the defendant has waived his or her right through a plea bargain.[12] These circuits hold that counsel's failure to file an appeal is automatically considered ineffective assistance of counsel, therefore entitling a defendant to an appeal.[13] Even though a defendant's waiver

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[9] *See* United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) ("It is clear that a defendant may waive in a valid plea agreement the right of appeal under 18 U.S.C. § 3742."); United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989) ("If defendants can waive fundamental constitutional rights such as the right to counsel or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.") (citation omitted).

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

[11] *See* Nunez v. United States (*Nunez I*), 495 F.3d 544 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008); s*ee also* Nunez v. United States (*Nunez II*), 128 S. Ct. 2990 (2008); Nunez v. United States (*Nunez III*), 546 F.3d 450 (7th Cir. 2008); Pamela A. MacLean, *7th Circuit Breaks With Six Other Circuits Over Waiver of Appeal*, NAT'L L.J., Aug. 13, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1187254928176.

The procedural history behind the *Nunez* cases is quite extensive. After the Seventh Circuit decided *Nunez I*, the defendant petitioned the Supreme Court for certiorari. *See* Petition for Writ of Certiorari at *1, *Nunez II*, 128 S. Ct. 2990 (2008) (No. 07-818), 2007 WL 4466866. Although the Supreme Court granted certiorari, it then remanded the case to the Seventh Circuit. *Nunez II*, 128 S. Ct. at 2990. Upon remand, the Seventh Circuit decided *Nunez III*. *Nunez III*, 546 F.3d at 450; *see also infra* note 48. However, even though *Nunez III* is the Seventh Circuit's more recent decision, this Note mainly cites to *Nunez I* because the language in *Nunez I* and *Nunez III* is exactly the same, almost word for word (except for a new introduction provided by the court in *Nunez III*). As noted by the Seventh Circuit in *Nunez III*: "Instead of sending readers to our first opinion, we will repeat much of what was said there. Recapitulation is better than leaving our reasoning scattered across volumes of the Federal Reporter." *Nunez III*, 546 F.3d at 453. In other words, even though there are two Seventh Circuit opinions relevant to this Note, they are one and the same. As such, the above-the-line text of this Note simply refers to them as "*Nunez*," treating them as one case. However, the two cases are differentiated in the footnotes here as *Nunez I* and *Nunez III*. *Nunez II* refers to the Supreme Court decision to remand to the Seventh Circuit.

[12] *See* Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007); Campusano v. United States, 442 F.3d 770, 777 (2d Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 793 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1198-99 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1264 (10th Cir. 2005). *But see* United States v. Mabry, 536 F.3d 231, 240-41 (3d Cir. 2008) (noting that "the Seventh Circuit adopted the correct approach in *Nunez*"), *petition for cert. filed*, 77 U.S.L.W. 3366 (2008).

[13] *See Watson*, 493 F.3d at 964; *Poindexter*, 492 F.3d at 268; *Tapp*, 491 F.3d at 266; *Campusano*, 442 F.3d at 771-72; *Gomez-Diaz*, 433 F.3d at 790; *Sandoval-Lopez*, 409 F.3d at 1197-98; *Garrett*, 402 F.3d at 1263.

renders an appeal futile and therefore frivolous,[14] counsel is still required to file one under the Sixth Amendment.[15]

An analysis of the Supreme Court's general jurisprudence on a lawyer's responsibility to file an appeal reveals that the Court has not adopted a consistent approach or a bright line, per se rule stating when a lawyer must file an appeal.[16] In fact, the inconsistency of the Court's approach over the last forty years is evidenced by the circuit split at hand. Highlighting the Court's inconsistency, both the majority circuits[17] and the Seventh Circuit engage in completely different, yet equally valid analyses of the Court's previous decisions in this area.

This lack of clarity has major practical implications for the criminal defense system. Given the high volume of plea bargains containing appeal waiver provisions,[18] it is imperative that criminal defense lawyers have clear guidance on how to proceed when a defendant requests an appeal despite a waiver of the right to appeal. But this very practical issue derives from the more theoretical question of what a lawyer's role should be within the lawyer-client relationship. The contrary holdings of the circuits are a result of contrasting models of the allocation of power in a client-lawyer relationship. The majority circuits adopt a paradigm in which the client dominates the lawyer-client relationship, whereas the Seventh Circuit follows a model in which the lawyer maintains autonomy over the client. The Court has been inconsistent on which model is correct, vacillating between a lawyer-dominated relationship and a client-controlled one. Further complicating this issue, the various codes of legal ethics are also inconsistent on the relationship between a lawyer and client, with some ethical rules favoring client autonomy and others encouraging a more paternalistic approach toward clients. Given this lack of clarity in Supreme Court jurisprudence as well as the ethics codes, a policy analysis is imperative in determining whether the view of the majority circuits or the view of the Seventh Circuit should prevail.

This Note explores the split among the circuit courts on this issue of a lawyer's responsibility to file an appeal once a defendant has waived the right to appeal. It addresses the legal and theoretical analyses behind the differing views as well as the policy implications. Part I discusses the facts and history behind the Seventh Circuit's decision in *Nunez*. Part II argues that both the Seventh Circuit and the majority

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[14] Such an appeal would be futile because an appellate court will dismiss the appeal based solely on the fact that the defendant waived the right to appeal in the plea bargain.

[15] *See Watson*, 493 F.3d at 964; *Poindexter*, 492 F.3d at 268; *Tapp*, 491 F.3d at 266; *Campusano*, 442 at F.3d at 771-72; *Gomez-Diaz*, 433 F.3d at 790; *Sandoval-Lopez*, 409 F.3d at 1197-98; *Garrett*, 402 F.3d at 1263.

[16] *See infra* Part II.A for a more extensive analysis of this issue.

[17] Throughout this Note, I will use the term "majority circuits" to refer to the Second, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits, specifically their holdings in *Watson*, *Campusano*, *Poindexter*, *Tapp*, *Sandoval-Lopez*, *Garrett*, and *Gomez- Diaz*.

[18] *See supra* note 4 and accompanying text.

circuits' approaches can be reconciled with Supreme Court precedent. Part III contends that the contrary holdings of the circuits is a result of their adoption of contrasting models of the allocation of power in a client-lawyer relationship and demonstrates the impact of the ethical rules of the legal profession on the circuits' decisions. Finally, Part IV advocates for a policy-based analysis. Specifically, this Part argues that the Seventh Circuit's approach is preferable for our criminal justice system because it benefits lawyers, defendants, the judiciary, and society at large.

I. THE CIRCUIT SPLIT: THE SEVENTH CIRCUIT IN *NUNEZ V. UNITED STATES*

In 2002, Armando Nunez was indicted and charged with "multiple cocaine offenses."[19] The government possessed substantial evidence that Nunez dealt cocaine to an undercover law enforcement official and transported drugs in his automobile from the Chicago area to distribution locations in Illinois, Indiana, and New Jersey.[20] As often occurs in criminal cases, Nunez was assigned counsel who conducted an investigation of the government's case against Nunez.[21] Once Nunez's counsel[22] assessed that the government's evidence against his client was extremely strong and that Nunez was unlikely to prevail at trial, he encouraged Nunez to accept the government's offer of a plea bargain.[23]

Pursuant to the plea agreement, the prosecutor dismissed two of the three drug charges against Nunez and recommended a reduced sentence.[24] Nunez pled guilty to conspiring to knowingly and intentionally possess cocaine with intention to distribute.[25] Nunez agreed to waive his right to direct appeal or collateral attack[26] unless the sentence exceeded the statutory maximum or the waiver was otherwise invalid.[27] Before accepting Nunez's guilty plea, the district court

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[19] Nunez v. United States (*Nunez I*), 495 F.3d 544, 545 (7th Cir. 2007), vacated, 128 S. Ct. 2990 (2008); *see also* Brief & Appendix of the United States at 3, Nunez v. United States, 495 F.3d 544 (7th Cir. 2007) (No. 06-1014) .

[20] United States v. Nunez, No. 04 C 3385, 2005 WL 2675043, at *1 (N.D. Ill. Oct. 18, 2005), *aff'd*, Nunez v. United States, 495 F.3d 544 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008).

[21] Brief & Appendix of the United States, *supra* note 19, at 4.

[22] On September 9, 2002, John M. Cutrone was appointed as Nunez's counsel. *Id.* at 3. "On February 27, 2003, [Nunez] filed a motion for leave to substitute Robert L. Rascia as his counsel," which was granted by the district court. *Id.* at 12 n.3.

[23] *Id.* at 4.

[24] *Nunez I*, 495 F.3d at 548.

[25] *Nunez*, 2005 WL 2675043, at *1.

[26] A direct appeal is "[a]n appeal from a trial court's decision directly to the jurisdiction's highest court, thus bypassing review by an intermediate appellate court." BLACK'S LAW DICTIONARY 106 (8th ed. 2004). A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal," such as a petition for a writ of habeas corpus (as Nunez later filed). *Id.* at 278.

[27] *Nunez I*, 495 F.3d at 545. Providing such an exception in an appeal waiver is quite common. *See* King & O'Neill, *supra* note 4, at 213 ("Many defendants who waived their rights to

painstakingly questioned Nunez[28] to confirm that he "was knowingly and voluntarily entering into the Plea Agreement"[29] that would so drastically waive many of his rights.[30] The district court asked Nunez extensive questions, and his answers indicated that he understood the exchange, notably, that he was waiving his right to an appeal.[31]

Despite Nunez's agreement to waive his right to appeal, he nevertheless requested that his lawyer appeal the case.[32] Nunez's lawyer refused to do so, given Nunez's waiver of his right to appeal.[33] In response, Nunez filed a collateral attack,[34] charging counsel with

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review obtained clauses in their agreements that limited their exposure to unexpected negative results at sentencing.").

[28] This questioning is required by the Federal Rules of Criminal Procedure 11(b). Rule 11 was amended in 1999 to specifically require courts to explain to defendants those plea bargains that waive the right to appeal or collateral attack. *See* King & O'Neill, *supra* note 4, at 222, 224.

[29] Brief & Appendix of the United States, *supra* note 19, at 6.

[30] The following dialogue between Nunez and the Court indicates that the district court clearly and explicitly indicated to Nunez the consequences of accepting the plea bargain:

> *District Court*: Do you understand that, if you plead not guilty and you went to trial and were found guilty, you would have a right to appeal every aspect of your case, including any errors that occurred during the course of the trial? Do you understand that?
>
> *Petitioner*: Yes.
>
> . . .
>
> *District Court*: Do you understand that [by pleading not guilty] you would have a right to appeal the sentence you ultimately receive?
>
> *Petitioner*: Yes.
>
> *District Court*: Do you understand that in this plea agreement you are giving up your right to appeal, direct appeal, of any aspects of your case, including the validity of your plea and the sentence you ultimately receive? Do you understand that, sir?
>
> *Petitioner*: Yes.
>
> *District Court*: Do you understand, the only review rights you retain would be what is called a collateral attack, which would allow you to raise a claim of involuntariness or ineffective assistance of counsel? Do you understand that, sir? And that is only related to this waiver in the plea agreement? Do you understand that, sir?
>
> *Petitioner*: Yes.

Id. at 19-20 (alteration in original). This type of questioning is routine as required by the Federal Rules of Criminal Procedure. *See supra* note 28.

[31] Additionally, according to Cutrone (Nunez's counsel), counsel reviewed the written plea agreement with Nunez, explaining why Nunez should accept the plea. Brief & Appendix of the United States, *supra* note 19, at 4-5. "According to Cutrone, he would never allow a client to enter into a plea agreement unless [he] was certain a client understood . . . all the terms of the plea agreement." *Id.* at 5 n.2.

[32] Writing for the court, Judge Easterbrook noted that it was unclear whether Nunez did in fact ask his lawyer to file an appeal. *Nunez I*, 495 F.3d at 545. Still, for purposes of the opinion, the Court assumed that Nunez did make this request. *Id.* at 545. This Note will work from the same assumption.

[33] *Id.*

[34] Nunez filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255, a type of collateral attack. *Id.*; *see also supra* note 26.

providing ineffective assistance.[35] The collateral attack was denied by both the district court[36] and the Seventh Circuit.[37] Because Nunez entered into the plea voluntarily, the Seventh Circuit held that the plea was valid and that the waiver must therefore be enforced.[38] Since the waiver only allowed for two exceptions for appeal (i.e., an illegally high sentence[39] or an invalid waiver[40]), Nunez's claim of ineffective assistance of counsel fell within the provisions of the waiver and was therefore excluded as a

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[35] In his habeas corpus petition, Nunez claimed that he did not enter knowingly and voluntarily into the plea bargain and that his counsel failed to file an appeal upon his request. Nunez stressed that he did not speak English "and that, because during some consultations with his counsel an interpreter was not present . . . , he could not understand what counsel told him and therefore did not understand the plea bargain's terms." *Nunez I*, 495 F.3d at 546. The Court made short shrift of Nunez's claims of incomprehension, noting that the record clearly indicated that Nunez repeatedly told the district judge that he understood the consequences of entering into a plea. Therefore, the Court concluded, the plea was voluntary. The Court proceeded to analyze the facts based on this assumption that the waiver was in fact valid. *Id.* Of course, the holding of *Nunez* would not apply if the waiver was not valid. An invalid waiver would change the legal analysis drastically; a basic assumption and fact in *Nunez* as well as in the cases in the majority circuits discussed below is that the plea was voluntary and that therefore the waiver of appeal was valid. *See infra* note 40.

[36] United States v. Nunez, No. 04 C 3385, 2005 WL 2675043, at *3 (N.D. Ill. Oct. 18, 2005), *aff'd*, Nunez v. United States, 495 F.3d 544 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008).

[37] *Nunez*, 495 F.3d at 546, 548-49.

[38] *Id.* at 545-46; *see also infra* note 40.

[39] An illegally high sentence is one that exceeds the maximum punishment provided for in the statute. Nunez's sentence of 160 months was less than the statutory maximum provided for in 21 U.S.C. § 841(b). *See Nunez I*, 495 F.3d at 545.

[40] An invalid waiver can arise when a defendant does not voluntarily assent to it. For example, if the defendant does not understand the terms of the waiver because he or she does not speak English, a waiver can later be deemed invalid. However, as stated above, the district court questioned Nunez to determine that he was voluntarily pleading guilty and waiving his rights. Nunez told the judge that he understood English:

> *District Court:* Now, are you pleading guilty today of your own free and voluntary act?
>
> *Petitioner*: Yes.
>
> . . .
>
> *District Court:* Was this plea agreement read to you before you signed it?
>
> *Petitioner*: Yes.
>
> *District Court:* Was it read to you in Spanish?
>
> *Petitioner*: No.
>
> [*Nunez's Attorney*]*:* We went over it in English, Judge. I constantly asked him if he understood.
>
> *District Court:* Are you convinced you understand the provisions of this plea agreement?
>
> *Petitioner*: Yes.
>
> *District Court:* You are satisfied with it having gone over it with your lawyer in English, is that right?
>
> *Petitioner*: Yes.

Brief & Appendix of the United States, *supra* note 19, at 7-8. Nunez's attorney informed the district court that Nunez "often spoke in English and understood their exchanges when interpreters were not present." *Nunez I*, 495 F.3d at 546. As the Seventh Circuit determined, Nunez accepted the waiver voluntarily, and it was therefore valid. *Id.*

potential claim.[41] In sum, once Nunez agreed to waive his right to appeal, Nunez's counsel was not obliged to file an appeal, despite Nunez's wishes.[42] Breaking with seven other circuits, the Seventh Circuit held that the failure to file an appeal did not trigger an automatic ineffective assistance of counsel claim because Nunez validly waived his right to appeal.[43]

II. SUPREME COURT PRECEDENT

In all of the cases addressed in the majority circuits, the facts were almost indistinguishable from *Nunez*.[44] Each defendant was charged with a drug crime and accepted a plea bargain because the government had significant evidence against him. As in *Nunez*, the defendants' plea bargains contained a waiver of the right to appeal unless the sentence exceeded the statutory maximum or the waiver was invalid.[45] Despite the waiver, each defendant alleged that he asked his lawyer to appeal, and counsel failed to do so.[46] Yet, as opposed to the Seventh Circuit, the majority circuits held that even where a defendant waived the right to appeal, counsel was still required to file an appeal upon the defendant's request.[47]

How did the Seventh Circuit arrive at a conclusion so starkly different from the other circuits?[48] In order to address this striking

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[41] *Nunez I*, 495 F.3d at 546.

[42] If Nunez had asked his lawyer to file an appeal based on the claim that the plea bargain and waiver were involuntary, his lawyer would have been required to file the appeal. *Id.* at 547 ("A defendant who wants a lawyer to argue on appeal that the plea was involuntary has a right to that legal assistance."). Here, however, Nunez "never argued that the waiver [was] invalid" but "[n]onetheless, he told his lawyer to appeal." *Id.* at 545. Thus, according to the Seventh Circuit, a lawyer cannot determine independently whether a defendant voluntarily waived the right to appeal and then refuse to file the appeal. Rather, once the defendant acknowledges that the waiver was voluntary, the lawyer has no duty to file the appeal. *Id.* at 547.

[43] *Id.* at 548-49.

[44] *See* Watson v. United States, 493 F.3d 960, 961 (8th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 265 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 264 (5th Cir. 2007); Campusano v. United States, 442 F.3d 770, 772 (2d Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 790 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1194-95 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1263-64 (10th Cir. 2005).

[45] Each defendant was extensively questioned by the judge to ensure that there was an understanding of the terms of the plea agreement. *See, e.g.*, *Poindexter*, 492 F.3d at 266; *Sandoval-Lopez*, 409 F.3d at 1194; *Garrett*, 402 F.3d at 1263-64.

[46] *See Watson*, 493 F.3d at 962; *Poindexter*, 492 F.3d at 267 n.4; *Campusano*, 442 F.3d at 772; *Gomez-Diaz*, 433 F.3d at 791; *Sandoval-Lopez*, 409 F.3d at 1195; *Garrett*, 402 F.3d at 1264; *see also infra* note 190 and accompanying text. In all of the cases in the majority circuits (except for *United States v. Tapp* in the Fifth Circuit) as well as in *Nunez*, it was unclear whether the defendant actually requested that counsel file an appeal. However, the circuits proceed on the assumption that an appeal was in fact requested by the defendant. In *United States v. Tapp*, however, the lawyer actually filed the appeal but it was dismissed as untimely. *Tapp*, 491 F.3d at 264.

[47] *Watson*, 493 F.3d at 964; *Poindexter*, 492 F.3d at 268; *Tapp*, 491 F.3d at 266; *Campusano*, 442 at F.3d at 771-72; *Gomez-Diaz*, 433 F.3d at 790; *Sandoval-Lopez*, 409 F.3d at 1197-98; *Garrett*, 402 F.3d at 1263.

[48] It is important to note that in *Nunez I*, the Seventh Circuit denied that it was creating a circuit split by explicitly stating that it was *not* adopting a holding contrary to the other circuits. *See*

posture taken by the Seventh Circuit, it is crucial to look to the Supreme Court cases that influence both the Seventh Circuit and the majority circuits, most notably *Anders v. California*,[49] *Strickland v. Washington*,[50] and *Roe v. Flores-Ortega*.[51] Although the circuit courts each applied the same Supreme Court cases on a lawyer's responsibility to file an appeal, the conclusion reached by the majority circuits in applying Court precedent was distinctly opposite to the Seventh Circuit's application. Indeed, the Court's jurisprudence surprisingly supports both the Seventh Circuit and the majority circuits' approach. This anomaly is a result of

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Nunez v. United States (*Nunez I*), 495 F.3d 544, 548-49 (7th Cir. 2007) ("But we 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 derived . . . ."); *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 594.1 n.14 (3d ed. Supp. 2007) ("Citing the six circuits which have held that it constitutes ineffective assistance of counsel for a defense attorney to fail to file a requested notice of appeal where defendant had waived right to file direct appeal and collateral challenge in plea agreement, the Seventh Circuit . . . *does not decide the question*.") (emphasis added). Instead, the Seventh Circuit proposed an alternate holding at the end of its opinion that attempted to distinguish the *Nunez I* facts from the cases before the majority circuits. *Nunez I*, 495 F.3d at 548. As described above, *Nunez I* consisted of a collateral attack based on an ineffective assistance of counsel claim. *Id.* at 545; *see also supra* Part I.A. The court noted that Nunez's waiver contained not only a waiver of the right to direct appeal but also a waiver barring relief on collateral review. *Nunez I*, 495 F.3d at 548-49. Because of the collateral review waiver, the court opined that Nunez had effectively waived his right to make an ineffective assistance of counsel claim in a collateral attack. *Id*. Consequently, the main issue of whether counsel's failure to file a notice of appeal would entitle Nunez to a new appeal was a moot question because relief was barred regardless by the plea bargain's waiver of collateral review. *Id.* ("Nunez's waiver must be enforced and his collateral attack dismissed *whether or not* his lawyer should have filed an appeal on demand.") (emphasis added). As such, even though the *Nunez I* decision was a strongly-worded, five-page opinion adamantly advocating against the position of the other circuits for the majority of its text, it nevertheless did not actually create a circuit split.

However, after the Seventh Circuit's decision in *Nunez I*, 495 F.3d 544, *vacated*, 128 S. Ct. 2990 (2008), Nunez petitioned the Supreme Court for certiorari, specifically requesting that the Supreme Court resolve the "conflict among the circuits." *See* Petition for Writ of Certiorari, *supra* note 11, at *1. The Supreme Court granted certiorari but then vacated the judgment and remanded the case to the Seventh Circuit, ignoring the issue of a circuit split. Nunez v. United States (*Nunez II*), 128 S. Ct. 2990, 2990 (2008). Rather, upon the urging of the Solicitor General, the Court remanded the case in order to examine whether the Seventh Circuit misconstrued the scope of Nunez's waiver. *Id.* at 2990. More specifically, the purpose of the remand was to examine whether the collateral review waiver precluded Nunez's ineffective assistance of counsel claim. *Id.* at 2990-91 (Scalia, J., dissenting).

Upon remand though, the government confessed error and stated that Nunez's waiver did not preclude Nunez's claim for ineffective assistance of counsel. Nunez v. United States (*Nunez III*), 546 F.3d 450, 451-52 (7th Cir. 2008). The government urged the Seventh Circuit to consider the substantive issues of the collateral attack and to proceed on the merits. *Id.* at 452. Although the Seventh Circuit disagreed with the government's interpretation of the waiver, noting that the waiver did in fact preclude Nunez's collateral review, it nonetheless proceeded with a merits analysis of the collateral attack. *Id.* Still, as originally stated in *Nunez I*, the court concluded in *Nunez III* that a defendant who has waived the right to appeal via plea bargain is not entitled to a new appeal when counsel fails to file the appeal upon the defendant's request. *Nunez III*, 546 F.3d at 453-54. *Nunez III* therefore solidified the dicta-created circuit split originally discussed in *Nunez I.*

[49] 386 U.S. 738, 744 (1967) (holding that a lawyer cannot decide independently that an appeal would be frivolous).

[50] 466 U.S. 668, 687-88 (1984) (holding that a two-prong test is necessary to determine a claim of ineffective assistance of counsel).

[51] 528 U.S. 470, 478-79 (2000) (holding that a criminal defendant has a statutory right to appellate review, and that when counsel frustrates that right by failing to consult with the client regarding an appeal, counsel's performance is automatically ineffective).

the Supreme Court's failure to adopt a consistent approach and a bright-line, per se rule stating when a lawyer must file an appeal.

A. Supreme Court Cases on the Right to Effective Counsel and the Right to Appeal

The first case of relevance is *Anders v. California*, which occurred after an explosion of cases under the Warren Court concerning the indigent's right to counsel as required by the Sixth Amendment.[52] In *Anders v. California*, the Court held that a lawyer cannot make an independent decision that a defendant's appeal would be frivolous.[53] If counsel for a criminal defendant determines that a defendant's claims are frivolous after a careful examination, counsel must advise the court and request permission to withdraw.[54] The Court required, however, that counsel submit a "brief referring to anything in the record that might arguably support the appeal."[55] Following the submission of this brief (now known as an *Anders* brief),[56] the court (and not counsel) then decides whether the case is frivolous.[57] Counsel must therefore continue as the defendant's advocate until the court agrees with counsel's suggestion that further litigation would be frivolous.[58]

In *Anders*, the Court rejected the lawyer's power to dismiss an appeal as frivolous, thereby rejecting the lawyer's ability to assert his or her professional judgment concerning the nature of the litigation.[59] As the dissent noted, the *Anders* majority made the "cynical assumption that an appointed lawyer's professional representation to an appellate court . . . is not to be trusted" and that a lawyer could not properly or honestly determine the merits of an appeal.[60] Thus, in *Anders*, the Court adopted a mechanical rule requiring a lawyer to file an appeal (or at the very minimum, an *Anders* brief), regardless of his or her professional judgment as to the worthiness of the appeal.[61]

Despite the bright-line rule established in *Anders*, the Court took a different approach in *Strickland v. Washington* and rejected a

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[52] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[53] *Anders*, 386 U.S. at 738.

[54] *Id.* at 744.

[55] *Id.*

[56] *See* BLACK'S LAW DICTIONARY 96 (8th ed. 2004) (defining "Anders brief" as "a brief filed by a court-appointed defense attorney who wants to withdraw from the case on appeal based on a belief that the appeal is frivolous").

[57] Campusano v. United States, 442 F.3d 770, 776 (2d Cir. 2006).

[58] *Anders*, 386 U.S. at 744-45.

[59] *Id.*

[60] *Id.* at 746-47 (Stewart, J., dissenting) (noting that the majority makes the incorrect assumption that "lawyers appointed to represent indigents are so likely to be lacking in diligence, competence or professional honesty").

[61] *Id.* at 744-45 (majority opinion).

mechanical rule for determining ineffective counsel claims.[62] Under the *Strickland* standard, in order to show that counsel was ineffective, a defendant must demonstrate first that "counsel's representation fell below an objective standard of reasonableness," and second, that "there is . . . reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[63] The Court explicitly noted that they were rejecting the establishment of mechanical rules and that the ultimate inquiry would be one of "fundamental fairness" and "reasonableness" as opposed to a more concrete standard.[64] Because there is no exacting set of comprehensive rules that can take into account the wide variety of circumstances that a criminal defense lawyer might face, the Court held that there was no reason to create rules that would limit the independence of counsel.[65]

Following in the vein of *Strickland*, *Roe v. Flores-Ortega* also rejected a bright-line rule that counsel must always consult with the defendant regarding an appeal.[66] In *Flores-Ortega*, counsel failed to file a notice of appeal without the defendant's consent.[67] Instead of adopting a per se standard, the Court held that under the Sixth Amendment, counsel has a duty to *consult* with the defendant regarding an appeal when counsel has sufficient reason to believe that a rational defendant would want to appeal or when a defendant demonstrates to counsel an interest in appealing.[68] As in *Strickland*, the Court adopted a two-prong approach: first, assessing whether counsel's failure to file an appeal was deficient, and second, examining whether the deficient performance prejudiced a defendant's case. The Court stressed that courts must look to the "totality of circumstances," "tak[ing] into account all the information counsel knew or should have known."[69] Hence, in the context of an appeal, a defendant must show that there is reasonable probability that but for counsel's deficient failure to consult with the defendant about an appeal, the defendant would have appealed.[70] Prejudice will be presumed when the "defendant [was] denied the opportunity for a proceeding at all."[71]

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[62] Strickland v. Washington, 466 U.S. 668, 696 (1984).

[63] *Id* .at 687-88, 703.

[64] *Id* at 697.

[65] *Strickland*, 466 U.S. at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").

[66] Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000). The Court specifically stated, "[W]e refuse to make this determination as a per se . . . matter." *Id.* at 481 (emphasis omitted).

[67] *Id.* at 474-75.

[68] *Id.* at 479.

[69] *Id.* at 480.

[70] A defendant would not have to show that he or she would have prevailed on appeal but merely that he or she would appealed had the lawyer presented it as an option.

[71] Gomez-Diaz v. United States, 433 F.3d 788, 792 (2005).

Like *Strickland*, the *Flores-Ortega* court embraced a fuzzy standard, one that would not provide exacting guidance to lawyers and judges.

Despite the Court's explicit and clear rejection of a per se rule that counsel must always consult with the defendant regarding an appeal, the Court made a variety of ambiguous statements in *Flores-Ortega*. At first, the Court stated the definite rule that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[72] However, immediately following this bright-line rule, the Court expressly rejected the imposition of mechanical rules on counsel.[73] Specifically, the Court stated that while states can impose specific rules on attorneys to protect defendants' rights, the federal Constitution only requires that counsel make "objectively reasonable choices," whatever that may entail (i.e., there is no specific definition or rule defining "reasonable choice").[74] Additionally, the Court emphasized that the American Bar Association's ("ABA") Standards for Criminal Justice are merely guidelines and not rules.[75] Thus, despite the Court's original statement that a lawyer may not disregard specific instructions to appeal (ostensibly a categorical rule, reminiscent of *Anders*), the Court proceeded to reject any form of mechanical rules to be imposed on lawyers.[76]

In summary, as is evident in the trajectory from *Anders* to *Strickland* through *Flores-Ortega*, the Court adopted a mechanical rule in *Anders*, rejected a per se rule in *Strickland*, and then wavered in *Flores-Ortega* between a concrete rule and a more amorphous standard. The Court's wavering left a question hanging in the air: should mechanical rules be imposed on lawyers in an effort to protect criminal defendants' right to effective counsel? If yes, then the majority circuits' mechanical view should prevail, requiring a lawyer to file an appeal regardless of the defendant's waiver of appeal. Or should lawyers have the power to exercise their professional discretion at every twist and turn in the road? If yes, then the Seventh Circuit's approach would be correct, granting counsel the power to determine whether an appeal should be filed once a defendant has waived the right. As analyzed below, the

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[72] *Flores-Ortega*, 528 U.S. at 477. If counsel does not "file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit." *Id.* (alteration in original) (quoting Peguero v. United States, 526 U.S. 23, 28 (1999)) (internal quotations omitted).

[73] *Id.* at 478. The Court found that such rules are "not appropriate." *Id.* at 479 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

[74] *Id.* at 479.

[75] *Id.*; *see generally* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

[76] Similarly, in *Jones v. Barnes*, the Court rejected a per se ruling that counsel has to raise every non-frivolous argument. While a criminal defendant maintains a right to make certain fundamental choices regarding his or her case, he or she does not have a constitutional right to compel counsel to make every possible argument. Jones v. Barnes, 463 U.S 745, 751 (1983).

Supreme Court's inconsistent view of a lawyer's role is the root of the conflict within the circuits.

B. The Application of Supreme Court Precedent to Nunez v. United States

The Seventh Circuit's decision in *Nunez* does not conflict with the earlier holdings of the Supreme Court in *Anders*, *Flores-Ortega*, and *Strickland*. As discussed below, *Nunez* can be reconciled with the holdings of the Supreme Court in *Anders* and *Flores-Ortega*. At the same time, *Nunez* implicitly follows the precedent set forth in *Strickland*.[77]

Examining *Anders*, it can be argued that the *Anders* rule—that "a lawyer cannot make an independent decision about whether an appeal would be frivolous"—only applies when a defendant actually maintains a right to appeal.[78] Nunez did maintain a right to appeal if the sentence exceeded the statutory maximum or the waiver was invalid.[79] However, he waived his right to appeal based on post-sentence ineffective assistance of counsel when he accepted the plea bargain.[80] The *Anders* approach therefore is not applicable here since in this instance Nunez waived his right to appeal based on ineffective counsel.

Similarly, *Flores-Ortega* is also inapplicable in *Nunez*. In *Flores-Ortega*, the Court stated that filing an appeal is a purely "ministerial task" as opposed to a strategic one, and therefore counsel was required to file the appeal.[81] Quite the contrary, the decision to file an appeal in *Nunez* qualified as a strategic decision as opposed to "ministerial." Whereas an appeal can only help but not harm most defendants, Nunez faced the risk of harm if an appeal was filed. Specifically, because Nunez waived his right to appeal, the prosecutor could withdraw concessions already granted upon counsel's filing of an appeal.[82] Thus, given the fact that the appeal could not succeed, counsel's filing of the appeal could have harmed Nunez by resulting in the prosecutor taking the generous concessions off of the table.[83]

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[77] *Strickland*, 466 U.S. at 687-88.

[78] Nunez v. United States *(Nunez I)*, 495 F.3d 544, 547 (7th Cir. 2007) (citing Anders v. California, 386 U.S. 738 (1967)), *vacated*, 128 S. Ct. 2990 (2008).

[79] *Id.* at 545.

[80] *Id.* at 548.

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

[82] *See Nunez I*, 495 F.3d at 548; *see also* United States v. Cimino, 381 F.3d 124, 128 (2d Cir. 2004) ("[W]hen a defendant breaches his plea agreement, the Government has the option to . . . treat it as unenforceable."); United States v. Whitlow, 287 F.3d 638, 639 (7th Cir. 2002) ("[W]e have held that a defendant who breaks a promise not to appeal entitles the prosecutor to walk away . . . ."); United States v. Hare, 269 F.3d 859, 862 (7th Cir. 2001) ("If the defendant does not keep his promises, the prosecutor is not bound either.").

[83] *Nunez I*, 495 F.3d at 548 ("A defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless."). In the plea bargain, the prosecutor conceded to the dismissal of two

Moreover, *Nunez* falls outside of the scope of *Flores-Ortega* because unlike the defendant in *Flores-Ortega*, the defendant in *Nunez* waived his right to direct and collateral review.[84] In his concurring opinion to *Flores-Ortega*,[85] Justice Souter expressly noted that the facts of *Flores-Ortega* did not involve a defendant who waived his right to appeal as part of a plea agreement (as opposed to *Nunez*, which did).[86] Similarly, Justice Souter specifically recognized that there can be cases that fall "beyond the margin" of *Flores-Ortega*, in which counsel would not be required to consult with the defendant regarding an appeal.[87] For example, as he suggests, counsel would not have a duty to discuss an appeal with the defendant if the judge meticulously explained the appeal rights to the defendant during the plea colloquy.[88] As described above, the district court did in fact ask Nunez extensive questions, and his answers indicated that he understood the exchange.[89] Therefore, this exception noted by Justice Souter to the holding of *Flores-Ortega* certainly applies to *Nunez*.

Justice Ginsburg's concurrence in *Flores-Ortega* also makes evident the difference between *Flores-Ortega* and *Nunez*. The question of *Flores-Ortega*, according to Justice Ginsburg, is merely whether defense counsel can abandon the defendant without counseling him or her regarding appeal rights.[90] However, as Justice Ginsburg noted, the issue in *Flores-Ortega* is limited to the counseling aspect (i.e., lawyer must provide counsel or advice regarding an appeal) but does not rule on whether counsel has a requirement to actually *file* the appeal. The facts in *Nunez* extended beyond a mere consultation between a lawyer and client and instead concerned the actual filing of an appeal.

Nonetheless, even if one argued that *Nunez* fell within the scope of *Flores-Ortega*, it would not preclude the Seventh Circuit's holding because Nunez would not be able to meet the test set out in *Flores-*

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of the three drug charges against Nunez and a recommendation for a reduced sentence. *See supra* note 24 and accompanying text.

[84] United States v. Mabry, 536 F.3d 231, 240 (3d Cir. 2008) ("The *Flores-Ortega* Court made clear that a presumption of prejudice applies in the context of an ineffectiveness claim because an attorney's deficient performance deprives the defendant of his or her opportunity for an appellate proceeding. Notably, *Flores-Ortega* did not address whether this principle has any force, let alone controls, where the defendant has waived his right to appellate and collateral review."), *petition for cert. filed*, 77 U.S.L.W. 3366 (2008).

[85] Justices Souter, Stevens, and Ginsburg joined Part II-B of *Flores-Ortega* but dissented from Part II-A. *Flores-Ortega*, 528 U.S. at 488 (Souter, J., concurring in part and dissenting in part).

[86] "[T]here is no claim here that [defendant] waived his right to appeal as part of his plea agreement." *Id.* at 488 n.1.

[87] *Id.*

[88] Justice Souter does, however, dismiss this situation as highly unlikely. *Id.* ("Such a possibility is never very likely and exists only at the furthest reach of theory, given a defendant's right to adversarial representation."). Still, it certainly appears as if the district judge in *Nunez* meticulously explained the appeal rights to the defendant during the plea colloquy. *See supra* note 30.

[89] *See supra* notes 28-30 and accompanying text.

[90] *Flores-Ortega*, 528 U.S. at 493 (Ginsburg, J., concurring).

Ortega to determine ineffective counsel. As stated above, the first prong of this test requires that the defendant demonstrate that counsel has performed deficiently, taking into account all the information counsel knew and determining whether "a rational defendant would [have] want[ed] to appeal."[91] In *Flores-Ortega*, the Court specifically notes that in assessing the deficiency prong, "a highly relevant factor . . . will be whether the conviction follows a guilty plea . . . ."[92] Since a plea bargain limits the appealable issues, a plea signals to counsel that the defendant is seeking an end to judicial proceedings.[93] Therefore, counsel's performance might not be considered deficient in this circumstance because the defendant indicated through his behavior that he did not want to appeal the case. Consequently, counsel legitimately did not file an appeal.[94] Since Nunez's conviction followed a guilty plea, his behavior indicated to his attorney that he was seeking an end to judicial proceedings. As such, his counsel's performance was not deficient in failing to file the appeal, and Nunez fails to meet the first prong of *Flores-Ortega*, which requires deficient performance by counsel.[95] Hence, the *Flores-Ortega* standard required to show ineffective counsel is not satisfied in *Nunez*.[96]

Without explicitly stating so, the holding in *Nunez* implicitly follows the general philosophy set forth by the Court in *Strickland*. *Nunez* rejects the imposition of mechanistic rules upon lawyers, which may limit the ability of counsel to make decisions based on professional judgment, experience, and common sense.[97] In particular, the holding of *Nunez* does not restrict the wide latitude counsel maintains in making strategic decisions for the client[98] but rather, as required by *Strickland*, implicitly applies a standard of reasonableness when addressing whether an appeal should be filed by counsel.[99] Following in the vein of

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[91] *Id.* at 480 (majority opinion).

[92] *Id.*

[93] *Id.*

[94] *Id.* at 479.

[95] *Id.* at 480.

[96] Similarly, Nunez fails to meet the second prong of *Flores-Ortega*, which requires the defendant to demonstrate prejudice from counsel's deficient performance. *Id.* at 482. According to *Flores-Ortega*, prejudice will be presumed when the defendant is denied the opportunity for a proceeding at all. *Id.* at 483. Here, Nunez was in fact denied the opportunity for a proceeding by his counsel's failure to file an appeal. However, in *Flores-Ortega*, the Court specifically noted that in order for prejudice to be presumed, the defendant must have a right to the judicial proceeding that he or she did not receive as a result of counsel's deficient performance. *Id.* ("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.") (emphasis added). Quite the contrary here, Nunez maintained no right to an appeal proceeding because he waived the right in the plea bargain. Thus, the presumption of prejudice does not apply, and the second prong of the *Flores-Ortega* standard required to show ineffective counsel is not satisfied in *Nunez*.

[97] Nunez v. United States (*Nunez I*), 495 F.3d 544, 547 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008).

[98] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[99] *Id.* at 687-88.

Strickland, *Nunez* calls for a lawyer to focus on "the overriding mission of vigorous advocacy of the defendant's cause"[100] and to reasonably assess whether the filing of an appeal would be a wise and appropriate decision. As stated above, the filing of an appeal could only have harmed and not helped Nunez.[101] Additionally, Nunez demonstrated that he was seeking an end to judicial proceedings when he accepted the plea. Therefore, Nunez's counsel certainly acted with "reasonableness under prevailing professional norms"[102] in refusing to file an appeal as required by *Strickland*.

C. The Application of Supreme Court Precedent to the Majority Circuits

For the most part, the majority circuits applied *Anders* and *Flores-Ortega* in their analyses, the same Supreme Court cases used by the Seventh Circuit.[103] Unlike the Seventh Circuit, however, the majority circuits prioritize the need to protect a defendant's right to appeal, even after he or she has seemingly waived this right.[104]

Even though *Flores-Ortega* did not involve a defendant waiving his or her right to appeal, the majority circuits nonetheless apply *Flores-Ortega* to cases involving such a waiver. According to the majority circuits, *Flores-Ortega* stands for the unambiguous proposition that "it is only when the defendant either does not make his appellate wishes known or does not clearly express his wishes that an attorney has some latitude in deciding whether to file an appeal."[105] They focus on the "unequivocal"[106] language in *Flores-Ortega*, which states "that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[107] In essence, "*Flores-Ortega* reaffirms the time-honored principle that an attorney is not at liberty to disregard the appellate wishes of his client"[108]

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[100] *Id.* at 689.

[101] *See supra* note 82 and accompanying text.

[102] *Strickland*, 466 U.S. at 688.

[103] The majority circuits also looked at other cases but these three cases were the most key to their analysis as well as to the analysis in this Note. *See infra* note 110.

[104] *See, e.g.*, Campusano v. United States, 442 F.3d 770, 775 (2d Cir. 2006).

[105] United States v. Poindexter, 492 F.3d 263, 269 (4th Cir. 2007); *see also* Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); United States v. Tapp, 491 F.3d 263, 265-66 (5th Cir. 2007); *Campusano*, 442 F.3d at 777; Gomez-Diaz v. United States, 433 F.3d 788, 793 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1198 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1265-66 (10th Cir. 2005).

[106] *Poindexter*, 492 F.3d at 269.

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

[108] *Poindexter*, 492 F.3d at 269; *see also Watson*, 493 F.3d at 964; *Tapp*, 491 F.3d at 265-66; *Campusano*, 442 F.3d at 777 ("The concern animating *Flores-Ortega* . . . is a powerful one even where the defendant is the only person who believes an appeal would be worthwhile."); *Gomez-Diaz*, 433 F.3d at 793; *Sandoval-Lopez*, 409 F.3d at 1199 ("Nevertheless the client has the constitutional right, under *Flores-Ortega* . . . 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

for any reason. If the defendant can show that he or she requested an appeal and counsel failed to do so, prejudice will be presumed under the *Flores-Ortega* standard, and the defendant will be entitled to an appeal on an ineffective counsel claim.[109] As required by *Anders*, a lawyer who believes the requested appeal is frivolous should still file the appeal and submit a brief to the court explaining the frivolous nature of the defendant's claim.[110]

While the majority circuits' application of *Flores-Ortega* and *Anders* may be legally sound and reasonable, it ignores the directive in *Strickland* to avoid establishing "mechanical rules" in determining the standard for effective counsel.[111] Unlike the Seventh Circuit's analysis in *Nunez*, the majority circuits adopt a per se rule requiring a lawyer to file an appeal even if counsel's professional judgment indicates that such an appeal would be frivolous or even harmful to the defendant.[112] However, while adopting a bright-line rule for lawyers does indeed go against the general sentiment of *Strickland*, the majority circuits' interpretation of *Flores-Ortega* is legitimate. As described above, the Court in *Flores-Ortega* made a variety of ambiguous statements, first stating a bright-line rule[113] but then expressly rejecting the imposition of mechanical rules on counsel as "not appropriate."[114] Moreover, in *Flores-Ortega*, the Court continued to endorse *Anders*, which certainly can be categorized as a per se rule (given that it categorically prevents a lawyer from dismissing a defendant's appeal as frivolous).[115] Thus, although the majority circuits do not incorporate the *Strickland* philosophy, this omission is a reflection of the lack of clarity and inconsistency in the relevant Supreme Court jurisprudence rather than a dishonest application of the law.

III. THE ALLOCATION OF POWER BETWEEN COUNSEL AND CLIENT

This circuit split is complicated by the fact that both the Seventh Circuit and the majority circuits' holdings can be reconciled with

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three aces, and pray that when he draws three cards, he gets a royal flush."); *Garrett*, 402 F.3d at 1266-67.

[109] *Campusano*, 442 F.3d at 772.

[110] The majority circuits also look to other cases for support such as *Peguero v. United States*, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit.") and *Rodriquez v. United States*, 395 U.S. 327, 330 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings.").

[111] *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984); *see also supra* note 65.

[112] *Watson*, 493 F.3d at 964; *Poindexter*, 492 F.3d at 268; *Tapp*, 491 F.3d at 266; *Campusano*, 442 at F.3d at 771-72; *Gomez-Diaz*, 433 F.3d at 790; *Sandoval-Lopez*, 409 F.3d at 1197-98; *Garrett*, 402 F.3d at 1263.

[113] *Flores-Ortega*, 528 U.S. at 477 ("[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.").

[114] *Id.* at 479 (citing *Strickland*, 466 U.S. at 688).

[115] Anders v. California, 386 U.S. 738, 744 (1967).

Supreme Court jurisprudence in this area.[116] Notably, either viewpoint can be explained as consistent with or as distinguishable from *Anders* and *Flores-Ortega*.[117] This suggests that there is more to the circuit split than meets the eye, and what lies at the core of the courts' disagreement is much more than a varying interpretation of Supreme Court precedent. The courts' contrasting views reflect different philosophical approaches towards decision-making in the lawyer-client relationship. While the majority circuits embrace a model in which the client makes the fundamental choices, the Seventh Circuit adopts one in which the lawyer determines the tactical and strategic decisions. As discussed below, these two models are also present in the various codes of legal ethics, which fail to endorse one over the other. Consequently, similar to the Supreme Court cases, looking to the ethical guidelines for guidance regarding this circuit split provides yet another dead-end.

A. The Two Models of Lawyering

There are two major approaches to lawyering: "the traditional, lawyer-centered model and the participatory, client-centered approach."[118] In the traditional model, the autonomous lawyer maintains the discretion to assert his or her professional judgment over the significant decisions.[119] Under this model, by retaining counsel, the defendant has accepted a passive role and implicitly agreed to allow counsel to handle the case.[120] Decision-making is delegated to the lawyer in this paradigm because it is in the public's best interest to entrust legal issues to lawyers, the officers of our justice system.[121] On the other hand,

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[116] *See supra* Part II.B-C.

[117] *Id.*

[118] Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 5 (1998); *see also* Mark J. Osiel, Review, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2009 (1990) ("Two very different conceptions of the lawyer compete for ascendancy within Western society. Each claims both to describe the essential social role of the attorney and to prescribe the ethical standards entailed by it. The first conception enshrines the moral ideal of public service and conceives of the bar association—the expression of collective power—primarily as a necessary check against capitulation by individual attorneys in the face of antisocial demands by clients. The second conception upholds the ideal of loyalty to clients as the touchstone of professional ethics and conceives of bar associations as vigorous advocates for the legitimate interests of lawyers in a pluralistic society of freely competing interest groups.").

[119] *See* Uphoff & Wood, *supra* note 118, at 7.

[120] *See id.*; *see also* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 457-59; Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003, 1003 (1980) ("The traditional rule and practice has been to allocate decision-making authority around ends and means, with 'ends' being the client's decision and 'means' the lawyer's.").

[121] *See* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 876 (1998). *See generally* Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307 (1997) (arguing that a lawyer's choice of the paternalistic model of lawyering versus the

the client-centered model allows for a defendant to make active choices while counsel merely lays out the legal arguments, providing guidance and suggestions.[122] Still, the defendant maintains the authority over decision-making.[123] This model ensures that lawyers listen to their clients.

The Seventh Circuit explicitly rejects the client-centered model in *Nunez*, contending that there is nothing in the Sixth Amendment that requires a lawyer to function as "the client's puppet."[124] Alternatively, the Seventh Circuit opined that "[p]rotecting a client from a lay-person's folly is an important part of a lawyer's job[,]"[125] and a lawyer must therefore exercise his or her own professional discretion to provide this protection to the client. Furthermore, the court stated that it is a lawyer's duty "to do what's best for the client," and it is up to the lawyer to determine what this may entail.[126] Because Nunez instructed his counsel to file a potentially detrimental appeal (i.e., it could have resulted in the prosecutor withdrawing concessions), his lawyer was correct in exercising his discretion and ignoring Nunez's request to file an appeal.[127]

On the other hand, the majority circuits focus on protecting the defendant's rights within the lawyer-client relationship by granting the client the full autonomy and power to make decisions.[128] In this client-centered model, the client maintains the option to decide on filing an appeal because no corners should be cut when Sixth Amendment rights are at issue.[129] Even though it may harm a defendant if counsel files an appeal, this dangerous and risky decision to appeal remains with the defendant:

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autonomous client model ultimately affects the way one counsels a client in a significant way); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing same); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987) (arguing for an alternative allocation of power in the attorney-client relationship modeled on an informed consent doctrine).

[122] Paul R. Tremblay, *Critical Legal Ethics*, 20 GEO. J. LEGAL ETHICS 133, 148 (2007) (reviewing SUSAN D. CARLE, LAWYERS ETHICS AND THE PURSUIT OF SOCIAL JUSTICE (2005)); *see also* Uphoff & Wood, *supra* note 118, at 8-10.

[123] *See* Zeidman, *supra* note 121, at 876; Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 395 (2003).

[124] Nunez v. United States (*Nunez I*), 495 F.3d 544, 547 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008).

[125] *Id.* at 548.

[126] *Id.*

[127] Interestingly, Judge Easterbrook's holding in *Nunez* is consistent with his general economic analyses of the criminal justice system. For an interesting discussion on Judge Easterbrook's view of a criminal justice system in which defendants are subject to the uncontrolled discretion of individual public officials, see Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 43 (1988). In his general jurisprudence, Judge Easterbrook supports discretion in the criminal justice system as efficient, taking the power of decision away from the defendant. He argues that "discretionary arrangements designed to pursue efficiency do not have unfair effects." *Id.* at 44.

[128] *See* Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 265-66 (5th Cir. 2007); Campusano v. United States, 442 F.3d 770, 777 (2d Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 793 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1199 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1267 (10th Cir. 2005).

[129] *Campusano*, 442 F.3d at 777.

> Sometimes demanding that one's lawyer appeal is like demanding that one's doctor perform surgery, when the surgery is risky and has an extremely low likelihood of improving the patient's condition. But even though no one would think a doctor incompetent for refusing to perform unwise and dangerous surgery, the law is that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[130]

In adopting the per se rule that the lawyer must file the appeal at a defendant's request, the majority circuits are in effect stating: "We will let a defendant walk off a cliff but at least it will be his or her decision to do so."

B. The Models of Lawyering in the Ethics Guidelines

This philosophical disagreement embodied in *Nunez* and the majority circuits on the correct allocation of power between lawyers and clients is vigorously debated by lawyers, legal scholars, and the judiciary.[131] As described above, the Supreme Court has vacillated between the two models.[132] The Court has not endorsed either view and its jurisprudence indicates praise and criticism for both models of lawyering.[133] Moreover, little guidance is provided in the ethical rules of conduct promulgated by the bar. The rules are unclear, inconsistent, and ambiguous,[134] mirroring the ambiguity of the Supreme Court regarding the proper role of lawyers.[135] This lack of clarity is also reflected in treatises analyzing criminal defense ethics.[136]

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[130] *Sandoval-Lopez*, 409 F.3d at 1197 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)).

[131] *See* Uphoff & Wood, *supra* note 118, at 4; *see, e.g.*, State v. Robinson, 224 S.E.2d 174, 179 (N.C. 1976) ("Trial counsel, whether court-appointed or privately employed, is not the mere lackey or 'mouthpiece' of his client. He is in charge. . . ."). *But see* Comm'r Internal Revenue v. Banks, 543 U.S. 426, 436 (2005) ("[T]he client retains ultimate dominion and control over the underlying claim.").

[132] *See supra* Part II.A; *see, e.g.*, Jones v. Barnes, 463 U.S 745, 751 (1983) (holding that while a criminal defendant maintains a right to make certain fundamental choices regarding the case, he does not have a constitutional right to compel counsel to raise every nonfrivolous argument that he requests); McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) ("The *pro se* defendant must be allowed to control the organization and content of his own defense"); *id.* at 187-88 ("We recognize that a *pro se* defendant may wish to dance a solo, not a *pas de deux.* Standby counsel must generally respect that preference.").

[133] *See supra* Part II.

[134] Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1068 (2003).

[135] *See supra* Part II.A.

[136] *See, e.g.*, JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS § 5:4 (2d ed. 2007) ("A criminal defense attorney should . . . respect his or her client's desires with respect to how the client's case should be defended—or whether it should be defended at all . . . . After all, it is the client's life, livelihood, and/or liberty which is ultimately at stake in criminal proceedings. On the other hand, . . . [a]n attorney's professionalism, sense of justice, and his or her interest in the zealous representation of a client may lead him or her to believe that a client's desires . . . are inappropriate, unlawful, [or] unwise . . . . Must a client's every wish be accommodated in such circumstances? The answer is clearly no.").

An attempt to apply these ambiguous ethics rules to the question of whether a lawyer must file an appeal when a defendant has waived this right in a plea agreement provides few answers.[137] Both the Seventh Circuit and the majority circuits' approaches can be legitimately defended and justified upon a study of the different ethical rules of the legal professions.

For example, the ABA's Standards for Criminal Justice[138] set forth conflicting propositions for a lawyer's role regarding an appeal. Standard 4-5.2(a)(v) states that the decision to appeal is among the decisions to be made by the defendant.[139] Similarly, the comment to Standard 4-8.3 reads:

> While Counsel has the professional duty to give his or her client fully and forcefully a candid opinion concerning the case and its probable outcome on appeal, counsel's role, however, is only to advise. *The decision whether to appeal must be made by the client*.[140]

However, according to Standard 4-1.2(e), defense counsel is not the defendant's "alter ego," but rather serves as the professional representative of the accused.[141] According to the comment of that section, the lawyer is not "strictly [the] 'mouthpiece' for the client" but instead maintains an "independent stance as a professional representative rather than as ordinary agent."[142] Thus, the ABA Standards for Criminal Justice suggest contrary propositions: the decision to appeal must be made by the defendant but at the same time, the lawyer's role is to make professional judgments and not to merely serve as a defendant's agent.

Likewise, the ABA Model Rules of Professional Conduct[143] also present conflicting ideas as to a lawyer's role. Some rules explicitly endorse the lawyer-dominated model, which assumes that clients are not capable of independently making good decisions. For example, Model Rule 2.1 encourages a lawyer to apply independent professional discretion in representing a client.[144] In the same vein, comment 1 to Model Rule 1.3 maintains that a lawyer should exercise professional judgment in determining the means by which to pursue the case.[145] But

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[137] Despite this ambiguity pervading the legal world's perception of the lawyer-client relationship, studies demonstrate that criminal defense attorneys "most often articulated a professional role of independent advisor rather than agent for their client." Mather, *supra* note 134, at 1073.

[138] The ABA's Standards for Criminal Justice provide guidance to "policymakers and practitioners working in the criminal justice arena." *See* About Criminal Justice Standards, http://www.abanet.org/crimjust/standards/home.html (last visited Jan. 4, 2009).

[139] ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.2 (1993).

[140] *Id.* § 4-8.3 cmt. (emphasis added).

[141] *Id.* § 4-1.2(e).

[142] *Id.* § 4-1.2 cmt.

[143] The ABA Model Rules of Professional Conduct set out the "professional standards that serve as models of the regulatory law governing the legal profession." *Preface* to MODEL RULES OF PROF'L CONDUCT (2008).

[144] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008).

[145] *Id.* R. 1.3 cmt.

Model Rule 1.2 grants the client the ultimate authority to decide the goals the lawyer should pursue.[146] By conferring the ultimate authority to the client but allowing for the lawyer to exercise professional judgment, the Model Rules also hesitate as to the correct allocation of power between the lawyer and client.

The Restatement of the Law Governing Lawyers,[147] however, is somewhat clearer. Under section 21(3), "a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives."[148] Furthermore, section 22 provides a list of certain decisions that the client maintains authority to make but specifically does not include filing an appeal in this list.[149] Still, the Restatement does not unequivocally suggest that the decision to file an appeal remains within the lawyer's authority.

The "battle" between the lawyer-dominated model and the client-controlled one is played out in the legal ethics guidelines, without a clear winner. It is unlikely that the Supreme Court, the ABA, or the legal profession as a whole will fully adopt a preferred method of lawyering, in which the allocation of power between lawyer and client is clearly set out.[150] Thus, in determining whether a lawyer has a responsibility to file an appeal upon a defendant's request after a defendant has waived this right in a plea bargain, it is imperative to look beyond the models of lawyering presented in Supreme Court precedent and codes of legal ethics. This issue must therefore be determined through a policy analysis, examining the potential effects of the circuits' holdings on judges, lawyers, and defendants.

IV. A POLICY ANALYSIS: WHY THE SEVENTH CIRCUIT'S APPROACH IS PREFERABLE

Excusing a lawyer from filing an appeal upon a defendant's request after a defendant has waived this right in a plea agreement will be beneficial to judges, lawyers, and defendants. Under the Seventh Circuit's rule, lawyers are not forced to file futile and therefore frivolous appeals, thereby promoting both attorney and judicial efficiency. Furthermore, defendants are protected from the withdrawal of concessions already granted. Hence, from a public policy perspective, the Seventh Circuit's holding is preferable to the majority circuits' holding.

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146 *Id.* R. 1.2.

147 The *Restatement of the Law Governing Lawyers* clarifies the common law applicable to the legal profession. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

148 *Id.* § 21(3).

149 *Id.* § 22(1).

150 *See* Mather, *supra* note 134, at 1084 ("[R]eform will be difficult, even if we agreed on the direction to take to improve how lawyers act with their clients.").

A. Increasing Judicial Efficiency

The majority circuits' holding encourages frivolous litigation, thereby minimizing judicial efficiency. As the Seventh Circuit points out, Nunez's lawyer had a duty to avoid burdening the judiciary with frivolous litigation.[151] Indeed, filing a futile appeal creates a burden on an already overloaded appellate system. From 1982 to 2006, the number of appeals in the U.S. Court of Appeals grew by 138%.[152] In 2005, the number of federal appeals reached an all-time high after rising for eleven consecutive years.[153] In addition, the number of criminal appeals in the U.S. Court of Appeals has surged by 246% since 1980,[154] rising 4% over 2008.[155] Similarly, state appellate courts face growing caseloads as well, with appeals doubling about every decade since World War II.[156] In some states, because of overloaded dockets, an appellate case can take more than four years to finish.[157]

It is shocking that with such dramatic statistics, the majority circuits would encourage increasing the number of frivolous appeals. Any appeal, even an explicitly meritless one, makes use of judicial resources almost immediately.[158] When a party files an appeal, an appellate court begins to expend resources on the case as soon as it arrives at the courthouse.[159] Upon the case's arrival, the clerk confirms that the party has submitted the necessary filing fees and documents.[160] At the same time, court staff creates a schedule and collects the appellate

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[151] Nunez v. United States (*Nunez I*), 495 F.3d 544, 547 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008).

[152] The number of cases filed in the U.S. Court of Appeals grew from 27,946 in 1982 to 66,618 in 2006. U.S. DEP'T OF JUSTICE, BUREAU OF STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006), http://www.albany.edu/sourcebook/pdf/t5662006.pdf.

[153] Press Release from Karen Redmond, U.S. Courts, Fiscal Year 2006 Caseloads Remain at High Levels (Mar. 13, 2007), http://www.uscourts.gov/Press_Releases/caseload031307.html.

[154] The number of criminal appeals filed in the U.S. Court of Appeals grew from 4405 in 1980 to 15,246 in 2006. U.S. DEP'T OF JUSTICE, BUREAU OF STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006), http://www.albany.edu/sourcebook/pdf/t5672006.pdf. In his thirty-two year tenure on the Ninth Circuit, Judge Wallace watched the circuit's appeals more than quintuple. *See* Honorable J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 189 (2005).

[155] SUPREME COURT OF THE UNITED STATES, CHIEF JUSTICE'S YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2008), http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf.

[156] Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 283 (1989).

[157] *See* Commonwealth v. O'Berg, 880 A.2d 597, 602 (Pa. 2005) ("[T]here have been instances where a direct appeal took more than four years to be completed."); *see also* State v. Drakeford, 777 A.2d 202, 210 n.2 (Conn. App. Ct. 2001) (Landau, J., concurring) ("In the month that this case was argued, there were more than 300 cases ready for argument and almost 800 other appeals filed, but not yet ready for oral argument."); McGruder v. State, 886 So. 2d 27, 35 (Miss. Ct. App. 2004) ("It is readily apparent that the Court of Appeals is handling an overwhelming amount of the docket.").

[158] *See* Wallace, *supra* note 154, at 192.

[159] *See id.*

[160] *See id.*

materials (such as briefs) for review.[161] The assigned judge then must review the materials, enforce the schedule, and make sure that litigants comply with deadlines.[162] The appeal filed by a *Nunez*-like defendant in the majority circuits may be entirely frivolous, but it still requires courthouse attention, thereby wasting already limited judicial resources and reducing judicial efficiency.

Furthermore, the majority circuits overlook the initial historical reason behind the implementation of appeal waivers in plea bargains. When the Sentencing Guidelines went into effect in 1987, the number of criminal appeals surged, and as a result, waivers of appeal became popular among prosecutors.[163] In 1995, "the Department of Justice distributed a memorandum to federal prosecutors" encouraging them to regularly include appeal waivers in plea bargains.[164] The Department of Justice was concerned that "far too many government resources were being squandered on meritless appeals by defendants who were merely unhappy with their sentences but had no good legal claims."[165] Appeal waivers were also encouraged by judges facing the potential for backlog.[166] The Department of Justice's encouragement of appeal waivers was therefore specifically an attempt to prevent criminal appeals backlog in the federal judiciary.[167] Similarly, in the 1990s, some state appellate courts attempted to decrease backlog by eliminating the right of appeal in plea-based convictions.[168] Thus, by requiring counsel to file an appeal despite a defendant's waiver, the majority circuits neutralize the benefits afforded by appeal waivers and disregard the major purpose for its implementation and subsequent popularity.[169]

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[161] *See id.*

[162] *See id.*

[163] *See* King & O'Neill, *supra* note 4, at 219-20 ("Prior to the Guidelines, once a defendant entered a guilty plea, there was little to appeal. Because defendants waived most pretrial and trial rights when pleading guilty, and because sentencing appeals were futile, criminal appeals were primarily reserved for those few defendants who were convicted after trial. But the new sentencing statutes and the Guidelines changed that. The Guidelines provided hundreds of new sentencing issues for defendants to raise on appeal, even after pleading guilty. The hope of avoiding these sorts of challenges motivated prosecutors to include appeal waivers in plea agreements.").

[164] *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Examination of Criminal Defense Lawyers as Cause Lawyers* 41 (Berkeley Electronic Press, Working Paper No. 534, 2005), *available at* http://works.bepress.com/etienne/1.

[165] *Id.* at 41-42.

[166] *See* King & O'Neill, *supra* note 4, at 221.

[167] *See* Etienne, *supra* note 164, at 41-42.

[168] *See, e.g.*, State v. Bulger, 614 N.W.2d 103, 106-07 (Mich. 2000) ("By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and '[p]lea-based appeals constitute[d] approximately thirty percent of all appeals facing the Michigan Court of Appeals.' Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts." (quoting Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. DET. MERCY L.R. 431 (1996)) (citations omitted)).

[169] Indeed, the majority of circuits' holdings create the potential for extensive judicial proceedings that needlessly drain judicial resources. Specifically, in the majority of circuits, when a *Nunez*-like defendant files a writ of habeas corpus claiming ineffective assistance for counsel's failure to file an appeal, the district court must grant an evidentiary hearing to determine if the defendant did in fact instruct counsel to file an appeal. *See* Campusano v. United States, 442 F.3d

The majority of circuits are contributing to judicial ineffectiveness and slowing down an already bogged-down system by requiring counsel to file meritless appeals. But by excusing counsel from filing these frivolous appeals, as the Seventh Circuit suggests, judges will be free to spend time on the more serious judicial issues with actual, meritorious arguments. Of course, maximizing judicial efficiency should not trump a defendant's fundamental right to due process,[170] specifically the right of access to the courts,[171] by denying defendants the opportunity to appeal. But the defendants in *Nunez* and the majority circuit cases did receive due process and access to the courts. The plea bargains (and waivers of appeal) were supervised and approved by the court, thereby satisfying their due process right. Furthermore, the defendants were given the opportunity to make a choice (i.e., whether or not to accept the plea bargain). While a defendant's right to due process is fundamental to our system,[172] a defendant does not have the right to pursue a frivolous appeal.[173] Due process does not mean giving a defendant carte blanche to burden our judicial system by filing an appeal after agreeing not to do so.

B. Increasing Lawyer Efficiency and Commitment to the Practice of Criminal Law

In addition to draining judicial resources, requiring lawyers to file frivolous appeals after a defendant has waived the right to appeal creates an enormous burden on criminal defense attorney efficiency. In particular, because 90% of all criminal defendants are assigned public defenders, this weight falls on the already overworked public defender attorneys.[174] Increasing the workload requirements of public defenders is highly detrimental to attorney efficiency. Currently, the vast majority of public defenders' workloads exceed the ABA's suggested number of cases per year, with an annual average caseload of over 1000.[175] In fact,

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770, 776 (2d Cir. 2006). Either side can then appeal the district court's decision. *See id.* If the defendant succeeds in demonstrating that he or she requested that his or her lawyer file an appeal, a direct appeal will follow. *See id*. Under the Seventh Circuit's rule, however, none of these proceedings would be necessary. From the start, the defendant would have no claim of ineffective assistance because counsel was never required to file an appeal. As such, the defendant's habeas petition would be dismissed by the district court without any need for even an evidentiary hearing.

[170] *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971) ("[T]he right to due process reflects a fundamental value in our American constitutional system.").

[171] Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

[172] *See supra* note 170.

[173] Penson v. Ohio, 488 U.S. 75, 83 (1988).

[174] Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995).

[175] *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686-87 & n.40 (2007) ("On average, public defenders in Baltimore, for example, have been forced to handle as many as 1,163 misdemeanor cases per year, nearly three times the maximum number of cases that the American

their workload often prevents public defenders from meeting with clients until the day of trial.[176] Because their clients bear no cost for appealing, public defenders already spend a large part of their time arguing frivolous appeals (or filing *Anders* briefs).[177] Additionally, public defenders face the problem of inadequate resources such as nonfunctioning computers[178] and limited support staff.[179] Likewise, private defense attorneys who represent indigent defense cases on a contract basis face a similar problem of limited time and resources.[180] Because they are paid a flat fee for each defendant, they often are forced to operate "volume practices," in which they take on more clients than their resources can sufficiently support.[181] Given that these criminal defense lawyers and public defenders have limited time and resources, eliminating the requirement to file an appeal once a defendant agrees to an appeal waiver will enable them to concentrate their efforts and resources on value-producing work as opposed to futile appeals.

Moreover, requiring lawyers to file these appeals may deter attorneys from practicing criminal law, and more specifically, from providing criminal defense counsel to the indigent. With salaries skyrocketing for young lawyers entering the private sector as compared to much lower salaries for public defenders,[182] the incentive to represent the criminal indigent is already low. But by requiring the filing of this frivolous appeal, the best and the brightest of graduating law students with access to high-paying jobs will be even more disinclined to accept

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Bar Association has concluded one attorney can handle effectively . . . . Public defenders in New York are handling up to 1,600 cases per year."). According to the National Advisory Commission on Criminal Justice Standards and Goals, a lawyer's caseload per year should not exceed 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health or twenty-five appeals. *See* ABA Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System* 5 n.19 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

[176] *See* Caroline Wolf Harlow, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 8 tbl. 17 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (indicating that 13.6% of state inmates and 4.9% of federal inmates did not have contact with their counsel until trial).

[177] *See* Primus, *supra* note 175, at 682.

[178] *See id.* at 687 ("[T]he funding problems are so severe that attorneys do not have functioning computers, let alone adequate time and resources to investigate their cases.").

[179] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 2 (2001), http://www.ncjrs.gov/pdffiles1/bja/185632.pdf ("As populations and caseloads have increased, many public defender offices have been unable to obtain corollary increases in staff.").

[180] *See* Primus, *supra* note 175, at 688.

[181] *See id.*

[182] *See* Joseph Goldstein, *Law Firms Racing to Boast Best Pay for Associates*, N.Y. SUN, Nov. 2, 2007, at Bus. 1, *available at* http://www.nysun.com/business/law-firms-racing-to-boast-best-pay-for-associates/65738/ (noting that the starting salary for a first year associate at top firms in New York is around $160,000). Quite the contrary, public defenders make significantly less money. *See Criminal Litigation Careers: Public Defender*, VAULT, http://www.vault.com/nr/newsmain.jsp?nr_page=3&ch_id=242&article_id=22532151&cat_id=2813 (last visited Jan. 4, 2009) ("Salaries in the $40,000 range are common in big cities . . . . Federal public defenders make . . . as much as a $70,000 starting salary in New York or as low as $45,000 elsewhere.").

jobs as public defenders. Furthermore, those already practicing criminal defense of the indigent often experience "burnout" and abandon their jobs as public defenders for less challenging work.[183] Requiring a lawyer to file frivolous appeals will only add to the challenging nature of the work for these lawyers, increasing burnout and professional frustrations, thereby discouraging lawyers from continuing their work representing the indigent. In essence, the majority circuits' position will effectually serve as disincentive for lawyers to practice criminal defense law and represent the poor.

Prosecutor efficiency is also minimized when defense lawyers file these frivolous appeals. In general, since the surge in popularity of appeal waivers in the 1990s,[184] prosecutors have found appeal waivers to be extremely successful and helpful in reducing their work burden, minimizing the amount of resources expended and narrowing the issues raised on appeal.[185] However, when a defendant accepts a waiver of appeal in a plea bargain but then proceeds to file a meritless appeal, the prosecutor must respond with a brief or memorandum to the court.[186] Additionally, since the prosecutor can withdraw concessions when a defendant violates the terms of a plea agreement by filing an appeal,[187] the time spent by the prosecutor on working out the concessions for the initial plea bargain becomes a retroactive waste. The prosecutor then needs to readdress the case, utilizing resources to do so and minimizing efficiency.

In addition, the majority circuits' holding provides an incentive to the defendant to lie to the court, potentially damaging a lawyer's professional credibility. Specifically, defendants convicted through plea bargains will have an incentive to fraudulently claim that they instructed counsel to file an appeal and counsel failed to do so.[188] According to the majority circuits, an automatic claim for ineffective counsel is triggered if a defendant can prove this.[189] Indeed, in the cases from most of the circuits (except for the Fifth Circuit), the defendants claimed that an appeal was requested but counsel denied that the defendant had in fact

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[183] *See* Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1205 (2004) (noting that public defenders quickly find themselves "burned out, worn out, emotionally spent"); *see also Criminal Litigation Careers: Public Defender*, *supra* note 182 ("The public defender might be the unsung hero of the legal system. As a government employee, he makes relatively little for a litigator. He has little say over his cases and often works with the defendants that no one else wants. He doesn't have the resources that the district attorney's office has and must often engage in his own investigations. Many of his cases seem almost hopeless and, to the victims of crime, he appears almost as bad as his defendants.").

[184] *See supra* Part IV.A.

[185] King & O'Neill, *supra* note 4, at 230.

[186] *See id.* at 220, 231.

[187] *See, e.g.*, United States v. Whitlow, 287 F.3d 638, 640-41 (7th Cir. 2002) (holding that 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); United States v. Cimino, 381 F.3d 124, 128 (2d Cir. 2004) (same).

[188] *See* United States v. Farr, 297 F.3d 651, 657 ("We have observed in the past that criminal defendants frequently 'demonize' their lawyers.").

[189] *See supra* Introduction.

requested it.[190] Requiring a lawyer to defend his or herself from these types of wrongful accusations could potentially prove detrimental to his or her professional reputation.[191] Moreover, counsel may not have readily accessible evidence to demonstrate that the defendant never requested an appeal, and as a result, it could appear as if he or she provided ineffective counsel. Finally, a lawyer would have to attend an evidentiary hearing to prove that a request for an appeal was never made, using time and resources to do so, again minimizing attorney efficiency.

C. Protecting Defendants

Finally, while the majority circuits claim to be concerned about affording defendants their Sixth Amendment rights, it is the Seventh Circuit's approach that sufficiently provides protection to defendants. When a defendant files an appeal after agreeing to a waiver of appeal in a plea bargain, the plea bargain becomes worthless to the government. The concessions originally offered no longer provide any benefit to the government since the prosecutor will now have to expend resources responding to the defendant's appeal.[192] As such, once a defendant's counsel files an appeal notwithstanding the waiver, the prosecutor has the option to withdraw concessions already granted in response to the defendant's breach of the agreement.[193] Given the fact that the appeal cannot succeed (since the defendant has already accepted the plea),[194] counsel's filing of the appeal only serves to harm the defendant by potentially resulting in the prosecutor taking the concessions off of the

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[190] *See* Watson v. United States, 493 F.3d 960, 962 (8th Cir. 2007); United States v. Poindexter, 492 F.3d 263, 267 & n.4 (4th Cir. 2007); Campusano v. United States, 442 F.3d 770, 772 (2d. Cir. 2006); Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1195 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1264 (10th Cir. 2005); *see also supra* note 46 and accompanying text.

[191] Courts have expressed concern over legal proceedings that negatively affect a lawyer's career. *See* United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) (holding that after a district court sanctions a lawyer for an ethical violation, the lawyer can appeal the decision because the sanction may be detrimental to lawyer's career). Additionally, courts stress the importance of maintaining a lawyer's professional reputation. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part) ("[M]ost lawyers are wise enough to know that their most precious asset is their professional reputation."); Addington v. Texas, 441 U.S. 418, 424 (1979) (noting that reputational interests "are deemed to be more substantial than mere loss of money"); United States v. Gonzales, 344 F.3d 1036, 1046 (10th Cir. 2003) ("An attorney's professional reputation undoubtedly is his or her most valuable asset.").

[192] United States v. Whitlow, 287 F.3d 638, 640-41 (7th Cir. 2002); United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001) ("An appeal requires the prosecutor's office to spend time researching the record, writing a brief, and attending oral argument. All of this time could be devoted to other prosecutions; and a promise that frees up time may induce a prosecutor to offer concessions.").

[193] *See supra* note 82.

[194] When a defendant appeals despite an appeal waiver, the government may file a motion to dismiss the appeal based upon the waiver. *See* United States v. Buchanan, 131 F.3d 1005, 1008 (11th Cir. 1997). An appellate court will dismiss the appeal as meritless since the defendant waived the right to appeal. *See Sandoval-Lopez*, 409 F.3d at 1197.

table.[195] Also, if prosecutors believe that appeals will be filed despite defendants' promise not to do so, prosecutors will be more reluctant to make concessions to defendants.[196] Prosecutors, Judge Easterbook of the Seventh Circuit notes, "cannot be fooled in the long run"[197] and "[d]efendants must take the bitter [waiver of appeal] with the sweet [concessions]."[198]

Despite the potential detrimental effect of an appeal on the defendant, the majority circuits hold that this decision should lie in the hands of the defendant and that protecting defendants should mean providing them with the right to make such decisions.[199] Under that rationale, as long as counsel informs the defendant that the appeal could be harmful and risky, the defendant should make the final decision. However, there are many instances in which the legal system protects clients by removing their right to decide. For example, in an effort to protect a client from a wily lawyer, a lawyer cannot contact the opposing client without permission from the opposing client's lawyer.[200] A client cannot agree to waive this rule and instead, the right to waive it belongs to the client's lawyer.[201] A client also cannot agree to pay an unreasonable attorney's fee.[202] These rules remove choice from clients in an effort to promote their best interests. Similarly, by removing the decision to appeal from defendants, the Seventh Circuit is protecting them from making poor decisions that will likely harm them.

As discussed above, given that public defenders and court-appointed attorneys have limited resources, eliminating a lawyer's duty to file an appeal after a defendant has waived the right to appeal will enable criminal defense attorneys to concentrate their time, money, and resources defending criminals awaiting trial, which will improve the overall quality of defendants' representation.[203] While the Seventh Circuit's approach does not provide an avenue for the defendant to fruitlessly pursue frivolous claims, it does protect the benefits a

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[195] Nunez v. United States (*Nunez I*), 495 F.3d 544, 548 (7th Cir. 2007), *vacated*, 128 S. Ct. 2990 (2008); *see, e.g.*, *Hare*, 269 F.3d at 860; United States v. Wells, 211 F.3d 988, 995 (6th Cir. 2000) ("[A] defendant who breaches a plea agreement forfeits any right to its enforcement."); *see also supra* Part II.B.

[196] United States v. Wenger, 58 F.3d 280, 282 (1995) ("Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal. Although any given defendant would like to obtain the concession and exercise the right as well, prosecutors cannot be fooled in the long run.").

[197] *Id.*

[198] *Id.* at 283 ("[Defendant] wants the benefits of the existing agreement but not the principal detriment. That is the one outcome that would be most destructive of the plea agreement process. Defendants must take the bitter with the sweet. It is all or nothing, and [defendant] most assuredly does not want to start over and face the prospect of a trial.").

[199] *See supra* Part III.A.

[200] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008). This rule is commonly referred to as the "No Contact" rule.

[201] *Id.*

[202] *Id.* at R. 1.5(a).

[203] *See supra* Part IV.B.

defendant has already received. It also takes into account the general well-being of criminal defendants throughout the system.

CONCLUSION

This circuit split between the Seventh Circuit and the majority circuits looms over the criminal justice system and has the potential to wreak havoc and uncertainty among criminal defense lawyers and defendants.[204] This dangerous ambiguity is not limited to courts that fall within the Seventh Circuit's jurisdiction.[205] In fact, in July 2008, the Third Circuit sided with the Seventh Circuit and dismissed the majority circuits' approach.[206] Thus, given the wide sweeping effect of this circuit split in criminal cases, it would behoove the Supreme Court to clarify its jurisprudence by holding that that a plea bargain in which a defendant waives the right to appeal relieves counsel of a duty to file an appeal.[207]

Nonetheless, there is a different approach for attorneys and judges to consider if the approach of the majority circuits prevails. A defendant can waive constitutional rights in exchange for concessions, including the Sixth Amendment right to the assistance of counsel.[208] Defense attorneys and prosecutors could hypothetically contract around

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[204] Indeed, district courts within the Seventh Circuit have already begun citing to *Nunez* to support the proposition that a defendant who has waived the right to appeal via plea bargain is not entitled to a new appeal when counsel fails to file the appeal upon the defendant's request. *See, e.g.*, Salas v. United States, No. IP 05-111-H/F-CR-01, 2007 WL 3286611, at *3 (S.D. Ind. Nov. 6, 2007) (holding that a defendant does not receive ineffective assistance of counsel when counsel fails to file an appeal after the defendant has waived the right to appeal in a plea bargain); Hermann v. United States, No. 05-3277, 2007 WL 2700161, at *1 (C.D. Ill. Sept. 10, 2007) (same).

[205] *See, e.g.*, United States v. McCormick, No. 01-80306, 2008 WL 5110574, at *6 (E.D. Mich. Dec. 2, 2008) ("[D]efendant cannot show that counsel was ineffective for failing to file a direct appeal, because defendant waived his right to appeal . . . ."); United States v. Walls, No. 05-92, 2008 WL 927926, at *8 (E.D. Ky. Apr. 4, 2008) ("[T]he defendant's valid waiver of his right to appeal dooms his underlying ineffective assistance of counsel claim . . . .").

[206] In *United States v. Mabry*, the Third Circuit stated:

> The analysis employed in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver. While a defendant may be entitled to habeas relief if his attorney ineffectively fails to file a requested appeal because it is presumed to be prejudicial under *Flores-Ortega*, if that same defendant has effectively waived his right to habeas, he cannot even bring such a claim unless the waiver fails to pass muster under an entirely different test: one that examines its knowing and voluntary nature and asks whether its enforcement would work a miscarriage of justice . . . . We, therefore, will part ways with the approach taken by the majority of courts of appeals. Although vacated on other grounds, the *Nunez* opinion of the Court of Appeals for the Seventh Circuit presents the proper focus.

United States v. Mabry, 536 F.3d 231, 241-42 (3d Cir. 2008).

[207] This would not require the Supreme Court to overturn any precedents. As described above, the Seventh Circuit's holding can be reconciled with previous Supreme Court jurisprudence in this area. *See supra* Part II.B. Rather, such a holding would serve as a clarification to previous Court cases (such as *Anders v. California*, 386 U.S. 738 (1967), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)) by further defining when a lawyer has a responsibility to file an appeal.

[208] *See* United States v. Hare, 269 F.3d 859, 860 (7th Cir. 2001); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003).

the requirement for counsel to file an appeal by explicitly including a waiver of the right to counsel as part of an appeal waiver plea agreement. By doing so, counsel would be exempt from filing the appeal not because the defendant waived the right to appeal but rather because the defendant waived the right to counsel. Assuming that the plea bargain was valid,[209] this process would bypass those defendants requesting an appeal following the acceptance of the plea bargain. Like the Seventh Circuit approach, this method would maximize judicial and attorney efficiency by preventing frivolous appeals. Defendants would also benefit from this approach. In particular, they would not be able to breach the plea agreement by filing an appeal, thereby preventing prosecutors from withdrawing the concessions offered in the plea bargain.[210]

Nonetheless, a defendant might be more hesitant to waive the right to counsel than to waive the right to appeal. Additionally, there is something discomforting about regularly encouraging and compelling a defendant to waive the constitutional guarantee of counsel, something that seems inherently and philosophically in conflict with the Sixth Amendment. As such, the Seventh Circuit's holding is preferable and should be adopted by the Supreme Court.[211] By dispensing with a lawyer's requirement to file an appeal upon a defendant's request after he or she has waived the right in a plea bargain, the Seventh Circuit created a policy that benefits all participants in the criminal justice system while abiding by both Supreme Court precedent and models of legal professional responsibility.

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[209] To be valid, the plea bargain must be "voluntary" and "intelligent." Brady v. United States, 397 U.S. 742, 747 (1970) (quoting Boykin v. Alabama, 395 U.S. 238, 242 (1969)). If the plea bargain was not valid, neither the waiver of appeal nor the waiver of counsel would be effective. *See supra* note 35.

[210] Of course, if the defendant claimed the waiver was involuntary, then counsel would still need to file an appeal on the basis that waiver was invalid despite the defendant's waiver of the right to counsel. *See supra* note 42.

[211] In his appeal to the Supreme Court, Nunez was represented by the prominent and large firm Winston and Strawn, which has an active appellate and Supreme Court practice. *See* Petition for Writ of Certiorari, *supra* note 11, at *1; *see also* WINSTON & STRAWN LLP, http://www.winston.com/index.cfm?contentID=19&itemID=156&itemType=20&pageID=320 (last visited Feb. 6, 2009). It therefore seems likely that Nunez will petition again for certiorari. Additionally, given the import of the circuit split and the fact that the Court previously granted certiorari in this case, it is also likely that the Court will agree to hear it again.

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