

No. 17-8587

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*

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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June 28, 2018

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED ..	1
STATEMENT OF THE CASE	2
Introduction	2
The <i>Coram Nobis</i> Petition Challenging the Effectiveness of Counsel	3
The Appeal	4
SUMMARY OF ARGUMENT	8
ARGUMENT	
I. The lower court's factual determinations are dispositive of the issue petitioner seeks to raise here	10
II. Petitioner's legal contention lacks merit, as he misinterprets <i>Flores-Ortega</i> and his effort to extend that case far beyond its import should be rejected	16
CONCLUSION	23

TABLE OF AUTHORITIES

Page No.

Cases

<i>Adams v. Robertson</i> , 520 U.S. 83 (1997)	21-22
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	10
<i>Hernandez v. New York</i> , 500 U.S. 352 (1991)	13
<i>Howell v. Mississippi</i> , 543 U.S. 440 (2005)	21, 22n.7
<i>Minnesota v. Olson</i> , 495 U.S. 91 (1990)	13
<i>New York v. Syville</i> , 938 N.E.2d 910 (N.Y. 2010)	3, 4
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010)	21
<i>People v. West</i> , 789 N.E.2d 615 (N.Y. 2003)	18
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	passim
<i>Sochor v. Florida</i> , 504 U.S. 527 (1992)	3n.1
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984)	20

Statutes

28 U.S.C. §1257	1
22 N.Y.C.R.R. § 671.3	4n.2, 19
N.Y. Criminal Procedure Law § 380.55	19
N.Y. Penal Law § 110/125.25	2

N.Y. Penal Law § 120.10	2
N.Y. Penal Law § 215.40	2
N.Y. Penal Law § 265.01	2

Other Authorities

Stephen M. Shapiro, Supreme Court Practice, § 3.28 (10th ed. 2013)	13
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OPINIONS BELOW

The order of the New York Court of Appeals, affirming petitioner's judgment of conviction is published at 30 N.Y.3d 347, 89 N.E.3d 1207 (N.Y. 2017) (Pet. App. 1a-45a). The order is reprinted in Petitioner's appendix at p. 1a.

The decision of the Appellate Division is reported at 138 A.D.3d 877, 28 N.Y.S.3d 329 (App. Div. 2016) (Pet. App. 47a).

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states:

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

STATEMENT OF THE CASE

Introduction

On July 18, 2008, petitioner stabbed a man repeatedly with a boxcutter, which he then hid in the ceiling of a restaurant. He was charged with Attempted Murder in the Second Degree (N.Y. Penal Law § 110.125.25[1]), Assault in the First Degree (N.Y. Penal Law § 120.10[1]), Tampering with Physical Evidence (N.Y. Penal Law § 215.40[2]), and Criminal Possession of a Weapon in the Fourth Degree (N.Y. Penal Law § 265.01[2]).

Petitioner retained trial counsel, Dennis Coppin, Esq., and the matter went to trial in October of 2009, before a judge and jury. Counsel secured an acquittal on the attempted murder and first degree assault charges, which carried a potential sentence of 25 years to life, but petitioner was convicted of the tampering and weapon possession charges. On November 12, 2009, petitioner was sentenced to concurrent indeterminate prison terms of from one to three years on the evidence-tampering conviction, and one year on the weapon-possession conviction.

As the New York Court of Appeals found in its decision, the clerk of the court, at sentence, handed petitioner a standard notice regarding his right to appeal the conviction, distributed to all defendants upon conviction in Supreme Court within New York's Second Judicial Department, informing him of his right to appeal and indicating that "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." Pet. App. at 3a. The notice also included the address of the Second Department. Defense counsel subsequently filed a notice of appeal on petitioner's behalf. Petitioner was released from prison in March

2010, four months after being sentenced, and he never retained an attorney, sought poor person relief, or perfected his appeal. *Id.*

Nearly four years after the filing of the notice of appeal, the State moved to dismiss his appeal as abandoned. *Id.* at 3a-4a. The State sent the motion to petitioner's last known address and to counsel, but neither responded. *Id.* at 4a. In December 2013, the Appellate Division dismissed petitioner's appeal.¹

In December 2014, Immigration and Customs Enforcement took petitioner into custody. In April 2015, petitioner unsuccessfully moved to reinstate his appeal. *Id.*

The *Coram Nobis* Petition Challenging the Effectiveness of Counsel

In October 2015, almost six years after his attorney filed the notice of appeal, petitioner moved for a writ of error *coram nobis* in the Appellate Division, Second Department. *Id.* Under New York law, that petition may be used to attack the effectiveness of counsel in taking, perfecting, or briefing an appeal. *See New York v. Syville*, 938 N.E.2d 910, 916 (N.Y. 2010). On such an application, a defendant has the burden of establishing his or her entitlement to relief, including the facts necessary to support it. *See* Pet. App. at 8a.

Petitioner claimed that he was deprived of the effective assistance of counsel, alleging in an affidavit that counsel had never discussed an appeal with him,

¹Petitioner does not now argue that counsel's failure to respond to the motion to dismiss rendered him ineffective. Moreover, that issue is procedurally barred from review because the Court of Appeals found that that claim was not properly before it given that the appeal in this case was from the denial of *coram nobis*, not from the dismissal of the appeal. Pet. App. 4a; *see Sochor v. Florida*, 504 U.S. 527, 533-34 (1992).

that he did not understand his appellate rights, and that he would have pursued an appeal had he had known he could. *Id.* at 4a-5a. Trial counsel filed an affirmation stating that he filed a notice of appeal on petitioner’s behalf but did not recall discussing – *after* he filed the notice of appeal – how to perfect the appeal. Counsel did not reveal what discussions he had regarding the notice of appeal or the desirability of pursuing it prior to filing the notice. Counsel did affirm, however, that it “was understood” that he was not to serve as appellate counsel. *Id.* at 5a.

On July 11, 2012, the Appellate Division, citing *People v. Syville*, 938 N.E.2d at 910, held that petitioner had “not established his entitlement to the relief requested.” Pet. App. at 47a.

The Appeal

A judge of the New York Court of Appeals granted leave to appeal. In that court, Arjune argued that the right to counsel extended to both filing and perfecting an appeal, and that, as a result, retained counsel had a constitutional obligation to comply with court rules that he provide a written notice to petitioner informing him about poor person relief prior to filing the notice of appeal.² The State responded that the Appellate Division correctly determined that petitioner’s claims that he was not advised of his appellate rights were demonstrably false, that counsel had no constitutional duty to prepare a poor person

²Under the rules of New York State’s Second Department, after a defendant is convicted and sentenced, counsel must advise him in writing of his right to appeal and ask whether he would like to appeal. If the defendant timely notifies counsel that he would like to appeal, counsel must file the notice of appeal. 22 N.Y.C.R.R. § 671.3(a). In the written notice, counsel must explain, among other things, how to obtain the trial transcript, to retain counsel, to apply for assigned appellate counsel and a free copy of the transcript. 22 N.Y.C.R.R. § 671.3(b). And, if requested to do so by the defendant, counsel must make the applications. *Id.*

application for petitioner, and that petitioner failed to demonstrate that any deficiency resulted in the loss of his appeal.

In a decision dated November 20, 2017, the New York State Court of Appeals affirmed the Appellate Division's decision denying petitioner's motion. The court held that petitioner failed to meet his burden of showing that he had been deprived of the effective assistance of counsel, "both in terms of his specific claim that counsel did not advise him of his right to seek poor person relief in connection with his appeal and the more general claim . . . that counsel did not consult with him regarding an appeal." Pet. App. at 8a-9a. Explaining the factual basis for its decision, the court found that petitioner failed to establish that his attorney did not consult with him about an appeal or that he was otherwise unaware of his appellate rights. *Id.* at 16a.

The court found that counsel's "carefully worded affirmation [did] not support [petitioner's] claims that he *never* discussed appealing, did not consult with [him] after sentencing, or failed to inform [him] that he would need either a different lawyer for an appeal or to apply for poor person relief." *Id.* at 16a-17a. Notably, counsel failed to outline his standard practice or "address whether he consulted with [petitioner] *before* filing the notice of appeal" on the day following the sentence. *Id.* at 17a. Similarly, petitioner's allegations failed to show "that counsel failed to comply with the relevant court rules" regarding written communications. *Id.* at 16a.

Petitioner also failed to make out his factual contentions that "he was unaware of his appellate rights, how to seek poor person relief, or how to otherwise perfect the appeal" *Id.* The court noted that he never denied that the form provided him at sentencing was the standard appeal notice, nor that "he was unable to understand the form, including its instruction on how to obtain poor person relief,

particularly given the fact that he was previously capable of retaining trial counsel” *Id.* And, while petitioner failed to explain why he waited so long to file his *coram nobis* motion, “the record suggests that the reason [he] waited years to pursue further relief was that he was not interested in appealing his conviction and relatively short sentence until his status as a convicted felon led to further consequences.” *Id.* at 19a. The court thus found that petitioner had failed to demonstrate that he lost his appellate rights as a result of counsel’s alleged deficiency.

The court also disputed the dissent’s understanding of this Court’s decision in *Flores-Ortega*. Noting that this Court framed the issue in that case as whether counsel is *per se* ineffective for failing to file a notice of appeal whenever the defendant did not instruct otherwise, the court held that the case did not address whether counsel had a duty to consult with defendant independent of the filing of a notice of appeal with regard to the manner in which to obtain poor person relief or the advisability of doing so. *Id.* at 12a. Regardless of this view of *Flores-Ortega*, however, the court’s decision made clear that petitioner had failed to make out his factual contentions that counsel had never consulted with him regarding an appeal or the advisability of pursuing one, or to comply with state rules requiring written notice of the means to obtain poor person relief. *Id.* at 16a-17a.

There were two dissenting opinions. Judge Rivera opined that, because counsel did not have contact with petitioner after filing the notice of appeal and violated the Second Department’s attorney rules, he violated this Court’s holding in *Flores-Ortega*. *Id.* at 21a-22a. Judge Rivera argued that, where an attorney does not follow New York’s rules in assisting a defendant in perfecting his appeal and causes the defendant to lose his appeal as of right, he violates both federal and New York standards for effective assistance. *Id.* at 28a. She also found that ABA rules, such as those requiring a duty to consult with a

defendant about an appeal, were central to this Court's holding in *Flores-Ortega*. *Id.* at 33a-34a.

Contrary to the majority, Judge Rivera found that trial counsel's affirmation supported petitioner's claims by failing to state whether it was counsel's practice to inform "defendants about their right to appeal or how to request appellate indigent representation." *Id.* at 35a. And she held that the form handed to petitioner was insufficient both because its contents were not in the record and because it was otherwise inadequate to inform him of his appellate rights. *Id.* at 37a. Finally, Judge Rivera urged the adoption of a rule requiring "seamless representation," including "ensuring that [defendants] understand their appellate rights and the steps necessary to exercise them, and, where necessary, assisting them in perfecting their appeals by obtaining substitute counsel." *Id.* at 41a-42a.

In his brief dissent, Judge Wilson joined Judge Rivera's dissent, but emphasized that counsel's conduct, including his failure to advise petitioner "about the advantages and disadvantages of taking an appeal," violated this Court's holding in *Flores-Ortega*. *Id.* at 43a-45a.

SUMMARY OF ARGUMENT

The Court of Appeals, rejecting petitioner's factual assertions as inadequate and incredible, found that petitioner had not established that counsel had never consulted with him about pursuing an appeal or discussed how to apply for poor person relief. As the court held, counsel's "carefully worded" affirmation referencing his actions *after* filing a notice of appeal on the day following the sentence said nothing about any discussions before that time, including any discussions at the time of sentence he may have had about the advisability of pursuing an appeal or how to do so. Similarly, the court found that petitioner's allegations that he had no knowledge of his right to appeal or how to obtain poor person relief were inadequate and belied by the record. Indeed, he was handed a notice specifically explaining how to apply for poor person relief: by application to the Appellate Division, whose address was provided. In addition, the court discredited petitioner's personal denials of consultation and knowledge, finding them unsupported.

The court also found that petitioner failed to establish that his failure to pursue the appeal was due to any alleged error of counsel. As the court below found, petitioner was made fully aware of how to apply for poor person relief, but simply chose not to do so in light of his impending release from prison.

These factual findings are dispositive of the question petitioner seeks to present here. Even if counsel had a duty to consult with petitioner about the advisability of pursuing an appeal independent of the filing of the notice of appeal itself, and even if he had an obligation to inform petitioner of how to obtain poor person relief, petitioner failed to establish that counsel did not do so. And, under the court's findings, even if counsel's performance had been deficient, petitioner failed to establish that his failure to pursue the appeal was due to counsel's error.

Because the issue upon which petitioner seeks review turns on the factual determinations of the court below rather than the legal issue he seeks to present, this Court should deny certiorari.

Petitioner nevertheless seeks this Court's intervention, asserting that counsel here failed to consult with petitioner and failed to discuss the manner of obtaining poor person relief. This, he argues, was constitutional error, as *Flores-Ortega* purportedly commands at least consultation with a convicted defendant about the prospects of appeal, except in rare circumstances. But his factual premise is contrary to the findings of the court below and those findings are entitled to deference and obviate any need to review the legal issue.

Moreover, petitioner's reading of *Flores-Ortega* is wrong. That case specifically addressed the question of the need to consult with a defendant for the purposes of filing a notice of appeal, as indeed the Court's framing of the question presented makes clear. The case says nothing about further obligations of counsel to consult for the purpose of filing a poor person application or convincing him that he should further pursue his case. And petitioner cites to no other case of this Court suggesting that a defendant is entitled to counsel in order to ask for free counsel, particularly where he retained counsel below.

Because the factual determinations of the Court below are dispositive of the legal issue petitioner raises and because in any event petitioner's legal contention is entirely unsupported, certiorari should be denied.

ARGUMENT

I. The lower court's factual determinations are dispositive of the issue petitioner seeks to raise here.

The Sixth Amendment issue is unworthy of this Court's review because the factual findings of the court below are dispositive of the legal issue petitioner seeks to present. Petitioner seeks to raise the issue of whether an attorney who fails to consult a defendant about his appellate rights but files a notice of appeal provides effective assistance. But the Court of Appeals expressly found that petitioner – who bore the burden to establish counsel's effectiveness – failed to show that counsel did not consult with him about his appeal, that petitioner was ignorant of his appellate rights, or that he would have perfected his appeal but for counsel's alleged deficiencies. These factual determinations render petitioner's purported legal issue irrelevant: even if counsel had a duty to consult, petitioner failed to establish that he did not.

While the Constitution does not guarantee the right to an appeal, this Court has held that, once a state grants this right, it must provide assistance to indigent defendants who pursue an appeal. *See Griffin v. Illinois*, 351 U.S. 12, 23 (1956). In addition, the Court has held that, in certain circumstances, counsel has a duty to file a notice of appeal on a defendant's behalf. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). In *Flores-Ortega*, this Court rejected the contention that trial counsel has a *per se* duty to file a notice of appeal, holding that trial counsel's obligation in that regard is dependent on defendant's instructions, and that counsel has a duty to explore defendant's wishes "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." *Id.* In addition, the Court held that the failure to file a notice

of appeal does not require reversal unless the defendant shows he lost his right to appeal due to counsel's actions. *Id.* at 484. Petitioner now asks this Court to interpret *Flores-Ortega* as requiring a duty to consult about an appeal independent of the filing of a notice of appeal, as it is undisputed here that counsel did file a notice of appeal.

But the Court need not resolve that issue because the factual findings that the Court of Appeals adopted are dispositive of this case, regardless of the answer to that question. The court found as a factual matter that petitioner had failed to establish that counsel had not consulted with him about an appeal. Indeed, the court found that counsel's "carefully worded affirmation [did] not support [petitioner's] claims that he *never* discussed appealing, did not consult with [him] after sentencing, or failed to inform [him] that he would need either a different lawyer for an appeal or to apply for poor person relief." Pet. App. at 16a-17a.

On this factual question, the court found significant that counsel failed to outline his standard practice or "address whether he consulted with [petitioner] *before* filing the notice of appeal." *Id.* at 17a. The court noted that petitioner did not explain this gap apart from his self-serving assertion that counsel did not speak to him about an appeal. And it found that, in the affidavits of petitioner's parents', they did not "*swear* that trial counsel failed to discuss an appeal with them or to inform them that he was not acting as appellate counsel." *Id.* at 18a. Thus, the court held that petitioner's "unsubstantiated claims" did not entitle him to relief. *Id.*

Because petitioner failed to establish that counsel did not consult with him, or discuss the advisability of pursuing an appeal or the means of doing so, petitioner cannot establish that counsel's

performance was defective, even if petitioner's legal contention were correct.³

Similarly, because of the Court of Appeals' factual determinations, petitioner cannot establish that but for counsel's conduct, he would have pursued an appeal. The court found that petitioner was aware of his appellate rights, as he had been handed the standard form informing him of his right to appeal and indicating that "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." Pet. App. at 3a. Indeed, the written notice specifically provided the address of the court to which the application should be made.

The Court of Appeals also found that petitioner failed to show that "he was unable to understand the form, including its instruction on how to obtain poor person relief, particularly given the fact that he was previously capable of retaining trial counsel." Pet. App. at 16a. Nor did the court credit petitioner's claim that he had cognitive limitations that would have prevented him from understanding his rights or how to pursue an appeal. In its statement of facts, the court noted that, by his own admission, petitioner's "cognitive

³The Court of Appeals factual determinations in this regard also obviate any need to review the different issue presented by *Amici*: whether counsel was ineffective for failing to discuss the immigration consequences of his conviction. Amicus Br. at 24-5. As the court held, petitioner simply did not establish the content of any conversation that took place prior to the time of the filing of the notice of appeal. Because this claim is founded on the absence of advice and because the Court of Appeals held that the content of conversations prior to the filing of the notice of appeal were never established, *Amici*'s issue lacks the required factual premise. In any event, as discussed *infra*, pp. 21-22, that issue was never presented to the state courts and should not be reviewed here.

limitations . . . did not prevent him from maintaining employment in construction, managing independent living skills, taking his elderly mother to doctor appointments and ensuring that she took her medication, and helping his girlfriend's teenage child complete her homework." Pet. App. at 2a. Thus, the state court rejected any claim that petitioner was subjectively ignorant of his rights because he suffered an impairment that would prevent him from understanding basic instructions on asking for the assignment of appellate counsel.

The court then went on to find that "the reason defendant waited years to pursue further relief was that he was not interested in appealing his conviction and relatively short sentence until his status as a convicted felon led to further consequences." Pet. App. at 19a. Under these findings, petitioner cannot obtain relief even if his interpretation of *Flores-Ortega* is correct because he could not "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.

Moreover, the state court's factual determinations are entitled to deference in this Court. Indeed, as this Court has stated, in the absence of exceptional circumstances, the Court defers to state court findings of fact, even when those facts relate to a constitutional issue, as "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Hernandez v. New York*, 500 U.S. 352, 366 (1991); see, e.g., *Minnesota v. Olson*, 495 U.S. 91 (1990). And even if the factual determination were not correct, this Court will not ordinarily grant review simply to address a factual error, rather than a legal one. See Stephen M. Shapiro, *Supreme Court Practice*, § 3.28 (10th ed. 2013) (this Court "will not exert its jurisdiction merely to review a decision of a state court

upon a question of fact” or re-examine the state court’s findings of fact once a case is before it).

Petitioner, however, ignoring the state court’s findings, claims that he was denied the effective assistance of counsel due to counsel’s failure to consult with his client about an appeal. Petitioner claims that counsel admitted that he failed to consult with him about the appellate process, and that “counsel did not speak with [petitioner] *at all* about an appeal.” Pet. Br. at 11-13. But the state court, as discussed above, found that counsel’s “carefully worded affirmation [did] not support [petitioner’s] claims that he never discussed appealing, did not consult with [petitioner] after sentencing, or failed to inform [him] that he would need either a different lawyer for an appeal or to apply for poor person relief.” Pet. App. at 16a-17a. Thus, the court specifically found counsel’s purported “admission” – upon which petitioner now relies – inadequate to support petitioner’s factual premise.

Addressing the prejudice claim, petitioner asserts that, had counsel consulted with him, he would have appealed his conviction. Pet. Br. at 15-17. But the court specifically rejected petitioner’s claim that his counsel’s performance led him to forego an appeal. Instead, the Court of Appeals specifically found that “the reason [petitioner] waited years to pursue further relief was that he was not interested in appealing his conviction and relatively short sentence until his status as a convicted felon led to further consequences.” Pet. App. at 19a. Therefore, the court inferred that petitioner “did not simply neglect [his] appellate rights, but consciously chose not to exercise them until [he] acquired a reason to do so.” *Id.* (internal quotation omitted). Thus, the court below rejected petitioner’s prejudice argument for the same reason it rejected his performance argument – because

he failed to establish the factual basis upon which he now relies.⁴

Indeed, both petitioner's brief and the brief of *Amici* are replete with statements of fact that contravene the state court's factual determinations. *See, e.g.*, Pet. Br. at 21 ("Mr. Arjune's trial counsel 'did not speak with [him] during or after his trial about an appeal' . . .", citing his own assertions and the dissent below but not the majority's findings); Amicus Br. at 10 (defendant was "unaware he needed to take separate action to obtain appellate counsel"); Amicus Br. at 16 ("there is no indication in the record that counsel explained to Mr. Arjune he would not be representing him on appeal").

Petitioner, for example, asserts that "counsel never talked to [him] about (1) his right to appeal; (2) the legal consequences of not appealing; (3) the availability and process of obtaining appointed counsel; and (4) the procedures for obtaining poor person relief." Pet. Br. at 2. But the Court of Appeals found that petitioner did not make out this factual contention, as counsel said nothing about the discussion that occurred before the filing of the notice of appeal. Moreover, the first two of these topics would most likely have been discussed prior to filing the notice, and counsel was well aware that, at a minimum, defendant had been informed as to the latter two. *See also* Pet. Br. at 12 (petitioner "was provided with no consultation regarding how to perfect his appeal or even how to obtain appointed counsel or poor person relief."); Pet. Br. at 12 ("counsel did not speak with Mr. Arjune at all about an appeal").

⁴Additional support for this finding can be found in defendant's lack of response to the motion to dismiss, despite the fact that the prosecutor served petitioner himself by mail and not just his attorney. And defendant never swore in his affidavit that he did not see the motion or was unaware of it, and his lack of response was telling as to his interest in preserving his right to appeal.

These many assertions, contravened by the state court's findings of fact, attest to the importance of the factual issue to defendant's claim; without them, his contention simply cannot stand.

In sum, because the court below rejected petitioner's factual premise, his claim fails regardless of whether his legal contention is correct. This Court should thus decline to review the legal issue he seeks to raise.

II. Petitioner's legal contention lacks merit, as he misinterprets *Flores-Ortega* and his effort to extend that case far beyond its import should be rejected.

Even if petitioner's legal contention did make a difference under the facts here, it is unworthy of review as it rests on a fundamental misinterpretation of this Court's decision in *Flores-Ortega*. That case commands the filing of a notice of appeal upon request and consultation with the client about filing such a notice in specified circumstances. Nothing in the decision requires trial counsel, having filed a notice of appeal, to give further advice regarding the advisability of continuing to pursue the appeal or to inform a defendant of how to apply for poor person relief, especially where counsel has been retained and the court has otherwise informed defendant of the means for seeking such relief. Nor has petitioner shown any other case that would demand the imposition of duties on trial counsel beyond the filing of the notice of appeal, such as assisting a defendant in obtaining appellate counsel. Accordingly, even if this case did present an appropriate vehicle for reviewing petitioner's legal issue, review should be denied because his legal contention is unsupported and without merit.

In the very first line of its decision in *Flores-Ortega*, this Court specifically framed the issue in that case as one dealing with the obligations of counsel to

file a notice of appeal: “we must decide the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel’s failure to file a notice of appeal without respondent’s consent.” *Flores-Ortega*, 528 U.S. at 473. Then, after observing that counsel must follow the defendant’s express direction in this regard (whether that direction is to file or not to file a notice of appeal), the Court re-framed the question, again posing it as one involving the obligation to file a notice of appeal: “Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?” *Id.* at 477.

In answering that question, the Court first rejected the Ninth Circuit’s rule, which required that counsel file such a notice unless the defendant specifies otherwise. *Id.* at 478. The Court expressly declined the invitation to impose a specific, bright-line rule as to do so would be inconsistent with *Strickland*, which requires a case-by-case analysis taking all circumstances into account. *Id.*

The Court then held, “In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal.” *Id.* In answering this antecedent question, the Court, here too, rejected a bright-line rule, one suggested by ABA Standards, that consultation is required in every case. Such a detailed rule had no place in the effective counsel analysis, according to the Court. Instead, the obligation to consult about the need to file a notice of appeal arises only under certain circumstances, when there is reason to believe 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.” *Id.* at 480.

But nothing in *Flores-Ortega* divorced the duty to consult from the duty to file a notice of appeal. Indeed, the question regarding the obligation to consult was raised for the purpose of determining whether counsel has an obligation to file a notice of appeal. It did not impose a further obligation on counsel beyond the filing – whether that obligation is postulated as one to help the defendant obtain poor person relief or to otherwise encourage him or her to perfect the appeal.

Nor is it necessary to impose such a further obligation on counsel. As the Court of Appeals found, defendants in New York like petitioner are routinely informed of the means of obtaining poor person relief.⁵ They are handed a document at sentencing specifying not only that they have a right to appeal but that they can make an application for assigned counsel in the Appellate Division by showing their inability to pay for an attorney or the other costs of pursuing an appeal. The written notice, which the defendant takes with him, even specifies the address of the relevant court.

The Court of Appeals has also explained that the application requires no legal knowledge. Routinely in New York, poor person applications turn solely on a few basic assertions regarding the defendant's finances, information exclusively within defendant's knowledge, rather than any legal issue. *See People v. West*, 789 N.E.2d 615, 619-620 (N.Y. 2003). Indeed, countless *pro se* defendants obtain poor person relief based on simple forms used by the Appellate Division that ask a few factual questions.

New York rules also provide other assistance to defendants seeking to obtain poor person relief on appeal. Currently, a defendant who has assigned

⁵The Court of Appeals noted that petitioner “never even denied that the form handed to him at sentencing – while counsel presumably stood next to him – was the standard form handed to every defendant.” Pet. App. at 16a.

counsel in the trial court may ask that court at sentence for poor person relief in the appellate court, without any written application at all. N.Y. Criminal Procedure Law § 380.55.⁶ And defendants who do not make that request of the trial court may nevertheless ask trial counsel for assistance, and trial counsel is obligated to provide it under court rules. 22 N.Y.C.R.R. § 671.3(b). Failing that, a simple request for information from the appellate court, whose address has been provided, would result in additional assistance in filing the motion. And in the unusual circumstances when an application is denied, it is invariably without prejudice to a renewed application. For all these reasons, defendant need not have counsel in order to ask for counsel.

Amici nevertheless argue that trial counsel is *per se* ineffective unless they either “perfect[] their [client’s] appeals or assist[] them in exercising their rights to substitute counsel” Amicus Br. at 6. They find a source for such a requirement in the ABA standards, arguing that this “Court repeatedly applies the ABA’s standards as a benchmark for assessing whether counsel was ineffective” and condemning the Court of Appeals for failing to insist on compliance with those standards in its decision. Amicus Br. at 10-16. Likewise, petitioner claims that counsel’s conduct was deficient in light of the rules for New York’s Appellate Division, Second Department, as well as the ABA standards. Pet. Br. at 4-5).

But this Court expressly declined in *Flores-Ortega* to adopt any specific rules of conduct for trial counsel in assisting a defendant in pursuing an appeal. Indeed, such rules “would be inconsistent with both [the Court’s] decision in *Strickland* and common

⁶While this section was enacted after the events here, the statute demonstrates the absence of any need for this Court to intervene to protect indigent defendants in New York in future cases.

sense.” 528 U.S. at 479. And the Court in *Flores-Ortega* specifically rejected one ABA bright-line rule, holding that “‘prevailing norms of practice as reflected in American Bar Association standards and the like . . . are only guides,’ and imposing ‘specific guidelines’ on counsel is ‘not appropriate.’” *Flores-Ortega*, 528 U.S. at 479 (quoting *Strickland v. Washington*, 466 U.S. 688 [1984]). Likewise, it held that, while states may impose their own rules on counsel, “the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Flores-Ortega*, 528 U.S. at 479. Thus, the Court of Appeals properly evaluated counsel’s conduct in light of the record before it – and in light of its precedent and this Court’s precedent – rather than give constitutional force to court rules or ABA suggestions.

And, analyzing the particular facts of this case as *Strickland* demands, counsel had no obligation to consult with petitioner about the need to seek poor person relief or assist in preparing such an application. Counsel made clear that he would not serve as petitioner’s appellate attorney, and because he was present at sentencing, was fully aware that petitioner had been informed of how and where to file a poor person motion, should petitioner have insufficient funds to hire an attorney.

And, in this regard, counsel here, unlike in many cases, had been retained by petitioner in the trial court. He thus had no particular reason to know that petitioner had no further funds to pursue an appeal. Under these facts, counsel had no duty to assist petitioner in preparing a poor person motion or otherwise pursuing an appeal.

Nevertheless, petitioner claims that the Court of Appeals improperly relied on the notice given to him in court because it was no substitute for counsel’s advice. Pet. Br. at 13-15. But the notice was relevant both to counsel’s duty to elaborate on it and as to whether petitioner’s failure to pursue the appeal was the result

of counsel's conduct. Indeed, as the Court of Appeals noted, this Court observed in *Flores-Ortega* that, in some cases, a trial court's instructions at sentencing are so clear that a reasonable attorney might "decide that he need not repeat that information." *Flores-Ortega*, 528 U.S. at 479-80. And here, the notice was clear, petitioner indisputably received it, counsel knew as much, and petitioner never asserted that he had any questions about it. This suggests that counsel, who was retained and did in fact file a notice of appeal, had no further duty to assist petitioner in filing a poor person application, particularly since petitioner did not have poor person relief in the court below.

Nor did the Court of Appeals conclude that this notice "obviated the need for legal counsel," as *Amici* suggest, Amicus Br. at 18-22, or that trial counsel "has no obligation to inform the defendant of his or her right to the further assistance of counsel on appeal, including such assistance without cost" Amicus Br. at 4. The court simply held that petitioner here was made aware of how to pursue poor person relief, and in this case, where counsel had been retained, counsel did not have to provide a further explanation of how to make such an application.

Finally, *Amici* ask this Court to hear an issue not raised in state court – whether counsel had a duty to advise petitioner of what effect an appeal might have on his immigration status. Amicus Br. at 23-5; *Padilla v. Kentucky*, 559 U.S. 356 (2010). But this Court should not address an issue that was not raised or decided in state court: "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005), citing *Adams v. Robertson*, 520 U.S. 83, 86

(1997) (*per curiam*).⁷ Here, petitioner did not argue in any state court that counsel was under a constitutional obligation to inform him of the immigration consequences of his conviction, and thus certiorari should be denied on this issue.

In short, nothing in *Flores-Ortega* requires or authorizes a rule under which trial counsel must assist a defendant in pursuing poor person relief or discuss that procedure with him after having filed a notice of appeal. Nor did counsel have such an obligation under the facts of this case. Petitioner has not suggested that he ever asked for counsel to assist him in preparing a poor person motion, and, absent such a request, counsel acted reasonably in filing the notice of appeal, making clear to petitioner that he would not act as appellate counsel, and assuring that petitioner knew how to proceed with a request for appellate counsel if he could not afford one.

Moreover, as noted above, petitioner has failed to show that counsel did not discuss with petitioner the advisability of pursuing an appeal. Indeed, counsel's submission said nothing about what was discussed prior to or at the time of sentence about an appeal, and his filing of the notice of appeal suggests at the least that some discussion was had.

In sum, in the absence of a general rule requiring counsel's assistance in obtaining poor person relief or a showing that such was necessary here, the

⁷This requirement should be viewed as jurisdictional, as many of this Court's decisions have described it. *See Howell*, 543 U.S. at 445 (collecting cases). Ultimately, however, this Court will decline to review an issue "whether [its] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, [where] even treating the rule as purely prudential, the circumstances here justify no exception." *Adams*, 520 U.S., at 90, 117 S.Ct. 1028 (citations omitted). *Amici* have offered no evidence that the state courts considered this issue and no circumstances justifying an exception.

Court of Appeals decision in no way contravened *Strickland* or *Flores-Ortega*.

CONCLUSION

The petition for certiorari should be denied both because petitioner's claim presents an issue of fact rather than the legal question he seeks to raise and because his legal contention is unsupported and meritless.

Respectfully submitted,

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June 28, 2018