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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 150303

JOSE CRISTINO VELASQUEZ-LOPEZ,

Appellant/Petitioner,

v.

HAROLD CLARKE,

Appellee/Respondent.

BRIEF OF THE APPELLEE

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Appellee/Respondent.

BRIEF OF THE APPELLEE

STATEMENT OF THE CASE

On June 10, 2010, petitioner, pursuant to a plea agreement, pled guilty in the Circuit Court of Culpeper County to 33 counts of taking indecent liberties with a child, in violation of Virginia Code § 18.2-370.1. The circuit court conducted the sentencing hearing on December 7, 2010, and sentenced petitioner to a total term in prison of 156 years, with 138 years suspended. (App. 32-37). The circuit court entered final judgment on September 21, 2010.

Catherine Lea, petitioner's trial attorney, filed a notice of appeal on October 7, 2010. (App. 123-124). On January 28, 2011, the Court of Appeals of Virginia dismissed the appeal, for failure to file a timely petition for appeal. (App. 125).

On September 12, 2012, petitioner, by counsel, filed a habeas corpus petition in the Culpeper Circuit Court. (App. 47-92). Subsequently, petitioner filed an amended habeas corpus petition in that court. (App. 93-138). After respondent moved to dismiss the petition, the circuit court conducted an evidentiary hearing on September 2, 2014. (App. 139-166). On October 6, 2014, the circuit court filed a letter opinion denying the petition. (App. 255-260). On October 22, 2014, the circuit court entered final judgment and dismissed the petition. (App. 264-265).

Then, Velasquez-Lopez filed a petition for appeal from the habeas corpus dismissal order. This Court granted the appeal on May 26, 2015, limited to petitioner's second assignment of error, which states as follows:

> THE CIRCUIT COURT ERRED IN HOLDING THAT PETITIONER'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE SHE FAILED TO PERFECT HIS APPEAL.

(App. 269).

STATEMENT OF FACTS

Trial Record

Velasquez-Lopez was indicted on 33 counts of taking indecent liberties on various dates between 2003 and 2008 against his stepdaughter, who was born in 1995. (App. 1-18). Petitioner's guilt emerged after he "brought this to the attention of the police. He ... confessed to his pastor, and he came and he confessed to the police of guilt. And the defendant said that it happened usually two times a week." (App. 131). The victim stated that petitioner sexually abused her "every single week without fail, almost on a daily basis." (*Id.*). Petitioner, who "gave a very detailed lengthy confession and was very forthcoming," said that the abuse happened "usually two times a week." (App. 131, 132).

Based on petitioner's lack of fluency in English and asserted unfamiliarity with the American justice system, the circuit court conducted numerous hearings before trial aimed at determining his competency to stand trial. At the conclusion of a hearing on May 13, 2010, in which each party presented the testimony of a mental health expert who had evaluated petitioner, the circuit court expressed agreement with the Commonwealth's

assertion that Velasquez-Lopez was competent to proceed. (Add. 1).[1] The court concluded from "the testimony of both sides ... that Mr. Velasquez-Lopez suffers from no mental deficits. In other words, there is no diagnosed mental condition. There is no indication of organic problems that have some sort of organic basis. There is no indication of any disability in terms of his ability to process information." (App. 24).

On June 9, 2010, petitioner signed a document entitled "Plea of Guilty to a Felony." (App. 104-107). Among other things, Velasquez-Lopez represented therein that he understood that, by his guilty plea, he might waive any right to appeal the circuit court's decision. (App. 106). The parties then entered into a plea agreement, under which petitioner agreed to plead guilty to 33 counts of taking indecent liberties, and the Commonwealth agreed it would not bring any further charges against him for sexual incidents with the victim in Culpeper County prior to September 30, 2008. (App. 111). The plea agreement further recited that there was no agreement about sentencing and the parties would be free to argue the matter. (*Id.*).

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[1] Some of the transcript pages that respondent designated for inclusion in the appendix are not contained in it. For the Court's convenience, these pages are included as an addendum to this brief and are designated as "Add. __."

On June 10, 2010, petitioner pled guilty to the 33 counts pursuant to the plea agreement. The trial judge then engaged in a lengthy colloquy with petitioner about his guilty pleas. (App. 83-84; Tr. 117-123). The trial judge accepted the plea agreement and convicted petitioner on all 33 counts. (Tr. 127-128). At sentencing on September 7, 2010, the circuit court imposed an active term of 18 years. (App. 113-118). The court entered final judgment on September 21, 2010. (*Id.*).

In a letter dated September 20, 2010, and written in English, petitioner complained to the trial judge that trial counsel "did not due [sic] her job to inform me properly about the plea that I signed. She only told me bits and pieces about the plea agreement." (App. 119). Petitioner stated that he "would like to know if you can reduce some of my time because I like you to know that I did admit guilt to everything I done." (*Id.*). In a subsequent letter dated October 4, 2010, and again written in English, petitioner acknowledged his prior request for sentence reduction but stated that he was

> writing to you this time to try and get this case re-opened so that the lawyer my brothers got can work on the case. Because I told you before that in my last letter to you that I was not comfortable with my lawyer Ms. Lea. That she did not explain everything to me right. I feel that the lawyer my brothers got can help me better to try and get me less time than I got. ... My brothers tell me that the lawyer they got can help me only if the

> case is re-opened. I am trying to also contact Ms. Lea, so that she can re-open the case. But I don't know if she will.

(App. 121). Then, on October 6, 2010, petitioner filled out an inmate complaint request form in which he stated: "Judge Berry Culpeper County Circuit Court would like you to re-open my case." (App. 122).

On October 7, 2010, Lea filed a notice of appeal on behalf of petitioner. (App. 123-124). Because Velasquez-Lopez thereafter did not file a petition for appeal, the Court of Appeals dismissed the action on January 28, 2011. (App. 125).

Habeas Corpus Record

Petitioner, by counsel, filed a habeas corpus petition, as amended in the Culpeper Circuit Court. (App. 93-138). In the petition, Velasquez-Lopez mainly challenged the validity of his guilty pleas, based on his asserted inability to understand either the terms of the plea agreement or the questions put to him by the trial judge during his guilty plea colloquy. Additionally, petitioner raised several ineffective assistance allegations, including that Lea had been ineffective for not filing an appeal.

Respondent moved to dismiss the petition and included an affidavit from Lea that, among other things, stated that the questions posed to her by petitioner "became increasingly sophisticated as the process continued." (App. 165). Additionally, she had been accompanied by Louis Rivera, the

court-appointed translator, and "his translations were consistent with an increasing understanding of the rights and processes involved in the defense preparation and plea process." (*Id.*). Lea's affidavit further stated that she received a communication from petitioner dated October 8, 2010 informing her that he had new counsel who would be filing his appeal. (App. 166).

The circuit court held an evidentiary hearing on the allegations, during which both petitioner and Lea testified. Velasquez-Lopez stated that he had asked Lea to reopen the case. (App. 177). Petitioner claimed he did not tell her he had a new lawyer and also testified that, as to a possible appeal, he never told Lea not to file one. (Tr. 61-62).

Lea testified that after her appointment as trial counsel, in the almost 11 months between the first court proceeding and the sentencing, petitioner's "understanding progressed significantly and ... he had ... [become] a client who was truly assisting with his case rather than a client who was asking me to give me everything about his case ...." (App. 193). By the time petitioner entered into the plea agreement and pled guilty, Lea's prior concerns about his ability to understand the court proceedings had been assuaged; "[o]therwise I would not have gone forward ...." (*Id.*).

Regarding the appeal, once the trial court denied petitioner's request to reconsider his sentence, Lea "took that to mean that he would like that appeal filed and to preserve that I went ahead and filed" the notice of appeal. (App. 194-195).

Additionally, Lea received a letter in Spanish from petitioner dated October 4, 2010. (App. 195-197). Lea had the letter translated into English, and it stated in pertinent part:

> The reason for this letter is to tell you that I do not feel satisfied with your work. My brothers want to do something better for me but I would like to ask you if you could re-open the case. They want to appeal my case but we need you to open the case so that another attorney can do something for me ... I hope that you will come see me soon and I will explain whats [sic] to follow.

(App. 197, 252).

At the bottom of the translated letter were handwritten notations by Lea. (*Id.*). The first notation stated: "10/6/10 – visited JCV-L @ Culpeper Jail informed he did <u>NOT</u> want me to file an appeal for him." (App. 197-198, 252). The second notation recited that petitioner's brother had called Lea and asked her "to visit and then file." (App. 198, 252). The third and final notation was that she had reviewed the matter with T.C. Lea, "who was my stepdad who was my mentor attorney." (*Id.*).

Then, Lea received a letter from Velasquez dated October 8, 2010, written in English. (App. 199, 254). The first paragraph of that letter stated: "I am writing to let you know that I am giving you authorization to give my new lawyer any paper work that he request." (App. 200, 254).

Lea testified that she filed the notice of appeal because she understood "that they needed to preserve the time, as a way to do that and because the Court had already had an opportunity to review and had rejected that opportunity even though I had not." (App. 198). Lea explained her failure to file the petition for appeal thusly:

> [N]ot only did I have a discussion with Mr. Velasquez-Lopez that he did not want me to do the paper work for the appeal document but first his brother and then he, himself, in writing informed me that he had an attorney for whom I was to prepare the file and he would get in contact with me."

(App. 198). At no point did petitioner tell Lea that he wanted her to file an appeal, as distinct from "reopening" the case." (App. 200). But for the communications she received from Velasquez-Lopez about a new lawyer coming into the case, she would have filed a petition for appeal as she had filed the notice of appeal. (*Id.*). Lea, though, never heard from another lawyer indicating that he or she was handling the appeal or requesting the file from her. (App. 232-234).

In its letter opinion, the circuit court referred to the letters Lea had received from petitioner dated October 4th and October 8th of 2010. (App. 258-259). The court found that Lea had filed the notice of appeal in order to preserve petitioner's right of appeal. (App. 259). The lower court further stated that Lea "prepared her file for pick up by a new attorney, however, the file was never picked up and Ms. Lea received no further communication from Mr. Velasquez-Tores." (*Id.*). The court found that petitioner "had clearly conveyed his wishes that he did not want [Lea] to file an Appeal for him." (*Id.*). Under these circumstances, the court held that Lea had not been deficient for not filing a petition for appeal. Based on its findings of fact and conclusions, of law recited in the letter opinion, the circuit court's final order rejected petitioner's ineffective appellate counsel claim. (App. 264-265).

ARGUMENT

THE CIRCUIT COURT CORRECTLY HELD THAT PETITIONER HAD NOT BEEN DENIED HIS RIGHT TO FILE AN APPEAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON ITS FINDING OF FACT THAT PETITIONER INFORMED COUNSEL THAT HE DID NOT WANT HER TO FILE HIS APPEAL.

Petitioner's court-appointed trial attorney, Catherine Lea, filed a timely notice of appeal from his convictions pursuant to his plea agreement with the Commonwealth. In adherence to Velasquez-Lopez's express

directives (as well as that of his brother) not to proceed further in the case and not to file an appeal on his behalf, counsel did nothing further. Finding that petitioner "clear[ly] conveyed his wishes that he did not want her to file an Appeal for him," the circuit court denied habeas relief on his claim. (App. 259). The court cited *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), for the principle that a defendant cannot properly challenge the representation of an attorney who follows his instruction not to file an appeal. (*Id.*).

Petitioner nevertheless maintains that counsel was ineffective for not perfecting an appeal in the Court of Appeals. Petitioner maintains that he did not "clearly" convey such directions to Lea and that, in the event of any ambiguities regarding the matter, "they should not be interpreted in favor of the attorney. Such indulgence is particularly inappropriate where, as here, a statute expressly describes the appropriate action an attorney is [to] take." (Pet. Br. 12). Petitioner's argument is neither factually nor legally well-taken and fails to demonstrate the lower court erroneously denied habeas relief on his claim.

First, petitioner's argument effectively disregards this Court's rejection of his first assignment of error in this appeal. In that assignment of error, Velasquez-Lopez challenged the knowing, voluntary nature of his guilty

plea based on his assertion that the "evidence demonstrated that he did not understand the maximum sentence or comprehend the role of the jury, and believed he had to do as his attorney directed." (Pet. App. 1). In support of that assignment of error, Velasquez-Lopez asserted that he was "an individual of low intellect, no understanding of the American legal system and [with] only a rudimentary comprehension of English ...." (*Id.*)

In this vein, petitioner maintained that "mental health evaluations indicat[ed] that [he] had severe deficits of comprehension, more profound than a mere civics lesson could resolve." (Pet. App. 13). Likewise, Velasquez-Lopez supposedly had given inconsistent, uncomprehending answers in the written plea form and the guilty plea colloquy. (Pet. App. 12-14). This Court did not award an appeal on this issue and thus must have concluded that the record in fact established petitioner's ability to understand the court proceedings and the pros and cons of the plea agreement, as well as his ability to enter a valid plea.

Despite this Court's rejection of petitioner's first assignment of error, on brief he plainly attempts to revive this issue. For example, petitioner states that it is "relevant ... that Ms. Lea had requested a competency evaluation based on Mr. Velasquez-Lopez's comprehension of the trial proceedings and that evaluation initially found Mr. Velasquez-Lopez

incompetent for lack of basic comprehension ...." (Pet. Br. 11) (citations omitted). Likewise, petitioner says Lea was aware that he "had an imperfect understanding of the legal process ... when he indicated his intent to appeal." (*Id.*).

These contentions simply cannot be squared with this Court's determination that petitioner sufficiently understood the proceedings and the plea agreement offer to accept it and enter a valid guilty plea. And petitioner's assertions of his claimed inability to understand the legal process ignore Lea's numerous statements in the trial proceedings, her state habeas affidavit, and her testimony at the plenary hearing that in the months during which the case progressed in the circuit court, petitioner's understanding of the legal process became more and more knowledgeable. (App. 165, 192-193). Likewise, the experienced interpreter, who assisted petitioner at all 14 court hearings as well as outside the court, testified that he "was completely satisfied" about Velasquez-Lopez's ability to consider the plea agreement and that his fluency in English improved over the course of time. (App. 244, 247, 250).

Petitioner otherwise argues that Lea provided constitutionally ineffective assistance by not perfecting his appeal. Velasquez-Lopez challenges as plainly wrong the lower court's finding of fact that he clearly

conveyed his desire that she not file an appeal for him. (Pet. Br. 8). Petitioner maintains the record on this point was ambiguous and should be resolved in his favor. (Pet. Br. 12). In sum, petitioner says that Lea acted unreasonably in not perfecting an appeal and violated his Sixth Amendment right to effective assistance of counsel on appeal.

In considering this claim, it is important to bear in mind the limited nature of the issue before this Court. First, Lea filed a notice of appeal. Also, petitioner does not complain that Lea failed to "consult" with him about a possible appeal, but only that she disregarded or at least unreasonably responded to his instructions about an appeal. To that extent, then, the issue in *Flores-Ortega* is distinguishable. See pp. 15-16 of this brief. Instead, much as in *Miles v. Sheriff of the Virginia Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003), the issue here is whether counsel disregarded petitioner's wishes and failed to perfect an appeal.

The principles governing Velasquez-Lopez's ineffective appellate counsel claim are well-settled. First, the two-part test in *Strickland v. Washington*, 466 U.S. 668 (1984), applies here. *See Flores-Ortega*, 528 U.S. at 476-477. *Strickland* requires a petitioner to show that counsel's representation fell below an objective standard of reasonableness (*i.e.*, the "performance" prong) and that a reasonable probability of a different result

exists, but for counsel's claimed ineffectiveness (the "prejudice" prong). 466 U.S. at 688, 694. *See also Miles*, 266 Va. at 114, 581 S.E.2d at 193. Further, in *Flores-Ortega* the Supreme Court made clear that the case-specific, deferential standard of review mandated by *Strickland* applies to an ineffective appellate allegation.

> As we have previously noted, "no particular set of detailed rules for counsel's conduct can satisfactory take account of the variety of circumstances faced by defense counsel." Rather, courts must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," and "judicial scrutiny of counsel's performance must be highly deferential."

528 U.S. at 477 (citations omitted).

Flores-Ortega also identified the two polar extremes under which an attorney's failure to file an appeal is or is not objectively reasonable.

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. ... This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.

Id. at 477 (emphasis in original).

The Supreme Court then went on to address the issue of counsel's representation in a case "where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken ...." *Id.* at 478. In determining whether an attorney's failure in *Flores-Ortega* to file a notice of appeal was deficient, the Supreme Court stated that the

> separate, but antecedent, question [was] whether counsel in fact consulted with the defendant about an appeal. ... 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.

Id. The Supreme Court then went on in *Flores-Ortega* to explicate the circumstances under which an attorney is constitutionally obligated to consult with the defendant about an appeal. *Id.* at 479-487.

The present case presents precisely the opposite circumstance from that in *Miles*, where the petitioner's "claim falls squarely at the end of the spectrum where an attorney disregards a defendant's instructions to file a notice of appeal." 266 Va. at 115, 581 S.E.2d at 194. That is, Velasquez-Lopez gave Lea instructions that she should not proceed as his appellate counsel. The lower court's finding of fact that petitioner clearly signaled his desire that Lea not file an appeal for him demonstrates, as per the repeated statements in *Flores-Ortega*, that she did not act in a constitutionally unreasonable manner.

Further, contrary to petitioner's argument, the lower court's finding of fact certainly finds fair support in the record and is not clearly erroneous and thus mandates deference on appeal. *See Commonwealth v. Herring*, 285 Va. 59, 76, 758 S.E.2d 225, 235 (2014) (finding of fact that defendant, convicted of four abductions, had intended to deprive family members of their personal liberty was not unsupported by evidence or plainly wrong and thus was deferred to on appeal).[2] First, the very fact that Lea filed a notice of appeal for the stated purpose of preserving Velasquez-Lopez's appellate rights attests to her conscientious discharge of any duties as counsel. (App. 193, 233-234).[3] Moreover, at about the time she filed the notice of appeal, Lea received a letter from petitioner stating that his brothers wanted to "appeal my case, but we need you to open the case so that

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[2] Velasquez-Lopez maintains that any ambiguities here "should not be interpreted in favor of the attorney." (Pet. Br. 12). It is fundamental, though, that on appeal the evidence is viewed in the light most favorable to the appellee. *See Phan v. Commonwealth*, 258 Va. 506, 507, 521 S.E.2d 282, 282 (1999). In the case at bar, the lower court considered the conflicting testimony of petitioner and Lea and reasonably resolved credibility issues in her favor. (App. 257-258).

[3] It is hardly clear that Lea owed any duties to petitioner at the time she filed the notice of appeal. The circuit court record reflects that she was appointed to act as trial counsel, but contains no equivalent order (or even statement of the trial judge at the end of sentencing) appointing her as appellate counsel. Further, in the certificate of service accompanying the notice of appeal, Lea specifically stated that she had "not been appointed to represent defendant on any appeal." (App. 124). In his habeas petition, Velasquez-Lopez characterized this merely as a "questionable assertion ...." (App. 99).

another attorney can do something for me." (App. 197, 252). Even assuming any ambiguity in this letter, it was dispelled when Lea met with petitioner at the local jail on October 6, 2010, and, as her handwritten notation emphasized, she was informed that Velasquez-Lopez "did NOT want me to file an appeal for him." (App. 197-198, 252).

Then, Lea received a second letter from Velasquez-Lopez dated October 8, 2010, in which he wrote to authorize her "to give my new lawyer any paper work that he request." (App. 200, 254). Lea reasonably understood that petitioner did not want her to file an appeal and thus did not file a petition for appeal. (App. 198). The fact is that petitioner never told Lea that he wanted her to file an appeal, as distinct from "reopening" the case. (App. 200). But for the several communications she received from petitioner about new counsel entering the case, she would have filed a petition for appeal, just as she had the notice of appeal. (App. 200).

In another letter dated October 4, 2010, Velasquez-Lopez likewise wrote the trial judge and explicitly stated that his family had secured the services of another lawyer. (App. 75). The letter referred three times to "the lawyer my brothers got" and made clear petitioner's dissatisfaction with Lea's representation (as he had in an earlier letter to the judge dated September 20, 2010). (App. 73, 75).

Accordingly, the circuit court's finding of fact that petitioner clearly conveyed his desire to Lea not to file his appeal was not clearly erroneous and confirms that the lower court correctly rejected Velasquez-Lopez's ineffective appellate counsel allegation. In this regard, the fact that petitioner spoke in terms of Lea or another lawyer "reopening" the case hardly calls into correctness of the lower court's finding of fact regarding the appeal.

Again, this Court has already held that petitioner validly pled guilty pursuant to the plea agreement, and the record shows that Velasquez-Lopez's understanding of the proceedings became increasingly sophisticated in the almost one-year that the case pended in the circuit court. Beyond this, as Lea testified, when the circuit court denied petitioner's *pro se* motion to reconsider his sentence, that ruling, coupled with petitioner's conversation with her, led Lea to conclude "that he would like that appeal filed and preserved it I went ahead and filed the motion." (App. 194-195).

More to the point, the record plainly confirms that petitioner himself differentiated between the "reopening" of the case and any possible appeal of the circuit court's final order. In his own testimony at the habeas evidentiary hearing, Velasquez-Lopez first stated that he had last spoken

directly with Lea at the local jail after sentencing and at that time asked her to reopen the case. (Add. 2). Petitioner explained this request to mean that he asked Lea "[t]o keep it open so I can have another attorney help me." (Add. 5). Velasquez-Lopez never testified that he actually asked Lea to file an appeal; the most he said was that he never told her not to pursue one. (Add. 3, 7). *See Jerman v. Director*, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004) (habeas petitioner has burden of proving his claims of ineffective assistance of counsel by preponderance of evidence).

Similarly, in his letter to Lea dated October 4, 2010, petitioner signaled his awareness of the fact that the reopening of the case in the circuit court and the filing of an appeal in the appellate court involved different matters: "My brothers want to do something better for me but I would like to ask you if you could reopen the case. They want to appeal my case but we need you to open the case so that another attorney can do something for me. At least so I could have less time to serve ...." (App. 252). The controlling fact here is that, even assuming petitioner had some misunderstanding as to the exact nature of a motion to reopen the case as distinct from the noting or perfecting of an appeal, that played no role whatever in his repeated instructions to Lea that he did not want her to file an appeal for him. Thus, the lower court's finding of fact was valid.

As a final ground for attacking Lea's failure to perfect an appeal, petitioner cites Standard 9.2, Virginia Standards of Practice for Indigent Defense Counsel. (Pet. Br. 9). Petitioner maintains that "despite the clear statutory mandate" Lea failed to perfect an appeal. (Pet. Br. 10). In his amended petition, however, petitioner cited only § 19.2-159 (which he does not likewise cite on appeal). Thus, Velasquez-Lopez's reliance upon Standard 9.2 is procedurally barred under Rule 5:25 (as would be any reliance upon § 19.2-159, for failure to cite it in this Court).

Regardless, both in his amended habeas petition and on appeal, petitioner has clearly based his ineffective counsel claim on constitutional, not state law, grounds. (App. 93, 101; Pet. Br. 8-9). In *Strickland*, the Supreme Court specifically pointed out:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association Standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 ..., are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel ... Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

466 U.S. at 688-689.

Flores-Ortega cited this very language in rejecting the dissent's reliance upon the ABA Standards for Criminal Justice and the ABA Model of Professional Responsibility. 528 U.S. at 479, 490-491. In making clear that these various standards did not mandate a finding of ineffective counsel in *Flores-Ortega*, the Supreme Court stated:

> [W]hile States are free to impose whatever specific rules they see fit to insure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense. [W]e have consistently declined to impose mechanical rules on counsel – even when those rules might lead to better representation – not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but rather] simply to insure that criminal defendants receive a fair trial." The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.

Id. at 479-481 (emphasis and alterations in original, citations omitted). Thus, the Supreme Court declined to make the issue of counsel's duty to consult with a defendant about an appeal "a *per se* (or 'almost' *per se*) matter." *Id.* at 481.[4]

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[4] The Court reached its decision in the face of the dissent's contention – much like Velasquez-Lopez's – about "the condition of the particular defendant claiming *Strickland* relief here." *Id.* at 492 (Souter, J., dissent).

Velasquez-Lopez's reliance upon Standard 9-2 falls short of showing any constitutional violation. The lower court, having found that Velasquez-Lopez clearly conveyed his desire that Lea not act as appellate counsel, ruled that Lea's representation was not constitutionally inadequate. That ruling was faithful to *Flores-Ortega* and should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Circuit Court of Culpeper County denying the petition for writ of habeas corpus.

Respectfully submitted,

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Justice Souter asserted: "Flores-Ortega spoke no English and had no sophistication in the ways of the legal system. ... 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.* (citations omitted).

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CERTIFICATE OF TRANSMISSION AND SERVICE

On July 30, 2015, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5A:19(f). A copy was emailed to John C. Kiyonaga, Esquire, counsel for appellant, at john@johnckiyonaga.com. In accordance with Rule 5A:4(d), I certify that this document contains 5,228 words, in compliance with Rules 5A:19(a) and 5A:21(g). Courtesy copies have been sent to the trial judge and the Commonwealth's Attorney.

The Commonwealth desires to present oral argument in this case.

S/_____
Robert H. Anderson, III
Senior Assistant Attorney General

ADDENDUM

1 opportunity to be able to go over this further with your
2 client before we conduct an arraignment.
3 THE COURT: Do you want to use the 8th of June
4 then?
5 MS. LEA: I'd like to use the 8th of June as the
6 arraignment day.
7 THE COURT: All right, then the Court's going to
8 set arraignment for the 8th of June. Again, the order will
9 direct that---or will approve the 10 hours of the inter-
10 preters time, up to and including 10 hours, for Ms. Lea to
11 be able to address this. And, Mr. Smith, essentially, the
12 Court has agreed with you and in your evaluation of the
13 posture of the case. On the other hand, the Court does
14 recognize that there are due process implications to some-
15 one's ability to assist in the preparation of their defense
16 for the reasons the Court has indicated, and so that's the
17 basis upon which the Court approves this additional time
18 with the interpreter, based upon the testimony of both ex-
19 perts in the case. All right, anything else we can do this
20 morning that you're aware of, Mr. Smith?
21 MR. SMITH: What time was that on the 8th?
22 THE COURT: It's at 9:30.
23
24
25

Add. 1

1 Q: Were you afraid to answer any question in any
2 manner that might jeopardize the plea that Ms. Lea had told
3 you you should enter?
4 A: Yes.
5 Q: In other words, your testimony is you felt
6 that you could not answer in any way that would jeopardize
7 the plea, is that correct?
8 A: That's right.
9 Q: Do you remember the last time you spoke face
10 to face with your attorney, Ms. Lea?
11 A: Yes.
12 Q: Was that in the jail here in Culpeper after
13 the sentencing?
14 A: Yes.
15 Q: Did you ask her to reopen your case on that
16 occasion?
17 A: Yes.
18 Q: Did she agree to do so?
19 A: Yes.
20 Q: Did you write her several days later to say,
21 to ask her to make her file available to a new lawyer?
22 A: Yes.
23 Q: Did you ever give her a lawyer's name?
24 A: No.
25

Add 2

1 Q: Was there, in fact, at that point a new law-
2 yer?
3 A: No.
4 Q: So there was, in fact, no lawyer to collect
5 the file at that point.
6 A: That's right.
7 Q: Did you believe that your brothers had con-
8 tracted a new lawyer at that point?
9 A: No.
10 Q: So, in fact, there was no lawyer to take over
11 for Ms. Lea.
12 MR. ANDERSON: I'm going to object again, Your
13 Honor, leading.
14 THE COURT: Objection sustained.
15 Q: Before I became involved in the case, did any
16 other lawyer other than Ms. Lea represent you in this mat-
17 ter?
18 A: No.
19 Q: After asking Ms. Lea to reopen or to appeal
20 your case, did you ever tell her not to pursue the appeal?
21 A: No.
22 Q: So the last specific instruction you gave to
23 Ms. Lea was that she reopen or appeal your case.
24 A: Yes, that's right.
25

1 MR. ANDERSON: Your Honor, the evidence was a ref-
2 erence to reopening the case. I don't recall any prior ref-
3 erence to or appeal which that question you rejected.
4 Q: Your Honor, he did say reopen or appeal in re-
5 sponse to one of the earlier questions, but I can ask him
6 again.
7 THE COURT: Go ahead and ask him again. I have
8 the reopen but the last question he indicated that he told
9 Ms. Lea---he never told Mr. Lea not to pursue the appeal,
10 but there was no testimony that I recall that he said he had
11 asked her to appeal.
12 Q: During your last face to face meeting with Ms.
13 Lea, what did you ask her to do?
14 A: I asked that she reopen my case.
15 Q: Now, when you say reopen the case, was it your
16 wish that she do whatever was in her power to change the
17 outcome of the case?
18 MR. ANDERSON: I object. He gave an answer. I
19 don't think that there needs to be some elaboration of that
20 sort with his own witness.
21 THE COURT: Rephrase the question, Mr. Kiyonaga.
22 Q: Your Honor, I'm not sure I understand the ob-
23 jection. When he's saying he asked to reopen the case, he
24 doesn't even speak English. He's unfamiliar with the sys-
25 tem.

1 THE COURT: You can ask him what he meant with
2 that but not give him the answer for what he means.
3 MR. ANDERSON: And the question should be what did
4 you mean by reopening the case? That's the question.
5 THE COURT: So you can ask him that.
6 Q: Very well, Your Honor. What did you mean when
7 you asked Ms. Lea to reopen your case?
8 A: To keep it open so that I can have another at-
9 torney help me.
10 Q: Were you anxious to change the result of the
11 case?
12 A: Yes.
13 Q: Were you asking her to do whatever she could
14 to make that possible?
15 A: No.
16 Q: Did you ever specifically tell Ms. Lea not to
17 pursue your appeal?
18 A: No.
19 Q: So your last specific instruction to her was
20 that she reopen the case.
21 A: That's right.
22 Q: No further questions.
23
24 CROSS-EXAMINATION
25 By: Mr. Anderson

1 Q: I'm going to ask it again. I'm not talking
2 about reopening the case. My question is simple. Did you
3 ever tell your attorney you wanted her to file an appeal for
4 you?
5 A: To file?
6 Q: To appeal the case for you to the higher
7 court.
8 A: I don't recall. The only thing that I do re-
9 call, I was over at the jail and I asked her to reopen my
10 case.
11 Q: But you do acknowledge, I'm trying to make
12 sure I understand your direct testimony, you do acknowledge
13 that you told Ms. Lea that you had a new attorney and that
14 she should give that new attorney the legal papers in the
15 case, is that correct?
16 MR. KIYONAGA: That was not his testimony. His
17 testimony was not to hand over the file, the testimony was
18 to allow access to a new attorney, not to surrender the---
19 Q: I have written down here, Your Honor, wrote
20 her several days later to ask her to give papers to new law-
21 yer.
22 MR. KIYONAGA: I remember---
23 Q: How in the world is that a basis for an objec-
24 tion?
25

1 THE COURT: Well, what I have is he said he wrote
2 her several days later and said make file available to re-
3 view, to new attorney.
4 Q: So I think the question is proper.
5 THE COURT: Then he said no one was available to
6 collect file, so based on the no one available to collect
7 file, then he can ask the question.
8 Q: Let me put it in simple terms, you did, after
9 you had been sentenced, did tell her in the jail you had a
10 new lawyer, isn't that correct?
11 A: No.
12 Q: You did not tell her that you had a new law-
13 yer.
14 A: No.
15 Q: One last question, isn't it a fact that as to
16 a possible appeal, the only thing you ever said to Ms. Lea
17 was that you never told her not to appeal?
18 MR. KIYONAGA: Your Honor, his testimony was that
19 he---
20 A: Would you repeat that?
21 Q: I'm trying to remember what the question was.
22 Isn't it true that as to a possible appeal, the only thing
23 you can say is that you never told her not to file an ap-
24 peal?
25 A: That's right.

1 Q: Were you afraid to make the judge angry or
2 jeopardize the plea when you said nobody forced you into en-
3 tering the plea?
4 A: That's right.
5 Q: And when you told him you were aware of the
6 max sentence, the maximum sentence, did you think the maxi-
7 mum sentence was eighteen (18) years?
8 MR. ANDERSON: The question should be what did you
9 think was the maximum sentence?
10 THE COURT: Objection sustained, leading.
11 A: Eighteen (18) years.
12 Q: What did you think was the maximum sentence
13 when you told the judge that you were aware of the maximum
14 sentence that you faced?
15 A: Eighteen (18) years.
16 Q: Now, we've been going back and forth here
17 about reopen the case as opposed to appeal the case. Did
18 your previous attorney, Ms. Lea, ever sit down with you and
19 explain through an interpreter your right to an appeal? I'm
20 referring to the specific term, appeal.
21 A: No.
22 Q: Were you unhappy with the sentence that you
23 got?
24 A: That's right.
25 Q: Did you want her to try to change that result?

1 A: Not her.
2 Q: Did you---
3 THE COURT: I'm sorry, I didn't hear the response.
4 A: No her.
5 Q: Did you want a different result?
6 A: Yes.
7 Q: You wanted the process undertaken so that you
8 could possibly get a different result?
9 A: That's right.
10 Q: So you asked her to reopen the case.
11 A: That's right.
12 Q: And you never specifically told her that she
13 should not pursue a different result for the case.
14 A: That's right.
15 Q: No further questions.
16 MR. ANDERSON: I just have two or three, Your Hon-
17 or.
18 THE COURT: Go ahead.
19
20 RECROSS-EXAMINATION
21 By: Mr. Anderson
22 Q: Do I understand you to have said on redirect
23 examination that you felt you had to agree with what I was
24 asking you on cross-examination?
25 A: Yes.

1 officer who conducted the presentence investigation and
2 drafted the report. If the Court would indulge me one se-
3 cond. Your Honor, there's a lot of back and forth about
4 whether he asked Ms. Lea to reopen the case or to appeal the
5 case. But Mr. Velasquez was very clear that she never actu-
6 ally explained to him his right to an appeal. He's a Salva-
7 dorian with a first grade education who doesn't speak Eng-
8 lish. How can he be expected to appreciate the difference
9 between reopening a case and appealing a case. He has an
10 absolute right to an appeal and he has a right to have it
11 explained to him by his attorney. All he knew was that he
12 wasn't happy with the result, it wasn't what he had been led
13 to expect and he wanted to have it changed. She understood
14 that and she noted his appeal and the statute states very
15 clearly, Your Honor, that once an attorney is appointed to
16 represent somebody before the circuit court, that appoint-
17 ment continues, in effect, through the appeal. She was nev-
18 er given leave to withdraw. Nobody ever entered their ap-
19 pearance. Nobody even showed up to replace her. She just
20 dropped it. No petition was ever filed and the appeal was
21 dismissed by the court of appeals. He entered an unwilling
22 and involuntary plea. He did so in part as a consequence of
23 ineffective assistance and he suffered ineffective assis-
24 tance also because Ms. Lea did not prosecute his appeal as
25 she is required to do by statute.

1 with guilt. I then went ultimately to the police. That
2 doesn't sound like someone who was browbeaten into pleading
3 guilty in court and admitting his guilt. She testified that
4 she never ever said anything about you'll only get twelve
5 (12) years. The plea agreement, the forms here plainly re-
6 flect his awareness that there was no agreement as to sen-
7 tencing. And again, as to the 2003 issue, he, himself, was
8 hardly constantly saying 2003. She alluded to it to the
9 trial judge, it wasn't some secret. He chose---there's no
10 serious issue here that he's not guilty of these thirty-
11 three (33) crimes. He chose on these four out of thirty-
12 three (33) to plead guilty along with the other twenty-nine
13 (29). Finally, on the issue of the appeal, if he's so igno-
14 rant about his right to appeal, as I understand it he at
15 some point today testified that he told her he wanted to
16 file an appeal. That's contrary to her testimony. It's
17 also contrary to the written evidence we have where she went
18 to see him on October 6th and he said don't file an appeal
19 for him. If there's some discrepancy between him and his
20 brother as to whether an appeal should be filed, you obvi-
21 ously, your client is the one who counts. He said I don't
22 want you to file an appeal. She said she would have filed
23 one but for that. She was repeatedly told, you're out of
24 the case, I want you to turn over papers to the new lawyer.
25 She's certainly not---I understand our statute. She's

1 certainly not constitutionally ineffective where she's been
2 given her marching orders in that manner. There's a U.S.
3 Supreme Court case, Roa, R-o-a v. Flores F-l-o-r-e-s-Ortega
4 and I forgot to get the cite. It's about twelve (12), fif-
5 teen (15) years old and it deals with what is ineffective
6 counsel in the context of a failure to file an appeal and it
7 essentially said, in a guilty plea situation it's a very
8 separate category because guilty pleas by their very nature
9 cut off all sorts of appellate avenues. The supreme court
10 in so many words says, if the client nevertheless says I
11 want you to file an appeal, unambiguously says it, and the
12 attorney doesn't, they're ineffective. If the attorney un-
13 ambiguously says I don't want you to file an appeal, then
14 obviously there's nothing to the case. Most cases are not
15 so clear-cut and the Supreme Court essentially said that it
16 should be an issue of whether the attorney should have rea-
17 sonably surmised that the defendant wished to file an ap-
18 peal. Here, based on everything, there's no reason for this
19 attorney to conclude that this defendant whose guilt was
20 plain, plainly acknowledged and who was sentenced in the way
21 consistent with the terms of the plea agreement wished to
22 appeal. In fact, why would he wish to appeal. A retrial is
23 about the last thing he needs in terms of probable outcomes.
24 So, we submit also that counsel was not ineffective with re-
25 spect to the matter of the appeal. She said she would have

1 filed the petition for appeal as she had filed the notice
2 but for these actions. That's not ineffective counsel. And
3 finally, on the issue of her performance at sentencing, I
4 submit that the failure to put on evidence today is a waiver
5 of that but even if it isn't, then we rely on our arguments
6 as to that. On the motion to dismiss she plainly was not
7 constitutionally deficit during argument. For all those
8 reasons I'd ask the Court to dismiss the petition.
9 MR. KIYONAGA: May I be heard briefly, Your Honor?
10 THE COURT: Go ahead.
11 MR. KIYONAGA: Your Honor, it's not necessary that
12 you find Mr. Velasquez incompetent, that you find him intel-
13 lectually disabled. The question is whether he understood
14 his pleas and whether he entered into it voluntarily. He
15 had told his attorney twice in writing 2003 was off limits.
16 He told Dr. Fracher and he told the judge at sentencing.
17 The evidence is that he didn't understand his plea included
18 conduct in 2003 and there's absolutely no record from Ms.
19 Lea, no writing by her memorializing her explaining the dis-
20 crepancy between the plea that he made and his written as-
21 sertions to her made twice. She denied that she told him
22 any expected sentence. Ask yourself, Your Honor, whether
23 it's believable that an attorney representing somebody on a
24 felony charge would not even attempt the guidelines calcula-
25 tions so as to be able to predict some sort of likely or

1 probably or expected plea. Ms. Lea was careless on a plea
2 of guilty form. She maintains that she wrote in number 16
3 in error. She maintains that she overlooked the need for
4 any response on 17b. Whoever wrote those in, she certainly
5 didn't look at it afterwards to make sure that it was done
6 properly, nobody did. She never memorialized his agreement
7 to conduct in 2003. She never memorialized properly her
8 disclosure to him of the max sentence. Your Honor, the
9 preponderance of the evidence is that Mr. Velasquez did not
10 understand the pivotal terms of his plea, that his will was
11 overborne by the intimidation and confusion that he felt and
12 by the conceded need that he had to agree with the instruc-
13 tions of his attorney and with the acknowledgments and ques-
14 tions of the Court. The preponderance of the evidence is
15 that this was not voluntary and knowingly pleaded and
16 certainly there's no question from the record but that his
17 right to an appeal was not protected by his counsel, that he
18 was denied his constitutional right to pursue appeal.
19 THE COURT: All right, so, the Court appreciates
20 counsel shortening your closing arguments but the Court is
21 going to issue its ruling in writing based on the lateness
22 of the hour and also the fact that the Court wants to review
23 its notes and the case law that's been cited, so, we'll be
24 issuing a ruling in writing. Court will stand adjourned.
25 HEARING CONCLUDED