SUPREME COURT OF THE UNITED STATES

No. 98–1441

ERNEST C. ROE, WARDEN, PETITIONER *v.* LUCIO FLORES-ORTEGA

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

[February 23, 2000]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we must decide the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent.

I

The State of California charged respondent, Lucio Flores-Ortega, with one count of murder, two counts of assault, and a personal use of a deadly weapon enhancement allegation. In October 1993, respondent appeared in Superior Court with his court-appointed public defender, Nancy Kops, and a Spanish language interpreter, and pleaded guilty to second-degree murder. The plea was entered pursuant to a California rule permitting a defendant both to deny committing a crime and to admit that there is sufficient evidence to convict him. See *People* v. *West*, 3 Cal. 3d 595, 477 P. 2d 409 (1970). In exchange for the guilty plea, the state prosecutor moved to strike the allegation of personal use of a deadly weapon and to dismiss both assault charges. On November 10, 1993, respondent was sentenced to 15 years to life in state prison.

After pronouncing sentence, the trial judge informed respondent, "You may file an appeal within 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." App. 40.

Although Ms. Kops wrote "bring appeal papers" in her file, no notice of appeal was filed within the 60 days allowed by state law. See Cal. Penal Code §1239(a) (West Supp. 2000); Cal. Appellate Rule 31(d). (A notice of appeal is generally a one-sentence document stating that the defendant wishes to appeal from the judgment. See Cal. Appellate Rule 31(b); Judicial Council of California, Approved Form CR–120 (Notice of Appeal– Felony) (Jan. 5, 2000), http://www.courtinfo.ca.gov/cgi–bin/forms/.cgi.) Filing such a notice is a purely ministerial task that imposes no great burden on counsel. During the first 90 days after sentencing, respondent was apparently in lockup, undergoing evaluation, and unable to communicate with counsel. About four months after sentencing, on March 24, 1994, respondent tried to file a notice of appeal, which the Superior Court Clerk rejected as untimely. Respondent sought habeas relief from California's appellate courts, challenging the validity of both his plea and conviction, and (before the California Supreme Court) alleging that Ms. Kops had not filed a notice of appeal as she had promised. These efforts were uniformly unsuccessful.

Respondent then filed a federal habeas petition pursuant to 28 U. S. C. §2254, alleging constitutionally ineffective assistance of counsel based on Ms. Kops' failure to file a notice of appeal on his behalf after promising to do so. The United States District Court for the Eastern District of California referred the matter to a Magistrate Judge, who in turn ordered an evidentiary hearing on the limited issue of whether Ms. Kops promised to file a notice of appeal on respondent's behalf. At the conclusion of the hearing, the Magistrate Judge found:

"The evidence in this case is, I think, quite clear that there was no consent to a failure to file [a notice of appeal].

. . . . .

"It's clear to me that Mr. Ortega 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.

"I think there was a conversation [between Ortega and Kops] in the jail. Mr. Ortega testified, and I'm sure he's testifying as to the best of his belief, that there was a conversation after the pronouncement of judgment at the sentencing hearing where it's his understanding that Ms. Kops was going to file a notice of appeal.

"She has no specific recollection of that. However, she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had Mr. Ortega requested that she file a notice of appeal, she would have done so.

"But, I cannot find that he has carried his burden of showing by a preponderance of the evidence that she made that promise." App. 132–133.

The Magistrate Judge acknowledged that under precedent from the Court of Appeals for the Ninth Circuit, *United States* v. *Stearns*, 68 F. 3d 328 (1995), a defendant need only show that he did not consent to counsel's failure to file a notice of appeal to be entitled to relief. The judge concluded, however, that *Stearns* announced a new rule that could not be applied retroactively on collateral review to respondent's case. See *Teague* v. *Lane*, 489 U. S. 288 (1989). Thus, the Magistrate Judge recommended that the habeas petition be denied. App. 161. The District Court adopted the Magistrate's findings and recommendation, and denied relief. *Id.*, at 162–163.

The Court of Appeals for the Ninth Circuit reversed, reasoning that the rule it applied in *Stearns*– that a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent– tracked its earlier opinion in *Lozada* v. *Deeds*, 964 F. 2d 956 (1992), which predated respondent's conviction. 160 F. 3d 534 (1998). Because respondent did not consent to the failure to file a notice of appeal– and thus qualified for relief under *Stearns*– the court remanded the case to the District Court with instructions to issue a conditional habeas writ unless the state court allowed respondent a new appeal. We granted certiorari, 526 U. S. 1097 (1999), to resolve a conflict in the lower courts regarding counsel's obligations to file a notice of appeal. Compare *United States* v. *Tajeddini*, 945 F. 2d 458, 468 (CA1 1991) (*per curiam*) (counsel's failure to file a notice of appeal, allegedly without the defendant's knowledge or consent, constitutes deficient performance); *Morales* v. *United States*, 143 F. 3d 94, 97 (CA2 1998) (counsel has no duty to file a notice of appeal unless requested by the defendant); *Ludwig* v. *United States*, 162 F. 3d 456, 459 (CA6 1998) (Constitution implicated only when defendant actually requests an appeal and counsel disregards the request); *Castellanos* v. *United States*, 26 F. 3d 717, 719–720 (CA7 1994) (same); *Romero* v. *Tansy*, 46 F. 3d 1024, 1030–1031 (CA10 1995) (defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect defendant's appeal; unless defendant waived right, counsel was deficient for failing to advise defendant about appeal right); *United States* v. *Stearns*, *supra*, (counsel's failure to file a notice of appeal is deficient unless the defendant consents to the abandonment of his appeal).

II

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), we

held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, *id*., at 687, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel 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. Today we hold that this test applies to claims, like respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal.

A

As we have previously noted, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id*., at 688–689. Rather, courts must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *id*., at 690, and "[j]udicial scrutiny of counsel's performance must be highly deferential," *id*., at 689.

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See *Rodriquez* v. *United States*, 395 U. S. 327 (1969); cf. *Peguero* v. *United States*, 526 U. S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his

instructions, his counsel performed deficiently. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal). The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?

The Courts of Appeals for the First and Ninth Circuits have answered that question with a bright-line rule: Counsel must file a notice of appeal unless the defendant specifically instructs otherwise; failing to do so is *per se* deficient. See, *e.g.*, *Stearns*, 68 F. 3d, at 330; *Lozada*, *supra*, at 958; *Tajeddini*, *supra*, at 468. Such a rule effectively imposes an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly. We reject this *per se* rule as inconsistent with *Strickland*'s holding that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U. S., at 688. The Court of Appeals failed to engage in the circumstance-specific reasonableness inquiry required by *Strickland*, and that alone mandates vacatur and remand.

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning– advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable man-

ner only by failing to follow the defendant's express instructions with respect to an appeal. See *supra*, at 5-6. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

Because the decision to appeal rests with the defendant, we agree with JUSTICE SOUTER that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function §4–8.2(a) (3d. ed. 1993); *post*, at 3–4. In fact, California imposes on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal. See Cal. Penal Code Ann. §1240.1(a) (West Supp. 2000). Nonetheless, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are only guides," and imposing "specific guidelines" on counsel is "not appropriate." *Strickland, supra*, at 688. And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. See *Strickland*, 466 U. S., at 688. We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense. See 466 U. S., at 689 (rejecting mechanistic rules governing what counsel must do). For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant

expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is "professionally unreasonable," *id.*, at 691, as a constitutional matter, in not consulting with such a defendant regarding an appeal. Or, for example, suppose a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information. We therefore reject a bright-line rule that counsel must always consult with the defendant regarding an appeal.

We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for 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. See *id.*, at 690 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by con-

sidering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Rather than the standard we announce today, JUSTICE SOUTER would have us impose an "almost" bright-line rule and hold that counsel "almost always" has a duty to consult with a defendant about an appeal. *Post*, at 1. Although he recognizes that "detailed rules for counsel's conduct" have no place in a *Strickland* inquiry, he argues that this "qualification" has no application here. *Post*, at 4. According to JUSTICE SOUTER, in *Strickland* we only rejected *per se* rules in order to respect the reasonable strategic choices made by lawyers, and that failing to consult about an appeal cannot be a strategic choice. *Post*, at 4-5. But we have consistently declined to impose mechanical rules on counsel– even when those rules might lead to better representation– not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . . [but rather] simply to ensure that criminal defendants receive a fair trial." 466 U. S., at 689. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. See *id*, at 688 (defendant must show that counsel's representation fell below an objective standard of reasonableness). We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal. We differ from JUSTICE SOUTER only in that we refuse to make this determination as a *per se* (or "almost" *per se*) matter.

B

The second part of the *Strickland* test requires the defendant to show prejudice from counsel's deficient performance.

1

In most cases, a defendant's claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, either at trial or on appeal. See, *e.g.*, *id.*, at 699 (claim that counsel made poor strategic choices regarding what to argue at a sentencing hearing); *United States* v. *Cronic*, 466 U. S. 648, 649–650 (1984) (claim that young lawyer was incompetent to defend complex criminal case); *Penson* v. *Ohio*, 488 U. S. 75, 88–89 (1988) (claim that counsel in effect did not represent defendant on appeal); *Smith* v. *Robbins*, 528 U. S. ___ (2000) (claim that counsel neglected to file a merits brief on appeal); *Smith* v. *Murray*, 477 U. S. 527, 535–536 (1986) (claim that counsel failed to make a particular argument on appeal). In such circumstances, whether we require the defendant to show actual prejudice— "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, *supra*, at 694— or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. That is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," *Cronic*, *supra*, at 658, or a fair appeal, see *Penson*, *supra*, at 88–89. "Absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated." *Cronic*, *supra*, at 658.

We "normally apply a 'strong presumption of reliability' to judicial proceedings and require a defendant to over-

come that presumption," *Robbins*, *supra*, at ___ (slip op., at 24) (citing *Strickland*, *supra*, at 696), by "show[ing] how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, *supra*, at 659, n. 26. Thus, in cases involving mere "attorney error," we require the defendant to demonstrate that the errors "actually had an adverse effect on the defense." *Strickland*, *supra*, at 693. See, *e.g.*, *Robbins*, *supra*, at ___ (slip op., at 25) (applying actual prejudice requirement where counsel followed all required procedures and was alleged to have missed a particular nonfrivolous argument); *Strickland*, *supra*, at 699–700 (rejecting claim in part because the evidence counsel failed to introduce probably would not have altered defendant's sentence).

2

In some cases, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was – either actually or constructively– denied the assistance of counsel altogether. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage." *Cronic*, *supra*, at 659. The same is true on appeal. See *Penson*, *supra*, at 88. Under such circumstances, "[n]o specific showing of prejudice [is] required," because "the adversary process itself [is] presumptively unreliable." *Cronic*, *supra*, at 659; see also *Robbins*, *supra*, at ___ (slip op., at 24) ("denial of counsel altogether . . . warrants a presumption of prejudice"); *Penson*, *supra*, at 88–89 (complete denial of counsel on appeal requires a presumption of prejudice).

Today's case is unusual in that counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. According to respondent, counsel's deficient performance deprived him of a notice of appeal

and, hence, an appeal altogether. Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether. In *Cronic*, *Penson*, and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Cronic*, *supra*, at 659. The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any "'presumption of reliability,'" *Robbins supra*, at ___ (slip op., at 24), to judicial proceedings that never took place.

3

The Court of Appeals below applied a *per se* prejudice rule, and granted habeas relief based solely upon a showing that counsel had performed deficiently under its standard. 160 F. 3d, at 536. Unfortunately, this *per se* prejudice rule ignores the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal. If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief. Cf. *Peguero* v. *United States*, 526 U. S. 23 (1999) (defendant not prejudiced by court's failure to advise him of his appeal rights, where he had full knowledge of his right to appeal and chose not to do so). Accordingly, we hold that, to show prejudice in these circumstances, a defendant 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.

In adopting this standard, we follow the pattern estab-

lished in *Strickland* and *Cronic*, and reaffirmed in *Robbins*, requiring a showing of actual prejudice (*i.e.*, that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See *Strickland*, 466 U. S., at 493–496; *Cronic*, 466 U. S., at 658–659; *Robbins*, 528 U. S., at ___ (slip op., at 24-25). Today, drawing on that line of cases and following the suggestion of the Solicitor General, we hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.

We believe this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill* v. *Lockhart*, 474 U. S. 52 (1985), and *Rodriquez* v. *United States*, 395 U. S. 327 (1969). In *Hill*, we considered an ineffective assistance of counsel claim based on counsel's allegedly deficient advice regarding the consequences of entering a guilty plea. Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled. We held that "to satisfy the 'prejudice' requirement [of *Strickland*], the defendant must show 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*, *supra*, at 59. Similarly, in *Rodriquez*, counsel failed to file a notice of appeal, despite being instructed by the defendant to do so. See *Rodriquez*, 395 U. S., at 328. We held that the defendant, by instructing counsel to perfect an appeal, objectively indicated his

intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other appellan[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated." *Id.*, at 330. See also *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (defendant entitled to new appeal when counsel's deficient failure to comply with mechanistic local court rules led to dismissal of first appeal).

As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case. See 466 U. S., at 695–696. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination. We recognize that the prejudice inquiry we have described is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place; specifically, both may be satisfied if the defendant shows nonfrivolous grounds for appeal. See *Hill*, *supra*, at 59 (when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial). But, while the performance and prejudice prongs may overlap, they are not in all cases coextensive. To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

By the same token, although showing nonfrivolous

grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," *Rodriquez,* 395 U. S., at 330, will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed. See *ibid.;* see also *Peguero,* 526 U. S., at 30 (O'CONNOR, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion"). We similarly conclude here that it is unfair to *require* an indigent, perhaps *pro se,* defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed.

III

The court below undertook neither part of the *Strickland* inquiry we have described, but instead presumed both that Ms. Kops was deficient for failing to file a notice of appeal without respondent's consent and that her deficient performance prejudiced respondent. See 160 F. 3d, at 536. JUSTICE SOUTER finds Ms. Kops' performance in this case to have been "derelict," presumably because he believes that she did not consult with respondent about an appeal. *Post,* at 2. But the Magistrate Judge's findings do not provide us with sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance. Specifically, the findings below suggest that there may have been some conversation between Ms. Kops and respondent about an appeal, see App. 133; see also 160 F. 3d, at 535 (Ms. Kops wrote "'bring appeal papers'" in her file), but do not indicate what was actually said.

Assuming, *arguendo*, that there was a duty to consult in this case, it is impossible to determine whether that duty was satisfied without knowing whether Ms. Kops advised respondent about the advantages and disadvantages of taking an appeal and made a reasonable effort to discover his wishes. Cf. *Strickland, supra*, at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's . . . decisions"). Based on the record before us, we are unable to determine 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. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.