No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

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

BRIEF FOR THE PETITIONER

BILL LOCKYER
Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5290
Counsel for Petitioner

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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OPINION OR JUDGMENT BELOW[1]

The decisions previously filed in this case are reproduced in the joint appendix ("J.A.") filed under separate cover. The opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") appears at J.A. 164-168 and is reported at 160 F.3d 534 (CA9 1998) (case number 97-17232). The unreported order of the United States District Court for the Eastern District of California appears at J.A. 162-163 (case number CV-F-95-5612 GEB HGB P). The unreported Findings and Recommendations of the United States Magistrate Judge appear at J.A. 152-161 (case number CV-F-95-5612 GEB HGB P). The California Supreme Court's unreported order denying habeas relief appears at J.A. 45 (case number S042190). The California Court of Appeal's unreported opinion denying habeas corpus relief appears at J.A. 42-44 (case number F021708).

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1. This section contains the citations required by Rule 24(d) of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

On November 2, 1998, the Ninth Circuit issued a published opinion in this case. On December 11, 1998, the Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc. On March 4, 1999, the Warden filed his petition for writ of certiorari, within ninety (90) days of the denial order. On May 3, 1999, this Court granted the Warden's petition, limited to the question presented above. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix A. These authorities include: the Sixth Amendment to the United States Constitution; California Penal Code § 1237.5; California Penal Code § 1240.1; California Rules of Court, Rule 31(d); California Rules of Court, Rule 470; and Federal Rules of Criminal Procedure, Rule 32.

STATEMENT OF THE CASE

An information was filed in the Superior Court of California, in and for the County of Fresno ("superior court"), in case number 490730-9, charging Respondent Lucio Flores Ortega ("the Prisoner") as follows: in count one, with violating California Penal Code § 187 (murder);[2] and in counts two and three with violating § 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of § 12022(b) (an

2. All further statutory references are to the California Penal Code unless otherwise indicated. This is not a capital case.

enhancement for the personal use of a deadly weapon). (J.A. 24, 27-29 [Plea Tr. at 12, 15-17].)

On October 13, 1993, the Prisoner pled guilty to the murder count. (J.A. 26-27 [Plea Tr. at 14].) On November 10, 1993, the superior court granted the prosecution's motion to dismiss counts two and three (assault with a deadly weapon) and to strike the § 12022(b) allegation of personal use of a deadly weapon. (J.A. 39 [Sentencing Tr. at 9].)

On the same date, the superior court sentenced the Prisoner to fifteen years to life in state prison, with 267 days of custody credit. (J.A. 40 [Sentencing Tr. at 10].) The superior court advised the Prisoner of his appeal rights and the applicable time limits. (J.A. 40 [Sentencing Tr. at 10-11].) The Prisoner was also advised of his right to appointed counsel on appeal. (J.A. 40 [Sentencing Tr. at 11].) The court stated:

> You may file an appeal 60 days from today's date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.

(J.A. 40 [Sentencing Tr. at 10-11].)

Nevertheless, the Prisoner did not file a timely notice of appeal.

On or about March 17, 1994, or March 24, 1994, the Prisoner attempted to file a late notice of appeal. (Excerpts of Record filed in the Ninth Circuit on February 20, 1998 ["ER"] 47-55; CR 8 [lodged state record; Notice of Appeal dated March 24, 1994].)[3] The clerk of the

3. "CR" refers to the Clerk's Record (i.e., the docket sheet prepared by the Clerk of the United States District Court for the Eastern District of California).

superior court informed the Prisoner that his notice was not filed because it was untimely. (ER 57; CR 8 [lodged state record; letter of April 8, 1994, from Clerk of Fresno County Superior Court].) Thereafter, the California Court of Appeal, Fifth Appellate District, denied the Prisoner's petition for writ of habeas corpus which included a motion for leave to file a belated notice of appeal. (J.A. 42-44 [opinion denying relief]; CR 8 [lodged state record; petition for writ of habeas corpus filed in the California Court of Appeal, Fifth Appellate District, case number F021708].) The California Supreme Court denied a habeas corpus petition filed therein, which requested the same relief. (J.A. 45 [denial order]; ER 68-76 [California Supreme Court petition]; CR 8 [lodged state record; habeas corpus petition filed in California Supreme Court, case number S042190].)

On July 27, 1995, pursuant to 28 U.S.C. § 2254, the Prisoner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, and the Warden answered. (J.A. 46-75 [Petition]; J.A. 78-91 [Answer].)

In his federal habeas petition, the Prisoner claimed that his state trial counsel (Ms. Nancy Kops) promised to file a notice of appeal on his behalf and failed to do so. (J.A. 51, 59, 62-63, 66, 74-75.) Following appointment of the Federal Defender as Prisoner's counsel, an evidentiary hearing was held on January 24, 1997, to address the sole issue of the credibility of this assertion. (J.A. 92-93 [order of appointment]; J.A. 106-138 [excerpts from Evidentiary Hearing Transcript ["Evid. Hrg. Tr."]]; Supplemental Excerpts of Record filed in the

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Pursuant to Rule 26.2 of the Rules of the Supreme Court of the United States, the Warden will refer to relevant portions of the record not included in the joint appendix. Most such portions of the record are comparatively unimportant. Most relevant portions of the record are included in the joint appendix.

Ninth Circuit on March 25, 1998 ["SER"] [complete Evid. Hrg. Tr.]; CR 23 [same].) The Prisoner, trial counsel, and a court interpreter testified at the hearing. (J.A. 106-126 [Evid. Hrg. Tr. at 33-57] [counsel's testimony]; SER 2-68 [complete testimony].)

At the conclusion of the evidentiary hearing, the Magistrate Judge made a number of findings from the bench. The Magistrate Judge read a passage from *United States v. Stearns*, 68 F.3d 328, 330 (CA9 1995), which requires that a federal defendant consent to the failure to file a notice of appeal, even after a guilty plea. (J.A. 132 [Evid. Hrg. Tr. at 74].) The Magistrate Judge stated that the evidence was "quite clear" that the Prisoner did not consent to the failure to file a notice of appeal. (J.A. 132 [Evid. Hrg. Tr. at 74].) The Magistrate Judge also said that it was "clear" that the Prisoner had "little or no understanding" of the appeal process, or "what appeal meant at that stage of the game." (J.A. 133 [Evid. Hrg. Tr. at 75].) The Magistrate Judge expressed his belief that there was a conversation after sentencing between counsel and the Prisoner from which the Prisoner inferred that counsel would file a notice of appeal. (J.A. 133 [Evid. Hrg. Tr. at 76].)

The Magistrate Judge noted that trial counsel had no recollection of this. (J.A. 133 [Evid. Hrg. Tr. at 76].) The Magistrate Judge also stated that counsel was very experienced and obviously very meticulous. (J.A. 133 [Evid. Hrg. Tr. at 76].) The Magistrate Judge said that had the Prisoner requested that counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Finally, the Magistrate Judge found that the Prisoner had not met his burden of showing by a preponderance of the evidence that counsel had promised to file a notice of appeal. (J.A. 133 [Evid. Hrg. Tr. at 76].)

The parties briefed the issue of whether the Prisoner was entitled to relief under *Stearns* in light of the

Magistrate Judge's findings. (J.A. 139-151 [post-hearing briefs].)

On April 3, 1997, the Magistrate Judge filed his Findings and Recommendations ("F. & R."), recommending denial of the petition. (J.A. 152-161.) The Findings and Recommendations recited the Magistrate Judge's statement that the Prisoner had little or no understanding of the appellate process or what an appeal meant. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations also noted the finding that the Prisoner had not met his burden of proving by a preponderance of the evidence that counsel had promised to file a notice of appeal. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations also reported the finding that the Prisoner did not consent to counsel's "failure" to file a notice of appeal. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations nevertheless concluded that the Prisoner was not entitled to relief under *Stearns*, 68 F.3d 328, because *Stearns* was a "new rule" barred by *Teague v. Lane*, 489 U.S. 288 (1989). (J.A. 155-160 [F. & R. at 5-9].) The Prisoner filed objections and the Warden replied. (CR 28 [Objections]; CR 29 [Reply].) The District Court adopted the Findings and Recommendations in full and denied the petition. (J.A. 162-163.) The Prisoner filed an appeal in the Ninth Circuit.

In a published opinion, *Ortega v. Roe*, 160 F.3d 534 (CA9 1998), filed November 2, 1998, the Ninth Circuit reversed and remanded. (J.A. 164-168.) The Ninth Circuit held that *Stearns* did not state a "new rule," rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (CA9 1992). (J.A. 168.) In *Lozada*, the Ninth Circuit held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668 (1984), if it is established that counsel's failure to file a notice of appeal was without the defendant's consent. *Lozada* involved a conviction after trial. *Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994). The Ninth Circuit's *Ortega* decision

instructed the District Court to issue a conditional writ releasing the Prisoner from state custody unless the state trial court vacated and reentered the Prisoner's judgment of conviction and allowed a fresh appeal. (J.A. 168.)[4] The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc.

On May 3, 1999, this Court granted the Warden's petition for certiorari on the question presented.

SUMMARY OF ARGUMENT

In general, trial counsel has no 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.

This principle is supported by the widely recognized proposition that, in general, trial counsel has no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea. In turn, this proposition is supported by the equally well-established principle that a guilty plea waives numerous appellate issues. In a similar vein, it has been recognized that requiring a trial court to advise a defendant of his/her post-plea appeal rights would often be confusing, build false hopes, encourage frivolous appeals, and burden taxpayers. Further, the Warden's position is supported by the principle that, in general, by pleading guilty a defendant has manifested a desire to terminate the litigation.

Further, if the *Ortega* decision stands, every defendant in the Ninth Circuit who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, at least if his/her

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4. In at least one other case, the Ninth Circuit has granted relief based on *Stearns* and *Ortega*. *Salmon v. Carrillo*, No. 96-55707 (9th Cir. Nov. 13, 1998) [1998 WL 792290] (unpublished disposition).

case became final after *Lozada* was decided. This would subject even final judgments to challenge via state or federal habeas corpus petitions based on claimed lack-of-consent even though California law has never required an attorney to obtain consent before abandoning an appeal following a guilty plea. Most of the resulting requests for certificates of probable cause (generally required for post-plea appeals in California) and subsequent appeals will be meritless as they will have arisen out of guilty pleas.

The Warden's position is also supported by this Court's recent statement that the rule of presumed prejudice articulated in *Rodriquez v. United States*, 395 U.S. 327 (1969), is not implicated where there is no request for an appeal. *Peguero v. United States*, ___ U.S. ___, ___, 119 S.Ct. 961, 965, 143 L.Ed.2d 18, ___, 67 USLW 4154, ____ (1999).[5]

In sum, it is clear that, in general, trial counsel has no 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. This Court should disapprove of *Ortega v. Roe*, 160 F.3d 534, and *United States v. Stearns*, 68 F.3d 328, to the extent they are inconsistent with this principle. This Court should also hold that the Prisoner is not entitled to relief and should reverse the judgment of the Ninth Circuit.

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5. *Strickland v. Washington*, 466 U.S. at 692, states that, "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."

Evitts v. Lucey, 469 U.S. 387, 396 (1985), states that a first appeal of right is not adjudicated in accord with due process if the appellant does not have the effective assistance of an attorney.

ARGUMENT

I.

IN GENERAL, TRIAL COUNSEL HAS NO 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

In general, trial counsel has no 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.

For the reasons discussed below, requiring a request for appeal is particularly appropriate in a guilty plea case, especially where the defendant has been advised of his appeal rights.[6]

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6. As used in this brief, a "guilty plea" shall also include a plea of no contest.

The Warden does not waive any argument pursuant to *Teague v. Lane*, 489 U.S. 288.

A request for appeal is also required after a trial. *See, e.g., United States v. Davis*, 929 F.2d 554, 556-57 (CA10 1991). However, this requirement applies with particular force after a guilty plea.

A. Requiring A Request For Appeal Is Particularly Compelling In A Guilty Plea Case

Requiring a request for appeal makes particular sense in the context of a guilty plea. To begin with, a guilty plea waives numerous appellate issues. This Court has recognized this principle:

> . . . a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)].

Tollett v. Henderson, 411 U.S. 258, 267 (1973), bracketed citation added.[7]

There are significant differences between post-trial appeals and post-plea appeals. One court has discussed these differences in the context of applying a

7. The Prisoner may assert that he entered his guilty plea without actually admitting his guilt. (J.A. 27 [Plea Tr. at 14-15].) However, this is a distinction which makes no difference. Cf. § 1016 (legal effect of no contest plea to crime punishable as felony shall be same as that of a guilty plea for all purposes); *see also People v. Bradford*, 15 Cal.4th 1229, 1374-75, 939 P.2d 259, 346, 65 Cal.Rptr.2d 145, 232 (Cal. 1997).

presumption of ineffective assistance of counsel. The court stated:

> Criminal defendants convicted at trial generally file a notice of appeal. As a result, (1) the absence of a notice of appeal and an affidavit of waiver strongly suggests the failure of trial counsel to consult adequately with the client concerning the right to appeal; and (2) creating a conclusive presumption [of ineffective assistance] in that circumstance would not significantly increase the burden on this court. Moreover, the presumption would be in the interest of finality. In the absence of the presumption, the question of ineffectiveness of counsel could be litigated for years in habeas corpus proceedings, with the likely result that an untimely appeal ultimately would be permitted.

State v. Peppers, 110 N.M. 393, 398; 796 P.2d 614, 619 (N.M. Ct.App. 1990), bracketed phrase added.

The *Peppers* court then contrasted post-trial appeals with post-plea appeals:

> In contrast, after a plea of guilty or no contest, appeals are uncommon. After all, only a limited number of issues can be raised on appeal from a conviction based on a plea. Failure to appeal does not imply lack of diligence by counsel. We have never suggested that counsel should obtain affidavits of waiver of appeal when appeals are not pursued after a plea of guilty or no contest. In addition, creation of a conclusive presumption of ineffective assistance of counsel when such a plea has not been appealed would provide defendants with an automatic right to an

> untimely appeal from the plea. Appellate courts would likely be burdened with numerous additional appeals reopening old cases. The interest in finality would be thwarted, not advanced.

State v. Peppers, 110 N.M. at 398-99; 796 P.2d at 619-20.[8] Thus, there are significant differences between post-trial appeals and post-plea appeals. (E.g., waiver of appellate issues after plea.) These differences weigh against a presumption of ineffective assistance where no appeal is filed following a plea. *Stearns* has effectively created a such a presumption in post-plea cases. Indeed, under *Stearns* this presumption is conclusive where an attorney does not file an appeal or obtain a waiver of appeal rights. Because the *Stearns* presumption overlooks critical distinctions between post-trial appeals and post-plea appeals, it should be rejected.

It is widely recognized that a guilty plea waives appellate issues. In California, a guilty plea admits all matters essential to the conviction. *People v. DeVaughn*, 18 Cal.3d 889, 895-96, 558 P.2d 872, 875, 135 Cal.Rptr. 786, 789 (Cal. 1977); *see also People v. Turner*, 171 Cal.App.3d 116, 125-26, 214 Cal.Rptr. 572, 577 (Cal.Ct.App. 1985) (guilty plea waives right to raise questions regarding evidence). Indeed, California generally requires a certificate of probable cause for an appeal from a judgment following a guilty plea. § 1237.5; Cal. Rules of Court, Rule 31(d). Federal cases have also recognized that a guilty plea limits the issues that can be raised on appeal. *See, e.g., United States v. Cordero*, 42 F.3d 697, 698 (CA1 1994); *Laycock v. New Mexico*, 880 F.2d 1184, 1187-88 (CA10 1989); *Marrow v. United States*,

8. Notwithstanding the language in *Peppers*, the Warden reiterates that a request for appeal is also required after a trial. *See, e.g., United States v. Davis*, 929 F.2d at 556-57.

772 F.2d 525, 529 (CA9 1985). States besides California have acknowledged this as well. *See, e.g., State v. Peppers*, 110 N.M. at 398-99, 796 P.2d at 619-20. Again, waiver of appellate issues weighs against a rule of ineffective assistance where there is no appeal or waiver of appeal after a guilty plea.

Marrow, 772 F.2d at 529, likewise noted that a defendant who pleads guilty waives numerous appellate issues. The court correctly pointed out that advising a defendant of his appeal rights after a guilty plea is frequently pointless and in such cases is not constitutionally required. As the court stated:

> More important, one who has voluntarily pleaded guilty after being fully advised of his rights pursuant to Rule 11 will normally have foreclosed his right to appeal. *See Tollett* [*v. Henderson*], 411 U.S. [258] at 266-67, 93 S.Ct. [1602] at 1607-08 [1973]. Informing a defendant who has pleaded guilty of the right to appeal would in a large number of cases serve no useful purpose. In those cases counsel need not advise the defendant of any right to appeal.

Marrow, 772 F.2d at 529, bracketed citation added.

Further, the Warden submits that, in general, when a defendant pleads guilty, he manifests a desire to terminate the litigation. This Court has observed that a defendant demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for a successful rehabilitation in a shorter period of time than might otherwise be necessary. *Brady v. United States*, 397 U.S. 742, 753 (1970). Thus, after a plea it is usually

reasonable to assume that further legal proceedings will be unnecessary.[9]

The Warden's position is supported by a number of federal circuit decisions which have indicated that a defendant must ask his attorney to file a notice of appeal before the attorney has an obligation to do so. *See, e.g.*, *Ludwig v. United States*, 162 F.3d 456, 459 (CA6 1998); *Morales v. United States*, 143 F.3d 94, 97 (CA2 1998); *Castellanos v. United States*, 26 F.3d 717, 719 (CA7 1994). The requirement of a request is usually contained in a discussion of whether a per se rule of prejudice applies where counsel has failed to initiate or prosecute an appeal. In contrast to these decisions, the Ninth Circuit's rule effectively requires an attorney to file a notice of appeal whenever the defendant does not consent to the abandonment of his appeal. *See, e.g.*, *Stearns*, 68 F.3d at 330. As noted, the Ninth Circuit's rule overlooks or dismisses critical distinctions between convictions following trial and convictions following guilty plea (e.g., waiver of appellate issues following a guilty plea). *See, e.g.*, *State v. Peppers*, 110 N.M. at 398-99, 796 P.2d at 619-20.[10] The Warden submits that, in general, a request for appeal is required before counsel has a Sixth Amendment obligation to file a notice of appeal, at least following a guilty plea, particularly where the defendant has been advised of his appeal rights.

9. This Court has also noted that there is a "fundamental interest" in the finality of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

10. In *Ortega*, 160 F.3d at 536, the Ninth Circuit stated that *Stearns* tracked *Lozada*, 964 F.2d 956. The Warden submits that *Lozada* is distinguishable from *Stearns* and the present case. *Lozada* was not a guilty plea case. *Lozada v. State*, 110 Nev. at 350, 871 P.2d at 945. The Warden has already discussed the distinctions between guilty plea cases and trial cases.

B. Requiring A Request For Appeal Is Particularly Compelling Where The Defendant Has Been Advised Of His Appeal Rights

The requirement of a request is also particularly compelling where the defendant has been advised of his appeal rights, as in this case. As noted in *Castellanos*, the constitution does not require a lawyer to advise his client of the right to appeal. *Castellanos*, 26 F.3d at 719.[11] The duty to advise rests principally with the trial judge. *Castellanos*, 26 F.3d at 719. Further, even if both judge and counsel forget to provide such advice, most defendants know about the possibility of appeal and cannot complain if they are not provided with redundant information. *Id.* While this is undoubtedly true, the requirement of a request is more compelling where the defendant is advised of his appeal rights.

In the present case, the Prisoner pled guilty and the trial court advised the Prisoner of his appeal rights. (J.A. 40 [Sentencing Tr. at 10-11].) The District Court and Magistrate Judge properly found that there was no request for an appeal. (J.A. 157-159 [F. & R. at 6-7]; J.A. 133 [Evid. Hrg. Tr. at 76].) The Findings and Recommendations noted that under § 1240.1(b), an attorney has a duty to file a notice of appeal when "directed to do so by a defendant having a right to appeal." (J.A. 157 [F. & R. at 6].) The Findings and Recommendations also cited trial counsel's evidentiary hearing testimony that if a client asked her to file a notice of appeal, she would do so. (J.A. 158 [F. & R. at 7]; J.A. 119-120 [Evid. Hrg. Tr. at 49-50].) The Findings and Recommendations state, "It would appear, therefore, that Ms. Kops [trial counsel] would have been under no statutory duty to file an appeal on behalf of petitioner [the

11. At least this is generally true following a guilty plea. *See, e.g.*, *Marrow*, 772 F.2d at 528.

Prisoner] under California law." (J.A. 158 [F. & R. at 7].) This constitutes a finding that the Prisoner did not request trial counsel to file a notice of appeal. As noted, the Magistrate Judge found that had the Prisoner requested that counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, it would be appropriate to hold that, in the present case, counsel had no Sixth Amendment duty to file a notice of appeal.

II.

THE REQUIREMENT OF A REQUEST FOR APPEAL IS SUPPORTED BY THE PRINCIPLE THAT, IN GENERAL, TRIAL COUNSEL HAS NO ABSOLUTE SIXTH AMENDMENT DUTY TO ADVISE A DEFENDANT OF HIS APPEAL RIGHTS AFTER A GUILTY PLEA

The requirement of a request for appeal is also supported by the principle that, in general, trial counsel has no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea. If counsel has no absolute constitutional duty to advise a defendant of his post-plea appeal rights, it is difficult to understand how counsel can have an absolute constitutional duty to obtain a waiver of such rights.

Marrow, 772 F.2d at 528, articulates the principle that counsel has no duty, in all cases, to advise his client of post-plea appellate remedies:

> We conclude that there is no duty in all cases to advise of the right to appeal a conviction after a guilty plea. Rather, counsel is obligated to give such advice only when the defendant inquires about appeal rights or when there are circumstances present that indicate that defendant may benefit from receiving such advice.

The *Marrow* court found support for its conclusion in the legislative history of the Federal Rules of Criminal Procedure, Rule 32. The *Marrow* court looked first to an older version of Rule 32 which did not

require any advisement of appeal rights after a guilty plea. *Id.*

The *Marrow* court cited the advisory committee notes to the Rules to explain the rationale for the rule:

> To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. *See* American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advise to "contested cases."
>
> The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Marrow, 772 F.2d at 528, quoting notes of the Advisory Committee on Rules.

The *Marrow* court noted that Rule 32 has since been amended to require the trial court to advise a defendant of any right to appeal the sentence following a plea. *Marrow*, 772 F.2d at 528. The *Marrow* court pointed out that this amendment merely continues the distinction between the trial court's duty to advise of appellate rights after pleas of guilty and not guilty. *Id.* at 528-29. As the court stated:

> The plain language of the amendment, providing that the judge shall advise the defendant of his right to appeal the sentence, rather than his right to appeal the conviction, indicates that Congress intended to continue the current distinction between the judge's duty to advise of the right to appeal after pleas of guilty and not guilty. The legislative history unequivocally supports this conclusion[] [quotation omitted].

Marrow, 772 F.2d at 528-29.

The current version of Rule 32 maintains this distinction. Rule 32(c)(5), provides, in pertinent part:

> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis.

Federal Rules of Criminal Procedure, Rule 32(c)(5).[12]

The *Marrow* court recognized that counsel's duty to advise his client is not coextensive with that of the court, and that in some cases counsel has a duty to advise his client of the right to appeal his post-plea conviction. *Marrow*, 772 F.2d at 529. Nevertheless, the *Marrow* court correctly believed that the reasons stated by the Advisory Committee were of some relevance. *Id.*

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12. Rule 32(c)(5) also provides: "If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant."

Thus, there is no absolute constitutional duty by counsel to advise a defendant of his appeal rights following a guilty plea. This principle supports the proposition that, in general, trial counsel has no 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. If counsel has no absolute constitutional duty to advise a defendant of his post-plea appeal rights, it is hard to understand how counsel could have an absolute constitutional duty to obtain a waiver of such rights.

III.

A RULE OF PRESUMED PREJUDICE SHOULD NOT BE APPLIED WHERE, AS HERE, THERE IS NO REQUEST FOR AN APPEAL[13/]

Further, the Warden submits that a rule of presumed prejudice should not be applied where, as here, there has been no request for an appeal.

The Warden's position is supported by this Court's recent decision in *Peguero v. United States*, 119 S.Ct. 961. In *Peguero*, this Court held that "a district court's failure to advise the defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission." *Id.* at 963. This Court went on to state that in the case before it, petitioner had full knowledge of his right to appeal, hence the district court's violation of Federal Rules of Criminal Procedure, Rule 32 by failing to inform him of that right did not prejudice him. *Id.* at 964-65. Shortly thereafter, this Court stated:

> Our decision in *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), does not hold otherwise. In *Rodriquez*, the Court held that when counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit. *Id.*, at 329-330, 89 S.Ct. 1715. Without questioning the rule in *Rodriquez*, we conclude its holding is

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13. The Warden submits that this matter is fairly included in the question presented. Rule 14.1 of the Rules of the Supreme Court of the United States.

> not implicated here because of the District Court's factual finding that petitioner did not request an appeal.

Peguero, 119 S.Ct. at 965.

Likewise, in the present case, *Rodriquez's* holding is not implicated because of the District Court's factual finding that the Prisoner did not request an appeal. (J.A. 157-159 [F. & R. at 6-7]; J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, *Rodriquez's* rule of presumed prejudice is inapplicable.

IV.

TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE UNDER CALIFORNIA LAW; CALIFORNIA LAW COMPORTS WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

Trial counsel clearly rendered effective assistance under California law. Further, the Warden submits that California law comports with the federal constitution.

California's legal landscape (at least as of January 1994, when the Prisoner's conviction became final) would not have required the filing of a notice of appeal. Indeed, the sentencing court was not required to advise the Prisoner of his appeal rights following his guilty plea. Cal. Rules of Court, Rule 470 (this rule is still in effect); *see also People v. Serrano*, 33 Cal.App.3d 331, 337-38, 109 Cal.Rtpr. 30, 33-34 (Cal.Ct.App. 1973) (no duty by trial court to advise defendant of right to appeal after guilty plea).

In a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." § 1240.1(a). However, under the plain terms of the statute, this duty applies only to attorneys who represented a defendant "at trial." The instant case was a guilty plea case.

Under § 1240.1, defense counsel is required to file a notice of appeal only if there are arguably meritorious appellate issues or the defendant directs that an appeal be filed. § 1240.1(b). These statutory provisions are still in effect.

The Warden submits that, based on the certified record, there do not appear to have been any arguably meritorious appellate issues. In the present case, trial counsel was representing the Prisoner, an indigent, who entered a guilty plea to second degree murder. Trial counsel testified that in her opinion the only grounds for appealing the sentence would have been that the sentencing court abused its discretion in denying probation, and such a claim would almost certainly fail. (J.A. 114-115 [Evid. Hrg. Tr. at 43-44].) Assuming arguendo that issues relating to the validity of the plea could be raised on appeal (§ 1237.5), there do not appear to be any such issues. (J.A. 16-30 [Plea Tr.].) It is hard to imagine that the Prisoner could mount a serious challenge to the jurisdiction of the superior court.[14/]

Again, the District Court found that there was no request to file an appeal. (J.A. 157-159 [F. & R. at 6-7].) The Magistrate Judge found that had the Prisoner requested that trial counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, at least as of January 1994, California law would not have required the filing of a notice of appeal in the present case. California law remains the same today. § 1240.1(b).

The Warden submits that California law comports with federal constitutional requirements. *See, e.g.*, *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719; *Marrow*, 772 F.2d at 528.

14. The California Constitution, Article VI, § 10, provides that except with regard to various writ proceedings, superior courts have original jurisdiction in all other causes except those given by statute to other trial courts.

V.

THERE ARE ADDITIONAL REASONS FOR DISAPPROVING *STEARNS* AND REVERSING *ORTEGA*

There are additional reasons for disapproving *Stearns* and reversing *Ortega*. *Stearns* is distinguishable from the present case and was wrongly decided.

A. *Stearns* Is Distinguishable

The Warden submits that *Stearns* (upon which *Ortega* relies) is distinguishable and was wrongly decided. *Stearns* is distinguishable because it involved review of a federal prisoner's 28 U.S.C. § 2255 motion and did not involve California law as does this case. *Stearns*, 68 F.3d at 329. The present case involves an appeal from a state court judgment and is subject to state procedural rules specifically limiting trial counsel's duties with respect to filing a notice of appeal (e.g., § 1240.1(b)). As previously discussed (Argument IV, *ante*), these state rules comport with federal constitutional requirements. Whatever merit the *Stearns* rule has in the federal context, it should not be extended to state court proceedings. In light of § 1240.1(b), it is difficult to understand how counsel could have had a duty to file a notice of appeal, let alone a duty to file one just because the Prisoner did not consent to the abandonment of his appeal.[15/]

15. Moreover, California has a rule requiring defendants to exercise personal diligence in ensuring that notices of appeal are filed. *Cf. In re Benoit*, 10 Cal.3d 72, 88-89, 514 P.2d 97, 108, 109 Cal.Rptr. 785, 796 (Cal. 1973). The Warden submits that this requirement comports with the federal constitution. *Ortega* conflicts with this requirement. This is yet another reason why *Ortega* improperly extended *Stearns* to state prisoner cases.

Moreover, *Stearns* involved a complex federal sentencing scheme which precluded trial counsel from assuming that the defendant did not want to appeal his sentence. *Stearns*, 68 F.3d at 330. In the present case, there were no meritorious grounds for appealing the Prisoner's sentence. (J.A. 114-115 [Evid. Hrg. Tr. at 43-44].) Thus, *Stearns* is distinguishable on this basis as well.

B. *Stearns* Was Wrongly Decided

Further, *Stearns* was wrongly decided. As noted, in *Stearns* the Ninth Circuit stated that the issue was whether the defendant consented to the failure to file a notice of appeal, rather than whether counsel ignored an explicit request to file. *Stearns*, 68 F.3d at 330. However, other circuits have explicitly held otherwise and have required such a request be made. *See, e.g.*, *Castellanos*, 26 F.3d at 719. The Warden submits that *Castellanos* states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances and regardless of state law to the contrary (e.g., California law).

For these additional reasons, *Ortega* should be reversed and *Stearns* disapproved.

CONCLUSION

Accordingly, the Warden asks that this Court hold that, in general, trial counsel has no 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. The Warden asks this Court to disapprove of *Ortega* and *Stearns* to the extent they are inconsistent with this holding. Finally, the Warden asks this Court to hold that the Prisoner is not entitled to relief, and to reverse the judgment of the Ninth Circuit.

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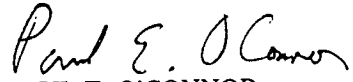
Respectfully submitted,

BILL LOCKYER
Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General



PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record

Counsel for Petitioner