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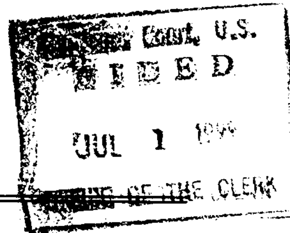

IN THE

Supreme Court of the United States

ERNEST C. ROE, Warden,

Petitioner,

vs.

LUCIO FLORES ORTEGA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does trial counsel have a Sixth Amendment duty to file a notice of appeal in the absence of an express waiver from the defendant when (1) the conviction was entered on a plea of guilty; (2) in counsel's opinion, there are no arguably meritorious grounds for appeal; (3) defendant has been advised of his right to appeal; and (4) defendant has not requested an appeal?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Ninth Circuit, if upheld, would require the routine reinstatement of appeals in cases where trial counsel correctly and properly determined there were no grounds for appeal. This would impose a pointless burden on state appellate

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

courts, diverting resources from the more important task of deciding genuine issues. This would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The habeas petitioner in the present case, Lucio Flores Ortega, pled guilty to one count of second-degree murder on October 13, 1993. Pet. for Cert. 3; *Ortega* v. *Roe*, 160 F. 3d 534, 535 (CA9 1998). He was represented by Public Defender Nanci Kops at the plea hearing. Magistrates Finding and Recommendations (cited below as "F & R") 2-3.[2] A month later, on November 10, 1993, he was sentenced. Pet. for Cert. 3. At the sentencing, Ortega was again represented by Ms. Kops. See Respondent's Brief in Opposition 1. During the sentencing proceeding, he was advised of his appeal rights and the time limits for filing a notice of appeal by the Fresno Superior Court. Pet. for Cert. 3.

Rule 31(a) of the California Rules of Court requires the defendant to file a notice of appeal within 60 days of sentencing. A notice of appeal was not filed within this time limit. Instead, on March 24, 1994, defendant attempted to file a late notice of appeal. *Ortega*, *supra*, 160 F. 3d, at 535. The notice was rejected as untimely. *Ibid.* He then sought state habeas relief claiming that his "trial counsel was ineffective for failing to file a timely notice of appeal." *Ibid.* Relief was denied by the California Court of Appeals on August 12, 1994. Pet. for Cert. 3.

With his state court remedies exhausted, Ortega then turned to the federal system for relief. *Ortega*, *supra*, 160 F. 3d, at 535. In his federal habeas petition, he again asserted that his trial counsel was ineffective. Pet. for Cert. 4. An evidentiary hearing was held on January 24, 1997, "on the limited issue of the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf." *Ortega*, 160 F. 3d, at 535; see also Evidentiary Hearing Transcripts (cited below as "Evid. Hrg. Tr.") 2. During the hearing, the Magistrate commented about Ms. Kops, stating that "she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person." Evid. Hrg. Tr. 75-76. The Magistrate further stated that he believed Ms. Kops would have filed a notice of appeal if the defendant requested it. *Id.*, at 76; see also F & R 10-11.

After the hearing, the Magistrate made a number of findings. See Evid. Hrg. Tr. 75-76. As for the specific question, the Magistrate concluded that the respondent had failed to prove "that his counsel had promised to file a notice of appeal." *Id.*, at 76; F & R 3. The Magistrate also concluded that Ortega had not consented to his trial counsel's failure to file a notice of appeal. F & R 5.

The Magistrate then concluded that the Ninth Circuit's opinion in *United States* v. *Stearns*, 68 F. 3d 328 (CA9 1995) was "a 'new rule' which could not be applied retroactively under *Teague* v. *Lane*." *Ortega*, *supra*, 160 F. 3d, at 535. Because *Stearns* was a "new rule," the Magistrate concluded respondent was not entitled to relief. *Ibid.* The District Court adopted the Magistrate's Findings and Recommendations. *Ibid.*

The Ninth Circuit Court of Appeals reversed. *Ibid.* The court concluded that *Stearns* was simply an application of its opinion in *Lozada* v. *Deeds*, 964 F. 2d 956 (CA9 1992) and therefore, not a "new rule" that would be barred by *Teague*. *Ortega*, *supra*, 160 F. 3d, at 536.

This Court granted certiorari on May 3, 1999, limited to the question as stated *infra*, at page 18.

2. This document is in the Joint Appendix. However, *amicus* cannot cite to the pages of Joint Appendix as it was not yet complete by our printing deadline.

SUMMARY OF ARGUMENT

This case is a simple challenge to the effectiveness of trial counsel and should be analyzed as such. There is no denial of the right to counsel on appeal when there never was an appeal at all. Trial counsel did not fulfill the state's procedural requirements for an appeal, and, under the principles of *Coleman* v. *Thompson*, this omission should be judged like any other.

The Ninth Circuit, by distorting the test of *Strickland* v. *Washington,* has placed a new Sixth Amendment duty on trial counsel. Current Supreme Court authority does not require this distortion. It simply recognizes that a proper standard for state habeas cases is being debated within the circuits and establishes a procedural rule for federal defendant cases. The Court has developed in *Strickland* a workable test that effectively balances the competing interests involved in ineffective assistance claims. This test should be applied. Application of the test demonstrates that trial counsel's decision not to file a notice of appeal is not always ineffective and therefore, a presumption of prejudice is not warranted.

In *Caspari v. Bohlen*, this Court explained that *Teague* is a threshold question in every habeas corpus case. The Ninth Circuit relied on its own opinion in *Lozada* v. *Deeds* to establish the legal landscape at the time Ortega's conviction became final. A proper survey reveals that the imposition of a duty to file unrequested, meritless appeals remains debatable, and thus would be a "new rule" contrary to *Teague* v. *Lane*.

ARGUMENT

I. The present case is one of challenged effectiveness of trial counsel, not denial of appellate counsel.

The Ninth Circuit started down the wrong track in *Lozada* v. *Deeds*, 964 F. 2d 956 (CA9 1992), following the remand from this Court in *Lozada* v. *Deeds*, 498 U. S. 430 (1991). The

Ninth Circuit held that when trial counsel does not file a notice of appeal, "this is the 'actual or constructive denial of the assistance of counsel altogether' referred to in *Strickland* [v. *Washington*, 466 U. S. 668, 692 (1984)]." 964 F. 2d, at 958. The consequence of this conclusion was that no showing of prejudice, *i.e.*, a reasonable probability of a different result, was thought to be necessary. *Ibid.*

Thus, in this situation, the *Strickland* prejudice inquiry and the "duty" question of whether trial counsel was obligated to file the notice of appeal come down to the same question. The State of California does not deny that trial counsel has a duty to appeal if there are arguably meritorious grounds. Indeed, the state has gone so far as to affirmatively impose that duty itself by statute. See Cal. Penal Code § 1240.1(b). The state also requires trial counsel to appeal when defendant requests an appeal. *Ibid.* The only area of dispute involves appeals which are neither requested nor meritorious. There is no denial of a right to counsel on such an appeal if there is no right to such an appeal at all.

By holding that counsel must file groundless appeals in the absence of an express waiver, rather than only upon express request, the Ninth Circuit has effectively added a new requirement to California's appellate process. In this regard, it is helpful to remember what this Court has said about the latitude the Constitution leaves to the states in this area:

> "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A state may decide whether to have direct appeals in such cases, and if so under what circumstances.
>
> . . . . .
>
> "So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated." *Carter* v. *Illinois*, 329 U. S. 173, 175-176 (1946).

Evitts v. *Lucey*, 469 U. S. 387, 393 (1985) reaffirmed that states may provide appeals or not, as they choose, but also held that if the state does provide appeals, the procedure must comport with due process, *ibid.*, which includes effective assistance of counsel. *Id.*, at 396.

California's rule that a defendant who wishes to appeal must file a timely notice is, of course, a perfectly legitimate rule serving important state interests. Since the mid-1970s, this Court's decisions on procedural default in habeas cases have recognized the importance of federal court respect for state procedural rules. The history is traced in *Coleman* v. *Thompson*, 501 U. S. 722, 745-749 (1991).

Coleman involved the same type of default as the present case—a failure to file the notice of appeal, thus defaulting the entire appeal rather than a particular issue. *Id.*, at 749. *Coleman* considered and rejected the contention that this made a difference in the standard to be applied. *Id.*, at 749-750. It is an "irrational distinction" to separate one kind of default from another. The same rule applies to both.

The procedural default rule and the ineffective assistance of counsel rule are closely related. Functionally, the right to effective assistance serves as a safeguard protecting defendants from miscarriages of justice as a result of defaulted claims. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). The two rules are also related in their common "prejudice" element. The prejudice element of the ineffective assistance test is the same as the "materiality" element of the *Brady* v. *Maryland*, 373 U. S. 83 (1963) line of cases. See *Strickland* v. *Washington*, 466 U. S. 668, 687, 694 (1984). The prejudice element of the procedural default test is also the same as the materiality element of *Brady*. See *Strickler* v. *Greene*, 527 U. S. __ (No. 98-5864, June 17, 1999) (slip op., at 33) (lack of "reasonable probability" negates both materiality and prejudice). Thus, the two prejudice elements are equal to each other. See *Schlup* v. *Delo*, 513 U. S. 298, 332-333 (1995) (O'Connor, J., concurring)

(implicitly equating *Strickland* prejudice test with default prejudice test).

Because the two tests are so similar, it makes little difference whether an issue defaulted by counsel is analyzed as an independent claim of ineffective assistance or under the rule for procedural default, with ineffective assistance as the "cause." See *Smith* v. *Murray*, 477 U. S. 527, 535-536 (1986) (using *Strickland* standard of competence to reject claim of "cause").

It *would* make little difference, that is, unless the federal habeas court takes the double step of (1) imposing a duty on trial counsel where none existed before, and (2) dispensing with the *Strickland* prejudice requirement. In that event, the effect would be to subvert the state's decision regarding "under what circumstances" it will hear appeals, a decision which this Court clearly stated in *Carter, supra,* at 5, belongs to the states and not to the federal judiciary.

The conflict between the holding in the present case and the policy of respecting state procedure is easily avoided by recognizing the fallacy of *Lozada*'s holding that this is a case of "denial of . . . counsel altogether." There is no right to counsel in a proceeding which never happens. The right to counsel on appeal depends entirely on the state's decision to allow the appeal. See *Evitts*, *supra*, 469 U. S., at 393-394.

The State of California has decided not to impose on counsel the duty to file a notice of appeal when the appeal is neither requested nor meritorious. The question is whether *that* decision comports with the demands of the Due Process Clause. *Cf. id.*, at 393. The focus is on the act or omission of *trial* counsel in initiating the appeal or not doing so. Does that omission amount to ineffective assistance of counsel? This is one omission in the course of representation in a proceeding in which the state *did* provide counsel; it is not a denial of counsel altogether.

II. The standard test of *Strickland* v. *Washington* should be applied.

In *Strickland*, the Court established the now familiar two-step deficient performance/prejudice analysis. In order to obtain relief under this analysis, "a defendant must show that: (1) his attorney 'made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment'; and (2) he suffered prejudice as a result." *United States* v. *Horodner*, 993 F. 2d 191, 194 (CA9 1993) (quoting *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984)) (internal quotation marks omitted).

This test has effectively balanced the competing interests involved in habeas review. In establishing its test, *Strickland* considered both the "finality concerns" of the state and the need to ensure a fair, reliable proceeding. 466 U. S., at 694. Again, the procedural default cases are strongly analogous. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners . . . . ¶ On the other hand, there is the state's interest in the integrity of its rules and proceedings and the finality of its judgments . . . ." *Reed* v. *Ross*, 468 U. S. 1, 10 (1984). The *Strickland* test reaches the same balance by providing a forum for review when it is alleged a defendant's Sixth Amendment rights have been violated. However, it does not make access so easy that the federal court becomes a place for a second trial. *Strickland* explains that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, *supra*, 466 U. S., at 691. This standard protects the state's interest in the finality of its judgments by insuring that only errors that are "so serious as to deprive the defendant of a fair trial" are overturned on habeas review. *Id.*, at 687. *Strickland*'s prejudice element, like that of the procedural default test, also promotes comity and federalism by recognizing that "[f]ederal intrusion into state criminal trials frustrate both the state's sovereign power to

punish offenders and their good-faith attempts to honor constitutional rights." *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982).

The Ninth Circuit, however, has interpreted *Strickland*, *supra*, along with *Rodriquez* v. *United States*, 395 U. S. 327 (1969) as requiring a presumption of prejudice "if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada* v. *Deeds*, 964 F. 2d 956, 958 (CA9 1992); see also *United States* v. *Stearns*, 68 F. 3d 328, 330 (CA9 1995) (extending the *Lozada* reasoning to appeals after guilty pleas). This presumption effectively places a Sixth Amendment duty on trial counsel to file a notice of appeal without regard to counsel's evaluation of the merits of an appeal. *Strickland* did explain that "[i]n certain Sixth Amendment contexts, prejudice is presumed." However, this is not one of the situations that *Strickland* identified as deserving of a presumption of prejudice. See *post*, at 15-17.

A. Lozada/Rodriquez.

An overly broad interpretation of this Court's decision in *Lozada* v. *Deeds*, 498 U. S. 430 (1991) (*per curiam*) sent the Ninth Circuit off course in its analysis of ineffective assistance of counsel claims and directed it towards the categorical approach it has adopted when the right to appeal is at issue. In *Lozada*, this Court was asked to decide whether the Ninth Circuit Court of Appeals had erred in denying a certificate of probable cause. *Id.*, at 432. Lozada had sought habeas relief from the Federal District Court based on a claim of ineffective assistance of counsel. *Ibid.* The District Court dismissed the petition, concluding that Lozada had failed to show prejudice under *Strickland*'s deficient performance/prejudice test. *Ibid.* The District Court conclusion was based on the fact that "Lozada had not indicated what issues he would have raised on appeal and had not demonstrated that the appeal might have succeeded." *Ibid.* A certificate of probable cause was subsequently denied by both the District Court and the Court of Appeals, based on this lack of prejudice. This Court recognized that in other circuits prejudice had been presumed in situations

similar to Lozada's; therefore, the standard for prejudice was " 'debatable among jurists of reason'," and the issue *could* be resolved in a different manner. *Ibid.* (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893, n. 4 (1983)). Because of this divergence, the Court concluded that Lozada had made a "substantial showing of the denial of [a] federal right," *id.*, at 893, and remanded the case to the Court of Appeals for the issuance of a certificate of probable cause. *Lozada*, 498 U. S., at 432.

This Court's *Lozada* opinion never resolved whether a presumption of prejudice was the appropriate standard. The Court simply acknowledged that the issue was debatable,[3] and therefore, met the standard for issuance of a certificate of probable cause. Any suggestion taken from this Court's *Lozada* opinion that a presumption of prejudice is necessarily the correct standard is in error, as "new rules of constitutional law are not established in dicta . . . ." *Henderson* v. *Morgan*, 426 U. S. 637, 651 (1976) (White, J., concurring).

Concluding that an issue is debatable is very different from deciding the point. For example, in *Caspari* v. *Bohlen*, 510 U. S. 383 (1994), this Court was asked to decide "whether the Double Jeopardy Clause prohibits a state from twice subjecting a defendant to a *noncapital* sentence enhancement proceeding." *Id.*, at 386 (emphasis added). The Court, instead, resolved the case on *Teague* grounds. *Id.*, at 397. The question presented in *Caspari* was not resolved until four years later, in *Monge* v. *California*, 524 U. S. 721, 141 L. Ed. 2d 615, 628, 118 S. Ct. 2246, 2253 (1998).

The *Lozada* Court cited *Rodriquez* v. *United States*, 395 U. S. 327, 330 (1969) as additional authority for the debate among the circuits. See *Lozada*, *supra*, 498 U. S., at 432. This citation simply recognized the circuits' reliance on *Rodriquez*

3. This debate among the circuits as recognized by this Court also supports the conclusion that *United States* v. *Stearns*, *supra*, announced a new rule for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989). See *post*, Part III.

in forming the presumption of prejudice. It did not, however, conclude that *Rodriquez* should alter the established *Strickland* prejudice analysis. On remand, the Ninth Circuit's opinion in *Lozada* v. *Deeds* attempted to reconcile *Rodriquez* and *Strickland* and concluded that Lozada's circumstances amounted to "the 'actual or constructive denial of the assistance of counsel altogether' referred to in *Strickland*." *Lozada*, *supra*, 964 F. 2d, at 958. This conclusion was then extended to appeals from guilty pleas in *Stearns*, without further analysis of the appropriateness of the presumption. *Stearns*, *supra*, 68 F. 3d, at 330. The Ninth Circuit's conclusion, as well as those from other circuits which have relied on *Rodriquez*, fails to recognize that *Rodriquez* was a federal rules case and not a constitutional case. This results in a distortion of *Strickland*'s limited presumed-prejudice category in order to accommodate *Rodriquez*.

In *Rodriquez*, petitioner's counsel had failed to file a notice of appeal from his federal conviction. *Rodriquez*, *supra*, 395 U. S., at 328. Petitioner then sought post-conviction relief pursuant to 28 U. S. C. § 2255 from the Federal District Court, claiming that "his retained counsel had fraudulently deprived him of his right to appeal." *Rodriquez*, 395 U. S., at 328-329. The Ninth Circuit had in place a procedural rule that required § 2255 applicants "in petitioner's position to disclose what errors they would raise on appeal and to demonstrate that denial of an appeal had caused prejudice." *Id.*, at 329. The Court noted, "Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel." *Id.*, at 330.[4] A showing of prejudice was too high a hurdle for the unrepresented petitioner, and the Court concluded that no such showing would be required to reinstate the appeal.

The *Rodriquez* holding, however, is not a constitutional mandate. It is simply a federal procedural rule. The Constitu-

4. 18 U. S. C. § 3006A was amended the next year to expand appointments in collateral proceedings. See Pub. L. No. 91-447, § 1, 84 Stat. 916, 919 (1970) (adding subd. (g), predecessor of present subd. (a)(2)(B)); H. Rep. No. 91-1546, 1970 U. S. Code Cong. & Admin. News 3982, 3992-3993.

tion is not invoked anywhere in the decision as requiring this mode of proceeding. This Court has "more latitude in setting standards . . . in federal courts under [its] supervisory power than [it has] in interpreting the provisions of the Fourteenth Amendment . . . ." *Mu'Min* v. *Virginia*, 500 U. S. 415, 424 (1991). A decision establishing a procedure for federal courts, without indicating that the procedure is constitutionally required, does not by itself impose that same procedure on state courts. See also *Victor* v. *Nebraska*, 511 U. S. 1, 11 (1994).

The *Rodriquez* holding has the value of efficiency in a unitary system where federalism is not a concern. A lawyer is needed to evaluate the case to determine if there are any arguably meritorious issues. See *Rodriquez, supra*, 395 U. S., at 330. The alternatives then are (1) appoint counsel for the § 2255 proceeding to identify issues and, if substantial issues are found, grant relief, reinstate the appeal, and appoint counsel for the appeal; or (2) simply reinstate the appeal and appoint appellate counsel. Where the appointment funds all come out of the same pot, number 2 has the virtues of simplicity and brevity.

When proceedings cross the federal-state boundary, though, things get more complicated. A grant of relief in this case would require the State of California to appoint counsel and hear and decide the appeal, when its legitimate rule of procedure bars that appeal. This burden can and should be imposed on the state if, and only if, there is a real probability of injustice.

The state has already taken its own steps to safeguard against injustice. It has already shouldered the expense of providing counsel to determine whether Ortega has arguably meritorious issues to appeal. That job has already been done by trial counsel, Ms. Kops.

Ms. Kops' conclusion that there is nothing to appeal is hardly surprising in a guilty plea case. The plea waives most issues. See, *e.g.*, *United States* v. *Broce*, 488 U. S. 563, 573-574 (1989) (double jeopardy claim waived). The whole

purpose of the *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969) advisements is to limit attacks on pleas.

If the federal habeas court does not have confidence in the safeguards provided by the state court, then it can and should appoint counsel itself to identify the issues that would have justified an appeal. If there are no such issues, then the habeas petitioner's claim fails both prongs of *Strickland*; trial counsel did her job correctly, and her omission caused no harm to her client. In such a case, there is no justification for pushing the burden of yet another frivolous appeal on the already overloaded state appellate courts.

B. Deficient Performance.

In *Strickland*, this Court explained that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U. S., at 687-689. The Court further explained that "if the defendant makes an insufficient showing on one" of the components of the test, the court does not need to address both components. *Id.*, at 697. The court is, however, required to establish both components before concluding that counsel provided ineffective assistance in violation of the defendant's Sixth Amendment rights. In *Kimmelman* v. *Morrison*, 477 U. S. 365, 381 (1986), the Court again reiterated that "the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." The Ninth Circuit's presumption of prejudice effectively alleviates the defendant's burden and eliminates any analysis of the reasonableness of counsel's performance in the present case. To be sure, the deficient performance and prejudice components of the *Strickland* test are uniquely intertwined in the present case. This fact, however, does not suggest that the Court should scrap the *Strickland* test whenever a defendant's appeal rights are at issue. Rather, it reinforces the necessity of a complete *Strickland* analysis.

In *Strickland*, this Court warned that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, *supra*, 466 U. S., at 689. The Ninth Circuit's approach does not give trial counsel's performance the deference it should be afforded under *Strickland*. Rather, it assumes incompetence. The Ninth Circuit's focus is on the defaulted appeal rights. With this focus, it assumes counsel was deficient. *Nix* v. *Whiteside*, 475 U. S. 157, 165 (1986) (quoting *Strickland*, 466 U. S., at 689), explained that in order "[t]o counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " The Ninth Circuit should have indulged in this same strong presumption.

Analysis under California's standards reveals the reasonableness of counsel's actions in the present case. Penal Code section 1240.1(b) requires that trial counsel

> "execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal."

This rule incorporates many of the principles directing this Court's Sixth Amendment jurisprudence. Because *Strickland* recognized that "[c]ounsel's function is to assist the defendant" and that "counsel owes the client a duty of loyalty . . . ," 466 U. S., at 688, Penal Code section 1240.1(b) has statutorily mandated as much with its requirement that trial counsel pursue an appeal when it is in the defendant's interest. In *United States* v. *Cronic*, 466 U. S. 648, 656, n. 19 (1984), the Court explained that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical." (Citation omitted). Recognizing that counsel has an ethical duty to keep frivolous appeals

out of the courts, see, *e.g.*, ABA Model Rules of Professional Conduct, Rule 3.1 (1992); ABA Model Code of Professional Responsibility, DR 7-102(A)(2), EC 7-4 (1983); *Anders* v. *California*, 386 U. S. 738, 744 (1967), the Penal Code only made filing a notice of appeal required if there were "arguably meritorious grounds."

Trial counsel was not ineffective in the present case. The defendant did not request an appeal. If he had, the District Court Magistrate believed, trial counsel would have filed a notice of appeal. See Evid. Hrg. Tr. 76; see also F & R 10-11. Therefore, counsel was under no duty to file an appeal unless there were "arguably meritorious grounds" for an appeal. At the District Court evidentiary hearing, trial counsel testified that she would not have encouraged Mr. Ortega to appeal, that the only grounds for appealing would be that the judge abused his discretion in denying probation, and that the claim "would almost certainly fail." Evid. Hrg. Tr. 44. The Magistrate's Findings and Recommendations further suggested that trial counsel, under California law, had no duty to file an appeal. F & R 11. The Ninth Circuit ignored California's standards and instead placed an additional duty on counsel to obtain consent before choosing not to file an appeal.

C. Prejudice.

Strickland identified three situations in which the Sixth Amendment requires a presumption of prejudice. *Strickland*, *supra*, 466 U. S., at 692-693. The first two situations occur when there is either an "actual or constructive denial of the assistance of counsel" or "various kinds of state interference with counsel's assistance." *Id.*, at 692. Prejudice is presumed in these situations because 1) "case-by-case inquiry into prejudice is not worth the cost," 2) the violations are "easy to identify," and 3) the violations are "easy for the government to prevent." *Ibid.* The other situation where prejudice is presumed occurs when defense counsel is burdened with an actual conflict of interest. This last situation, the Court explained, only warrants "a similar, though more limited, presumption of

prejudice." *Ibid.* Trial counsel's failure to file a notice of appeal is not one of the situations that the *Strickland* Court contemplated deserving of a presumption of prejudice.

Case-by-case inquiry into prejudice is well worth the cost when a notice of appeal is not filed by trial counsel. Section 1240.1(b) of the California Penal Code requires trial counsel to file a notice of appeal when there are "arguably meritorious" grounds for appeal. This requirement, in turn, forces a review by trial counsel of the case. Trial counsel, who is closest to the case and the defendant's cause, is in the best place to uncover any appealable issues. If trial counsel decides not to file a notice of appeal, it is unlikely that the loss of appeal resulted in prejudice that so undermined the reliability of the proceeding. Cases in this category with actual prejudice will be the rare exception, rather than the rule, the exact opposite of the category identified by *Strickland* as appropriate for a rule of presumed prejudice.

In addition, it is nearly impossible for the government to identify and prevent Sixth Amendment violations occurring within the attorney-client relationship. To uncover whether a defendant wants to appeal would require inquiry into privileged conversations, and prevention would require taking on defense counsel's role and would, most definitely, "interfere with the constitutionally protected independence of counsel . . . ." *Strickland*, *supra*, 466 U. S., at 689.

Finally, when counsel decides not to file a notice of appeal there is typically no conflict of interest that would justify a presumption of prejudice. A conflict of interest occurs when counsel "breaches the duty of loyalty," *id.*, at 692, and occurs in the multiple representation setting. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 348-350 (1980) (analyzing a series of conflict of interest cases all involving multiple representation). This is not a multiple representation case. Therefore, counsel did not represent interests contrary to Ortega's. Counsel's failure to file a frivolous, unrequested appeal did not breach the duty of loyalty.

In *Cronic* v. *United States*, 466 U. S. 648, 659, n. 26 (1984), the Court explained that, apart from circumstances the "magnitude" of which require a presumption of prejudice, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Because in the present situation none of the presumption of prejudice categories is applicable, the defendant needs to demonstrate that counsel's failure to file a notice of appeal prejudiced him. The standard for prejudice requires the defendant to establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra*, 466 U. S., at 694. This standard, in the present case, does not require the defendant to make his appeal on habeas review. In *Strickler* v. *Greene*, 527 U. S. __ (No. 98-5864, June 17, 1999) (slip op., at 27), for purposes of *Brady* materiality analysis,[5] the Court recently reiterated that the " 'question is not whether the defendant would more likely than not have received a different verdict . . . , but whether . . . he received a fair trial, understood as a trial resulting in a verdict of worthy of confidence.' " (Quoting *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995)). If there are substantial grounds for an appeal, it is reasonably probable that the outcome would be different if a full appeal were permitted. This is enough to establish prejudice. The defendant does not have to show that he would have succeeded on appeal. The possible success of an appeal is enough to "undermine confidence in the outcome." *Strickland*, *supra*, 466 U. S., at 694. No such showing was made in this case.

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5. See *supra*, at 6, establishing that *Brady* materiality analysis is the same as *Strickland* prejudice.

III. Imposition of a duty to file unrequested, meritless appeals would be a "new rule" contrary to *Teague* v. *Lane.*

This Court granted review limited to the second question presented by petitioner. The question asks "whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of such a request by the defendant, particularly where the defendant has been advised of his appeal rights." The Court denied certiorari on Question 1, which asked a specific question regarding the application of *Teague* v. *Lane*, 489 U. S. 288 (1989). That question was, "1. Whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is 'dictated by precedent' within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)."

Amicus takes the denial of certiorari on Question 1 to mean that the Court will not consider an argument that circuit precedent is irrelevant to the *Teague* analysis and that *only* Supreme Court precedent may be considered. *Cf.* 28 U. S. C. § 2254(d)(1). We make no such ambitious argument here, but only follow the path well marked by this Court's precedents. Notwithstanding the limited grant of certiorari, because this case involves a federal habeas corpus request for relief based on what the government has argued is a new rule, the general *Teague* question, as opposed to the highly specific issue posed in Question 1, is fairly included in the "merits" question.[6]

As this Court explained in *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), "[a] threshold question in every habeas case . . . is whether the court is obligated to apply the *Teague* rule to the defendant's claim." The federal District Court concluded that the petitioner is not entitled to relief, because he seeks the benefit of a new rule announced by the Ninth Circuit. The

6. In some cases, this Court has decided retroactivity questions raised only by *amicus* and not briefed or argued by the party supported at all. See, *e.g.*, *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967).

decision in this case imposes an obligation on the State of California to hear and decide appeals in cases where counsel does not believe there are grounds to appeal and defendant has neither expressly requested nor expressly waived the appeal. This obligation is "new" "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, 489 U. S., at 301 (emphasis in original).

To determine whether *Teague*'s nonretroactivity principle should bar relief for a state prisoner, there are three steps that should be followed. See *Caspari*, *supra*, 510 U. S., at 390.

> "First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation], and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,'[citation]. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Ibid.*

Respondent's conviction, for purposes of nonretroactivity analysis, became "final" on January 9, 1994. Pet. for Cert. 3, n. 3.

A proper survey of legal landscape includes the opinions of this Court, and, if no definitive answer lies there, of all the federal circuits, and of the state courts. See *Caspari*, *supra*, 510 U. S., at 393-395. Precedent of a single federal circuit cannot be sufficient, because the question is "whether a *state* court . . . would have felt compelled by existing precedent," *id.*, at 390 (emphasis added), and precedent of the lower federal courts is not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21. Unanimity of the lower courts, or something close to it, may

indicate a rule is dictated by existing precedent. Conversely, a substantial split of authority demonstrates that " 'reasonable jurists [could] disagree.' " *Caspari*, 510 U. S., at 395. The authorities cited by the Attorney General, see Pet. for Cert. 18-22; Brief for Petitioner, part I, are more than sufficient to establish that, taking the legal landscape as a whole, the result Ortega seeks is not *dictated* by precedent. For the Ninth Circuit to decide to the contrary based on its own precedent alone, ignoring the rest of the "landscape," was clear error under *Caspari*.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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