

No. 17-

IN THE
Supreme Court of the United States

MARIO ARJUNE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

**On Petition for a Writ of Certiorari
to the New York Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), trial counsel’s performance of the “ministerial task” of filing a notice of appeal satisfies the constitutional obligation to “consult” with a defendant about “the advantages and disadvantages of taking an appeal” and to make “a reasonable effort to discover the defendant’s wishes.”

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

The parties appearing here and below are: (1) Mario Arjune, Petitioner here and Appellant below; and (2) the State of New York, Respondent here and Appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED..	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION...	10
I. THE NEW YORK COURT OF APPEALS’ DECISION IS CONTRARY TO THIS COURT’S DECISION IN <i>ROE V. FLO-</i> <i>RES-ORTEGA</i>	10
A. Trial counsel’s failure to “consult” with Mr. Arjune about his right to appeal constitutes ineffective assistance of counsel under <i>Flores-Ortega</i>	10
B. Counsel’s failure to perfect the appeal and to provide adequate consultation satisfies the “prejudice” prong as articu- lated in <i>Flores-Ortega</i>	15
II. TRIAL COUNSEL’S DUTY TO CONSULT ABOUT AN APPEAL IS AN IMPORTANT AND RECURRING QUESTION	17

TABLE OF CONTENTS—continued

	Page
III. THIS CASE IS A CLEAN VEHICLE TO CLARIFY TRIAL COUNSEL’S OBLIGATIONS IN STATES THAT PERMIT GAPS IN LEGAL REPRESENTATION BETWEEN TRIAL AND APPEAL	20
A. Mr. Arjune properly preserved the issue presented	20
B. The Sixth Amendment issue is the only issue presented	21
C. The facts of this case directly implicate <i>Flores-Ortega</i>	21
CONCLUSION	23
APPENDICES	
APPENDIX A: Decision of the New York Court of Appeals, Affirming Denial of Defendant-Appellant’s Petition for a Writ of Error <i>Coram Nobis</i> , <i>People v. Arjune</i> , 89 N.E.3d 1207 (N.Y. Nov. 20, 2017)	1a
APPENDIX B: Order of the New York Court of Appeals, Granting Appellant Leave to Appeal, <i>People v. Arjune</i> , 27 N.E.3d 123 (N.Y. July 13, 2016)	46a
APPENDIX C: Order of the Supreme Court of New York, Appellate Division, Denying Appellant’s Petition for a Writ of Error <i>Coram Nobis</i> , <i>People v. Arjune</i> , 28 N.Y.S.3d 329 (N.Y. App. Div. Apr. 13, 2016)	47a

TABLE OF AUTHORITIES

CASES	Page
<i>Lee v. United States</i> , 137 S. Ct. 1958 (2017).....	11, 17
<i>New York v. Andrews</i> , 17 N.E.3d 491 (N.Y. 2014).....	19
<i>New York v. Perez</i> , 12 N.E.3d 416 (N.Y. 2014)	19
<i>New York v. Syville</i> , 938 N.E.2d 910 (N.Y. 2010).....	7, 20
<i>New York v. West</i> , 789 N.E.2d 615 (N.Y. 2003).....	20
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	<i>passim</i>
<i>Strickland v. Washington</i> , 466 U.S. 668 (2000).....	15

CONSTITUTION AND STATUTES

U.S. Const. amend VI.....	1
Mont. Code Ann. § 46-8-103(1)	17
N.C. Gen. Stat. § 7A-451(b)(6)	18
N.H. Rev. Stat. Ann. § 604-A:3.....	17
N.J. Stat. Ann. § 2A:158A-5.....	17
N.M. Stat. Ann. § 31-15-10(C)	18
N.Y. Jud. Law § 606.5(b).....	19
N.Y. Jud. Law § 671.3	5, 19
N.Y. Jud. Law § 821.2(a).....	19
N.Y. Jud. Law § 1015.7	19
Nev. Rev. Stat. Ann. § 178.397	17
12 R.I. Gen. Laws § 12-15-3.....	18
S.D. Codified Laws § 7-16A-10	18
Utah Code Ann. § 77-32-304(1)(b)	18
Va. Code Ann. § 19.2-159(C).....	18

TABLE OF AUTHORITIES—continued

	Page
COURT RULES	
Ark. R. App P. – Crim. 16(a)	17
Md. R. 4-214(b)	17
Mass. R. App. P. 3(e)	17
Miss. R. App. P. 6(b)	17
N.H. Sup. Ct. R. 32(1)	17
N.D. R. Crim. Proc. 44(a)	18
Pa. R. Crim. P. 122(B)(2)	18
S.C. App. Ct. R. 602(e)(1)	18
Tenn. R. Crim. P. R. 37(e)(3)	18
Wash. Sup. Ct. Crim. R. 3.1(b)(2)	18
W. Va. R. Crim. Proc. 44(a)	18
Wis. R. App. Proc. 809.30(2)	18
Wyo. R. Crim. Proc. 44(b)(8)	18
OTHER AUTHORITIES	
Am. Bar Ass’n, ABA Standards for Criminal Justice (2d ed. 1980)	5, 6, 18
Lissa Griffin, 1 <i>Federal Criminal Appeals</i> (Mar. 2018 update)	18

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mario Arjune, respectfully petitions for a writ of certiorari to review the opinion of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 89 N.E.3d 1207 and reprinted in the petition appendix at 1a–45a (“Pet. App.”). The order of the Appellate Division, Second Department, of the Supreme Court of New York denying the writ of error *coram nobis* is reported at 138 A.D.3d 877 and is reprinted in the appendix. Pet. App. at 47a.

JURISDICTION

The New York Court of Appeals entered its judgment on November 20, 2017. Pet. App. at 45a. On February 7, 2018, Justice Ginsburg extended the time within which to file a petition for writ of certiorari to and including April 19, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution’s Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend VI.

INTRODUCTION

The New York Court of Appeals erroneously concluded that trial counsel satisfies his constitutional duties to a convicted client by filing a notice of appeal without taking any further steps to consult with his client or perfect the appeal. That decision conflicts

with this Court’s rule announced in *Roe v. Flores-Ortega*, which recognized that “in the vast majority of cases, . . . counsel ha[s] a duty to *consult* with the defendant about an appeal.” 528 U.S. 470, 481 (2000) (emphasis added). This Court defined the constitutionally imposed “duty to consult” as requiring both (1) “advising the defendant about the advantages and disadvantages of taking an appeal” and (2) “making a reasonable effort to discover the defendant’s wishes.” *Id.* at 478. Completing the “ministerial task” of filing a notice of appeal achieves neither of these aims. *Id.* at 474.

Mario Arjune’s lawyer completed the “ministerial task” of filing a notice of appeal. Despite knowing that Mr. Arjune would face significant collateral consequences because of his felony conviction (including potential deportation), counsel allowed Mr. Arjune’s right to appeal to lapse. He did so without further contact—let alone consultation—with his client. Counsel never talked to Mr. Arjune about (1) his right to appeal; (2) the legal consequences of not appealing; (3) the availability and process of obtaining appointed appellate counsel; and (4) the procedures for obtaining poor person relief. As a result, Mr. Arjune lost his ability to appeal his felony conviction.

Four years after filing a notice of appeal, counsel received a notice that the State had moved to dismiss the appeal as abandoned for failure to perfect. Counsel once again failed to make any effort to protect Mr. Arjune’s right to appeal. He did not contact Mr. Arjune about the notice or clarify that his role as trial counsel was complete.

Trial counsel’s conduct amounted to ineffective assistance of counsel under the test set forth in *Flores-Ortega*. But the New York Court of Appeals denied Mr. Arjune’s petition for writ of error *coram nobis*.

That decision contravenes *Flores-Ortega*. Counsel failed to consult Mr. Arjune about the appeal, and that failure was constitutionally deficient.

STATEMENT OF THE CASE

Petitioner Mario Arjune immigrated to the United States from Suriname in 2006. Pet. App. at 2a. Mr. Arjune—who possesses only a fifth-grade education—has “severe cognitive limitations” including “extremely low” verbal intellectual functioning, “borderline” nonverbal cognitive functioning, and “low, if any literacy” in English. *Id.* at 24a (Rivera, J., dissenting).

In 2008, Mr. Arjune was a 22-year old construction worker with no criminal history when he was attacked by a group of seven men at a local restaurant. Acting in self-defense, Mr. Arjune stabbed one of his assailants and hid the knife. He was arrested on charges arising from the fight. *Id.* at 22a (Rivera, J., dissenting). At trial, Mr. Arjune’s retained counsel successfully asserted a justification defense. *Id.* at 3a. Mr. Arjune was acquitted of second degree murder and first degree assault. He was convicted of tampering with physical evidence and fourth degree criminal possession of a weapon. *Id.*

At his sentencing hearing, neither the trial judge nor Mr. Arjune’s counsel explained or even mentioned Mr. Arjune’s right to appeal. *Id.* at 23a (Rivera, J., dissenting). However, the court clerk noted, “[l]et the record reflect the defendant is being handed a notice of appeal.” *Id.* at 3a. The record does not elucidate what information that document contained. The State claims that Mr. Arjune—a first-time offender—received a copy of the State’s standard “Notice of Defendant of His Right to Appeal.” That notice provides a cursory explanation of a defendant’s right to appeal and to seek leave to prosecute the appeal as a poor

person upon a showing of financial inability. *Id.* It “neither informs defendant of how to establish proof of financial inability nor how to retain counsel or obtain a transcript utilizing poor person relief.” *Id.* at 39a (Rivera, J., dissenting). The trial judge subsequently sentenced Mr. Arjune to 1–3 years of imprisonment. *Id.* at 3a.

Mr. Arjune’s trial counsel filed a notice of appeal the following day. He did so without informing Mr. Arjune or consulting him about the advantages or disadvantages of appealing. *Id.* at 3a–4a. The record does not specify whether Mr. Arjune and his trial counsel discussed an appeal prior to sentencing. By all indications, however, it appears that counsel “did *not* speak with [Mr. Arjune] during or after his trial about an appeal.” *Id.* at 4a (emphasis added). In fact, trial counsel later averred that “he did not remember speaking to [Mr. Arjune] about how to perfect the appeal.” *Id.* at 5a. He admitted that he had “no recollection of any post-sentencing contact with defendant or defendant’s family.” *Id.* at 23a (Rivera, J., dissenting). Trial counsel neither warned Mr. Arjune that his conviction could subject him to deportation nor advised Mr. Arjune about obtaining poor person relief. *Id.* at 4a–5a. Had Mr. Arjune known about the deportation consequences of his conviction, his right to appeal, or his right to obtain the services of a public defender, he would have pursued the appeal. Pet. App. at 24a.

Trial counsel’s deficient performance not only deprived Mr. Arjune of his right to appeal, but also plainly violated the rules of the Appellate Division, Second Department, of the Supreme Court of New York, which requires counsel to provide “written notice to his client advising him of the right to appeal” containing, at the very least, instructions on how to

obtain poor person relief and take initial steps towards perfecting an appeal.¹ These rules are especially critical in jurisdictions like New York that permit a gap in legal representation between sentencing and appeal; they compensate for the lack of ongoing representation and ensure that trial counsel cannot simply desert a client post-conviction. These local rules are also broadly consistent with well-established ABA standards on continuing representation, which require appointed or retained trial counsel to “continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time.” Am. Bar Ass’n, ABA Standards for

¹ See N.Y. Jud. Law § 671.3(b):

In counsel’s written notice to his client advising him of the right to appeal or to make application for permission to appeal or for a certificate granting leave to appeal, counsel shall also set forth: . . . (3) the appellant’s right, upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application to the appellate court for the following relief: for the assignment of counsel to prosecute the appeal; for leave to prosecute the appeal as a poor person and to dispense with printing; and if stenographic minutes were taken, for a direction to the clerk and the stenographer of the trial court that a typewritten transcript of such minutes be furnished without charge to the appellant’s assigned counsel or, if appellant prosecutes the appeal *pro se*, to appellant[; and] (4) In such notice counsel shall also request the written instructions of his client, and if the client thereafter gives counsel timely written notice of his desire to make application for permission to appeal or for a certificate granting leave to appeal or to apply for the relief provided in paragraph (3) of this subdivision, or to make any one or all of these applications, counsel shall proceed promptly to do so.

Criminal Justice 21-2.2(a) (2d ed. 1980) (“ABA Standards”).

In March 2010, having received no communication from counsel, Mr. Arjune was released from prison. Pet. App. at 3a. Mr. Arjune remained unaware of his right to appeal, and had depleted his and his family’s funds at trial. He did not retain new counsel or move for poor person relief. *Id.* Absent representation, he did not perfect his appeal despite the timely-filed notice of appeal. *Id.*

In October 2013, the State moved in the Appellate Division of the Supreme Court of New York to dismiss the appeal as abandoned. *Id.* Pursuant to N.Y. Crim. Proc. Law § 470.60, the State mailed a required notice to Mr. Arjune’s counsel and Mr. Arjune at his last known place of residence. *Id.* at 4a. Neither Mr. Arjune nor his trial counsel responded, and the Appellate Division dismissed the appeal in December 2013. *Id.*

In December 2014, Immigration and Customs Enforcement detained Mr. Arjune. On April 22, 2015, he was released on bond. See *id.* After his release, with the help of an appellate indigent defense provider, Mr. Arjune unsuccessfully moved in the Appellate Division to reinstate his appeal. *Id.* Asserting that he was denied the effective assistance of counsel in perfecting his appeal, Mr. Arjune moved for writ of error *coram nobis* in the Appellate Division. *Id.* Mr. Arjune claimed that his “constitutional rights were violated as a result of trial counsel’s failure to take basic steps to ensure [he] was able to perfect his appeal.” *Id.* at 26a (Rivera, J., dissenting).

Mr. Arjune stated in an affidavit that “counsel did not speak with him during or after his trial about an appeal, about the fact that his conviction could sub-

ject him to deportation, or about poor person relief.” *Id.* at 4a–5a. Mr. Arjune also confirmed that he would have pursued an appeal had his original counsel provided that vital information. *Id.* at 5a.

Mr. Arjune’s application for a writ of error *coram nobis* also included an affidavit from his trial counsel. In that affidavit, trial counsel stated that he did not remember speaking to Mr. Arjune about how to perfect his appeal, and had no recollection about receiving the notice of the State’s October 2013 motion to dismiss the appeal. *Id.* at 4a. Mr. Arjune also provided “an affirmation from his immigration attorney about [Mr. Arjune’s] lack of understanding of his right to appeal”—confirming that Mr. Arjune did not understand his right to appeal or the potential deportation consequences of his conviction. *Id.* at 17a.

On April 13, 2016, the Appellate Division denied the writ of error *coram nobis* without opinion. *Id.* at 47a. The New York Court of Appeals subsequently granted leave to appeal the denial. *Id.* at 46a.

In November 2017, the New York Court of Appeals affirmed the Appellate Division’s denial of the writ of error *coram nobis*. The state high court refused to extend *New York v. Syville*, 938 N.E.2d 910 (N.Y. 2010), which permits a court to grant a writ of error *coram nobis* “for a defendant who demonstrated that he or she timely requested that trial counsel file a notice of appeal, the attorney failed to comply, and the omission could not reasonably have been discovered within the one-year time limit.” *Id.* at 2a. The court instead relied on *New York v. Perez*, 12 N.E.3d 416 (N.Y. 2014), and *New York v. West*, 789 N.E.2d 615 (N.Y. 2003), to conclude that “a defendant is not constitutionally entitled to the assistance of counsel in seeking poor person relief as long as he or she is given written notice” of appeal. *Id.* at 8a. The court rea-

soned that Mr. Arjune “has a heavy burden to demonstrate entitlement to a writ of error *coram nobis* premised on ineffective assistance of counsel for failing to assist in procuring poor person relief.” *Id.*

The majority read *Flores-Ortega* narrowly to apply only where counsel does not even file a notice of appeal. In *Flores-Ortega*, this Court articulated its expectation that “*in the vast majority of cases*, [] counsel ha[s] a duty to consult with the defendant about an appeal.” 528 U.S. at 479, 481 (emphasis added).² The majority nonetheless concluded that the principles underlying *Flores-Ortega* did not apply “when, as here, a notice of appeal was filed.” Pet. App. at 12a.

Declining to extend the writ of error *coram nobis* to “situations in which retained trial counsel filed a timely notice of appeal but allegedly failed to advise the defendant of his or her right to poor person relief, or to take any action when served with a motion to dismiss the appeal years after the notice of appeal was filed,” the court concluded that Mr. Arjune “has not met his burden of proving that counsel was ineffective.” *Id.* at 2a. Instead, the New York Court of Appeals would require Mr. Arjune to show that he exercised due diligence to pursue his appeal or to prove that it would be “impossible to discover the alleged omission [of advice about the right to appeal] with reasonable diligence.” *Id.* at 19a.

The decision drew two vigorous dissents. Judge Rivera recognized that Mr. Arjune’s trial counsel “vio-

² In dissent, Justice Souter recognized that “It is unreasonable for a lawyer with a client . . . to walk away from her representation after trial or after sentencing without at the very least acting affirmatively to ensure that the client understands the right to appeal.” *Flores-Ortega*, 528 U.S. at 488–89 (Souter, J., concurring in part and dissenting in part).

lated the United States Supreme Court’s holding from *Roe v. Flores-Ortega* . . . under which lawyers must make objectively reasonable choices about pursuing appeals on their clients’ behalf.” *Id.* at 21a (Rivera, J., dissenting) (“[C]ounsel could not desert his client.”). Interpreting *Flores-Ortega*, Judge Rivera concluded that this Court “unanimously held [that] only in rare cases would counsel be effective absent client consultation,” and that Mr. Arjune’s case did not present one of those “rare” circumstances. *Id.* at 27a (Rivera, J., dissenting). On the facts, Judge Rivera concluded that it was “clear” from the record that Mr. Arjune’s trial counsel did not take any action “to inform [Mr. Arjune] or confirm that [Mr. Arjune] had chosen not to pursue an appeal.” *Id.* at 35a–36a (Rivera, J., dissenting). She noted that trial counsel’s conduct fell “below applicable professional standards adopted by the American Bar Association, New York State Bar Association, and National Legal Aid and Defender Association.” *Id.* at 21a–22a (Rivera, J., dissenting).

Judge Rivera would have granted the motion for writ of error *coram nobis*. *Id.* at 28a–41a. Rejecting the form provided by the court clerk as an adequate substitute for consultation with counsel, Judge Rivera underscored that “the burden is on counsel, not the court, to ensure that [Mr. Arjune] thoroughly understands the right to appeal and how to pursue it.” *Id.* at 36a (Rivera, J., dissenting).

Judge Wilson joined Judge Rivera’s dissent and also wrote separately. Judge Wilson surmised that this Court would have ruled in Mr. Arjune’s favor. *Id.* at 43a (Wilson, J., dissenting). Noting that the actions of Mr. Arjune’s counsel “left Mr. Arjune ignorant of his appellate rights and bereft of meaningful counsel,” Judge Wilson concluded that “Mr. Arjune was denied

the protections of the Constitution . . . despite the imperatives of justice and the dictates of the Supreme Court.” *Id.* at 44a, 45a.

REASONS FOR GRANTING THE PETITION

I. THE NEW YORK COURT OF APPEALS’ DECISION IS CONTRARY TO THIS COURT’S DECISION IN *ROE V. FLORES-ORTEGA*

A. Trial counsel’s failure to “consult” with Mr. Arjune about his right to appeal constitutes ineffective assistance of counsel under *Flores-Ortega*.

In *Flores-Ortega*, this Court considered how to evaluate claims of ineffective assistance of counsel that are based on counsel’s failure to appeal without client consent. It held that “counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” 528 U.S. at 480. When either of those two conditions are satisfied, the duty to “consult” requires “[1] advising the defendant about the advantages and disadvantages of taking an appeal, and [2] making a reasonable effort to discover the defendant’s wishes.” *Id.* at 478.

A “rational defendant” in Mr. Arjune’s position would want to appeal. Mr. Arjune is an immigrant, and his felony conviction could (and did) lead to the initiation of deportation proceedings against him. “There is no reason to doubt the paramount importance” Mr. Arjune would have “placed on avoiding

deportation,” had he known it was a possibility. *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). Indeed, “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* (citation omitted). Accordingly, there was no downside to bringing an appeal for Mr. Arjune. And because an appeal would have been from a jury verdict rather than from a specific issue preserved despite a plea, Mr. Arjune could have raised a broader range of issues. See *Flores-Ortega*, 528 U.S. at 480. Additionally, the stigma of a felony conviction, and the attendant consequences—including, for example, difficulties in finding future employment—further reinforce the idea that any “rational defendant” would have wanted to appeal this conviction.

Because Mr. Arjune met the first criterion articulated in *Flores-Ortega*, trial counsel had a constitutional obligation to consult with him regarding the appellate process. *Id.* at 480. By his own admission, trial counsel did not live up to that obligation. Nevertheless, the New York Court of Appeals found that trial counsel’s assistance was not constitutionally defective. Pet. App. at 5a.

The New York Court of Appeals incorrectly narrowed this Court’s broad holding in *Flores-Ortega* to limited situations in which trial counsel failed to file a notice of appeal. The court below treated this Court’s controlling precedent as merely “instructive” when a notice of appeal *has* been filed. *Id.* at 9a (“*Roe v. Flores-Ortega* is distinguishable because, here, counsel did file a notice of appeal. Nonetheless, [*Flores-Ortega*] is instructive.”) (citation omitted).

But the rule articulated in *Flores-Ortega* was not so limited. The question “at the heart” of *Flores-Ortega* was, “Under what circumstances does counsel have

an obligation to consult with the defendant about an appeal?” 528 U.S. at 478. This Court answered by holding that counsel have a constitutional duty to consult with criminal defendants regarding available appellate options when a rational defendant would want to appeal or that particular defendant demonstrated an interest in appealing. *Id.* at 480. That duty is not predicated on a failure to file a notice of appeal. And it is not satisfied by the “ministerial task” of filing a notice of appeal. *Id.* at 474. Filing a notice of appeal is constitutionally meaningless without consultation with one’s client, particularly if the client is unaware of the filing.

Simply filing a notice of appeal, without providing the consultation required by *Flores-Ortega*, left Mr. Arjune to fend for himself. He was provided with no consultation regarding how to perfect his appeal or even how to obtain appointed counsel or poor person relief. For all practical purposes, he was in no better position than if his counsel had not filed a notice of appeal at all.

Rather, if “a rational defendant would want to appeal,” counsel must advise the client about the right to appeal and the related advantages and disadvantages of taking an appeal. *Id.* at 478, 480. That advice must, at minimum, ensure that the client understands the available appellate options (including the availability of appointed appellate counsel) and the steps necessary to pursue an appeal. *Id.* at 478. Moreover, counsel must make a “reasonable effort” to discover whether the client wishes to pursue an appeal. *Id.*

Mr. Arjune’s counsel failed to provide that constitutionally required consultation. The record indicates that counsel did not speak with Mr. Arjune *at all* about an appeal. Mr. Arjune’s sworn affidavit con-

firms as much. His trial counsel also admits that he has no recollection of any such conversation. Pet. App. at 5a. Although counsel asserts that it was “understood” that he would not serve as appellate counsel, *id.*, nothing in the record supports that claim. And even if this Court were to accept this unsupported explanation, such an “understanding” does not satisfy counsel’s obligation to “consult” about the “advantages and disadvantages of taking an appeal.” *Flores-Ortega*, 528 U.S. at 478, 480. Trial counsel bears that constitutional duty regardless of whether he will also serve as appellate counsel. Without that consultation, a defendant cannot make an informed choice about whether to retain (or seek appointed) appellate counsel.

Instead of giving effect to *Flores-Ortega*’s holding, the majority below misread dicta from *Flores-Ortega* to hold that counsel was not obligated to consult with Mr. Arjune about his appellate options because the trial court provided a one-paragraph “Notice of the Right to Appeal” to Mr. Arjune. Pet. App. at 8a–13a. The majority focused on a hypothetical described in *Flores-Ortega*. This Court surmised that when “a sentencing court’s instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel’s duty to consult,” counsel “might then reasonably decide that he need not repeat that information.” *Flores-Ortega*, 528 U.S. at 479–80; see Pet. App. at 44a. This Court described that situation as a reason why it rejected a bright-line rule requiring counsel to consult with a defendant in every case. The Court hypothesized that in some instances, a sentencing court would provide so much detail that counsel could reasonably decide not to repeat that information. In other words, counsel would not be constitutionally deficient for doing

so. Contrary to the New York Court of Appeals' reading, that does not mean that *any* information provided by the sentencing court is an adequate substitute for counsel's consultation in every case.

The written notice that the sentencing court allegedly³ provided to Mr. Arjune does not constitute the type of "clear and informative" instructions contemplated by the *Flores-Ortega* Court. The form included a single paragraph that tersely informed Mr. Arjune that he had a right to appeal and the right to have counsel appointed for him. Pet. App. at 3a.⁴ That single paragraph cannot fairly be called "so clear and informative as to substitute for counsel's duty to consult." *Flores-Ortega*, 528 U.S. at 480. That is especially true given the "specific meaning" conveyed by the term "consult" in this context—"advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478.

³ The only evidence in the record pertaining to notice is an entry by the clerk of the court stating: "[l]et the record reflect the defendant is being handed a notice of appeal." Pet. App. at 3a. The actual notice provided is not in the record, but the State asserts that this statement referred to the "standard 'Notice of Defendant of His Right to Appeal' that is handed to all Queens County defendants." *Id.*

⁴ The entire text of the paragraph reads:

You have a right to appeal to the Appellate Division, Second Department, within thirty [30] days and, in addition, upon proof of your financial inability to retain counsel and to pay the cost and expenses of the appeal, you have the right to apply to the Appellate Division, Second Department, for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. The Appellate Division, Second Department, is located at 45 Monroe Place, Brooklyn, New York.

Id.

Even setting aside Mr. Arjune’s cognitive limitations,⁵ the perfunctory notice form fell well short of the type of consultation described in *Flores-Ortega* and mandated by the Sixth Amendment. Not only does the notice fail to provide clear instructions on *how* Mr. Arjune could obtain appointed appellate counsel or seek poor person relief, it also fails to mention any of the “advantages and disadvantages of taking an appeal.” *Id.* And that simple form could not be used to ascertain anything about Mr. Arjune’s wishes. *Id.* Allowing such a cursory written notice to substitute for trial counsel’s constitutional duty to consult would gut the constitutional obligation that attaches “in the vast majority of cases.” *Id.* at 481. Indeed, similar notices are routinely provided. If the New York Court of Appeals’ decision stands, this Court’s expectation about the “vast majority of cases” could quickly shrink to a minority of criminal convictions.

B. Counsel’s failure to perfect the appeal and to provide adequate consultation satisfies the “prejudice” prong as articulated in *Flores-Ortega*.

Had trial counsel fulfilled his constitutional duty to consult with his client about an appeal, Mr. Arjune would have appealed his felony conviction. That is all he needed to show to prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (2000). As this Court set forth in *Flores-Ortega*, when an ineffective assistance of counsel claim is based on counsel’s fail-

⁵ As Judge Rivera’s dissent notes, although the majority opinion describes Mr. Arjune’s cognitive impairments as “purported,” the record includes a psychiatric evaluation by an expert witness describing these limitations, and the State does not contest that Mr. Arjune has severe cognitive limitations. *Id.* at 25a (Rivera, J., dissenting).

ure to consult about the right to appeal, “a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Flores-Ortega*, 528 U.S. at 484. “[W]hen counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Id.* That is because the “presumption of fairness” that attaches to judicial proceedings does not apply where ineffective assistance of counsel allegedly deprives an individual of an entire proceeding. *Id.* at 483.

A successful showing of prejudice does not require a petitioner to articulate the grounds of a meritorious appeal or prove that an appeal would likely have been successful. *Id.* at 485 (noting the Court previously rejected “any requirement that the would-be appellant specify the points he would raise were his right to appeal reinstated”) (internal quotation marks omitted). Rather, all that Mr. Arjune needed to show was “that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” *Id.* at 484. Mr. Arjune did so.

Had Mr. Arjune been sufficiently advised of his rights to appeal and to appointed counsel (including the procedures necessary to obtain appointed counsel and move for poor person relief), he would have pursued an appeal. Mr. Arjune, his parents, and his appellate counsel all provided affidavits to that effect. Furthermore, Mr. Arjune faced serious deportation consequences as a result of a felony conviction. Those consequences reinforce Mr. Arjune’s claim that he would have appealed if counsel had sufficiently ad-

vised him of his rights and the risks associated with forgoing appeal. Cf. *Lee*, 137 S. Ct. at 1968. Under *Flores-Ortega*, that showing, based on “all relevant factors,” demonstrates prejudice. 528 U.S. at 480 (“Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.”).

II. TRIAL COUNSEL’S DUTY TO CONSULT ABOUT AN APPEAL IS AN IMPORTANT AND RECURRING QUESTION

The extent of the constitutional duty recognized by this Court in *Flores-Ortega* is an important question that arises in virtually every criminal case in both state and federal court. *Id.* at 470. This Court should clarify that an attorney’s duty to consult about appeal applies to the “critical juncture” between sentencing and appeal. Allowing state courts to restrict *Flores-Ortega* will deny the constitutionally-mandated assistance of counsel to criminal defendants, who deserve to be equipped with guidance about whether and how to pursue an appeal.

Courts around the country have not settled on a uniform approach to counsel’s duty to consult convicted clients regarding appellate options. The majority of state and federal courts require trial counsel to continue to represent their client between sentencing and appeal unless trial counsel affirmatively withdraws from the case or is replaced by substitute counsel.⁶ This practice is also reflected in the Ameri-

⁶ See, e.g., Ark. R. App. P. – Crim. 16(a); Md. R. 4-214(b); Mass. R. App. P. 3(e); Miss. R. App. P. 6(b); Mont. Code Ann. § 46-8-103(1); Nev. Rev. Stat. Ann. § 178.397; N.H. Rev. Stat. Ann. § 604-A:3; N.H. Sup. Ct. R. 32(1); N.J. Stat. Ann.

can Bar Association’s standards. The ABA recommends that the duties of criminal counsel include “continuing representation” during the period between sentencing and perfecting an appeal:

Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time.

ABA Standard 21-2.2(a).

A few states demand less. Michigan does not require continuing representation. See Mich. Ct. R. 7.104(A)(3) (criminal defendant must request appointment of an appellate attorney within 21 days of judgment). Of particular relevance here, New York similarly does not require trial counsel to continue

§ 2A:158A-5; N.M. Stat. Ann. § 31-15-10(C); N.C. Gen. Stat. § 7A-451(b)(6); N.D. R. Crim. Proc. 44(a); Pa. R. Crim. P. 122(B)(2); 12 R.I. Gen. Laws § 12-15-3; S.C. App. Ct. R. 602(e)(1); S.D. Codified Laws § 7-16A-10; Tenn. R. Crim. P. R. 37(e)(3); Utah Code Ann. § 77-32-304(1)(b); Va. Code Ann. § 19.2-159(C); Wash. Sup. Ct. Crim. R. 3.1(b)(2); W. Va. R. Crim. Proc. 44(a); Wis. R. App. Proc. 809.30(2); Wyo. R. Crim. Proc. 44(b)(8); see also Lissa Griffin, 1 *Federal Criminal Appeals* § 1:18 (Mar. 2018 update) (“The basic philosophy underlying assignment of counsel on appeal is continuity of representation. That is, most of the courts of appeals require counsel who represented a defendant at trial to continue representation after the defendant is convicted, unless relieved by order of the court of appeals.” (citing the following Circuit Rules: 2d Cir. R. 4(b); 5th Cir. App. III(3); 6th Cir. R. 12(a) & App. I(III)(1); 7th Cir. R. 51(a) & (c); 8th Cir. App. II(II)(1); 10th Cir. R. 46.3 and Add. I (2)(A); 11th Cir. Add. IV(d)(2)).

their representation post-trial or to affirmatively withdraw.

Instead of imposing a uniform requirement of continuing representation, each of the Appellate Divisions in New York place varying requirements on trial counsel. See N.Y. Jud. Law §§ 606.5(b), 671.3(b), 821.2(a), 1015.7 (establishing different standards for trial counsel’s duties regarding appeals for the First, Second, Third, and Fourth Appellate Divisions). These recommended standards overlap with ABA standards. For example, the Second Appellate Division (which heard Mr. Arjune’s appeal) requires trial counsel to provide written guidance to the client regarding an appeal. *Id.* § 671.3(a). This document must provide the client with the same type of “consultation” required by *Flores-Ortega*. It must “advise[e] him of his right to appeal or to make application for permission to appeal or for a certificate granting leave to appeal . . .” and it must “request[] his written instructions as to whether he desires to take an appeal or make such application.” *Id.* Therefore, even in states which do not statutorily require trial counsel to either provide post-sentencing representation or affirmatively withdraw, the question of the extent of trial counsel’s ongoing duties is a recurring issue that will benefit from clear guidance.

Within New York alone, state courts have entertained and rejected numerous Sixth Amendment claims based on trial counsel’s failure to consult about the right to appeal since *Flores-Ortega*. See, e.g., *New York v. Andrews*, 17 N.E.3d 491, 497–98 (N.Y. 2014) (denying *coram nobis* relief for ineffective assistance of counsel claim based on allegations a trial attorney failed to consult about an appeal); *Perez*, 12 N.E.3d at 421 (finding retained counsel ineffective for failing to perfect an appeal, but affirming denial of

the appeal because defendant should have known of counsel's ineffectiveness nine years before bringing his claim); *Syville*, 938 N.E.2d at 914–15 (holding writ of error *coram nobis* could be used to bring ineffective assistance of counsel claim based on attorney's failure to file a requested notice of appeal); *West*, 789 N.E.2d at 619–20 (holding defendant not entitled to assistance of counsel in preparing application for poor person relief on appeal).

The recurring nature of these types of ineffective assistance claims, the applicability of the duty to consult to virtually all criminal cases, and the inconsistency of protections nationwide demonstrate the need for this Court to clarify when the *Flores-Ortega* duty to consult applies.

III. THIS CASE IS A CLEAN VEHICLE TO CLARIFY TRIAL COUNSEL'S OBLIGATIONS IN STATES THAT PERMIT GAPS IN LEGAL AND REPRESENTATION BETWEEN TRIAL AND APPEAL

A. Mr. Arjune properly preserved the issue presented.

Mr. Arjune's motion for a writ of error *coram nobis* was premised entirely on the failure of his trial counsel to consult with him about his right to appeal and the opportunity to obtain poor person relief. Pet. App. at 4a (noting Mr. Arjune "moved for a writ of error *coram nobis*, claiming that he was denied the effective assistance of counsel in perfecting his appeal.").

Mr. Arjune maintained his claim on appeal to the New York Court of Appeals. *Id.* at 46a (granting appeal); *id.* 1a–2a. Thus, Mr. Arjune has argued ineffective assistance of counsel at every stage of his writ of error *coram nobis* proceedings, and he raises the same issue before this Court. Moreover, because Mr.

Arjune had twice moved unsuccessfully for reinstatement of his appeal in the Appellate Division, a petition for writ of error *coram nobis* remains his only recourse and the proper vehicle for pursuing his right to appeal.

B. The Sixth Amendment issue is the only issue presented.

There is no obstacle to this Court reaching the question presented in this Petition. The Appellate Division denied the writ of error *coram nobis*, and Mr. Arjune appealed the denial on the grounds of ineffective assistance of counsel. *Id.* at 47a. The New York Court of Appeals affirmed denial of the writ of error *coram nobis*. *Id.* at 1a–2a. The propriety of the dismissal of the writ of error *coram nobis* is therefore the only issue raised by this Petition.

C. The facts of this case directly implicate *Flores-Ortega*.

Counsel must make “objectively reasonable choices” in determining whether and how to consult with clients concerning appellate rights and procedures. *Flores-Ortega*, 528 U.S. at 479. As this Court recognized in *Flores-Ortega*, “courts evaluating the reasonableness of counsel’s performance” will find “that counsel had a duty to consult with the defendant about an appeal” in the vast majority of cases. *Id.* at 481. This case squarely presents the question whether Mr. Arjune’s case is one of those rare instances in which trial counsel could reasonably choose not to consult with a convicted client about the right to appeal.

The record is replete with evidence that Mr. Arjune’s counsel was objectively unreasonable in contravention of *Flores-Ortega*. First, Mr. Arjune’s trial counsel “did not speak with [Mr. Arjune] during or after his trial about an appeal” and “has no recollec-

tion of any post-sentencing contact with defendant or defendant's family." Pet. App. at 4a; *Id.* at 23a (Rivera, J., dissenting). Second, trial counsel did not take any action "to inform [Mr. Arjune] or confirm that [Mr. Arjune] had chosen not to pursue an appeal." *Id.* at 36a. Finally, had Mr. Arjune known about his right to appeal, the deportation consequences of this conviction, or his right to the services of a public defender, he would have pursued an appeal. *Id.* at 5a; *Id.* at 24a (Rivera, J., dissenting).

The decision below contravenes *Flores-Ortega's* admonition that "Counsel has a constitutionally imposed duty to consult . . . when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 471. That decision was incorrect, and should not stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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