Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROE, WARDEN *v.* FLORES-ORTEGA

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

No. 98–1441. Argued November 1, 1999– Decided February 23, 2000

Respondent pleaded guilty to second-degree murder. At his sentencing, the trial judge advised him that he had 60 days to file an appeal. His counsel, Ms. Kops, wrote "bring appeal papers" in her file, but no notice of appeal was filed within that time. Respondent's subsequent attempt to file such notice was rejected as untimely, and his efforts to secure state habeas relief were unsuccessful. He then filed a federal habeas petition, alleging constitutionally ineffective assistance of counsel based on Ms. Kops' failure to file the notice after promising to do so. The District Court denied relief. The Ninth Circuit reversed, however, finding that respondent was entitled to relief because, under its precedent, a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent.

Held:

1. *Strickland* v. *Washington*, 466 U. S. 668, provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal. Under *Strickland*, a defendant must show (1) that counsel's representation "fell below an objective standard of reasonableness," *id.*, at 688, and (2) that counsel's deficient performance prejudiced the defendant, *id.*, at 694. Pp. 4–15.

(a) Courts must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," 466 U. S., at 690, and "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.*, at 689. A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner, see *Rodriquez* v. *United States*, 395 U. S. 327, while a defendant who explicitly tells

his attorney not to file an appeal plainly cannot later complain that, by following those instructions, his counsel performed deficiently, see *Jones* v. *Barnes*, 463 U. S. 745, 751. The Ninth Circuit adopted a bright-line rule for cases where the defendant has not clearly conveyed his wishes one way or the other; in its view, failing to file a notice of appeal without the defendant's consent is *per se* deficient. The Court rejects that *per se* rule as inconsistent with *Strickland*'s circumstance-specific reasonableness requirement. The question whether counsel has performed deficiently in such cases is best answered by first asking whether counsel in fact consulted with the defendant about an appeal. By "consult," the Court means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. Counsel who consults with the defendant performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions about an appeal. If counsel has not consulted, the court must ask whether that failure itself constitutes deficient performance. The better practice is for counsel routinely to consult with the defendant about an appeal. Counsel has a constitutionally imposed duty to consult, however, only when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. One highly relevant factor will be whether the conviction follows a trial or a guilty plea, because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings. Even then, a court must consider such factors as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights. Pp. 5–9.

(b) The second part of the *Strickland* test requires the defendant to show prejudice from counsel's deficient performance. Where an ineffective assistance of counsel claim involves counsel's performance during the course of a legal proceeding, the Court normally applies a strong presumption of reliability to the proceeding, requiring a defendant to overcome that presumption by demonstrating that attorney errors actually had an adverse effect on the defense. The complete denial of counsel during a critical stage of a judicial proceeding, however, mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *United States* v. *Cronic*, 466 U. S. 648, 659. The even more serious denial of the entire judicial proceeding also demands a presumption of prejudice because no presumption of reliability can be accorded to

Syllabus

judicial proceedings that never took place. Respondent claims that his counsel's deficient performance led to the forfeiture of his appeal. If that is so, prejudice must be presumed. Because the defendant in such cases must show that counsel's deficient performance actually deprived him of an appeal, however, he must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. This standard follows the pattern established in *Strickland* and *Cronic*, and mirrors the prejudice inquiry applied in *Hill* v. *Lockhart*, 474 U. S. 52, and *Rodriquez* v. *United States*, 395 U. S. 327. The question whether a defendant has made the requisite showing will turn on the facts of the particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal will often be highly relevant in making this determination. The performance and prejudice inquiries may overlap because both may be satisfied if the defendant shows nonfrivolous grounds for appeal. However, they are not in all cases coextensive. Evidence that a defendant sufficiently demonstrated to counsel his interest in an appeal may prove deficient performance, but it alone is insufficient to establish that he would have filed the appeal had he received counsel's advice. And, although showing nonfrivolous grounds for appeal may give weight to the defendant's contention that he would have appealed, a defendant's inability to demonstrate the merit of his hypothetical appeal will not foreclose the possibility that he can meet the prejudice requirement where there are other substantial reasons to believe that he would have appealed. Pp. 10–15.

2. The court below undertook neither part of the *Strickland* inquiry and the record does not provide the Court with sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance. The case is accordingly remanded for a determination whether Ms. Kops had a duty to consult with respondent (either because there were potential grounds for appeal or because respondent expressed interest in appealing), whether she satisfied her obligations, and, if she did not, whether respondent was prejudiced thereby. Pp. 15–16.

160 F. 3d 534, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined, and in which STEVENS, SOUTER, and GINSBURG, JJ., joined as to Part II–B. BREYER, J., filed a concurring opinion. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.