Circuit Court for Baltimore County
Case No. 03-K-16-000567

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 2076

September Term, 2022

JOSE ENRIQUE CALERO-MEDRANO

v.

STATE OF MARYLAND

Leahy,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 22, 2024

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In 2016, Jose Calero-Medrano ("Appellant") was arrested and charged with child sex abuse, second-degree rape, and related offenses against a member of his household. While he was detained pending his trial in the Circuit Court for Baltimore County, his English-speaking brother, Arturo Calero, found and retained private counsel who did not speak Spanish. Counsel visited Appellant in jail, and with the aid of an interpreter, entered into a contract for representation. Appellant went to trial asserting his innocence and was convicted and sentenced to forty years. Counsel did not note an appeal.

Six years later, Appellant petitioned for post-conviction relief, requesting that he be able to file a belated appeal on the ground that his counsel failed to note an appeal and thereby depriving him of the effective assistance of counsel. At the hearing, counsel testified that the day following the sentencing, Arturo Calero visited his office and expressed that "they were not happy with the sentence and . . . they need to speak to attorneys." Counsel related that he had formed the impression that Arturo Calero had dismissed him from any future representation. Counsel did not have any further communication with Appellant. The post-conviction court denied the petition in an order entered on April 26, 2022, finding that Appellant had not met his burden to show ineffective assistance of counsel because he did not "establish that trial counsel was ever instructed or requested to note an appeal," or that counsel was ever retained to pursue an appeal.

Appellant filed an Application for Leave to Appeal from the post-conviction court's ruling. On February 1, 2023, this Court granted Appellant's application on the issue raised

therein, which, as Appellant states in his brief, is: "Whether the circuit court erred in denying Mr. Calero-Medrano the right to a belated direct appeal[.]"

Applying the analysis set out by the United States Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), we hold that Appellant's counsel had a duty to consult with him about filing an appeal, and that his absolute failure to do so was deficient assistance. Further, we hold that Appellant's actions sufficiently demonstrate that but for the deficiency, he would have noted an appeal. Therefore, Appellant has demonstrated ineffective assistance of counsel under *Flores-Ortega*, and we must reverse the circuit court so that Appellant may file a belated appeal from his conviction.

BACKGROUND

Appellant's convictions are for acts that occurred over a three-year span from 2012-2015, while the victim was four to seven years old. He was charged on January 6, 2016, and detained in the Baltimore County Bureau of Corrections pending trial. The State sought enhanced penalties concomitant with second-degree rape involving a child under the age of thirteen years old, pursuant to Maryland Code (2002, Repl. Vol. 2021), Criminal Law § 3-304(c), which mandates the imposition of a prison sentence ranging from fifteen years to life, with no eligibility for parole during the first fifteen years.

After his arrest, Appellant's brother, Arturo Calero, selected and retained an attorney to defend Appellant at trial ("Trial Counsel") in the Circuit Court for Baltimore County. A native Spanish speaker, Appellant has little to no ability to speak or understand English and was assisted by an interpreter at his court appearances. Trial Counsel does not

speak Spanish. During the representation, Trial Counsel visited Appellant in lockup with an interpreter and communicated with the family through his English-speaking "point of contact" Arturo Calero via text message or in meetings at his office.

2016 Trial and Sentencing

The four-day jury trial began on September 21, 2016, and Appellant pleaded not guilty to all fifteen counts. The jury rendered a verdict on September 26, convicting Appellant of six counts of child sexual abuse and rape.

At his sentencing hearing on November 28, 2016, Trial Counsel requested that Appellant receive the mandatory minimum of fifteen years, and that his sentences run concurrently. He noted that Appellant's psychological profile in the Pre-Sentencing Investigation Report was favorable, and he contested the reporter's assertion that Appellant was minimizing the severity of the offenses rather than simply maintaining his innocence.

The State asked that the sentences be served consecutively, based on the heinous nature of the crimes. Running the sentences consecutively, the State averred that "the guidelines do call for 70 to [90] years."

In his allocution, Appellant continued to protest his innocence, stating, in part, "I really want to ask you for forgiveness despite the fact that I have never really done this. I just want to ask you if you could give me an opportunity. I have never done this and everything that has been shown has been based on what has been spoken."

The court sentenced Appellant to an aggregate active term of forty years of incarceration. Upon being directed by the judge to "advise [his] client," Trial Counsel told

Appellant, "I just wanted to be clear. Mr. Calero Medrano, you have thirty days to note an appeal with the Court of Special Appeals." While the record is inconclusive as to whether Trial Counsel conferred with his client in lockup following the hearing, both Trial Counsel and Appellant agree that Trial Counsel did not visit him in prison or contact him subsequently. In fact, the two had no further contact until the post-conviction hearing that Appellant initiated approximately six years later.

Post-Conviction Action

On November 2, 2021, an attorney appointed by the Office of the Public Defender entered his appearance as Appellant's counsel and filed a petition for post-conviction relief seeking a belated appeal.[1] Appellant's counsel argued that Trial Counsel failed to render effective assistance of counsel under the analysis of *Roe v. Flores-Ortega*, 528 U.S. 170 (2000) when he failed to note an appeal of the decision after sentencing. He asked the court to grant Appellant the right to note a belated appeal[2] prior to any further post-conviction proceeding.

[1] On September 10, 2019, Appellant had contacted the Office of the Public Defender by letter, with the aid of an interpreter, to request representation for a post-conviction action.

[2] Counsel also asked the court "to order that if Petitioner later seeks post-conviction relief, the next post-conviction filing would have 'first petition' status."

A post-conviction hearing was held in the Circuit Court for Baltimore County on March 30 and April 6, 2022. Appellant and Trial Counsel[3] testified, while the State offered no witnesses.[4]

Trial Counsel testified that he was "sure" he spoke to his client in the courtroom through an interpreter after the sentence was handed down, but he did not recall "the exact substance of it" or "if an appeal was mentioned[,]" and he "cannot remember" if he went back to the lockup after the sentence was read. He related that "I also communicated through [Appellant's] brother. I would meet [Appellant's] brother in my office. His brother would text me and from memory, his brother texted me as to meeting the next day." Accordingly, Trial Counsel said that Arturo Calero met with him in his law office and told him that "they were not happy with the sentence" and "that they need to speak to attorneys." Trial Counsel took the statements to indicate that "they didn't want [him] to do anything else in the case." Trial Counsel testified that he did not "go to see [his] client in lock-up after the sentencing at any point[,]" but "waited to hear back from [the family] to see if they wanted [him] to do more" but he never did.

Trial Counsel acknowledged that Appellant "initially signed the contract" for representation, but "to [his] knowledge" the person paying him was Arturo Calero. He stated that "[a]ll [his] retainers state that representation ends at the end of final disposition

[3] Trial Counsel testified by telephone.

[4] We note, as well, that neither party entered exhibits for the court's consideration, and the sentencing hearing transcript was not before the court.

in court." He did not recall that Arturo Calero ever asked him the price to file an appeal, but he acknowledged that he "wouldn't have charged any extra to simply file a one page notice of appeal[.]"

Appellant testified, through an interpreter, that he was unhappy with the lengthy sentence he received. He stated that Trial Counsel did not come back to the lock-up in the courthouse after the hearing, and said, "[a]fter I was sentenced I never saw him again." He asserted that, on his instruction, Arturo Calero "told counselor to file the appeal."

He said that Trial Counsel did not send him any correspondence, that "it has been seven years" and he had "never received anything from him." Appellant explained that he did not have his attorney's phone number, nor any paperwork from him, because his brother Arturo "handled all that." On cross-examination, Appellant acknowledged that he had contact with Trial Counsel throughout the course of the case through his brother, because he spoke English, and that his brother was the go-between. He explained that when Trial Counsel had visited him in jail before the trial, the attorney had brought his own interpreter with him, and that the only reason he was able to talk to his present post-conviction attorney over the phone was because the attorney had hired an interpreter for the calls.

The post-conviction judge issued a memorandum opinion and order on April 26 denying the petition. The court acknowledged that Trial Counsel, who represented Appellant through trial and sentencing, failed to file a "Notice of Appeal, Motion for New Trial, Motion for Modification of Sentence, or Application for Review of Sentence[,]" but

rejected Appellant's claim that Trial Counsel thereby failed to render effective assistance of counsel.

The post-conviction court, referring to the test articulated in *Strickland v. Washington*, observed that "[t]o obtain post-conviction relief on the basis of an ineffective assistance of counsel claim, the Petitioner bears the burden of showing that (1) trial counsel's performance was deficient *and* (2) that such deficiencies prejudiced the defense so as to deprive Petitioner of a fair trial." 466 U.S. 668, 687 (1984).

The post-conviction court acknowledged differences in the accounts provided by Appellant and his witness, Trial Counsel. The court observed, "[Appellant] acknowledged that he did not ask trial counsel to note or file an appeal but testified that his brother, Jose Arturo Calero [], told trial counsel to file an appeal." By contrast, Trial Counsel had testified that Arturo Calero "reiterated the family's disappointment with the lengthy sentence[,]" and "advised trial counsel that his family wanted to look into retaining a different attorney." The court centered on Trial Counsel's claim that "no one asked him to note an appeal, and no one retained him to file an appeal or any post-sentencing motions." In conclusion, the post-conviction court found that:

> [a]lthough [Appellant] may have instructed his brother, Mr. Arturo Calero, to request that trial counsel pursue an appeal, there is no evidence in the record to establish that trial counsel was ever instructed or requested to note an appeal. In addition, there is no credible evidence that trial counsel was ever retained to pursue an appeal or any other post sentencing relief.

Based on these observations, the court determined that Appellant had "failed to prove ineffective assistance of counsel" without reaching the second prong of the *Strickland* test.

DISCUSSION

Parties' Contentions

Appellant contends that Trial Counsel rendered ineffective assistance after sentencing when he failed to consult with him, or file an appeal, and he is therefore entitled to file a belated appeal from the 2016 verdict in the underlying criminal case. Although *Strickland v. Washington*, 466 U.S. 668 (1984) "governs ineffective assistance claims generally," Appellant urges that the Supreme Court's more recent decision in *Roe v. Flores-Ortega*, 528 U.S. 170 (2000) "controls ineffective claims based on counsel's failure to note an appeal." Appellant clarifies, quoting *Flores-Ortega* at 478, that "[w]hen a defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, the *Strickland* analysis depends on 'whether counsel in fact *consulted* with the defendant about an appeal.'" (Emphasis added by Appellant).

According to Appellant, Trial Counsel's "failure to consult" with him constituted deficient performance under the *Flores-Ortega* "rational defendant" standard. Applying that standard to his case, Appellant points out that: 1) he went to trial, "signaling a refutation of the State's theory, and preservation of the scope of potentially appealable issues"; 2) he testified that he was innocent and denied all wrongdoing; 3) "even at sentencing . . . with counsel by his side" he continued to reject the allegations; and 4) "despite his testimony and protestations, he received forty years of incarceration, the first fifteen of which are parole ineligible." "Under these circumstances," Appellant avers, "it should have been obvious to counsel" that he would want to appeal.

The post-conviction court, Appellant argues, applied the wrong test to the deficient performance prong of the *Strickland* test because the court determined that, in order to rebut the presumption that Trial Counsel acted within the range of reasonable professional assistance under *Strickland,* Appellant "had to prove '1) he instructed trial counsel to note or file the appeal; and 2) that trial counsel failed to follow his instructions.'" Appellant asserts that the post-conviction court "overlooked" the holding in *Flores-Ortega* that the analysis depends on whether Trial Counsel consulted with the defendant about an appeal. Because it is undisputed that Trial Counsel did not consult with him, Appellant contends that the rational defendant test was triggered but never applied by the post-conviction court.

In response, the State first defends the post-conviction court's ruling under the first prong of the *Strickland* test, asserting that Trial Counsel's "performance was not constitutionally deficient." Citing *Flores-Ortega*, the State argues that the duty imposed upon defense counsel by that case—to *consult* with his client about an appeal if he knows a 'rational defendant' in his client's shoes would wish to file one—is not invoked when the counsel has already been directed not to file an appeal. The State asserts that in its order, the post-conviction court credited Trial Counsel's testimony that—as paraphrased by the State—"Arturo Calero came to his office, the day after sentencing, told him that his services were no longer wanted and that they were seeking another attorney, and left defense counsel with the understanding that he was – unless they contacted him again – finished with the case." The State implies that Arturo Calero's actions are legally equivalent to an affirmative instruction from Appellant to not file an appeal in the case,

and consequently, "defense counsel's behavior comported with professional standards, and no more is required."

The State further argues even that if we *were* to find Trial Counsel's assistance deficient, there is insufficient evidence on the record for us to determine that the prejudice prong of the *Strickland* test has been met. The State concedes that, under *Flores-Ortega*, the bar for prejudice does not require a showing that "there is a meritorious basis for an appeal," rather, it only requires the defendant to "demonstrate that, but for counsel's deficient conduct, he would have appealed." The State acknowledges, that "generally, a person who had been sentenced to a period of 40 years' incarceration, following a jury trial, might want to take an appeal." But it surmises that, in the absence of a bright line rule, the trial court *might not* have found prejudice if it had reached that prong of the *Strickland* test. Therefore, the State requests that "if this Court were to reverse the post-conviction court's ruling as to the deficiency prong, it should remand for the post-conviction court to rule on the prejudice prong in the first instance."

In reply, Appellant asserts that he satisfied the prejudice prong of the *Strickland* test under the *Flores-Ortega* analysis by establishing with his testimony "there is a reasonable probability that, but for counsel's deficient failure to consult Appellant about appealing, he would have timely appealed." Appellant rebukes the State's argument that Appellant's brother, Arturo Calero, discharged Trial Counsel thereby relieving him of any duty to file an appeal. Appellant asserts that in Maryland, "representation is terminated in a criminal case only when: (1) under Maryland Rule 4-214(d), counsel successfully *moves to*

withdraw in open court or in writing with a certification the defendant was notified, or (2) under Section 6-407(a) of the Courts and Judicial Proceedings Article, after final judgment, and if no appeal is noted, *the time for noting an appeal has run*." (Emphasis in the original.) He argues that the circuit court's factual finding, that Appellant's "brother advised counsel he would seek other representation[,]" cannot support the legal conclusion that Trial Counsel discharged his duty to his client, because "[i]f counsel was under the impression he had been terminated, he was legally bound to notify [Appellant], and then file a motion to withdraw."

Standard of Review

Our review of the post-conviction court's determinations regarding effective assistance of counsel involves mixed questions of law and fact. *Newton v. State*, 455 Md. 341, 351 (2017) (citing *Harris v. State*, 303 Md. 685, 698 (1985). In *State v. Syed*, 463 Md. 60 (2019), the Supreme Court of Maryland expounded:

> Our review of a post-conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*. The appellate court exercises its own independent analysis as to the reasonableness, and prejudice therein, of counsel's conduct.

Id. at 73 (internal citations and quotations omitted).

The factual findings are reviewed for clear error, although we do "re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Harris v. State*, 303 Md. 685, 698

(1985). Ultimately, the appellate court "exercises 'its own independent analysis' as to the reasonableness, and prejudice therein, of counsel's conduct." *State v. Syed*, 463 Md. 60, 73 (2019) (quoting *Oken v. State*, 343 Md. 256, 285 (1996)).

Legal Framework

The right to effective assistance of appellate counsel "derives from an amalgamation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *State v. Thaniel*, 238 Md. App. 343, 370–71 (2018) (citing *Halbert v. Michigan*, 545 U.S. 605, 616-17 (2005) and *Smith v. Robbins*, 528 U.S. 259, 276 (2000)). "[T]he appropriate relief for ineffective assistance of appellate counsel would be the awarding of a belated or new appeal, at which issues which should have earlier been raised may ultimately be considered." *State v. Gross*, 134 Md. App. 528, 560 (2000).

Strickland v. Washington

In *Strickland v. Washington*, the United States Supreme Court established "the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." 466 U.S. 668, 684 (1984). In *Strickland*, the Court articulated "the general standards for judging ineffectiveness claims." *Id.* at 687-98. The Court established a two-pronged test to determine whether counsel's assistance was defective and warranted a reversal of the conviction. *Id.* at 687. Satisfaction of the first prong, the 'deficiency' prong, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" *Id.* The Court held that a

defendant alleging ineffective assistance of counsel "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. While the Court cited certain basic duties an attorney owes to a client, such as a duty of loyalty, a duty to advocate the client's case, and the duty to consult with a client, the Court instructed that these duties "neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* The Court instructed that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

The second prong of the *Strickland* test requires a showing that the deficient performance "prejudiced the defense." *Id.* at 687. Even "professionally unreasonable" errors by counsel will not warrant setting aside a criminal conviction "if the error had no effect on the judgment." *Id.* at 691. The defendant must show that but for counsel's "unprofessional errors," the result of the proceeding would have been different. *Id.* at 694. There is a presumption that the jury and factfinder acted within the bounds of the law. *Id.* at 695. The inquiry thus lies, when considering the totality of the circumstances, in whether "the decision reached would reasonably likely have been different absent the errors." *Id.* at 696. The Court acknowledged that in some Sixth Amendment contexts, such as "[a]ctual or constructive denial of the assistance of counsel altogether[,]" prejudice is presumed. *Id.* at 692. Failure to satisfy either deficient performance or prejudice defeats an ineffective assistance of counsel claim.

Roe v. Flores-Ortega

In *Roe v. Flores-Ortega*, the U.S. Supreme Court applied the *Strickland* test to analyze an ineffective assistance of counsel claim where a trial attorney had failed to file a notice of appeal without her client's consent. 528 U.S. 470, 485-86 (2000). The defendant, Flores-Ortega, was charged with one count of murder, two counts of assault, and a personal use of a deadly weapon enhancement allegation. *Id.* at 473. After pleading guilty to a second-degree murder charge, he was sentenced to fifteen years to life. *Id.* at 473-74. Upon pronouncing the sentence, the court advised Mr. Flores-Ortega of his right to file an appeal from his conviction. *Id.* at 474.

The court-appointed public defender "wrote 'bring appeal papers' in her file," but she did not file a notice of appeal— "a purely ministerial task that imposes no great burden on counsel"— within the allotted sixty days to preserve Mr. Flores-Ortega's rights. *Id.* at 474. Mr. Flores-Ortega was unable to communicate with his counsel during the first ninety days after his sentencing because he was in lockup undergoing evaluation. *Id.* When he emerged and attempted to file an appeal, it was rejected as untimely. *Id.* He brought a post-conviction action alleging that counsel's failure to file an appeal violated his constitutional right to effective assistance of counsel. *Id.*

The post-conviction court found that Mr. Flores-Ortega had given "no consent to a failure to file [a notice of appeal]." *Id.* at 475. It further found that the petitioner, who had used an interpreter in court, had "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game. *Flores-*

Ortega, 528 U.S. at 475. The court said, "I think there was a conversation [between the petitioner and counsel] in the jail." *Id.* The court found the petitioner *believed* that during "a conversation after the pronouncement of judgment at the sentencing hearing[,]" counsel agreed that "[she] was going to file a notice of appeal." *Id.* However, the court observed that counsel "has no specific recollection" of such a promise, and as she was "obviously an extremely experienced defense counsel" and "a very meticulous person[,]" the court "think[s] had [petitioner] requested that she file a notice of appeal, she would have done so." *Id.* at 475. The court concluded that Mr. Flores-Ortega had not "carried his burden of showing by a preponderance of the evidence that she made that promise" and denied his petition. *Id.*

When the case reached the Supreme Court, the Court held as a threshold matter that a claim "that counsel was constitutionally ineffective for failing to file a notice of appeal" was subject to the *Strickland* analysis without the heightened deference normally accorded trial counsel, because failing to file a notice of appeal "cannot be considered a strategic decision[.]" *Id.* at 477. After pronouncing that counsel *could* be constitutionally deficient "for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other[,]" the Court established what factors determined that result. *Id.*

Deficiency

Addressing the deficiency prong of the *Strickland* test, the Supreme Court instructed that:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. **We employ the term "consult" to convey a specific meaning-advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.** If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal.

Flores-Ortega, 528 U.S. 470, 478 (2000) (emphasis added).[5] Where counsel has not consulted with the defendant, then, the Court instructed that the question becomes "whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.* The Court rejected a bright-line rule, recognizing that "as a *constitutional* matter," it could not say that "in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." *Id.* at 479. Accordingly, the Court held that the duty to consult is invoked 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. "In making this determination,

[5] Citing to ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d ed.1993), the Court also stated that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal." *Flores-Ortega*, 528 U.S. at 479.

[the reviewing court] must take into account all the information counsel knew or should have known." *Id.*

The Court also indicated that the defendant's pre-conviction actions can contribute to a right to consultation under the deficiency prong of the *Strickland* test. *Id.* at 480. It explained that "[a]lthough not determinative, a highly relevant factor" in the analysis of the prejudice prong of the *Strickland* test "will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." *Id.* at 480. The Court observed that, "[w]e expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 481.

Prejudice

Addressing the prejudice prong of the *Strickland* test, the *Flores-Ortega* Court held that after a defendant has established counsel's deficiency in failing to consult with him about an appeal, he must further "demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed."[6] *Id.* at 484.

[6] Justice Souter, writing for a partially-dissenting minority, attacked the application of the deficiency standard articulated in *Strickland* to this case in place of a bright line rule. *Id.* at 491-92. He observed that "Flores-Ortega spoke no English and had no sophistication
Continued ….

The Court noted that it "normally appl[ies] a strong presumption of reliability to judicial proceedings and require[s] a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the finding of guilt" and thus, "in cases involving mere attorney error, we require the defendant to demonstrate that the errors actually had an adverse effect on the defense." *Id.* at 482 (internal quotation marks and citations omitted). However, where no appeal takes place, a reviewing court "cannot accord any 'presumption of reliability' to judicial proceedings that never took place." *Id.* at 483 (internal citation omitted). The Court held that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. *Id.* at 484. "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484.

This determination—that but for his counsel's deficient assistance he would have noted an appeal, "will turn on the facts of a particular case[;]" for example, "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination."

in the ways of the legal system[,]" and that to "condition the duty of a lawyer to such a client on whether, *inter alia,* 'a rational defendant would want to appeal' . . . [is] to employ a rule that simply ignores the reality that the constitutional norm must address. Most criminal defendants, and certainly this one, will be utterly incapable of making rational judgments about appeal without guidance." *Id.* at 492.

Id. at 485. The Court observed that in some cases, as when "the defendant shows nonfrivolous grounds for appeal," both prongs may be satisfied by the same facts, but they "are not in all cases coextensive." *Id.* at 486. The Court illustrated:

> although showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to specify the points he would raise were his right to appeal reinstated will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed.

Id. at 486 (internal quotation reference omitted). It observed "it is unfair to *require* an indigent, perhaps *pro se,* defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal[,]" and the defendant need only demonstrate that "but for counsel's deficient conduct, he would have appealed." *Id.* at 486.

Ultimately, the *Flores-Ortega* Court held that there was insufficient evidence on the record to reach a determination on either prong, so the Court vacated the judgment and remanded the case for further proceedings. *Id.* at 486.

Bostick v. Stevenson

While there is no reported opinion in Maryland applying the *Strickland* test to a claim of ineffective counsel for failure to note an appeal without consultation, in *Bostick v. Stevenson*, 589 F.3d 160, 166 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit applied the holdings of *Flores-Ortega* and found the petitioner's trial counsel "was constitutionally deficient because counsel did not consult with Bostick about an appeal following his conviction." *Id.* at 167. *See also United States v. Poindexter*, 492

F.3d 263, 271 (4th Cir. 2007) ("even if his client does not express (or clearly express) a desire to appeal, the attorney may be required to file a timely notice of appeal after appropriate consultation with [] his client.").

Bostick had been convicted of murder and sentenced to thirty years imprisonment. *Bostick*, 589 F.3d at 162. He did not explicitly instruct his trial counsel to file an appeal after his trial, and counsel never filed one. *Id.* The Court related the following undisputed facts in the parties' briefing:

> Bostick told his daughter in open-court that he would "get a appeal." He nonetheless did not directly ask his attorney to file one. Despite Bostick's in-court statement, counsel never discussed filing an appeal with him after he was convicted. This was ostensibly because Bostick previously told counsel that he would accept the jury's verdict[7] and counsel shared this sentiment. Finally, despite counsel's failure to consult with him about an appeal or aid him in filing one, Bostick has consistently sought relief through all available channels since his conviction.

Id. at 1666. Six months later, Bostick filed a *pro se* post-conviction petition for a belated appeal on the basis that counsel's failure to consult with him about an appeal was constitutionally deficient assistance. *Id.* at 162. That motion was denied. *Id.* at 163.

The Court of Appeals held that "counsel's failure to consult flew in the face of a duty to do so." *Id.* at 166. Citing both *Flores–Ortega*, 528 U.S. at 480 and *Frazer v. South Carolina*, 430 F.3d 696, 707–08 (4th Cir. 2005), the Court held:

> An attorney must consult with a client about filing an appeal either where a reasonable defendant would have wanted to appeal, typically because there

[7] Bostick's counsel testified that "before trial Bostick told him, 'that he was going to be satisfied with what the jury come up with, win, lose, or draw, and that would be the end of it.'" *Id.* at 163.

> were non-frivolous grounds to pursue, or because the particular defendant adequately demonstrated to counsel an interest in appealing. Though 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.

Id. at 166-67. The Court found, "trial counsel had a duty to consult with Bostick because he went to trial, there were nonfrivolous grounds to pursue, and, most importantly, Bostick unequivocally demonstrated his interest in an appeal post-verdict." The Court recounted:

> Bostick also clearly demonstrated his interest in filing an appeal in open court, which was sufficient, in and of itself, to implicate his attorney's duty to consult. Bostick explicitly told his daughter, in counsel's presence, that he would appeal. Though Bostick concedes that before the verdict he told counsel that he would be satisfied with the jury's decision, this does not negate his post-conviction assertion that he was going to appeal . . . This is especially so in light of counsel's duty to consult with clients about an appeal "in the vast majority of cases," following a jury verdict.

Id. at 167 (quoting *Flores-Ortega*, 528 U.S. at 581). The Court found that the same evidence also satisfied the prejudice prong of the *Strickland* test, showing that his counsel's inaction deprived him of an appeal that he otherwise would have taken both by demonstrating non-frivolous grounds, and by his "'unwavering and ongoing' interest in and pursuit of an appeal[.]" *Id.* at 168. The Court cited "Bostick's 'tenacity in pursuing habeas relief[,]'" and observed, "Bostick's is hardly a case in which a petitioner initially decides to forego an appeal and decides only after years in prison to challenge a conviction; indeed, at the time of sentencing, Bostick stated in open court that he would 'get a appeal.'" *Id.* at 168. Holding that both prongs of the *Strickland* test had been satisfied, the Court reversed and remanded the case for the court to "issue the writ of habeas corpus and that it

order Bostick released from prison unless the state grants him a direct appeal within a reasonable time." *Id.* at 168.

U.S. v Cooper

In 2010—one year after its decision in *Bostick*—the Fourth Circuit in *U.S. v. Cooper* expounded upon the standard for determining when "a rational defendant would have wanted to appeal" in order to satisfy the deficiency prong of the *Strickland* test. 617 F.3d 307, 313 (4th Cir. 2010). Cooper had submitted an *Alford* plea to two drug trafficking offenses and a related firearms offense, and the court sentenced him to the lowest sentence provided in the Sentencing Guidelines for the "base offense level" to which he stipulated in his sentencing agreement with the prosecution. *Id.* at 309-10. Counsel never noted an appeal. *Id.* at 311.

Cooper later testified that he had intended to ask counsel to file an appeal at the close of the sentencing hearing, but "he did not have time to do so before the marshals removed him from the courtroom." *Id.* "According to Cooper, Arnold responded that he would come to the jail the next day after 1:00 p.m., but he never showed up. Cooper also testified that he had tried to contact Arnold but that he could not get through because Arnold's office did not accept collect calls." *Id.* Counsel, however, testified that he had no recollection of Cooper asking him to come by the jail to visit him, and that he did not tell Cooper that he would visit him. *Id.* On appeal, Cooper argued that his attorney had a reasonable belief that he would have wanted to file an appeal, because he "entered a plea straight-up to all three counts of the indictment without a plea agreement" and "maintained

his innocence throughout the case" as demonstrated by his *Alford* plea. *Cooper*, 617 F.3d at 312.

The United States Court of Appeals for the Fourth Circuit, however, found that counsel's representation did not fall below the objective standard of reasonableness required to satisfy the first prong of the *Strickland* test. *Id.* at 315. The Court explained that "[i]n determining whether a rational defendant would have wanted to appeal, we consider important the facts concerning whether the defendant's conviction followed a trial or a guilty plea; whether the defendant received the sentence bargained for as part of the plea; and whether the plea expressly reserved or waived some or all appeal rights." *Id.* at 313 (quoting *Flores-Ortega*, 528 U.S. at 480). The Court cited a string of five illustrative Fourth Circuit cases to support its supposition that "[w]hen applying *Flores–Ortega* . . . a breach of the *Strickland* duty usually [occurs] because the defendant said something to his counsel indicating that he had an interest in appealing[.]"[8] *Id.* at 313. The Court found that Cooper "gave no indication that he wanted to appeal[,]" and so the test progressed to

[8] *See Bostick v. Stevenson,* 589 F.3d 160, 162 (4th Cir.2009) (defendant stated to his daughter, in open court, "Don't worry, I'll get a[n] appeal, don't worry"); *Frazer,* 430 F.3d at 702 (defendant who received consecutive sentences asked counsel to see "about having time run together" immediately after being sentenced); *Hudson v. Hunt,* 235 F.3d 892, 894 (4th Cir.2000) (defendant asked counsel "whether or not he could appeal" immediately after he had been convicted by a jury); *United States v. Witherspoon,* 231 F.3d 923, 925 (4th Cir.2000) (defendant told defense counsel that he "would like [his] case reviewed by a higher court" if the district court did not sustain any of his objections (alteration in original)); *see also United States v. Poindexter,* 492 F.3d 263, 265 (4th Cir.2007) (finding ineffective assistance of counsel for failure to appeal where the defendant unequivocally told his lawyer to file an appeal even though the defendant waived his appellate rights).

"whether the circumstances would reasonably have led counsel to conclude that 'a rational defendant would want to appeal,' thus prompting counsel's duty to consult." *Cooper*, 617 F.3d at 313 (quoting *Flores–Ortega*, 528 U.S. at 480).

The Court determined that Cooper's counsel "was justified in believing that a rational defendant in Cooper's situation would not want to appeal." *Id.* at 313. First, his "actions and words expressed repeatedly and clearly a desire to have the proceedings concluded as quickly as possible." *Id.* at 313-14. The Court noted that Cooper had entered an *Alford* plea in order to avoid trial, that he "stated several times during the plea colloquy that his purpose in pleading guilty was to end the judicial proceedings as quickly as possible[,]" which "affirmatively indicated to [counsel] a strong desire not to continue or prolong the case and to get it behind him." *Id.* at 314. These statements included: "I would like to finish this case," "What's important to me is to have this case resolved. I would say, this case has been a tragedy in my life[,]" "I need to give resolution to this situation," and, "I would like to repeat that I would like to finish off this situation." *Id.* at 314.

Second, "Cooper received the sentence he bargained for with the government, his expectations had been met, and no nonfrivolous grounds for appeal remained that would have put [his counsel] on notice that a reasonable defendant would have wanted to appeal." *Id.* at 314. The Court noted that pursuant to his sentencing agreement, the prosecution abandoned its intent to seek an enhancement and the parties agreed on a sentencing range calculated on a stipulated offense level. *Id.* at 314. Further, the court gave Cooper a sentence "at the low end of the Guidelines range and even granted his request to

recommend incarceration close to his family in Los Angeles." *Id.* at 314. The Court found that counsel "could reasonably believe that he had shaped a proceeding that not only was fair to Cooper but also accomplished everything Cooper wanted." *Id.* at 314.

Maryland Rules - Requirements for Representation

In addition to the decisional law that explains the applicable due process principles of the United States and Maryland constitutions, other sources supplement our measurement of effective counsel. As the United States Supreme Court notes in *Flores-Ortega*, "States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented[.]" *Flores-Ortega*, 528 U.S. at 479.

Under the Maryland Attorneys' Rules of Professional Conduct ("MARPC"), an attorney must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required" by the Rules and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Md. Rule 19-301.4. Where "a particular decision about the representation be made by the client," the attorney shall "promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the attorney to take."[9] Md. Rule 19-301.4 comment

[9] The Maryland Rules caution attorneys who accept compensation from third parties, such as friends or relatives of their clients:

> Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing,

Continued ….

[2]. An attorney should clarify any doubt about "whether a client-attorney relationship still exists . . . preferably in writing, so that the client will not mistakenly suppose the attorney is looking after the client's affairs when the attorney has ceased to do so." Md. Rule 19-301.3 comment [4]. Therefore, "if an attorney has handled a judicial or administrative proceeding that produced a result adverse to the client and the attorney and client have not agreed that the attorney will handle the matter on appeal, the attorney must consult with the client about the possibility of appeal before relinquishing responsibility for the matter." *Id.*

Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. Md. Rule 19-301.16, comment [1]. When an attorney terminates representation, she must "must comply with applicable law requiring notice to or permission of a tribunal" and obtain that permission. Md. Rule 19-301.16(c). She must then "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney[.]" Md. Rule 19-301.16(d). In fact, "[e]ven if the attorney has been unfairly discharged by the

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> attorneys are prohibited from accepting or continuing such representations unless the attorney determines that there will be no interference with the attorney's independent professional judgment and there is informed consent from the client.

Md. Rule 19-301.8(f)(1), comment [11]. *See also* Md. Rule 19.301.7, comment [13] ("An attorney may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the attorney's duty of loyalty or independent judgment to the client.").

client, an attorney must take all reasonable steps to mitigate the consequences to the client." Md. Rule 19-301.16, comment [9].

The MARPC are frequently cited in Attorney Grievance decisions and provide additional guideposts for assessing appropriate representation. For example, in *Att'y Grievance Comm'n of Maryland v. Pinno*, 437 Md. 70 (2014), "Mr. Pinno did not notify his clients that he would not be representing them or pursuing their claims; did not give them time to employ other counsel; and did not refund the fees he took from each client but did not earn." *Id.* at 81. The Maryland Supreme Court held that "[a]bandoning a client's case before it is completed and failing to return unearned fees violates MLRPC 1.16(d)[,]" which requires attorneys to take steps such as "giving reasonable notice to the client, allowing time for employment of other counsel" when they terminate representation. *Id*. The *Pinno* court further held that a failure to "'protect against expiration of the statute of limitations regarding his/her client's claim'" is a violation of MLRPC 1.3." *Id*. at 80 (citing *Attorney Grievance Comm'n v. Brown,* 426 Md. 298, 321 (2012)). The Court has also held that "the failure to prosecute a client's case, combined with a failure to communicate with the client about the status of the case, constitutes a violation of MLRPC 1.2(a)[,]" which rule "outlines the allocation of authority between a lawyer and client, requiring that 'a lawyer shall abide by a client's decisions concerning the objectives of the representation.'" *Att'y Grievance Comm'n of Maryland v. Garrett*, 427 Md. 209, 223 (2012).

Analysis

We trace the post-conviction court's error in this case to its misinterpretation of the relevant law, beginning with its application of "a strong presumption that counsel rendered constitutionally effective assistance," where there was no evidence that counsel ever consulted with Appellant about the possibility of an appeal. *Strickland* at 669. In fact, in *Flores-Ortega* the United States Supreme Court held that a claim that counsel was constitutionally ineffective for failing to file a notice of appeal was not subject to heightened deference to trial counsel. *Flores*-Ortega, 528 U.S. at 477. The Court explained:

> We normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption, by showing how specific errors of counsel undermined the reliability of the finding of guilt. Thus, in cases involving mere attorney error, we require the defendant to demonstrate that the errors actually had an adverse effect on the defense.

Id. at 482. (Internal quotation references and citations omitted.) The Court said that "[a]ssuming [Respondent's] allegations are true,"—that the deficiency "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself"—the "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, [] demands a presumption of prejudice. Put simply, we cannot accord any presumption of reliability to judicial proceedings that never took place." *Id.* at 483 (internal quotation and citation omitted).

Furthermore, in analyzing the case under the first *Strickland* prong, the post-conviction court stated, citing *State v. Flansburg*, 345 Md. 694, 705 (1997), that "to rebut

the presumption that trial counsel acted within the range of reasonable professional assistance, the Petitioner must prove that 1) he instructed trial counsel to note or file the appeal; and 2) that trial counsel failed to follow his instructions." Although it is true that in *Flansburg* the Supreme Court of Maryland held that Flansburg had satisfied his burden of proof of deficient assistance by showing that he had instructed counsel to file an appeal and counsel failed to follow those instructions, the *Flansburg* court never held that those elements were *required* to meet the burden.[10] *Flansburg*, 345 Md. at 705.

Here, the post-conviction court found that "there is no evidence in the record to establish that trial counsel was ever instructed or requested to note an appeal" by either Appellant or his brother. However, the court did not find, nor did any party testify, that either Appellant or his brother told Trial Counsel *not* to file a Notice of Appeal.

This case falls into the middle-ground between clear instruction to appeal and instruction to not appeal, "an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent[,]" as addressed by the United

[10] In *State v. Flansburg*, 345 Md. 694 (1997), the Supreme Court of Maryland recognized that the Maryland Rules, together with Maryland Public Defender Act, Code (1957, 1997 Repl. Vol.), the Post Conviction Procedure Act, Art. 27, § 645A, can create a statutory right to effective counsel in a post-conviction matter. Flansburg's parole was revoked after a hearing where he was represented by a public defender and he admitted to a serious violation of his parole. *Id.* He made two timely written requests asking his counsel to appeal his probation revocation, but counsel did not file the motion. *Id.* The Supreme Court of Maryland held that "[t]he failure to follow a client's directions to file a motion, when statutory provisions and rules expressly extend representation to such a motion, is a ground for the post conviction remedy of permission to file a belated motion for reconsideration of sentence." *Id.* at 705. The *Flansburg* court expressly limited its analysis to Flansburg's statutory rights. *Id.* at 698-99.

States Supreme Court in *Flores-Ortega*, 528 U.S. at 473. We must start with the Supreme Court's direction that in most circumstances, effective counsel requires consultation with defendant before failing to note an appeal of an adverse decision. *Flores-Ortega*, 528 U.S. at 481.

Deficiency

As previously noted, *Flores-Ortega* held that the duty to consult is invoked 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. The facts presented in the case record and the testimony of Appellant and Trial Counsel before the post-conviction court are largely undisputed.

The post-conviction court notes in her order that Appellant "*may have* instructed his brother, Mr. Arturo Calero, to request that trial counsel pursue an appeal," (emphasis added), but there is no evidence that trial counsel was ever "instructed or requested to note an appeal" or was "ever retained to pursue an appeal or any other post sentencing relief." However, Appellant has offered uncontested facts that support the proposition that a rational defendant would want to appeal. *First*, Appellant chose a trial over a plea deal and unwaveringly asserted his innocence. *Second*, Appellant was sentenced to an aggregate forty years in prison, which is twenty-five years longer than the mandatory-minimum-based concurrent sentence that he requested. *Third*, Arturo Calero informed Trial Counsel

on the day after sentencing that the family was "not happy with the sentence" and "that they need to speak to attorneys."

The *Bostick* Court found that trial counsel had a duty to consult appellant, because Bostick went to trial, Bostick had nonfrivolous grounds for an appeal, and "most importantly, Bostick unequivocally demonstrated his interest in an appeal post-verdict." *Bostick*, 589 F.3d at 167. Bostick communicated that interest when he told his daughter, in counsel's presence, that he would appeal, even though, he told counsel before the verdict that "he was going to be satisfied with what the jury come up with, win, lose, or draw, and that would be the end of it." *Bostick*, 589 F.3d at 163. Bostick also "consistently sought relief through all available channels since his conviction." *Id.* at 166. Here, as in *Bostick*, Appellant declined plea offers and maintained his innocence throughout trial and sentencing. Appellant—through his brother—informed Trial Counsel that he was unhappy with the verdict and intended to pursue legal remedy; the same information that Bostick's attorney gleaned from overhearing Bostick tell his daughter that he was going to "get a appeal."

We are not persuaded by the State's argument that the "rational defendant" test as articulated in *Flores-Ortega* does not apply in this case because Trial Counsel was essentially directed not to file an appeal. The State urges that, "based on instructions from his client's brother, [Trial Counsel] was to take no further action." Trial Counsel's undisputed testimony is that the day after sentencing, Arturo Calero told him that the family "were not happy with the sentence" and "that they need to speak to attorneys" (or, as the

court paraphrased, "advised trial counsel that his family wanted to look into retaining a different attorney"). Trial Counsel deduced from these statements, that the family "didn't want [him] to do anything else in the case." But even if Trial Counsel correctly understood that the family did not want him to pursue the appeal, he could not be certain that they did not want him to note the appeal, "a purely ministerial task," and one that Trial Counsel stated he would have done for free. At this, his last point of contact with the family, Trial Counsel was aware that Appellant did not have any other legal representation and that the thirty-day clock was ticking. Nonetheless, Trial Counsel "waited to hear back from [the family] to see if they wanted me to do more." At minimum, Trial Counsel had an obligation to clarify with Appellant directly "whether a client-attorney relationship still exists . . . preferably in writing, so that the client will not mistakenly suppose the attorney is looking after the client's affairs when the attorney has ceased to do so." Md. Rule 19-301.3 comment [4].

We observe that the circumstances in this case differ from those presented in *Cooper*, where the United States Court of Appeals for the Fourth Circuit found that trial counsel's representation did *not* fall below the objective standard of reasonableness required to satisfy the first prong of the *Strickland* test, because counsel "was justified in believing that a rational defendant in Cooper's situation would not want to appeal." *Cooper*, 617 F.3d at 313. The Court noted that Cooper's "actions and words expressed repeatedly and clearly a desire to have the proceedings concluded as quickly as possible[,]" *Id.* at 313-14, that he "received the sentence he bargained for with the government," and

he retained "no nonfrivolous grounds for appeal[.]" *Id.* at 314. To the contrary, Appellant in this case chose an adversarial trial, and continued to protest his innocence. During his sentencing allocution at sentencing, he insisted "I have never really done this. I just want to ask you if you could give me an opportunity[,]" where a show of acceptance and remorse might have yielded a more favorable outcome. Also, unlike Cooper, Appellant did not negotiate his sentence with the State. Where Cooper's court sentenced him "at the low end of the Guidelines range and even granted his request to recommend incarceration close to his family in Los Angeles[,]" Appellant received a sentence that was twenty-five years longer than what his counsel's requested. *Cooper*, 617 F.3d at 314.

We recognize that, at least in one respect, the present case differs from *Bostick* and resembles *Cooper*, in that Appellant does not offer the grounds upon which he intends to base his appeal. However, while the existence of nonfrivolous grounds for appeal is evidence that "a rational defendant would want to appeal", it is not a *condicio sine qua non* to satisfy the deficiency prong of the *Strickland* test. *See Flores-Ortega*, 528 U.S. at 486. Indeed, majority opinion in *Flores-Ortega* instructs:

> In making this determination, courts must take into account all the information counsel knew or should have known. Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an

> appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Flores-Ortega, 528 U.S. at 480 (internal citation to *Strickland v. Washington*, 466 U.S. 668, 690 removed).

At bottom, it is clear from the circumstances of the proceedings and the sentence imposed, that a "rational defendant would want to appeal" *Flores-Ortega*, 528 U.S. at 480, and from Arturo Calero's message to Trial Counsel, that Appellant "reasonably demonstrated to counsel that he was interested in appealing," *Id.* Appellant chose a trial over a plea deal and unwaveringly asserted his innocence, Appellant received a prison sentence of twenty-five years longer than the one he requested, and the family told Trial Counsel that the family was "not happy with the sentence" and needed the assistance of an attorney. Therefore, unlike the Court in *Flores-Ortega*, we have sufficient evidence on the record to determine that Trial Counsel had a duty to consult with Appellant, under which he must "advis[e] the defendant about the advantages and disadvantages of taking an appeal, and mak[e] a reasonable effort to discover the defendant's wishes." Trial Counsel's failure to do so satisfies the deficiency prong of the *Strickland* test.

Prejudice

Flores-Ortega tells us that Appellant must further show that, had he "received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal" to satisfy the prejudice prong of the *Strickland* test. *Flores-Ortega*, 528 U.S. at 486. While nonfrivolous grounds for appeal can, in some cases, be sufficient to

show prejudice, we recall the Court's instruction that "a defendant's inability to 'specify the points he would raise were his right to appeal reinstated' will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed[,]" as the defendant need only "demonstrate that 'but for counsel's deficient conduct, he would have appealed.'" *Id.* at 486 (citation omitted).

Here, Appellant's rejection of a plea deal in favor of a trial and his dogged assertion of innocence indicate that he was committed to pursue the judicial process to the end of the line. Justice Breyer, writing in concurrence with the majority in *Flores-Ortega*, emphasized that its holding should be interpreted liberally where defendants elected to go to trial:

> I write to emphasize that the question presented concerned the filing of a "notice of appeal *following a guilty plea.*" In that context I agree with the Court. I also join its opinion, which, in my view, makes clear that counsel does "almost always" have a constitutional duty to consult with a defendant about an appeal after a trial.

Flores-Ortega, 528 U.S. at 488 (Breyer, J., concurring) (internal citation to petition for certiorari removed).

Further, Trial Counsel's undisputed testimony is that the day after sentencing, Arturo Calero told him that the family "were not happy with the sentence" and "that they need to speak to attorneys." From this, a reasonable attorney would glean that, as of that date, the family intended to appeal but did not have any other representation retained. We cannot know what transpired in the family's life that they did not retain another attorney in

thirty days to assume the appeal. We do, however, know that Trial Counsel was on notice that the family needed this ministerial task to be performed in order to preserve their plan, and that Trial Counsel was their attorney until the thirty days had run.

A factor that distinguishes Appellant from the successful applicant in *Bostick*, is that while Bostick filed his petition for post-conviction relief six months after his sentencing, *Bostick*, 589 F.3d at 168, Appellant waited nearly six years. However, Appellant's inaction—the fact that he did not telephone his attorney to ask for a consultation, or in fact bring his post-conviction action for nearly six years, does not necessarily indicate passivity or resignation. Appellant was incarcerated, did not speak or understand English, and did not have counsel's telephone number or any paperwork from him.

Appellant's situation is similar to that of Mr. Flores-Ortega, who had used an interpreter in court and had "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." *Flores-Ortega*, 528 U.S. at 475. Just like Mr. Flores-Ortega, Appellant was unable to initiate communication with his counsel while in lockup. Therefore, we determine that Appellant's actions from 2016—his avocation of his innocence, his pursuit of trial, and his request that his brother communicate to Trial Counsel that he was unhappy with the sentence—satisfy the requirement that the evidence support the conclusion that, had he "received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Flores-Ortega*, 528 U.S. at 486. Having found that Appellant has demonstrated

ineffective assistance of counsel, we reverse the circuit court and instruct that leave to file a belated notice of appeal be granted.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2076s22cn.pdf