

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**

REPLY BRIEF FOR PETITIONER

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In its opposition, the State of New York underscores the need for this Court to clarify that an attorney’s “duty to consult . . . about an appeal,” *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), applies to the critical period between sentencing and the retention of appellate counsel. The State does not deny—and cannot—deny that “[d]espite this Court’s instructions in *Flores-Ortega*,” criminal defendants nationwide are losing their right to appeal because, like Mr. Arjune, they have not been counseled about perfecting their appeals, the consequences of failing to do so, and how to obtain appellate counsel. Brief for Nat’l Ass’n of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner 9–10.

Instead, the State defends the decision below on the merits, asserting that the New York State Court of Appeals properly read *Flores-Ortega* as holding that trial counsel’s duty with regard to an appeal is restricted to filing the notice of appeal. Under the State’s view, trial attorneys may abandon their clients without consultation about perfecting the appeal and retaining appellate counsel. The result is that defendants are deprived of counsel at the critical post-trial stage during which they must act to protect their appellate rights. See *infra* § I. Thus, such a reading is clearly wrong and reinforces the need for this Court’s review.

The State further argues that the scope of the duty to consult is not well-presented here because counsel may have consulted with Mr. Arjune *before* filing the notice of appeal, and the court clerk gave Mr. Arjune a form notice of appeal at sentencing. That is a red herring. Mr. Arjune’s trial counsel admitted that he never spoke with Mr. Arjune about the appeal after filing the notice of appeal and did not claim to have spoken with him beforehand. In addition, the form

notice the court clerk handed Mr. Arjune or his attorney did not explain how to perfect a poor person appeal or obtain appointed appellate counsel. See Petition Appendix 5a, 38a–39a (“Pet. App.”). Thus, the form was not “so clear and informative as to substitute for counsel’s duty to consult,” *Flores-Ortega*, 528 U.S. at 480, particularly where, as here, Mr. Arjune is scarcely, if at all, literate. See *infra* § II.

I. THIS CASE ILLUSTRATES THE NEED TO CLARIFY THE STANDARD SET FORTH IN *FLORES-ORTEGA*.

To determine whether a defendant received effective assistance of counsel, *Flores-Ortega* instructs courts to ask “whether counsel in fact consulted with the defendant about an appeal,” defining “consult” to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal.” 528 U.S. at 478. The State argues that this duty to consult is necessary only “for the purposes of filing a notice of appeal,” Brief for Respondent in Opposition 9 (“Opp’n”), so counsel has no further obligation to help the defendant obtain poor person relief or otherwise encourage him or her to perfect the appeal, *id.* at 18. But aside from noting that in *Flores-Ortega*, in contrast to this case, counsel failed to file a notice of appeal, *id.* at 17, the State provides no reason why trial counsel should be permitted to file a notice of appeal and then “walk[] away from all further obligation to or communication with [a defendant],” as the New York courts allowed to occur here. Pet. App. 44a (Wilson, J., dissenting).

The State has no response to the Petitioner’s showing (Brief for Petitioner 12 (“Pet.”)) that there is no practical difference between an attorney who files a notice of appeal and then abandons the client without consultation about how to perfect the appeal or obtain

appointed counsel and a counsel who fails to file a notice of appeal at all. Acceptance of the State’s argument would defeat the very “purpose of the effective assistance guarantee of the Sixth Amendment”—to “ensure that criminal defendants receive a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Indeed, a defendant is entitled to effective assistance of counsel on appeal precisely because a criminal appeal is “an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding.” *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

There is, thus, no support for New York’s contention that an attorney provides effective assistance of counsel merely by filing the notice of appeal, so there is no need to inquire whether the failure to consult about perfecting the appeal or obtaining appointed appellate counsel was an “objectively reasonable choice[].” *Flores-Ortega*, 528 U.S. at 479; Pet. App. 43a–45a (Wilson, J., dissenting); see also *State v. Patton*, 195 P.3d 753, 769 (Kan. 2008) (“Under *Flores-Ortega*, if appointed or retained counsel has failed to file or perfect a direct appeal by a criminal defendant, we will presume the existence of prejudice.” (emphasis added)); *Esquivel v. United States*, 2016 WL 6902150 (N.D. Tex. Oct. 3, 2016), *report and recommendation adopted*, 2016 WL 6902183 (N.D. Tex. Nov. 21, 2016) (finding that defendant’s right to effective assistance of counsel was violated when trial counsel did not file a notice of appeal even though “trial counsel testified that he reviewed [the defendant’s] appellate rights with him prior to rearraignment, [and] there is no dispute that trial counsel only ‘briefly’ spoke to [the defendant] just after sentencing and did not speak with him after the day of sentencing”); 1 Lissa Griffin, *Federal Criminal Appeals*

§ 1:33 (2018 update) (noting that as an ethical matter, “[c]ounsel must give the defendant his professional opinion about whether there are any meritorious grounds for an appeal”). Cf. *Maddox v. State*, 407 P.3d 152, 203, 206 n.27 (Haw. 2017) (adopting a rule under a parallel provision in Hawaii’s state constitution that all defense counsel must explain the meaning and consequences of the court’s judgment and the client’s right to appeal, as well as the advantages and disadvantages, and noting that the Court came to a similar result in *Flores-Ortega*).

Nor is there merit to the State’s further contention that “this Court expressly declined in *Roe v. Flores-Ortega* to adopt any specific rules of conduct for trial counsel in assisting a defendant in pursuing an appeal,” and thus the ABA standards requiring for counsel to consult with a defendant in the critical period between sentencing and the retention of appellate counsel should not serve as a benchmark for ineffectiveness. Opp’n 19–20. Although “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel,” this Court has long held that American Bar Association standards “are guides to determining what is reasonable” in cases presenting an ineffectiveness of counsel claim. *Strickland*, 466 U.S. at 688–89; see also, e.g., *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (citing Rule 1.2(a) of the ABA Model Rules of Professional Conduct (Am. Bar Ass’n 2016) in support of the proposition that a lawyer may not override a client’s decision to maintain his innocence, and distinguishing cases involving the defendant’s perjury by referencing comment 8 to Rule 3.3 of the Model Rules); *Jones v. Barnes*, 463 U.S. 745, 750–51 (1983) (citing Rules 4-5.2 and 21-2.2 of the ABA Standards for Criminal Justice (2d ed. 1980)

in affirming the right to make decisions regarding criminal appeals); *Combs v. Coyle*, 205 F.3d 269, 289–90 (6th Cir. 2000) (quoting *Strickland*’s instruction that the ABA standards are “guides to determining what is reasonable, but they are only guides,” 466 U.S. at 688, then quoting the ABA Standards for Criminal Justice, Defense Function 4-1.2(c) (2d ed. 1980) to support the proposition that death penalty cases “call[] for a greater degree of reliability when . . . impos[ing]” the death sentence); and *Beets v. Scott*, 65 F.3d 1258, 1269–70 (5th Cir. 1995) (citing numerous ABA Model Rules of Professional Conduct and associated comments in discussing lawyers’ constitutional “duty of loyalty”).

ABA Standard 21-2.2(a) states: “Counsel . . . 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 Standards for Criminal Justice, Transition from Trial Court to Appellate Court, 21-2.2(a) (approved Aug. 1978). As the ABA commentary explains, this standard stresses “the continuing responsibility of the trial attorney” in order “to avoid the problem of a hiatus in legal representation during [the] critical period” between sentencing and appeal, and thus serves to protect the defendant’s ability to exercise his right to appeal that underlie *Flores-Ortega* and *Evitts*. *Id.* at 21-2.2(a) cmt. (2d ed. 1980). It is therefore proper to cite the failure to follow this guideline as proof that counsel behaved in an objectively unreasonable manner and deprived Mr. Arjune of effective assistance of counsel.

II. THE FACTS OF MR. ARJUNE’S CASE DO NOT PRECLUDE REVIEW BY THIS COURT.

New York erroneously asserts that the question about the scope of duty to consult about an appeal is not well presented in this case because the affirmation of defense counsel did not say that counsel “*never* discussed appealing . . . or failed to inform [him] that he would need either a different lawyer for an appeal or to apply for poor person relief.” Opp’n 11 (quoting Pet. App. 16a–17a) (emphasis in original). The legally relevant fact is undisputed:¹ It comes from counsel’s

¹ Even if the facts were disputed, this Court need not defer to the inferences drawn by the New York Court of Appeals. In claiming otherwise, the State cites *Hernandez v. New York*, 500 U.S. 352, 366 (1991), (Opp’n at 13), but that case involved findings of fact made by a state *trial* court—not a court of appeals reading a cold record that consisted only of written affirmations without live testimony or credibility determinations. The State also cites *Minnesota v. Olson*, 495 U.S. 91 (1990), but the Court there stated that “[w]e do not disturb the state court’s judgment that these facts do not add up to exigent circumstances,” *id.* at 101, and only Justice Kennedy, concurring, mentions deference, *id.* at 102 (“I interpret the last two paragraphs of Part III as deference to a state court’s application of the exigent circumstances test to the facts of this case, and not as an endorsement of that particular application of the standard. With that understanding, I join the opinion of the Court.”). Furthermore, the Stern and Gressman treatise the State relies on cites cases establishing that this Court does *not* defer state court findings of fact that implicate a federal constitutional right. Stephen M. Shapiro, *Supreme Court Practice*, § 3.28 (10th ed. 2013) (quoting *Fisk v. Kansas*, 274 U.S. 380, 385–86 (1927) (noting that the Supreme Court will examine state court findings of facts “where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to find it necessary”)); *Stein v. New York*, 346 U.S. 156, 181 (1953) (“[The Supreme] Court cannot allow itself

own affirmation that “after filing the notice of appeal,’ counsel had no contact with defendant or his family,” Pet. App. 17a, and that counsel “did not remember speaking to defendant about how to perfect the appeal,” because he believed his representation “ended after the filing of the notice of appeal,” *id.* at 5a. As Judge Rivera pointed out, it was clear from counsel’s “own admissions that [he] did nothing other than file a notice of appeal.” Pet. App. 36a, n.6. If “counsel’s admission of his own failures is not enough, then no defendant, with or without cognitive limitations, can meet the standard” for ineffective assistance of counsel. *Id.*

New York also argues that the Notice of Appeal form that the court clerk purportedly handed to Mr. Arjune at sentencing sufficed to inform him of his right to appeal and obtain appointed appellate counsel. See Opp’n 12. In this sense, Mr. Arjune’s circumstance mirrors that of the defendant in *Flores-Ortega*, where this Court held that counsel had a duty to consult about an appeal even though the judge advised the defendant in open court, “You may file an appeal within 60 days from today’s date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.” *Flores-Ortega*, 528 U.S. at 474. Mr. Arjune received no such admonition in open court, but the notice that he may have received similarly indicated that he had a right to appeal. Moreover, as Judge Rivera explained, “without counsel’s guidance,” the form “would be of little use to [Mr. Arjune] who is barely

to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.”)

literate.”² Pet. App. 38a, n.7. And even if that were not the case, the form did not contain the “clear and informative” explanation of rights that might be able to “substitute for counsel’s duty to consult.” *Flores-Ortega*, 528 U.S. at 480. The form did not explain how to perfect a poor person appeal or obtain appointed appellate counsel, much less advise Mr. Arjune about the “advantages and disadvantages” of pursuing an appeal. *Id.* at 478; see also Pet. 14–15 & n.3; Pet. App. 38a–39a (Rivera, J., dissenting).

Finally, New York suggests that Mr. Arjune cannot show that he was prejudiced by the ineffective assistance of his counsel because the Court of Appeals inferred 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.” Opp’n 13 (quoting Pet. App. 19a). But that inference serves only to confirm that Mr. Arjune was not given effective assistance of counsel concerning the need to obtain appellate counsel and to perfect the appeal. A lay person without the advice of competent counsel might think that there is no reason to appeal a conviction until there are collateral consequences, but any competent counsel would make clear that the failure to perfect a timely appeal would result in the permanent loss of the right to appeal a felony conviction that would give rise to serious deportation consequences. See Pet. 16–17; *Lee v. United States*, 137 S. Ct. 1958 (2017). It is therefore

² Although the Court of Appeals’ opinion said “petitioner failed to show that ‘he was unable to understand the form,’” Opp’n 12 (quoting Pet. App. 16a), the record contains an undisputed psychologist’s examination concluding that his “verbal intellectual functioning is in the ‘Extremely Low’ range . . . , and that [he] has low, if any, literacy.” Pet. App. 24a (Rivera, J., dissenting).

clear that “but for counsel’s deficient performance, [Mr. Arjune] would have appealed.” *Flores-Ortega*, 528 U.S. at 484.

CONCLUSION

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

Respectfully submitted,

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