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 OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE IMMIGRANT DEFENSE PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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 and boasts 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. It 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, 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., Lee* v. *United States*, 137 S.Ct. 1958 (2017); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). The organization has a significant interest in ensuring that criminal defendants

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, *amici curiae* states that petitioner and respondent, upon timely receipt of notice of *amici curiae*'s intent to file this brief have consented to its filing.

receive effective assistance of counsel, and has frequently appeared as *amicus curiae* in cases implicating ineffective assistance of counsel. See *Padilla*, 559 U.S. 356; *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000).

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 Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional, and human rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP supports, trains, and advises criminal defense lawyers on issues that involve the rights of immigrants in state and federal criminal proceedings. IDP seeks to improve the quality of justice for immigrants accused of crimes and has a keen interest in ensuring protection of the due process right of immigrant defendants to appeal their criminal convictions.

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 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 New York Court of Appeal's opinion holds 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the United States Constitution, a criminal defendant who wishes to appeal his or her conviction has the right to do so. The Constitution likewise guarantees the right to effective counsel on that appeal. 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 New York Court of Appeals effectively held 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. Under this holding, 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. Trial counsel apparently 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 if the defendant, like Mr. Arjune, qualifies. Moreover, here, counsel abandoned Mr. Arjune without apprising Mr. Arjune of the potential repercussions of failing to challenge his conviction, when it could—as it did here—subject him to mandatory deportation.

According to the New York Court of Appeals, so long as the trial court clerk apprises the defendant

of his or her right to appeal and right to appellate counsel via a mass-produced, generic written notice (here, doing so *while* Mr. Arjune *had* counsel), the defendant has no recourse if his or her counsel abandons him or her thereafter. The logical extension of this 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 the Constitution for permitting such a gaping hole in the right to effective assistance of appellate counsel.

Indeed, for nearly 40 years, the relevant American Bar Association ("ABA") Standards for Criminal Justice require the opposite of what the New York Court of Appeals held was permissible here. 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 Aug. 1978) (emphasis added).

This Court should reject the rule applied by the New York Court of Appeals in the strongest terms. Trial counsel, whether appointed or retained, is responsible for protecting a defendant's appellate rights, which includes ensuring that a defendant is able to exercise his or her right to appointed counsel by properly advising him or her about that right and assisting the defendant in securing it. See infra Reasons for Granting the Petition § 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.

At minimum, this Court should clarify that the Sixth Amendment's guarantee of effective assistance of counsel is more than just a right to information. The New York Court of Appeals reasoned Mr. Arjune was fully apprised of his right to appeal because the trial court clerk handed him a written notice, while he was being sentenced. In so doing, the New York Court of Appeals dilutes the meaning of a right to counsel. As discussed infra Reasons for Granting the Petition § II, a general written notice regarding the right to appeal and means of securing appellate counsel is no substitute for the legal advice demanded by the Constitution. Courts may not replace the constitutional guarantee of effective assistance of counsel with a mass-produced hand-out.

Finally, this case offers a unique opportunity to consider the relationship between two related bodies of Sixth Amendment jurisprudence affecting noncitizens. *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), and its progeny demand that defense counsel inform noncitizen defendants of the potential immigration

consequences of a conviction. Under the reasoning of *Padilla*, the consultation required under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), regarding an appeal should likewise include the potential immigration consequences if a conviction is left to stand. If effective assistance of counsel encompasses a right to know that a conviction may lead to deportation, it should likewise include a right to know that a successful appeal may be the only means by which to avoid deportation. See infra Reasons for Granting the Petition § III. By granting this petition, the Court may recognize the logical overlap of its prior holdings and clarify whether a *Flores-Ortega* consultation should include a discussion of immigration consequences when the defendant is a noncitizen.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Clarify Counsel's Constitutional Obligation under *Flores-Ortega* to Consult with Criminal Defendants Regarding the Right to Appeal

A. This Court has held that criminal defendants have a constitutional right to effective assistance of counsel during appeals as of right

In *Douglas* v. *California*, 372 U.S. 353, 357-58 (1963), this Court held the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his or her first appeal as of right. Over two decades later, this 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). This 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, this Court has recognized that part and parcel of the Constitution's guarantee of effective appellate counsel is that de-

fendants receive effective assistance of counsel in deciding whether to pursue an appeal as of right. *Flores-Ortega*, 528 U.S. at 480. Applying the ABA's Standards for Criminal Justice, *id.* at 479, *Flores-Ortega* recognized that

> [C]ounsel 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. Where a counsel's deficient performance led to the forfeiture of a criminal defendant's appeal, prejudice is presumed. *Id.* at 483. Since 20% of state criminal appeals result in reversal, remand, or modification, and 11.6% of federal criminal appeals result in reversal, remand, or partial reversal, the right to an appeal is necessary to protect the rights of a significant number of defendants.[2] Trial courts and juries can get it wrong, and the right to an appeal is critical to ensuring the administration of justice.

Despite this Court's instructions in *Flores-Ortega*, criminal defendants are falling through the

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[2] See U.S. Department of Justice, Bureau of Justice Statistics, tbl.1: Percent of criminal appeals disposed in courts of last resort, by appeal characteristics 2010, *available at* https://www.bjs.gov/content/pub/pdf/casc.pdf; U.S. Department of Justice, Bureau of Justice Statistics, tbl.6.3: Criminal appeals cases terminated on the merits, by offense, October 1, 2012-September 30, 2013, *available at* https://www.bjs.gov/content/pub/pdf/fjs13st.pdf.

cracks. Mr. Arjune is like defendants across the country, in that he retained trial counsel, but was unaware he needed to take separate action to obtain appellate counsel. Mr. Arjune's petition offers this Court the opportunity to fill in the gap and prevent trial counsel from abandoning their clients before providing constitutionally guaranteed counsel regarding appellate rights.

B. Professional Rules of Conduct provide a template for protecting the Sixth Amendment rights of defendants like Mr. Arjune who must obtain separate counsel to pursue an appeal and must be followed to ensure effective assistance of counsel

This Court repeatedly applies the ABA's standards as a benchmark for assessing whether counsel was ineffective. See, *e.g.*, *Padilla*, 559 U.S. at 366 ("We long have recognized that '[p]revailing norms of practice as reflected in [ABA] standards and the like . . . are guides to determining what is reasonable[.]'" (citing *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984)) (alterations in original)); *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) ("we long have referred [to ABA standards] as 'guides to determining what is reasonable'") (citing *Strickland*, 466 U.S. at 688); *Flores-Ortega,* 528 U.S. at 479. The relevant ABA Criminal Justice Standards, 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 Aug. 1978) (emphasis added).[3]

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 that "[t]his is a critical stage in a criminal prosecution, and no defendant should lack legal counsel dur-

[3] 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(d) ("Counsel on appeal") (emphasis added).

ing 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 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).[4]

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[4] 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."); *State* 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.

Consistent with the rules adopted by other state and federal courts, 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.

N.Y.R.P.C. 1.16(e).

Requiring a lawyer who will not perfect the appeal to advise his or her client about how to obtain appellate counsel and assist his or her client in preparing the necessary papers guarantees effective assistance of counsel and is consistent with ABA standards and rules of professional conduct. 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, Transi-

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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)).

tion 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) ("Most 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. 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. See *Maples* v. *Thomas*, 565 U.S. 266, 283 (2012).

Taking steps consistent with these professional guidelines complies with counsel's constitutional duties, places a minimal burden on counsel, and saves 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.[5]

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[5] Further, such a rule would provide criminal defense attorneys, prosecutors, and judges with a precise guidepost to determine the point at which the duties of counsel end. The

C. Mr. Arjune's counsel flagrantly violated the foregoing principles and abandoned Mr. Arjune on appeal

The New York Court of Appeals decision flies in the face of the ABA and New York's ethical rules and principles. The appellate decision suggests that Mr. Arjune, rather than his trial counsel, is at fault because he failed to provide "nonhearsay proof regarding whether he was made aware of his right to appeal or whether his attorney discussed the taking of an appeal with him prior to filing the notice of appeal." Pet. App. 16. As noted in Judge Rivera's dissent, it is improper to blame Mr. Arjune for his counsel's behavior because "[u]nder well established statutory and case law, Appellate Division rules, and prevailing professional standards applicable then and now, counsel could not desert his client." *People* v. *Arjune*, 89 N.E.3d 1207, 1217 (N.Y. 2017). (Rivera J., dissenting).

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[6]—and did no more to ensure

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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.

[6] 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-

that Mr. Arjune's right to appellate counsel and his right to appeal were protected.

Despite the standards set forth above and New York's long-standing recognition that a "defendant is entitled to the assistance of appellate counsel in perfecting an appeal," *People* v. *O'Bryan*, 257 N.E.2d 19, 20 (N.Y. 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 Pet. App. 2a; 22 N.Y. Comp. Codes & Regs. § 671.3 (a) ("[C]ounsel shall promptly serve and file the necessary formal notice of appeal or application to the appropriate appellate court.")

But there is no indication in the record that counsel explained to Mr. Arjune he would not be representing him on appeal. Nor does the record suggest that counsel explained to Mr. Arjune he had a right to free appellate counsel, let alone that counsel assisted Mr. Arjune in any way to ensure that he could exercise that right. Cf. 22 N.Y. Comp. Codes R. & Regs 671.3 (b)(4), 1015.7 (articulating duties of counsel). Instead, the record indicates the opposite—counsel *unilaterally* declared that "[i]t was understood that [he] was trial and not appellate counsel." Pet. App. 5a.

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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). The lower court failed to recognize this distinction and instead, emphasizes that Mr. Arjune had no right to further assistance of appellate counsel. See Pet. App. 18a.

In fact, New York'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 *id.* at 4a ("[T]he People sent a copy of the motion to dismiss both to defendant at his last known residence and to counsel. Neither defendant nor counsel responded[.])"; *Maples*, 565 U.S. at 287-88 (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 New York's own service of documents on counsel in connection with the appeal, the lower court's decision does not show that New York proffered any 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.

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 is precisely what the right to counsel is supposed to prevent.

II. The Court Should Grant Certiorari to Clarify that a Notice Provided by the Trial Court Clerk Is Not a Substitute for Effective Assistance of Counsel

A piece of paper thrust onto a criminal defendant at sentencing is not effective assistance of counsel. The New York Court of Appeals held, in an unprecedented opinion, that a mass-produced piece of paper—a Notice of Rights—obviates the need for legal counsel and bypasses the Sixth Amendment. *Arjune*, 89 N.E.3d at 1215-16. The lower court's ruling came in two parts. First, it relied on *dicta* from *Flores-Ortega* concerning the possibility that a judge's explanation of the right to appeal might sufficiently avoid the need for further explanation by counsel. *Id.* at 1213. Based on this *dicta*, the court assumed that the "[Supreme] Court's definition of 'consult' cannot logically be read to extend *trial counsel's* duty to consult with the defendant regarding the merits with a view toward deciding whether to perfect the appeal." *Id*. Having alleviated counsel of his duty to provide effective assistance under *Flores-Ortega*, the court then found that the notice allegedly provided by the clerk of court (the notice is not in the record) made Mr. Arjune sufficiently aware of his right to appeal and the process of securing appellate counsel. *Id.* at 1215. Because the clerk of court purportedly furnished Mr. Arjune with this notice, the court reasoned Mr. Arjune's trial counsel had no further obligations to consult with him about an appeal. *Id.* at 1215-16.

The defects in reducing the Sixth Amendment's requirement for legal counsel to a require-

ment that defendants receive a paper flyer are numerous.

First, the lower court relied on *dicta* that has no application here. In *Flores-Ortega*, this Court explained it was resistant to impose a bright-line rule regarding consultation and enumerated possible factual scenarios in which further consultation about an appeal might be unnecessary. See 528 U.S. at 479-80. Among the examples was the following: "suppose a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information." *Id*. Federal appeals courts have observed that, despite this Court's list of possible exceptions, "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); accord *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.").

At minimum, the examples provided by *Flores-Ortega* are to be read narrowly. The Court contemplates instructions that are "so clear and so informative" that they supplant the role of an attorney. *Flores-Ortega,* 528 U.S. at 480. The act of handing a defendant a piece of paper as he is being sentenced, without affording him the opportunity to even read the paper, let alone ask questions, or discuss specific

aspects of his case is not a sufficient constitutional safeguard.

Second, the procedural posture in this case highlights the absurdity of equating a paper notice with the advice of counsel. The clerk of court provided Mr. Arjune with the notice while *he was standing next to his counsel*. See *Arjune*, 89 N.E.3d at 1215. Since all defendants have a right to counsel at sentencing, Mr. Arjune is presumably no different than every other defendant at sentencing in any other court in this country. In that moment, Mr. Arjune, like other defendants, believed he already had an attorney. 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 meticulously examine this notice handed to him by a clerk to seek legal advice regarding his appeal rights and the process of securing 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."); see also *Calaff* v. *Capra*, 215 F. Supp. 3d 245, 252-53 (S.D.N.Y. 2016) (holding that providing a defendant a paper rights notice without explaining that the defendant needs to obtain new counsel to pursue an appeal as "unreasonably confusing for a *pro se* indigent defendant because it did not clarify that Petitioner was no longer represented by counsel."). Why look to a paper for legal advice when your lawyer is standing next to you?

Third, reliance on a written notice incorrectly assumes a universal fluency in written English. This poses a substantial risk to noncitizen defendants. The

vast majority of noncitizens speak English as a second or third language, if at all. Even among noncitizens fluent in conversational English, many have only rudimentary written language skills. The Department of Education has found that inmates who come from non-English speaking homes "demonstrate significantly lower proficiencies [in English] than those who come from homes where English was spoken. The proficiencies of these inmates from a non-English language background . . . indicate that they demonstrate skills associated with *only the most basic literacy tasks*." Karl Haigler, Caroline Wolf Harlow, Patricia E. O'Connor, & Anne Campbell, Literacy Behind Prison Walls, U.S. Department of Education Office of Educational Research and Improvement, xx (October 1994), https://nces.ed.gov/pubs94/94102.pdf (emphasis added). Defense counsel is in a better position than the clerk of court to assess a defendant's comprehension level and advise him or her of the appellate process in a meaningful and understandable manner, including the potential of adverse immigration consequences if a conviction is left to stand unchallenged on appeal. A cookie-cutter notice is simply not an effective method of communication to individuals who struggle with the written language. By elevating the role of the Notice of Rights to effective assistance of counsel, the New York Court of Appeals inappropriately denies many noncitizen defendants not only effective assistance of counsel but also meaningful access to information.

The Sixth Amendment guarantees criminal defendants effective assistance of counsel, not just a right to some information in a paper notice. A piece of paper may provide information to some—to others it may be functionally indecipherable without counsel

and advice from an attorney. Simply put, a Notice of Rights is not equivalent to the right to counsel. It is not tailored advice based on an analysis of the law and facts. Thus, the Court should grant the writ in this case, if, for no other reason, to explain that the services provided by a criminal defense attorney cannot be replicated by a mass-produced hand-out.

III. The Court Should Grant Certiorari to Clarify the Relationship Between *Flores-Ortega* and *Padilla* Regarding an Obligation to Advise Noncitizen Defendants of the Potential Impact of an Appeal on Immigration Status

Noncitizens face draconian consequences when convicted of a crime. Accordingly, the Constitution requires counsel to advise noncitizens of the potential immigration consequences of taking a plea and forgoing a judicial proceeding. In *Padilla*, this Court recognized the importance of counseling a noncitizen defendant of possible collateral immigration consequences of a conviction. *Padilla* observed that "immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal[] is now virtually inevitable for a vast number of noncitizens convicted of crimes." 559 U.S. at 360 (internal citation omitted). Because "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction[,] [t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* at 364.

For many noncitizens, including Mr. Arjune, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 368 (quoting *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 322 (2001)). Because protecting a noncitizen's ability to remain in the United States is so crucial, defense counsel has a Sixth Amendment obligation to advise his or her client of the possibility of deportation before accepting a

guilty plea. *Id.* at 374 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

Failure to advise a noncitizen of potential deportation is virtually prejudicial per se; as a noncitizen, to show a violation of his or her Sixth Amendment rights, the defendant need only establish he or she would not have taken the plea had he or she been aware of the risk of deportation. *Lee* v. *United States*, 137 S.Ct. 1958, 1969 (2017). In so holding, the Court recognized the importance of the fight. A noncitizen's interest in remaining in the United States may be so great that he may be willing to "throw[] a 'Hail Mary' at trial" rather than accept deportation. *Id.* at 1967. Denial of a judicial proceeding, even when there is a slim chance of success, is prejudicial to a noncitizen. Cf. at 1965 ("deficient performance . . . arguably [leads] . . . to the forfeiture of a proceeding itself." (quoting *Flores-Ortega*, 528 U.S. at 483)).

Taken together, *Flores-Ortega*, *Padilla*, and *Lee* suggest that to comply with the Sixth Amendment, counsel must advise a noncitizen of the potential immigration consequences of forgoing an appeal. *Flores-Ortega* requires defense counsel to consult with a client about the availability of an appeal. *Padilla* and *Lee* clarify that a noncitizen defendant must be made aware of the immigration consequence of a conviction. Both areas of Sixth Amendment jurisprudence recognize that a defendant should be aware of his or her right to certain judicial proceed-

ings—be it an appeal or a trial—and the consequences of foregoing those rights. This case presents an opportunity to consider and explain the relationship between these constitutional requirements. Just as a noncitizen defendant has a right to be advised as to the impact of a conviction on his or her immigration status before taking a plea, he or she should also be advised that taking an appeal post-conviction may be a way to preserve his or her immigration status. Since an attorney must consult with a defendant regarding an appeal, that consultation should include a duty to alert noncitizens that an appeal may be the only means to prevent deportation.

Finally, as discussed supra, Part II, the paper notice Mr. Arjune received is not a substitute for legal counsel and cannot supplant a counsel's duty to consult with his or her client. Moreover, this paper notice did not advise Mr. Arjune, as a noncitizen defendant, of the potential immigration consequences of forfeiting an appeal. This further underscores that a paper notice cannot substitute for a counsel's duty to consult with his or her client, as required by *Flores-Ortega*.

CONCLUSION

For these reasons and those stated by Mr. Arjune, this Court should grant Mr. Arjune's petition for certiorari seeking reversal of the New York Court of Appeal's decision.

Respectfully submitted,

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