APL-2016-00153
Queens County Indictment No. 2178/08

Court of Appeals

of the

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

MARIO ARJUNE,

Defendant-Appellant.

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK IN SUPPORT OF DEFENDANT-APPELLANT

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Dated: August 30, 2017

STATEMENT PURSUANT TO RULE 500.1(f)

The *Amici Curiae*, the National Association of Criminal Defense Lawyers, the New York State Associate of Criminal Defense Lawyers and the Chief Defenders Association of New York have no parents, subsidiaries, or affiliates.

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs in the U.S. Supreme Court and other federal and state courts, including in this Court, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. *See, e.g.*, *Myers v. Schneiderman*, 29 N.Y.3d 988 (2017); *Friedman v. Rice*, 28 N.Y.3d 1105 (2017); *People v. Caldavado*, 26 N.Y.3d 1034 (2015). NACDL has a significant interest in ensuring that criminal defendants receive effective assistance of counsel, and has frequently appeared as an *amicus curiae* in cases implicating ineffective assistance

of counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Caldavado*, 26 N.Y.3d 1034.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of the NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes. NYSACDL seeks to ensure that those who have been convicted of crimes can pursue a direct appeal of their convictions even if they cannot afford to retain counsel.

The Chief Defenders Association of New York ("CDANY") is a vibrant organization of the chief defenders throughout New York State, providing a single voice for those who represent clients unable to afford counsel. CDANY collectively advocates for positive change in the State criminal justice system. This includes the education of legislators, courts, and the general public about the important role of defense counsel in our system of justice, and about ways to improve the system.

This case provides the Court with an opportunity to reaffirm the scope of the fundamental right to effective assistance of appellate counsel. Specifically, this case asks the Court to consider the question whether an indigent, barely literate defendant

loses his fundamental right to appeal when his counsel abandons him after noticing such an appeal, thus leading him to forfeit his appeal as of right. The People here ask this Court to hold that during the interim period between when an appeal is noticed and when an appeal is perfected, a criminal defendant has no recourse if such an appeal is lost by no fault of his or her own. Such a holding would run counter to the purpose of the right to effective assistance of counsel and would work a tremendous injustice on defendants who rely on counsel to zealously represent them on appeal.

SUMMARY OF ARGUMENT

Under New York law and the United States Constitution, a defendant who wishes to appeal his or her conviction has the right to do so. New York law and the Constitution likewise guarantee the right to effective counsel on that appeal. The federal constitutional and state law standards governing effective assistance of counsel require that counsel take basic steps to ensure that the rights of the defendant are protected. It is well established that trial counsel must, upon their client's request, file a notice of appeal. It is equally well established that counsel handling an appeal must do so effectively.

Despite the clarity of those propositions, the People argue here that there is a point in time at which a criminal defendant is left to his or her own devices and essentially has no right to effective assistance of appellate counsel. Specifically, the People contend that in the interim period between when counsel notices an appeal and when an appeal is perfected through the filing of a brief and record reflecting the work of effective appellate counsel, the right to the assistance of effective appellate counsel vanishes. Instead, in that interim period, counsel—as Mr. Arjune's did here—may abandon the defendant without repercussion. Counsel purportedly may do so without assisting in having substitute counsel appointed, let alone without apprising the defendant of his or her right to the further assistance of counsel on appeal, including such assistance without cost if the defendant, as here,

qualifies. According to the People, counsel may do so despite that the defendant has clearly signaled that he or she wants counsel (by retaining counsel before trial) and despite that defendant has indicated that he or she wants to appeal (indeed, Mr. Arjune's counsel noticed an appeal before abandoning him). By the People's reckoning, so long as the *trial court clerk* has apprised the defendant of his or her right to appeal and right to counsel (here, doing so *while* Mr. Arjune *had* counsel), the defendant has no recourse if his or her counsel abandons him or her thereafter. Rather, the logical extension of the People's position is that if the abandoned defendant does not perfect an appeal or request the appointment of—or hire—new counsel, the defendant has no one to blame but him or herself. This not only is cruel and perverse, but it is wrong under the law. There is no principled basis under New York law or the United States Constitution for finding such a gaping hole in the right to effective appellate counsel.

Indeed, for nearly 40 years, the relevant American Bar Association Standards for Criminal Justice require the opposite of what the People suggest. Those standards state:

> 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, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) (approved August 1978).

Thus, this Court should reject the rule for which the People advocate in the strongest terms. Trial counsel, whether appointed or retained, are responsible for protecting defendants' appellate rights, which includes ensuring that a defendant is able to exercise his right to appointed counsel by properly advising him or her about that right and assisting the defendant in securing it. *See infra* Argument § I. This court should hold that counsel who abandon their clients rather than either perfecting their appeals or assisting them in exercising their rights to substitute counsel are ineffective.

Not only is a rule protecting a defendant from losing his or her right to effective counsel at the critical stage of appeal at issue here consistent with, if not compelled by, the United States Constitution and New York law, but it is also easily administered, easy for competent criminal defense counsel to comply with, and to the benefit of criminal defendants, prosecutors, defense counsel, and this State's courts alike. *See infra* Argument § II.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT COUNSEL WHO, LIKE MR. ARJUNE'S COUNSEL, ABANDON THEIR CLIENTS RATHER THAN PERFECTING THEIR APPEALS OR APPRISING THEM OF THEIR RIGHT TO SUBSTITUTE COUNSEL ARE INEFFECTIVE.

A. The U.S. Supreme Court Has Held That Criminal Defendants Have A Constitutional Right To Effective Assistance of Counsel During Appeals As Of Right, And This Court Has Held That Such Defendants Are Entitled To "Meaningful Representation" During Such Appeals.

After holding that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his or her first appeal as of right, *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that the Due Process Clause entitles criminal defendants to *effective* assistance of counsel on such appeals. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). The Supreme Court explained that an unrepresented appellant "is unable to protect the vital interests at stake. To be sure . . . nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Id.* at 396.

Building on these principles, the United States Supreme Court has recognized that part and parcel of the Constitution's guarantee of effective appellate counsel is that defendants receive effective assistance of counsel in deciding whether to pursue an appeal as of right. *Roe v. Flores-Ortega*, 528 U.S. 470, 479-81 (2000). Applying

the American Bar Association's ("ABA") Standards for Criminal Justice, *id.* at 479, the Court recognized 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." *Id.* at 480; *see also id.* at 483 (instructing that a court is to presume prejudice where counsel's deficient performance led to the forfeiture of a criminal defendant's appeal, explaining that it could not grant any presumption of reliability to "judicial proceedings that never took place"); *id.* (prejudice exists where counsel's "deficiency deprived respondent of the appellate proceeding altogether").[1]

This Court, of course, is bound to follow—and has followed—these principles as a matter of federal constitutional law governing effective assistance. *See*, *e.g.*, *People v. Syville*, 15 N.Y.3d 391, 397 (2010) (applying *Flores-Ortega*, 528 U.S. at 477). Moreover, this Court has consistently held that New York State's

[1] Post-*Flores-Ortega*, the federal appeals courts recognized that although "there is no per-se rule, a lawyer who fails to consult with a defendant about an appeal following a jury trial almost always acts unreasonably." *Bostick v. Stevenson*, 589 F.3d 160, 167 (4th Cir. 2009); *see also, e.g., Campusano v. United States*, 442 F.3d 770, 777 (2d Cir. 2006) ("The concern animating *Flores–Ortega*—that defendants not be forced by attorney error to accept 'the forfeiture of a proceeding itself'—is a powerful one even where the defendant is the only person who believes an appeal would be worthwhile.").

"meaningful representation" standard governing effective assistance of counsel "offers greater protection than the federal test." *E.g.*, *People v. Clark*, 28 N.Y.3d 556, 562, 565 (2016).

For decades, this Court has emphasized that New York law governing effective assistance is a significant protection for criminal defendants pursuing an appeal as of right. *See, e.g.*, *People v. Gonzalez*, 47 N.Y.2d 606, 610 (1979) ("the assistance given [by appellate counsel] must be that of an advocate rather than as *amicus curiae*"); *People v. Stultz*, 2 N.Y.3d 277, 281-82 (2004) (applying the "meaningful representation" standard to appeals); *People v. Borrell*, 12 N.Y.3d 365, 368 (2009) ("counsel's actions [must be] consistent with those of a reasonably competent appellate attorney"). Consistent with New York's paramount interest in ensuring that criminal defendants receive meaningful assistance as they pursue their right to appeal, by 1964—long before *Flores-Ortega* recognized the federal constitutional dimensions of such obligations—the Appellate Divisions had "promulgated rules that require assigned or retained counsel 'immediately after the pronouncement of sentence' to advice a defendant" regarding his or her appellate rights, including "the right to appeal," "the manner for instituting an appeal," and "the right to seek leave for appointment of counsel and to proceed with the appeal as a poor person." *People v. West*, 100 N.Y.2d 23, 26 (2003) (citing various sections of 22 NYCRR).

As detailed below, in no way can counsel's abandonment of Mr. Arjune after noticing his appeal be deemed effective assistance as a matter of federal constitutional law, let alone be deemed a "meaningful representation" "consistent with [that] a reasonably competent appellate attorney" would provide as a matter of New York law. *See Borrell*, 12 N.Y.3d at 368.

B. Counsel Was Ineffective By Abandoning Mr. Arjune After Noticing His Appeal Without Ensuring That New Counsel Was Substituted And Without Even Apprising His Client Of His Right To Counsel On Appeal.

As in *Flores-Ortega*, *see supra* pp. 7-8, the U.S. Supreme Court and this Court repeatedly have applied the ABA's standards as a benchmark for assessing whether counsel was ineffective. *See*, *e.g.*, *Flores-Ortega*, 528 U.S. at 479; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("we long have referred [to ABA standards] as 'guides to determining what is reasonable'") (citations omitted); *People v. Oliveras*, 21 N.Y.3d 339, 347 n.6 (2013) (relying on ABA's Criminal Justice Standards in resolving ineffective assistance claim). The relevant ABA Criminal Justice Standards, those governing "Transition from Trial Court to Appellate Court," unequivocally show that counsel here breached his duty to Mr. Arjune. For decades, the ABA Standards have stated in the clearest possible terms:

> 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, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) ("Trial counsel's duties with regard to appeal") (approved August 1978) (emphasis added).[2]

Indeed, the commentary to Standard 21-2.2 states "[r]egardless of whether trial counsel will also represent the defendant on appeal, there is the continuing responsibility of trial counsel to provide assistance to a client beyond entry of final judgment in the trial court." ABA, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) (2d ed. 1980), *Commentary*. The commentary rightly emphasizes "[t]his is a critical stage in a criminal prosecution, and no defendant should lack legal counsel during this period." *Id.* The commentary further explains that "[t]his standard, in stressing the continuing responsibility of the trial attorney, seeks to avoid the problem of a hiatus in legal representation during a critical period." *Id.*

Other States and the federal appellate courts have strongly taken the ABA's guidance to heart. Indeed, as a leading treatise summarizes, "most of the [federal] courts of appeals require counsel who represented a defendant at trial to continue

[2] The standards further state that "counsel for a defendant-appellant or a defendant-appellee should continue to represent their client if the prosecution seeks review in the highest court, *unless new counsel is substituted or unless the highest court permits counsel to withdraw*." ABA, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-3.2 ("Counsel on appeal") (emphasis added).

representation after the defendant is convicted, unless relieved by order of the court of appeals." L. Griffin, 1 Federal Criminal Appeals § 1:18 ("Procedure—Continuation of trial counsel on appeal) (Mar. 2017) (citing rules of the United States Courts of Appeals for the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit, as well as the above-discussed ABA standard).[3]

[3] Other States have codified similar obligations. *See also, e.g., Lyons v. Arkansas*: 2016 Ark. 367, 2 (2016) ("Arkansas Rule of Appellate Procedure–Criminal 16 (2015) provides . . . that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause."); *Blakely v. Arkansas*, 279 Ark. 141, 142 (1983) (granting motion for belated appeal because defendant's counsel never requested permission to withdraw, and recognizing that counsel was therefore obligated to continue representing the defendant throughout the appeal); 3A Trial Handbook for Arkansas Lawyers § 102:3 (2016-2017 ed.) (requiring counsel to monitor a defendant's appeal "even if a motion to withdraw has been or will be filed"); *New Jersey v. Sheridan*, 655 A.2d 934, 935 (N.J. Super., App. Div. 1995) ("Counsel was appointed, . . . through the municipal appeal to the Law Division. In the absence of waiver of the right to counsel for this appeal, defendant is entitled to the continued assistance of counsel. R. 3:27-2 provides that: ['']The representation of the defendant by counsel so assigned shall continue through trial and, in the event of a conviction, shall continue through sentencing and shall include advising the defendant with respect to his right to appeal, and, if he desires to appeal, the preparation and filing of the notice of appeal and of an application for the assignment of counsel on appeal . . . .['']"); Ala. R. Crim. P. 26.10 & Committee Comments (Rule requiring upon "timely notice of appeal" that "the court shall enter an order appointing counsel," and commentary discussing ABA, Standards for Criminal Justice, *Criminal Appeals* 21-2.2(a)).

Although New York has not extended these principles as far as the federal courts and some other jurisdictions,[4] this State's rules recognize that even a counsel who will not represent his or her former client on appeal has continuing duties, including a duty to ensure that defendant is not left without the appellate representation to which he or she is entitled. For instance, the Second Department specifically recognizes that counsel's "[a]dditional duties . . . in the trial court" include providing his or her client a notice that not only "advis[es] him of the right to appeal," but also sets forth in writing: "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 . . ." 22 NYCRR 671.3(b)(3); *see also* §§ 606.5(b)(2), 821.2(a) (similar under First and Third Department Rules). The Second Department further requires that

[4] The United States District Court for the Southern District of New York recently held that the First Department's procedures requiring, *inter alia*, that defendants "draft a notarized letter on [their] own in order to prove [their] indigency" to receive appellate counsel constitute an unreasonable restraint on the right to counsel. *Calaff v. Capra*, 215 F. Supp. 3d 245, 252 (S.D.N.Y. 2016). Here too the Second Department notice the People contend Mr. Arjune received notes that he was required to come forward with "proof of [his] financial inability to retain counsel." RA-1. Whether these hurdles are themselves unconstitutional as *Calaff* held is not presented here, and this case may be easily resolved on the antecedent question regarding counsel's failure to even advise Mr. Arjune about his right to appellate counsel.

counsel obtain *the client's written instructions* regarding his or her desire to, *inter alia*, apply to prosecute the appeal as a poor person and for the assignment of counsel. *Id.* § 671.3(b)(4). If the client wishes to file such applications, the Second Department requires that counsel do so on the client's behalf. *Id.* The Fourth Department's Rules impose the same requirements. *Id.* § 1015.7 (requiring counsel to "move for permission to proceed as a poor person and assignment of counsel on the appeal").

Consistent with the Appellate Divisions' rules, the New York Rules of Professional Conduct make clear that counsel have continuing professional obligations even in cases in which their withdrawal has been sanctioned:

> Even when withdrawal is . . . permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel . . . and complying with applicable laws and rules.

R. 1.16(e).

1. Mr. Arjune's Counsel Flagrantly Violated The Foregoing Principles And Abandoned Him On Appeal.

All of the foregoing principles fly in the face of the People's suggestion that Mr. Arjune's counsel did not "'act[] in ignorance of his responsibilities'" or "caus[e] [Mr. Arjune] to forfeit his appeal." People's Br. 21. Rather, Mr. Arjune's counsel trampled on these standards and was ineffective as a result. Put simply, Mr. Arjune's

counsel filed a notice of appeal on Mr. Arjune's behalf—"a purely ministerial task," *Flores-Ortega*, 528 U.S. at 477[5]—and did no more to ensure that Mr. Arjune's right to appellate counsel and his right to appeal were protected.

Despite the standards set forth above and this Court's long-standing recognition that a "defendant is entitled to the assistance of appellate counsel in perfecting an appeal," *People v. O'Bryan*, 26 N.Y.2d 95, 96 (1970), Mr. Arjune's counsel essentially disappeared, leaving him without substitute counsel or advice about how to obtain such counsel. At best, the record suggests that counsel advised *the Second Department* that he was no longer representing Mr. Arjune. *See* A0000049 ("[T]his Notice of Appeal is being served and filed on appellant's behalf pursuant to Rule §671.3(a) of the Appellate Division, Second Department and that it shall not be deemed to be counsel's appearance as appellant's attorney upon the appeal."); 22 NYCRR § 671.3(a). But there is no indication in the record that

[5] Because Mr. Arjune's counsel filed a notice of appeal on his behalf thus signaling that Mr. Arjune indeed wanted to appeal, this is the opposite of the type of case in which *Flores-Ortega* recognized that counsel's duties are most limited post-conviction, namely that in which "a defendant . . . explicitly tells his attorney *not* to file an appeal." *Flores-Ortega*, 528 U.S. at 477 (emphasis in original). Thus, it is bizarre that the People repeatedly construe Mr. Arjune's choice to appeal and the fact that his counsel filed the appeal as factors that somehow support the notion that Mr. Arjune had no right to the further assistance of appellate counsel. *See* People's Br. 4 ("Counsel filed a notice of appeal on defendant's behalf . . . ."); *id.* at 3 ("The People argued that defendant's claim that he never spoke to counsel about an appeal was not credible because *counsel had filed a notice of appeal*") (emphasis added); *id.* at 17 (similar).

counsel explained to *Mr. Arjune* that he would not be representing him on appeal. Nor does the record suggest that counsel explained to Mr. Arjune that he had a right to new appellate counsel (without cost) if counsel's representation terminated, let alone that counsel assisted Mr. Arjune in any way to ensure that he could exercise that right. *Cf.* 22 NYCRR §§ 671.3(b)(4), 1015.7. Instead, the record indicates the opposite—counsel *unilaterally* declared that "as retained counsel, my representation of Mr. Arjune ended with the trial, sentence and filing of the notice of appeal." A000062 ¶ 3; *see* A000061 ¶ 2 ("After filing the notice of appeal, I do not believe I had further contact with Mr. Arjune or his family.").

In fact, the People's own actions suggest that they had reason to question whether trial counsel had fulfilled his duties to Mr. Arjune and even whether he remained Mr. Arjune's representative. *See* A000052, A000056, A000059 (service on Dennis B. Coppin, Esq.); A000055 ¶ 6 (stating that the People served counsel); People's Br. 10 (same); *Maples v. Thomas*, 565 U.S. 266, 287-8 (2012) (finding it "[n]otabl[e]" whom the State served with court papers in assessing whether defendant was still being represented by counsel). In addition to the People's own repeated service of documents on counsel in connection with the appeal, the People proffer no basis aside from counsel's own *ipse dixit* for their claim that Mr. Arjune understood that his former counsel would not be handling his appeal. *See* People's Br. 2 (stating without citation "Defense counsel subsequently filed a notice of appeal

on defendant's behalf *but made it clear to defendant that he would not act as appellate counsel*.") (emphasis added); *id.* at 3 (stating, based on counsel's affirmation alone, "it was understood that he was not to serve as appellate counsel"); *id*. at 4 ("[A]ccording to the affirmation submitted with the motion, [counsel] had made it clear to defendant that he would not act as appellate counsel."); *id.* at 12.[6]

In sum, Mr. Arjune's counsel provided no advice to Mr. Arjune about how to ensure that his right to counsel on appeal and his right to appeal itself were protected, and took no such measures on behalf of Mr. Arjune. Thus, Mr. Arjune's counsel's failings guaranteed that Mr. Arjune would "lack legal counsel during this" "critical stage in a criminal prosecution." ABA, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) (2d ed. 1980), *Commentary*. This, however, is precisely what the right to counsel is supposed to prevent.

[6] Neither the People nor Mr. Arjune's former counsel have introduced any retainer agreement showing that counsel's representation of Mr. Arjune was circumscribed in the manner described in his declaration and implied in the notice of appeal he filed on Mr. Arjune's behalf. Furthermore, the suggestion that counsel somehow "made it clear" to Mr. Arjune that he was not appellate counsel despite having filed an appeal for Mr. Arjune does not square with counsel's affirmation that "[a]fter filing the notice of appeal, I do not believe I had further contact with Mr. Arjune or his family." A000061 ¶ 2. In short, there is nothing in the record to suggest that Mr. Arjune was apprised before or after the filing of the appeal that his counsel would not assist him. *Cf.* People's Br. 17 (merely stating that counsel's declaration does not address "contents of the conversations *before* filing the notice of appeal").

2. This Court Should Reject The People's Argument That The Clerk of the Trial Court Was An Effective Substitute For The Counsel To Which Mr. Arjune Had A Right.

Notwithstanding that the People even treated Mr. Arjune's counsel as his representative well after Mr. Arjune's notice of appeal was filed, the People's argument against ineffective assistance boils down to a contention that Mr. Arjune purportedly received all the protection he was entitled *from the trial court clerk*. For instance, the People argue:

> [D]efendant had been handed the standard appeal notice at the time of sentencing [by the court clerk], and that notice specifically informed defendant not only of his right to appeal, but also of his right to apply to the Appellate Division for poor person relief [and] for the assignment of counsel . . . . Thus, even assuming that counsel was aware that defendant's family had run out of funds . . . counsel was also aware that defendant had sufficient information to pursue a poor person application. Counsel was not ineffective to inform defendant of this option for *a second time*."

People's Br. 5 (emphasis added); *see, e.g.*, *id.* ("again, defendant was informed *by the court* that upon a showing of indigence, he would be entitled to poor person relief") (emphasis added); *id.* at 10 ("At defendant's sentence, the court clerk handed defendant an appeal notice[.]"); *id.* at 13 ("the standard notice provided to defendant at sentencing specifically informed defendant of both his right to appeal and how to obtain poor person relief . . . . Therefore, the record below demonstrated that defendant was advised of his appellate rights and could have, but failed to, pursue

that appeal."); *id.* at 18-19, 22 (similar). The People's argument is laden with problems.

First, the People do not and cannot cite any law to support the notion that counsel's ineffectiveness can be cured by actions of the court or its clerk. This is for good reason; courts and defense counsel have markedly different functions and responsibilities. The former are neutral arbiters of disputes between the People and criminal defendants, whereas the latter are defendants' advocate. A court owes no duty of loyalty or other representative obligation to the defendant, whereas that is counsel's core responsibility.

Second, the People's suggestion that the protections the court purportedly offered were a substitute for counsel makes no sense given the procedural posture here. The instructions Mr. Arjune received from the court clerk upon which the People's argument is predicated were given to him *while he was represented by counsel*. Because counsel had not withdrawn or sought leave to withdraw (but instead subsequently filed a notice of appeal on Mr. Arjune's behalf), there is no reason why Mr. Arjune would have known of the need to obtain new counsel. *See Maples*, 565 U.S. at 283 ("Nor can a client be faulted for failing to act on his own

behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.").[7]

Indeed, the Southern District of New York recently held that rights notices of the type that the People rely on here (RA-1) constitute an unreasonable precondition to a defendant's right to appeal. *See Calaff*, 215 F. Supp. 3d at 251-53. In *Calaff*, defendant was given a Rights Notice, but was not advised that he would be unrepresented after counsel noticed his appeal, and the steps he was required to take to obtain appellate counsel were not explained, except in the Notice. The court held that the Rights Notice was "unreasonably confusing because it did not clarify that Petitioner was no longer represented by counsel." *Id.* at 252. Here too, the rights notice that the People contend Mr. Arjune received also did not advise that he would be unrepresented after counsel noticed his appeal, and thus he too faced the unreasonably confusing prospect of determining that he lacked representation and then taking (without any advice of trial counsel) the necessary steps to perfect his appeal.

[7] The People cite a number of things Mr. Arjune purportedly could have done to protect his appellate rights, *see* People's Br. 7-8, but all of them are predicated on the People's unsupported claim that "*defendant's attorney told him* that he needed a different attorney for the appeal," *id.* at 7 (emphasis added); *id.* at 14 ("once defendant's attorney told him that he needed a different attorney"). Mr. Arjune's counsel does not even make such a claim; rather, he asserts, as noted, that it was "understood."

Third, in any event, it would be unduly optimistic—if not downright foolish—to believe that a defendant just *convicted and sentenced by the court* ordinarily could be expected to trust what the People suggest was the court's legal advice, let alone to put such advice on par with advice of counsel. The minimal procedural protections offered by a court or its clerk are no substitute for the guarantee of effective assistance of counsel. *See People v. Emmett*, 25 N.Y.2d 354, 356 (1969). (stating that "[t]here is no substitute for the single-minded advocacy of appellate counsel," and rejecting argument that "since an appellate tribunal may have the record before it, it is competent to review a case and pass upon its merits without waiting for the defendant's counsel to make his own appraisal of that record or to submit a brief"); *accord People v. Stokes*, 95 N.Y.2d 633, 637 (2001).

* * *

This Court has repeatedly held that "[w]hen counsel's omission causes a defendant to lose the right to perfect or obtain merits consideration of an appeal, the deficient performance amounts to ineffective assistance of counsel in violation of the Due Process Clause," which is exactly what happened here. *Syville*, 15 N.Y.3d at 397 (citing *Evitts*, 469 U.S. at 387). In no way could abandoning a defendant in the way Mr. Arjune's counsel did qualify as the actions of a "reasonably competent appellate attorney." *Borrell*, 12 N.Y.3d at 365.

II. REQUIRING AN ATTORNEY WHO NOTICES AN APPEAL TO ASSIST HIS OR HER CLIENT IN OBTAINING SUBSTITUTE COUNSEL FOR THE APPEAL BOTH ENSURES THAT THE GUARANTEE OF EFFECTIVE ASSISTANCE IS FULFILLED AND IS ADMINISTRATIVELY WORKABLE.

The rule that *amici* advocate is far superior to the one the People seek, both in terms of what the interest of justice requires and what would be most easily administrable and efficient for all participants in the criminal justice system.

First, the guarantee of effective assistance of appellate counsel can be fulfilled only by making clear that—consistent with the ABA rules and the other above-discussed court rules and precedents—a lawyer who will not perfect the appeal he or she files must advise his or her client about how to obtain appellate counsel to do so and assist his or her client in preparing the necessary papers. To do otherwise presents an egregious risk to criminal defendants' fundamental right to counsel in their appeals as of right and undermines exactly what the ABA Standards are designed to prevent—"a hiatus in legal representation during a critical period." ABA, Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) (2d ed. 1980), *Commentary*.

Indeed, these risks are acute for criminal defendants who, like Mr. Arjune, lack prior experience with the criminal justice system. *Cf. Flores-Ortega*, 528 U.S. at 492 (Souter, J., concurring in part and dissenting in part) ("[m]ost criminal defendants, and certainly this one, will be utterly incapable of making rational

judgments about appeal without guidance"). And they are even more significant for criminal defendants who, like Mr. Arjune, have not always been represented by appointed counsel. Even if such defendants understand the right to an appeal and the right to counsel, including on appeal, generally, they may have little understanding that the latter right applies to them if they previously had retained counsel. *See* A000064 ¶ 3 ("I did not know that I could have a public defender on appeal."). Of course, such criminal defendants justifiably have even less understanding of their right to counsel and need to exercise that right when their retained counsel abandons them after noticing an appeal (like Mr. Arjune, they have no awareness that their rights are being lost). *See Maples*, 565 U.S. at 283. Only the People's rule raises the specter that criminal defendants will be left without a remedy in the face of such abandonment.

Second, this rule places a minimal burden on criminal defense attorneys while saving criminal defendants from the onerous task of navigating the appellate process alone. For a lawyer experienced with the criminal justice system, providing advice about these subjects and preparing the necessary papers is easily and quickly accomplished. On the other hand, the People's rule would place an immense burden on defendants, especially uneducated, non-English-speaking defendants, who must (i) come to understand the right to appellate counsel, (ii) then understand that to receive appellate counsel requires papers demonstrating one's indigence and

requesting the appointment of counsel, and (iii) then prepare such papers despite potential deficiencies in language and legal knowledge.

Third, the rule that *amici* advocate is more efficient for all the institutional players than the circumstances that the People's rule has brought about. Under the People's rule, there is a considerable risk that after an appeal is forfeited, all participants in the criminal justice system will endure months, if not years (as Mr. Arjune has), mired in collateral review proceedings regarding ineffective assistance of appellate counsel claims that are wholly unrelated to the merits of the case. Until the criminal defendant obtains counsel as a result of a successful collateral challenge, there is no opportunity to test the merits of the conviction and sentence on appeal. That serves no one. Such delays make direct appeals more difficult on defendants, prosecutors, and defense counsel alike, as all become more disconnected from the facts and law relevant to the underlying case. The problems, of course, only amplify if the conviction is reversed and the parties and their counsel have to contemplate new proceedings in the trial court long after the underlying events occurred and after witnesses' memories have faded.

Finally, this rule will more closely align New York's rule with standards of professional conduct and the many federal jurisdictions that have adopted them, leading to greater uniformity and stronger standards of professionalism across jurisdictions. The rule advocated here provides criminal defense attorneys,

prosecutors, and judges with a precise guidepost to determine the point at which the duties of counsel end. The simple requirement that counsel assist clients in ensuring their rights to appellate counsel and appeal itself are protected provides an equitable, non-burdensome, and efficient approach to resolving the issue of what duties attorneys who notice appeals owe their clients.

CONCLUSION

For these reasons and those stated by Mr. Arjune, this Court should reverse the Appellate Division's decision.

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NEW YORK STATE COURT OF APPEALS
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