No. 98-1441

In the Supreme Court of the United States

ERNEST C. ROE, WARDEN, PETITIONER

v.

LUCIO FLORES ORTEGA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights.

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INTEREST OF THE UNITED STATES

This case involves the proper standards for evaluating a claim that respondent's constitutional right to counsel was violated when his lawyer failed to perfect an appeal from the state court judgment entered on his plea of guilty. Because similar collateral attacks on federal criminal judgments will generally be adjudicated under the same standards, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. In 1993, respondent Ortega stabbed and killed an innocent bystander during a barroom confrontation with another man. See J.A. 34-36. Earlier the same day, respondent had chased the victim around a local park, brandishing a knife, after an apparently unrelated

dispute. That evening he had committed another armed assault, lunging with his knife at the man he later confronted again in the bar. J.A. 34-35, 37-38.

The State of California charged respondent with murder and two counts of assault. J.A. 152. It also sought a sentence enhancement on the murder count for personal use of a deadly weapon. *Ibid.* After consulting with counsel, respondent entered into a plea agreement under which he pleaded guilty to second-degree murder, and the State moved to dismiss the two assault charges and to strike its request for a deadly-weapon enhancement. J.A. 152-153.[1] At a sentencing hearing on November 10, 1993, respondent's counsel asked the state court to place respondent on probation, but the court rejected that request. J.A. 35-36, 40; see Cal. Penal Code § 1203(e)(2) (West Supp. 1999) (prohibiting probation, except in "unusual cases," where the offender "used * * * a deadly weapon upon a human being" in connection with the offense of conviction); Cal R. Ct. 413(c) (West 1996) (specifying factors to be considered in determining whether a case is "unusual"). The court instead sentenced respondent to the term of 15 years to life in prison prescribed by state law for second-degree murder. J.A. 40.[2]

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[1] The plea was entered under a state procedure that allows the accused to admit that the State has sufficient evidence to convict him, without actually admitting commission of the crime. See J.A. 153.

[2] At the time of respondent's offense, state law required the imposition of a term of 15 years to life for any second-degree murder that did not involve specified aggravating factors. Cal. Penal Code § 190(a) (West 1999) (version in effect before 1993 and later amendments; see Historical and Statutory Notes at pp. 181-183). First-degree murder was punishable by death (subject to compliance with various other provisions) or by a term of 25 years

No notice of appeal from respondent's conviction or sentence was filed within the 60 days allowed by state law. J.A. 152; see Cal. Penal Code § 1239(a) (West Supp. 1999); Cal. R. Ct. 31(d) (West 1996).[3] In March 1994 respondent attempted to file a notice of appeal challenging his conviction, stating that his lawyer had "misrepresented [the] * * * ramifications of pleading guilty" by telling him that he "would only get 3 1/2 years if [he] pleaded guilty," and that if he had not been "misled" by counsel he would not have pleaded

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to life in prison. *Ibid.* Although the applicable minimum term was subject to reduction by "good time" credits, a convicted offender was not otherwise eligible for release on parole during that term. See generally Cal. Penal Code §§ 5075 *et seq.* (West 1982) (relating to Board of Prison Terms, which passes on applications for release on parole at any point before expiration of maximum term of indeterminate sentence). With regard to the charges dismissed under the plea agreement, assault with a deadly weapon was punishable by up to four years' imprisonment, while the deadly weapon enhancement would have added a consecutive one-year term to the sentence otherwise imposed on the murder count. Cal. Penal Code § 245(a)(1) (West 1999); § 12022(b) (West Supp. 1999).

[3] In order to perfect an appeal concerning the validity of the conviction entered on respondent's guilty plea, respondent would have had to submit to the trial court a sworn statement showing "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and the trial court would have had to grant respondent a "certificate of probable cause" for the appeal. Cal. Penal Code § 1237.5 (West Supp. 1999). Neither requirement would have applied to an appeal challenging only respondent's sentence, or other aspects of the proceedings occurring after entry of the guilty plea. See Cal. R. Ct. 31(d) (West 1996) (*reprinted at* Pet. App. C3-C4); *People* v. *Delles*, 447 P.2d 629, 631 (Cal. 1968); see also, *e.g.*, *People* v. *Ribero*, 480 P.2d 308, 311-312 & n.3 (Cal. 1971).

guilty. C.A. E.R. 47-49. The court clerk rejected the notice as untimely. *Id.* at 57; J.A. 152-153.[4]

Respondent sought relief from the state court of appeal, filing both a petition for a writ of habeas corpus and a motion for leave to file a belated notice of appeal. See C.A. E.R. 59-62; J.A. 43. He repeated his claim that he had been misinformed about the consequences of pleading guilty, and added a claim that his attorney had not "[told him] about any time limitations for appeal." C.A. E.R. 60. The court of appeal noted that it had discretion to forgive a default in the timely filing of a notice of appeal, that its power in that regard was to be "liberally exercised," and that "reasonable doubts" were to be "resolved in favor of the petitioner in order to protect the right of appeal." J.A. 43-44. It further observed, however, that the transcripts of proceedings in the trial court "ma[de] clear pertinent facts," including that respondent's change of plea occurred "during trial" and "almost one month prior to sentencing"; that the court informed respondent, with an interpreter present, of the sentencing consequences of a guilty plea, as did the post-plea probation report; and that at sentencing, again with an interpreter present, respondent "expressed no surprise or objection to the term imposed." J.A. 44. Under those circumstances, the court refused to issue a writ of habeas corpus. *Ibid.*

Respondent also sought a writ of habeas corpus from the California Supreme Court, repeating and elaborating on his previous challenges both to the validity of his plea and conviction and to the refusal to entertain his appeal. C.A. E.R. 68-76. That petition added, for the

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[4] It appears that respondent also attempted to file a motion to withdraw his guilty plea, alleging similar grounds. C.A. E.R. 50-54.

first time, an allegation that respondent's attorney had not filed a timely notice of appeal "as she promi[s]ed." *Id.* at 70, 76. The state Supreme Court denied the petition without comment. J.A. 45.

2. After the state courts denied him relief, petitioner commenced this action in federal district court under 28 U.S.C. 2254 (1994 & Supp. III 1997), alleging only that his federal constitutional right to counsel was violated by trial counsel's "fail[ure] to file a notice of appeal on his behalf after promising to do so." J.A. 46, 51, 152-153. The district court referred the matter to a magistrate, who appointed counsel to represent respondent at an evidentiary hearing limited to determining "the credibility of [respondent's] assertions that [his lawyer] promised to file a notice of appeal on his behalf." J.A. 92, 153 (emphasis omitted).

At the hearing, the magistrate received testimony from respondent, his trial counsel, and the state-certified Spanish-language interpreter who had served both at the change-of-plea hearing and at sentencing. J.A. 154. Trial counsel testified that on the day before sentencing she met with respondent and an interpreter to review with him the pre-sentence report prepared by the state probation office. Br. in Opp. 1-2; see J.A. 109. At some point she wrote on that report the notation "bring appeal papers," as "a reminder to take appeal papers to court with her at sentencing." Br. in Opp. 2; see J.A. 109-110. She also testified that, in her opinion, the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation; that such an appeal would "almost certainly [have] fail[ed]"; and that, although she would not have encouraged an appeal, she would have filed one had respondent asked her to do so. J.A. 158; see J.A. 114-115, 119-120.

After hearing the evidence, the magistrate concluded that respondent 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." J.A. 133, 154. He found that respondent "did not consent to [counsel's] failure to file a notice of appeal," but also that respondent had "not met his burden of proving by a preponderance of the evidence that [counsel] had promised to file a notice of appeal on his behalf." J.A. 132-133, 154. Moreover, he concluded, respondent's lawyer was "obviously an extremely experienced defense counsel" and "a very meticulous person," so that "had [respondent] requested that she file a notice of appeal, she would have done so." J.A. 133.

The magistrate recognized that his finding that respondent did not consent to the failure to appeal would be sufficient to require relief under the Ninth Circuit's decision in *United States* v. *Stearns*, 68 F.3d 328 (1995). He held, however, that by dispensing with any requirement that a habeas petitioner show that he had asked his attorney to file a notice of appeal (or that she was otherwise under an affirmative duty to do so), *Stearns* had stated a "new rule" of federal constitutional law, which, under *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), could not be applied on federal collateral review of respondent's state conviction. J.A. 154-161. He therefore recommended that the district court deny respondent's federal habeas petition. J.A. 161. The district court, after "carefully review[ing] the entire file," including petitioner's objections to the magistrate's report, adopted the magistrate's findings and recommendations and denied relief. J.A. 162-163.

3. The court of appeals reversed. J.A. 164-169. The court reasoned that the rule it had applied in *Stearns*—that a habeas petitioner need show only "that counsel's

failure to file a notice of appeal was *without the petitioner's consent*"—had first been announced in *Lozada* v. *Deeds*, 964 F.2d 956, 958 (9th Cir. 1992), well before the time of respondent's plea and conviction. J.A. 168. Although *Lozada* involved a conviction entered after trial, rather than after a guilty plea, the court concluded that *Stearns* had merely "appli[ed] * * * the rule in *Lozada*," rather than announcing a "new rule" of law whose application to respondent's case would be barred by *Teague* v. *Lane*. *Ibid.* Because the district court's factual finding that respondent "did not consent to the failure to file a notice of appeal" in his case satisfied the sole requirement of the *Lozada*/*Stearns* rule, the court reversed the district court's judgment and remanded the case with instructions to issue a conditional writ of habeas corpus, "releasing [respondent] from state custody unless the state trial court vacates and reenters [respondent's] judgment of conviction and allows a fresh appeal." J.A. 166, 168.

SUMMARY OF ARGUMENT

A criminal defendant generally has a Sixth Amendment right to the effective assistance of counsel, both at trial and on direct appeal. The right extends to advice concerning whether or not to plead guilty, and to assistance in pursuing any appeal taken from the judgment entered after such a plea. Given that the nature of appeals, and the possible legal claims that might be advanced on appeal, are beyond the knowledge of most defendants, it would be anomalous if the defendant did not also have a right to assistance of counsel in understanding the appeal process and in making the decision whether to appeal. Respondent's right to counsel accordingly included a right to consult with a lawyer concerning the possibility and advisabil-

ity of pursuing an appeal from his conviction or sentence.

Respondent now contends that, had he been adequately represented, he would have perfected such an appeal. The court of appeals held that even if respondent never specifically instructed his lawyer to appeal, he was entitled to a new opportunity to appeal because he did not give his consent to his lawyer's failure to file a notice of appeal within the 60 days allowed by state law. That "consent" rule should be rejected, because it seriously undervalues the substantial public interest in the finality of criminal judgments, is in considerable tension with this Court's decisions, and is subject to abuse.

There are, nonetheless, circumstances under which a claim of ineffective assistance in taking an appeal may be made out. Where the defendant can prove that he instructed his lawyer to appeal but the lawyer failed to do so, the case for professional error is straightforward, and prejudice to the defendant may properly be presumed. The problem is more difficult where, as in this case, the defendant cannot make such a showing. In those circumstances, a court should accord the defendant a new opportunity to appeal only if he can demonstrate both (i) that, on the particular facts of his case, his lawyer's performance fell outside the potentially wide range of competent professional approaches to the question of counseling about an appeal from a conviction based on a guilty plea, and (ii) that there is a reasonable probability that, but for counsel's unprofessional errors, he would have directed his attorney to perfect an appeal. That standard will not require a conclusive determination, on collateral review, of the merits of the underlying claims the defendant seeks to present on appeal. It will, however, require a sufficient

showing of prejudice in the decision whether or not to appeal to provide some level of confidence that a court granting collateral relief is remedying a true violation of the defendant's right to counsel.

In this case, respondent cannot show that his lawyer failed to execute an actual instruction to appeal. Nor does the present record afford any sound basis for concluding that respondent's failure to appeal resulted from a decision, assumption, or error on the part of his counsel falling outside the normal range of competent post-guilty-plea representation, or that there is a reasonable probability that, if competently counseled, respondent would have directed his attorney to appeal. That record is accordingly insufficient to support the court of appeals' judgment.

ARGUMENT

I. COLLATERAL RELIEF SHOULD BE GRANTED TO RESTORE A FORFEITED FIRST APPEAL ONLY IF THE APPLICANT CAN SHOW NOT ONLY THAT COUNSEL PROVIDED PROFESSIONALLY INADEQUATE ASSISTANCE, BUT ALSO THAT THERE IS A REASONABLE PROBABILITY HE WOULD HAVE TAKEN THE APPEAL BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS

A. The Right To Counsel Includes A Right To Appropriate Consultation Regarding Appeal After A Guilty Plea

The Constitution guarantees the accused "[i]n all criminal prosecutions" the right to effective assistance of legal counsel at every critical stage of trial-level proceedings, from the filing of charges or other commencement of adversary judicial proceedings through acquittal or conviction. U.S. Const. Amend. VI; *United*

States v. *Gouveia*, 467 U.S. 180, 187-189 (1984); *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984); cf. *Nichols* v. *United States*, 511 U.S. 738, 743 & n.9 (1994) (right to appointed counsel for indigent defendants applies to all felony cases and to misdemeanors where actual imprisonment is imposed). The guarantee extends to the effective assistance of counsel in pursuing one direct appeal, where applicable law provides the opportunity for such an appeal as a matter of right. *Evitts* v. *Lucey*, 469 U.S. 387 (1985); see also, *e.g.*, *Penson* v. *Ohio*, 488 U.S. 75 (1988); *Anders* v. *California*, 386 U.S. 738 (1967). One aspect of effective legal assistance on appeal is compliance with the particular procedures and deadlines necessary, in the relevant jurisdiction, to effectuate the client's decision to appeal. *Evitts*, *supra*; see *Coleman* v. *Thompson*, 501 U.S. 722, 752-757 (1991) (distinguishing situations in which there is a constitutional right to effective assistance of counsel from those in which there is no such right).[5] Moreover, where a defendant asks counsel to perfect an appeal and counsel fails to do so, this Court and others have generally held that no other or more specific prejudice need be shown in order to justify relief. *Rodriquez* v. *United States*, 395 U.S. 327 (1969); see also *Peguero* v. *United States*, 119 S. Ct. 961, 965 (1999) (discussing *Rodriquez*); *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam).[6]

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[5] See also, *e.g.*, *Restrepo* v. *Kelly*, No. 97-2944, 1999 WL 346164 (2d Cir. June 2, 1999); *Ludwig* v. *United States*, 162 F.3d 456, 459 (6th Cir. 1998) (collecting cases); *United States* v. *Guerra*, 94 F.3d 989, 994 (5th Cir. 1996); *United States* v. *Peak*, 992 F.2d 39, 41-42 (4th Cir. 1993).

[6] See also, *e.g.*, *Restrepo*, 1999 WL 346164, at *8-*9; *McHale* v. *United States*, 175 F.3d 115, 116-118 (2d Cir. 1999); *Ludwig*, 162 F.3d at 459; *Guerra*, 94 F.3d at 994; *Castellanos* v. *United States*,

A defendant's right to counsel extends to advice concerning whether or not to plead guilty to the charges pending against him. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985); *Mabry* v. *Johnson*, 467 U.S. 504, 508-510 & n.10 (1984); *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973); *McMann* v. *Richardson*, 397 U.S. 759, 769-771 & n.14 (1970). Moreover, even after having pleaded guilty, the defendant may have colorable grounds to appeal—to challenge the sentence imposed by the court, for example, or an unfavorable evidentiary ruling that led to a conditional plea, or (in a few cases) the validity of the plea itself. See 18 U.S.C. 3742(a); Fed. R. Crim. P. 11(a)(2), 32(c)(5). The right to counsel also extends to pursuing any such claims on a first appeal as of right.

While the decision whether to appeal belongs to the defendant personally, see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), it is unrealistic to expect a defendant to comprehend the appellate process or its potential benefits, detriments, and limitations without the advice of counsel. To an even greater degree than trials, appeals turn on the nature of the governing law and such technicalities as standards of review. The appellate process itself is also likely to be foreign to most defendants. The decision whether to appeal cannot, accordingly, be made intelligently without appropriate access to a lawyer. It would be anomalous if the right to counsel that applies at the guilty-plea stage and to representation on appeal did not also include assistance

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26 F.3d 717, 718-720 (7th Cir. 1994); *Peak*, 992 F.2d at 41-42; *Lozada* v. *Deeds*, 964 F.2d 956, 958 (9th Cir. 1992); *Bonneau* v. *United States*, 961 F.2d 17 (1st Cir. 1992); *Abels* v. *Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990); *Estes* v. *United States*, 883 F.2d 645, 649 (8th Cir. 1989).

in understanding the appeal process, evaluating the strength or weakness of potential claims, and otherwise making an informed decision about whether or not to appeal in the first place. See *Nelson* v. *Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (right to counsel is "required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated"), cert. denied, 397 U.S. 1007 (1970).

Respondent's right to counsel accordingly included the right to consult with a lawyer, at or around the time that judgment was entered against him, concerning the possibility and advisability of pursuing an appeal from his conviction or sentence. See *Baker* v. *Kaiser*, 929 F.2d 1495, 1498-1500 (10th Cir. 1991) (discussing role of counsel in period allowed for filing appeal); *Hardiman* v. *Reynolds*, 971 F.2d 500, 505-506 (10th Cir. 1992) (noting special limitations applicable in context of guilty pleas, but remanding for application of *Baker* where defendant alleged inadequate post-plea counseling); *Marrow* v. *United States*, 772 F.2d 525, 527-530 (9th Cir. 1985) (similar).[7]

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[7] This analysis of the constitutional right to counsel is consistent with the duties imposed on counsel by California law, and with guidelines for counsel published by the American Bar Association. See Cal. Penal Code § 1240.1(a) (West Supp. 1999) ("[I]t shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal."); American Bar Ass'n, *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 4.82 (3d ed. 1993) ("After conviction, defense counsel should * * * give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the

B. A Rule That Presumes Ineffective Assistance Of Counsel From Failure To Appeal After A Guilty Plea Undervalues The Public Interest In Finality And Is Subject To Abuse

Respondent entered into a plea agreement with state prosecutors, under which he pleaded guilty to a charge of second-degree murder. He now contends that, had he been adequately counseled, he would have perfected an appeal challenging his conviction, his sentence, or both. See, *e.g.*, Br. in Opp. 9; J.A. 57-59 (portion of federal habeas petition); C.A. E.R. 47 (original untimely notice of appeal, noting challenge both to sentence and to validity of plea). In addressing that claim, the court of appeals did not evaluate the adequacy of the counseling that respondent received on the presence or absence of any arguable basis for appeal. Nor did the court consider whether respondent had instructed his lawyer to appeal on his behalf, after having been advised of that right by the trial court. Rather, the court held that respondent's simple ability to show that he "did not consent to counsel's failure to file" an appeal within the 60-day period allowed by the State after the entry of judgment sufficed to require the issuance of a federal writ of habeas corpus setting aside respondent's state conviction, unless the state trial court reentered its judgment so as to re-start the time for taking a direct appeal. J.A. 166, 168; see Cal. R. Ct. 31(d) (West 1996) (*reprinted at* Pet. App. C3-C4) (time limit for appeal following guilty plea). That approach incorrectly equates failure to file a notice of appeal, without explicit consent from the defendant, with constitutionally ineffective assistance of counsel.

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probable results of an appeal * * * [and] explain * * * the advantages and disadvantages of an appeal.").

The court of appeals' rule effectively requires a federal court to grant collateral relief upon a simple allegation of non-consent, unless the record affirmatively discloses, or the prosecuting government can show, that the defendant deliberately bypassed his right to take a direct appeal from the judgment entered on his guilty plea. See, *e.g.*, *Salmon* v. *Carrillo*, No. 96-55707, 1998 WL 792290 (9th Cir. Nov. 13, 1998) (per curiam) (unpublished summary order granting "automatic[] * * * [conditional] reversal" of state conviction where defendant "did not consent to the abandonment of his appeal"), petition for cert. pending, No. 98-1473; Br. in Opp. 5 (relying on *Fay* v. *Noia*, 372 U.S. 391 (1963)). Indeed, it would create a situation in which almost any guilty plea would have to be understood to contain an unwritten reservation of an opportunity to take one "direct" appeal at some later time, regardless of normal deadlines or procedural requirements. Such a rule seriously undervalues the respect owed to state (and federal) procedural rules, and the substantial public interest in the finality of criminal judgments. It is also in considerable tension with this Court's decisions rejecting the "deliberate bypass" standard for assessing a federal court's ability to grant collateral review of procedurally defaulted claims, including those in which the default consists of a failure to take any direct appeal. See *Coleman* v. *Thompson*, 501 U.S. at 744-751 (rejecting use of *Fay* standard in this context); see also, *e.g.*, *Murray* v. *Carrier*, 477 U.S. 478, 485-492 (1986); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

A defendant who claims a violation of his right to counsel based on his lawyer's failure to provide effective assistance in bringing a first appeal must bear

the usual burden of proving that the assistance he received was constitutionally deficient. Normally, that requirement entails a two-part showing: first, that counsel's performance was so seriously lacking in some particular respect as to fall below an objective standard of reasonableness; and second, that the defendant suffered some actual prejudice because of that inadequate performance. *Strickland*, 466 U.S. at 687; *Kimmelman* v. *Morrison*, 477 U.S. 365, 381 (1986); *Hill*, 474 U.S. at 58-59. To show deficient performance under the first step of this analysis, the defendant must overcome "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689-690.

That presumption has particular application when a defendant claims that ineffective assistance resulted in his failure to pursue an appeal after pleading guilty. Because guilty pleas account for a large proportion of criminal convictions, proposed rules that undermine the finality of the resulting judgments are properly disfavored. See, *e.g.*, *Hill*, 474 U.S. at 58 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (in turn quoting *United States* v. *Smith*, 440 F.2d 521, 528-529 (7th Cir. 1971) (Stevens, J., dissenting))); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Moreover, because there is nothing unusual about a defendant's failure to appeal after having pleaded guilty, such a failure by itself gives no hint of ineffective legal assistance. See *State* v. *Peppers*, 796 P.2d 614, 619-620 (N.M. Ct. App. 1990) (distinguishing guilty-plea cases from those involving failure to appeal from conviction after trial). To the contrary, once an unconditional guilty plea has been properly accepted by the court, the grounds available for challenging the resulting conviction itself are narrow. See, *e.g.*, *Tollett*, 411 U.S. at 267. Although a

defendant may have other possible grounds for appeal, such as a challenge to the sentence imposed by the court, those issues will often have been addressed in the negotiation or structuring of the plea (or even included in the plea agreement itself), and the defendant will have decided, with the advice of counsel, to accept a final resolution of the accusations against him. Thus, there is ordinarily nothing remarkable about a defendant's choosing not to pursue legal challenges further. In addition, the core concern "that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784.

There is also a special need for caution in this context because any opportunity to revisit, on collateral review, an initial failure to appeal from a judgment based on a guilty plea may present potential habeas petitioners with unusual temptations for abuse. Defendants who have made difficult decisions to plead guilty, often choosing among unpleasant options under conditions of inevitable legal uncertainty, may simply have second thoughts after the normal time for appeal has run. Compare *McMann*, 397 U.S. at 769-771; *Brady* v. *United States*, 397 U.S. 742, 756-758 (1970). Moreover, new rules of law may be announced that, while unavailable to the defendant on collateral review, could be invoked on a new or reinstated "direct" appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621-624 (1998); *Teague* v. *Lane*, 489 U.S. 288, 305-310 (1989) (plurality opinion).

Where such benefits may be sought on the basis of asserted representational errors that are beyond the prosecutor's ability to prevent, easy for the defendant to allege, and often difficult to disprove (given the potential absence of reliable records of private con-

sultations between a defendant and his lawyer), the prosecuting government, and the public it represents, may be deprived of a significant part of the proper benefits of its plea agreement with the defendant. Those benefits include not only the avoidance of trial, but also expedition, finality, and repose. See, *e.g.*, *Hill*, *supra*; *Blackledge*, *supra*; *Timmreck*, *supra*. Courts evaluating claims like respondent's should, therefore, pay particular heed to this Court's admonitions that the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The rule applied by the court of appeals in this case is inconsistent with those requirements.

C. Relief Should Be Granted If (But Only If) A Defendant Can Show Both Inadequate Performance By Counsel And Resulting Prejudice, Either Actual Or Presumed

1. *Appeals defaulted after a request by the defendant.* While the court of appeals' approach is deficient, there are certainly circumstances under which a claim of ineffective assistance in perfecting an appeal may be made out. The most obvious of these is where the defendant can prove that he directed his lawyer to perfect an appeal, but the lawyer failed to do so. In that situation, the client has made a decision that is his to make, see *Jones*, 463 U.S. at 751, and the lawyer has been given a task that involves technical knowledge and attention, but little or no exercise of professional judgment. Compare *id.* at 751-754 (in briefing and arguing appeal, counsel exercises independent legal

judgment). There will, indeed, seldom (if ever) be any adequate professional excuse for a lawyer's failure to take the technical steps necessary to perfect an appeal when the defendant has clearly communicated a decision to appeal.[8] Every court that has addressed the question, including this Court, has accordingly recognized that an attorney's failure to act under those circumstances amounts to ineffective assistance of counsel that justifies reinstatement of the defendant's direct appeal. See *Rodriquez*, *supra*; see also *Peguero*, 119 S. Ct. at 965 (discussing *Rodriquez*); *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719-720; and other cases cited in notes 5-6, *supra*.

The courts of appeals that have considered this situation have also held that a defendant who can show that he asked his attorney to appeal, and that the attorney failed to do so, need show no other "prejudice" to warrant collateral relief that will allow the original appeal to proceed. See cases cited in note 6, *supra*; see also *Strickland*, 466 U.S. at 692 ("In certain Sixth Amendment contexts, prejudice is presumed."); *Penson*, 488 U.S. at 85-89 (no showing of prejudice required where state appellate procedures deprived petitioner of effective assistance of counsel on appeal); cf. *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam).[9] That conclusion makes sense when the

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[8] If counsel believes that all possible grounds for appeal are frivolous, she may follow the course prescribed by this Court in *Anders*, 386 U.S. at 744-745. See also *Penson*, 488 U.S. at 80-82.

[9] The analysis of whether prejudice must be shown (or presumed) and what the nature of the prejudice must be arises under *Strickland* itself. The constitutional claim a defendant in this type of case presents on habeas is that ineffective assistance of counsel deprived him of his right to a first, counseled appeal. That Sixth Amendment claim was not defaulted by the very failure to

defendant has already demonstrated that he made the decision to appeal and directed his lawyer to effectuate it. In such a case, there is no question that the defendant expressed a desire to appeal within the time allowed for that decision. It is also beyond dispute that, but for counsel's inadequate performance, the appeal would have been procedurally perfected, and the defendant would have been entitled to consideration of his claims by an appellate court (and to the assistance of counsel in identifying and presenting those claims). Concerns about finality are accordingly muted, and those about strategic behavior on the part of the defendant are essentially eliminated. Indeed, such a defendant has shown that he was, in effect, deprived of the benefit of *any* counsel on appeal—a circumstance that *Strickland* itself recognized as sufficient to support a presumption of prejudice. See *Strickland*, 466 U.S. at

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appeal of which the defendant complains. Cf. *Kimmelman*, 477 U.S. at 374 n.1 (distinguishing between Sixth Amendment claim and the underlying right forfeited through counsel's ineffective assistance); *id.* at 393 n.1 (Powell, J., concurring) (same). Nevertheless, it would make no difference if the defendant's claim were thought of as simply denial of a direct appeal, as to which the procedural default (failing to file a timely notice of appeal) might be excused by ineffective assistance of counsel. The requirement, under *Coleman* and like cases, that a habeas petitioner show both "cause" for and "prejudice" from not having raised on direct appeal a claim later presented for collateral review, and the *Strickland* requirement that attorney errors be prejudicial, rather than merely unprofessional, before they will amount to a violation of the constitutional right to counsel, establish parallel standards in this context, where the fundamental claim is that ineffective assistance resulted in the loss of the opportunity for a direct appeal. Compare *Strickler* v. *Greene*, No. 98-5864 (June 17, 1999) ("In this case, cause and prejudice parallel two of the three components of the alleged [constitutional] violation itself.").

692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); *Penson*, 488 U.S. at 88.

2. *Appeals defaulted in the absence of any request by the defendant.* The problem is more difficult where, as in this case, an applicant for collateral relief cannot show that he actually directed his lawyer to perfect an appeal. In such a situation the concerns about finality and possible abuse outlined above are distinctly present, and it may be difficult for a district court to evaluate a defendant's claims concerning the effectiveness of counsel's assistance on the question of appeal. Perhaps for those reasons, the relevant decisions in the courts of appeals (other than the court below) have tended to hold, or at least strongly suggest, that a defendant is not entitled to relief on the basis of his attorney's failure to perfect an appeal, unless he can show that he in fact requested that the appeal be pursued. See, *e.g.*, *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719-720. That bright-line rule would doubtless produce a just result in the majority of cases; and it would have, of course, the virtues common to such rules.

A bright-line rule would not, however, be consonant with the importance of the matter to the individual defendant whose right to counsel may have been violated, or with the careful contextual analysis on which this Court has typically insisted in evaluating claimed violations of a defendant's right to the effective assistance of counsel. See, *e.g.*, *Strickland*, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."); *id.* at 696 ("Most important, in adjudicating a claim of actual ineffectiveness of

counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."); cf. *McMann*, 397 U.S. at 771 ("Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts."). If, to take an extreme example, a defendant could show that the court that sentenced him had announced on the record, over counsel's objection, that it had selected a particularly harsh sentence because of the defendant's race, and that counsel subsequently advised the defendant that he had no right to relief from the sentence so imposed, it is hard to see why the defendant should be barred from relief simply because he accepted counsel's advice at face value, rather than demanding the filing of what his lawyer had advised him would be a useless appeal.

The better approach is, accordingly, to recognize that even if a defendant cannot show that counsel failed to execute a clear direction to file an appeal, the defendant may nonetheless be able to establish, in some circumstances, that counsel performed below objective standards of competency in advising him concerning the possibility and advisability of an appeal from the judgment entered after a guilty plea. Because circumstances that actually justify relief are likely to be relatively rare, however, and because the burden of litigating meritless claims is high, it is necessary in this context both to emphasize the broad range of potentially competent representation that counsel may afford on legal issues surrounding the advisability of appeal in such circumstances, and to require some showing of actual "prejudice" before awarding collateral relief.

(i) As to the first point, lower courts have recognized—and this Court should confirm—that there is no constitutional requirement that a lawyer, under all

circumstances, even advise a client who has pleaded guilty of the right to appeal from the judgment entered on that plea, much less discuss the pros and cons of such an appeal. Whether there is a duty to give such advice depends, instead, on whether the defendant seeks counsel about a possible appeal, or the lawyer knows (or should, as a matter of reasonable professional competence, know or learn) that there is some substantial ground for appeal that the defendant might wish to pursue. See *Hardiman*, 971 F.2d at 506; *Laycock* v. *New Mexico*, 880 F.2d 1184, 1187-1188 (10th Cir. 1989); *Marrow* v. *United States*, 772 F.2d at 527-530; see also *Morales* v. *United States*, 143 F.3d 94, 96-97 (2d Cir. 1998); *Castellanos*, 26 F.3d at 719 (dictum); *Giles* v. *Beto*, 437 F.2d 192, 194 (5th Cir. 1971); compare Cal. Penal Code § 1240.1(b) (West Supp. 1999) (imposing duty on lawyers representing indigent defendants to file notice of appeal "when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment * * * and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available * * * on appeal; or when directed to do so by a defendant having a right to appeal"). As the Second Circuit has observed, whether a lawyer's failure to raise the issue of appeal after a guilty plea with the defendant *sua sponte* breaches any duty to the client

> may depend on whether defendant's counsel * * * advised him [of the right to appeal] prior to sentencing * * *, or whether the court gave him notice of his appellate rights (as it should, and did here), or whether the defendant had sufficient experience with the criminal justice system to know of his right to appeal without being told—not

> to mention the variable merits and prospects of an appeal, especially one from a sentence imposed following a plea.

Morales, 143 F.3d at 96.[10]

Moreover, questions concerning the adequacy of counseling about appeal following a guilty plea will often be intertwined with questions about the details and circumstances of the plea itself, and about counsel's advice relating to acceptance of the plea.[11] Indeed, in

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[10] Largely because of the uncertainty of any harm to the client in such situations, *Morales* expressly rejected the rule that the court below applied in this case, holding instead that a claim that counsel failed to raise the issue of appeal with the defendant after a guilty plea "does not support a presumption of prejudice under *Strickland*." 143 F.3d at 96; compare *id.* at 97 (endorsing Seventh Circuit's position that "ignoring a client's request to file an appeal is ineffective assistance without regard to the probability of the appeal's success"). The Second Circuit has subsequently read its decision in *Morales* to go further, adopting the bright-line rule that "counsel is ineffective only when ignoring a defendant's explicit direction to file an appeal." *Fernandez* v. *United States*, 146 F.3d 148 (2d Cir. 1998) (per curiam). That court does not, however, require any further showing of prejudice when the defendant demonstrates that counsel ignored such a direction. See *Restrepo*, 1999 WL 346164, at *8-*9; *McHale*, 175 F.3d at 117.

[11] In this case, the primary claim respondent sought to present to the state courts appears to have been that his guilty plea was invalid because counsel misinformed him about the consequences of such a plea. See pp. 3-4, *supra*; see also J.A. 58 (federal habeas petition, asserting, in recitation of facts, that counsel coerced respondent into pleading guilty because she was unprepared for trial). As noted above (see p. 2 & note 2, *supra*), however, in exchange for respondent's plea to a second- degree murder charge, the State dropped two felony charges of assault with a deadly weapon and a proposed sentence enhancement for use of weapon in connection with the murder. Respondent also avoided any chance of conviction for first-degree murder. Petitioner's lawyer

some cases the plea agreement may speak directly to the question of appeal, either specifically contemplating an appeal on particular issues, or specifically waiving the defendant's right to appeal on some or all potential grounds. Cf. Fed. R. Crim. P. 11(c)(6) (effective Dec. 1, 1999) (requiring court to determine, before accepting a guilty plea, that the defendant understands "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence"). Just as with claims that counsel provided ineffective assistance in advising a defendant to accept a plea agreement, courts considering habeas petitions based on allegedly ineffective assistance in rendering (or not rendering) advice about appeal will inevitably have to evaluate each case on its own facts. *Strickland* properly instructs, however, that in doing so they should demand that habeas petitioners identify with some precision "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and should then make "every effort * * * to eliminate the distorting effects of hindsight"; to "reconstruct the circumstances of counsel's challenged conduct"—including especially, in this context, the background of consultations surrounding the decision to plead guilty, and whether counsel would have had any reason to expect the defendant to be surprised or dissatisfied with the final outcome of the

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specifically recalled that she and a "very experienced" interpreter "spent quite a bit of time, prior to the plea, talking with [respondent] about his options." J.A. 77; see also J.A. 24; C.A. E.R. 85. A lawyer who had lengthy discussions with her client that resulted in his decision to accept the benefits and burdens of a plea agreement would not be professionally derelict, absent some unexpected development, for not later initiating a separate discussion of whether or not to appeal the judgment entered on that plea.

proceedings; and to "evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689-690. Finally, courts must strive to distinguish reasonable errors of prediction, or excusable mistakes of fact, law, or judgment, from the sort of professional lapse that constitutes true ineffective assistance. Compare, *e.g.*, *Murray*, 477 U.S. at 492 (discussing "[a]ttorney error short of ineffective assistance"); *McMann*, 397 U.S. at 774 (short of ineffective assistance, defendant who pleads guilty "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts").[12]

(ii) The close relationship between claims of ineffective assistance in failing to appeal after a plea and claims of ineffectiveness relating to the plea itself also suggests a familiar framework for requiring an appropriate showing of prejudice when the claim is not that counsel failed to carry out the defendant's decision to appeal, but that she failed to provide effective assis-

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[12] In part because of the probable frequent overlap between claims of ineffective assistance at the plea and the decision-to-appeal stages, and in part because any standard will require the holding of evidentiary hearings in some cases (as, for example, in this case, where the defendant alleges that counsel promised to file a notice of appeal), the standard we suggest is not likely to impose substantial incremental or avoidable burdens on district courts. Existing procedures allow those courts to concentrate their resources on cases in which an applicant raises potentially meritorious claims. See Rules 4, 8, and 10 of the respective Rules Governing Section 2254 Cases in, and Rules Governing Section 2255 Proceedings for, the United States District Courts (set out as notes following 22 U.S.C. 2254 and 2255). In cases challenging state convictions, moreover, federal district courts should seldom be required to hold evidentiary hearings if the defendant has had an opportunity to develop the factual basis for his claim in state proceedings. See 28 U.S.C. 2254(e) (Supp. III 1997).

tance in raising or advising about the question of appeal in the first place. When a habeas petitioner claims that counsel provided ineffective assistance in connection with his decision to plead guilty—a decision that generally has greater consequences than the decision whether to appeal from the judgment eventually entered on that plea—the law requires him to show not only that counsel's assistance was incompetent, but also that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. A similar standard should apply in cases like the present one.

In cases alleging ineffective counseling about appeal, as in those involving advice about pleas, the question of prejudice—in the sense of whether a competently counseled defendant would have acted differently—depends heavily not only on the details of confidential discussions between the defendant and his lawyer, but also on conclusions about the defendant's actual and hypothetical state of mind. Those are matters uniquely within the knowledge of the defendant—particularly when the defendant may seek to contradict matters otherwise of record. It is therefore appropriate to demand, in cases like this one, that a habeas petitioner satisfy a "prejudice" standard similar to the one announced in *Hill*: The defendant should be required to prove that there is a reasonable probability that, but for counsel's unprofessional errors, he would have directed his attorney to perfect an appeal. That standard will not require a conclusive determination, by the habeas court, of the merits of the underlying claims that the defendant seeks (or might seek, given the benefit of counsel) to present on appeal. Compare *Penson*, 488

U.S. at 86-89; *Anders*, 386 U.S. at 744-745.[13] It will, however, require a sufficient showing of prejudice *in the decision whether or not to appeal* to provide some level of confidence that a court that grants collateral relief is remedying a violation of the defendant's right to counsel, rather than simply excusing the default of a defendant whose failure to appeal was attributable to any of a number of other possible reasons, from conscious decision to his own inadvertence.

II. RESPONDENT HAS SHOWN NEITHER THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT WITH RESPECT TO THE ISSUE OF APPEAL, NOR THAT BUT FOR ERRORS ON HER PART HE WOULD HAVE TAKEN AN APPEAL

The record in this case reveals that the state trial court informed respondent at sentencing of his right to appeal, and to have counsel appointed to represent him on appeal. J.A. 40. The district court found that respondent's counsel did not "promise[]" to file an appeal. J.A. 154, 163, 166. The magistrate judge's observations, based on the evidentiary hearing over which he presided, further indicate his belief that although respondent and his lawyer apparently had a conversation about the issue, respondent did not explicitly ask his lawyer to take an appeal. J.A. 40 ("[S]he is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had [respondent]

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[13] The question is what decision the defendant would have made about appeal if competently counseled. The underlying merits of any claim the defendant might raise on appeal may be relevant to that inquiry, see *Hill*, 474 U.S. at 59, but the focus is on the action the defendant would have taken if competently counseled, see *id.* at 60.

requested that she file a notice of appeal, she would have done so."); see also J.A. 158. The question on which this Court granted review also takes it as a premise that respondent was informed of his right to appeal, but did not make such a request. Pet. i. We therefore assume for present purposes that although respondent knew in general of his right to appeal, he did not clearly express to his attorney any desire to take an appeal from the judgment entered on his guilty plea—but also "did not consent to counsel's failure to file a notice of appeal." J.A. 166; see J.A. 154.

That conclusion does not end the case because, as we have explained, a habeas petitioner should have the opportunity to show that counsel rendered ineffective assistance by, for example, failing to apprise him of an obviously meritorious ground for appeal, or failing entirely to respond to a request for advice and consultation. In this case, the present record reflects at most that there may have been some misunderstanding between respondent and his attorney about the desirability of an appeal. See J.A. 133. It affords, however, no sound basis for concluding that the failure to appeal resulted from any decision, assumption, or error of respondent's counsel that falls outside the normal range of competent guilty-plea representation. There is, for example, no obvious non-frivolous appellate issue that trial counsel should have identified and discussed with her client. See p. 5, *supra*. Nor does the record demonstrate a reasonable probability that, if competently counseled, respondent would have explicitly directed his attorney to appeal.

The present record is therefore insufficient to support the court of appeals' judgment ordering a grant of collateral relief. That judgment should accordingly be reversed, and the case should be remanded for what-

ever further proceedings that court may deem appropriate in light of the legal standards articulated by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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