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A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel

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A DECADE OF *STRICKLAND*'S TIN HORN: DOCTRINAL AND PRACTICAL UNDERMINING OF THE RIGHT TO COUNSEL

William S. Geimer*

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It will be an enormous social task to bring to life the dream of Gideon v. Wainwright—the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.¹

[I]t may be that what many in our society want Gideon to stand for is an illusion that there is equal access, that there is equal justice, when they are unwilling to pay the price to ensure that it actually occurs.²

We may still refer to the noble ideal that every defendant stands equal before the law, but in fact we have reconciled ourselves to standing short of achieving it.³

I. INTRODUCTION: IGNORING THE TRUMPET CALL

A. *The Unappreciated Magnitude of Strickland's Harm*

In *Gideon's Trumpet*, his acclaimed book about the landmark case of *Gideon v. Wainwright*,⁴ Anthony Lewis wrote: "The Supreme Court had sounded a trumpet. The response had to come from society."⁵ Lewis was reflecting on a remark by Justice Stewart, made before *Gideon* was decided, that even if appointment of counsel was mandated in every case, the Supreme Court could not, nor should it, make sure that indigent criminal defendants were provided with "truly adequate representation."⁶ The distinction between the presence of an attorney and "truly adequate representation"

¹ ANTHONY LEWIS, *GIDEON'S TRUMPET* 205 (1964) (emphasis added).

² Nicholas Katzenbach, *Justice—A Reality or an Illusion*, 10 PACE L. REV. 415, 416 (1990).

³ Hon. Judith S. Kaye, *Gideon v. Wainwright: A Lesson in the Obvious*, 10 PACE L. REV. 419, 425 (1990).

⁴ 372 U.S. 335 (1963) (holding that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires states to provide counsel, at public expense if necessary, to individuals facing serious criminal charges). The right has been extended to encompass criminal prosecutions involving loss of liberty for any period of time, but not to those crimes with lesser penalties. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁵ LEWIS, *supra* note 1, at 193.

⁶ Potter Stewart, *Right to Counsel*, 18 LEGAL AID BRIEF CASE 91, 93 (1960).

is the subject of this Article.

A quarter century after *Gideon*, Lewis joined many others in concluding that the trumpet had at least been muted.⁷ Today, the condition of an individual's right to counsel is even worse than has been previously recognized. Not only has the Supreme Court abandoned Lewis' vision of the promise of *Gideon*; but the Court has become a negative force, ensuring that the trumpet call will not be heeded.

In 1984, *Strickland v. Washington*⁸ effectively discarded *Gideon*'s noble trumpet call to justice in favor of a weak tin horn. Directly contrary to its rhetoric in *Strickland*,⁹ the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial. This weakening of the guarantee certainly has proven to be true regarding the component of the right to counsel purporting to guarantee minimally adequate *performance* by criminal defense counsel.

This Article analyzes the means by which the United States Supreme Court has undermined, if not virtually destroyed, the right of indigent accused to have counsel do the kind of things on the accused's behalf that an attorney should reasonably be expected to do. The Article pays particular attention to the impact of the Court's action in capital cases, partly because of the importance of these cases, and partly because the worst jurisprudence is often more plainly illustrated there.

An important component of understanding and analyzing the Court's "right to counsel" jurisprudence is to recognize the way the Court has manipulated framing the constitutional issues and procedural doctrines that are critical to such claims' outcomes. The Court has effectively carved up the

⁷ *A Muted Trumpet*, N.Y. TIMES, Mar. 17, 1988, at A31; see also Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) (arguing that underfunding of agencies that provide defense counsel to the indigent severely undermines the Sixth Amendment's right to effective assistance of counsel).

⁸ 466 U.S. 668 (1984). It is obvious from the title of this Article that the doctrine, holding, and implications of *Strickland* will be examined at length. At this point, it is sufficient to remember only the basic holding: a defendant alleging ineffective assistance of counsel must bear the burden of proving (1) that the performance of counsel was so deficient that she was not functioning as the "counsel" envisioned by the Sixth Amendment, and (2) that this deficient performance deprived defendant of a trial whose result was reliable. *Id.* at 687. These two requirements are commonly referred to as the "performance" and "prejudice" prongs of the *Strickland* "test." The same day, the Court decided *United States v. Cronin*, 466 U.S. 648 (1984). Three years later came *Burger v. Kemp*, 483 U.S. 776 (1987). *Cronin* and *Burger* are particularly illustrative of the destructive effects of the *Strickland* doctrine on the rule of law. See *infra* text accompanying notes 173-232.

⁹ "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685.

right to counsel and placed it in pigeonholes. Whether *Strickland* applies, which is often critical to the success or failure of a claim, depends on the pigeonhole in which a claim is placed. The principal pigeonholes are:

1. Whether the accused was denied the presence of an attorney?¹⁰
2. Whether counsel was "actually ineffective"?¹¹
3. Whether counsel was denied the ability to perform, for example, because of late appointment?¹²
4. Whether the state directly interfered with counsel's functioning?¹³
5. Whether counsel had multiple client conflicts of interest?¹⁴

If there is any rhyme or reason at all to the Court's analysis and pigeonholing of right to counsel claims, it is that an analytical framework that is more generous to prisoners developed gradually in inverse relation to the frequency with which a particular type of claim arose.

Strickland has been roundly and properly criticized for fostering tolerance of abysmal lawyering. This criticism is particularly strong in cases, like that of David Leroy Washington, the petitioner in *Strickland*, in which an indigent defendant faces the death penalty.¹⁵ While further reporting of the

¹⁰ *Gideon*, as explained and qualified by *Argersinger* and *Scott*, provides this guarantee. See *supra* note 4.

¹¹ This situation is governed directly by *Strickland*.

¹² See, e.g., *Cronic*, 466 U.S. at 648; *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹³ See, e.g., *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975). But cf. *Perry v. Leeke*, 488 U.S. 272 (1989).

¹⁴ See, e.g., *Burger v. Kemp*, 483 U.S. 776 (1987); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

¹⁵ See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) [hereinafter Bright, *Counsel for the Poor*] (examining the pervasiveness of inadequate counsel in capital cases); Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 857-62 (1992) [hereinafter Bright, *In Defense of Life*] (providing chilling examples of inadequate representation in capital cases); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990) [hereinafter Bright, *Death by Lottery*] (explaining that *Strickland*, in combination with the Supreme Court's procedural default cases, has fostered a substandard level of representation for the poor, and arbitrary and inequitable results in the infliction of the death penalty). Indeed, editing to moderate length the section of this Article illustrating what *Strickland* has fostered in the courtroom, particularly to those facing death, was a difficult task. See *infra* text accompanying notes 315-412.

abysmal lawyering betrayal of *Gideon* is important, it is not the principal purpose of this Article. The Article seeks to illuminate the pernicious effects of *Strickland* on recognized doctrines that were once thought to be essential to fairness in criminal cases, and on the legal profession itself to the extent that there is any hope that its standards of professional responsibility might be meaningful in criminal law. The sheer *weight* and *diversity* of the harm wrought by *Strickland* has not been fully appreciated in commentary. A decade after *Strickland*'s tin horn sounded across the land, a more comprehensive damage assessment should be undertaken.

Strickland stands figuratively charged in a four-count indictment. Many lesser instances of wrongdoing will also be part of the evidence in Section II of this Article, which seeks to demonstrate that the *Strickland* Court has:

COUNT 1: Purposely manipulated the doctrine of harmless error in order to protect ineffective lawyering, while at the same time denying that the doctrine is relevant to the issue at all.¹⁶

COUNT 2: "Deincorporated" the most fundamental criminal law provision of the Bill of Rights, leaving the right to effective assistance of counsel open to general Fourteenth Amendment due process analysis, thereby greatly facilitating the denial of relief to criminal defendants who have been badly served by members of the legal profession.¹⁷

COUNT 3: Fostered the continuation of criminal defense performance that is often characterized not only by general laziness, deceit, and incompetence, but also by abandonment of clients to their accusers.¹⁸

COUNT 4: Enlisted the norms and professional responsibility standards of the legal profession in support of the doctrinal offenses alleged in Counts 1 and 2, while simultaneously denigrating the importance of those standards, thereby providing disincentives to upgrade them.¹⁹

B. *Reviving the Right to Counsel*

If the charges are true, the state of the right to counsel today calls for academics and practitioners to consider not only reform proposals, but also more radical responses. Toward this reform goal, Section III of this Article

¹⁶ See *infra* text accompanying notes 233-61.

¹⁷ See *infra* text accompanying notes 262-314.

¹⁸ See *infra* text accompanying notes 315-412.

¹⁹ See *infra* text accompanying notes 153-57.

presents recommendations and options that, while not specifically recommended, are worthy of consideration. A campaign to secure the overruling of *Strickland* and replace it with a doctrine that can make the right to counsel meaningful is recommended. A new approach to codes and rules of professional responsibility is recommended. Also recommended, for consideration by *competent* criminal defense attorneys, is the option of non-participation—of refusing appointments. This final recommendation is undoubtedly controversial. It may be time, however, for competent counsel to pause and consider whether their participation impedes justice by lending the appearance of legitimacy to an unjust institution. Particularly in capital cases, competent defense is the exception, not the rule.

In capital cases, the decision of competent defense attorneys not to participate would be an intensely personal one. No one should presume to dictate the correct decision. Non-participation, however, is a legitimate issue. Professor Charles Ogletree, also an experienced and capable public defender, might not endorse such a choice, but he has stated that fully implementing *Gideon* will require judges, even prosecutors, to intervene when a defendant is not being properly represented,²⁰ and on some occasions may require a defense attorney to say: "I can no longer tolerate being part of this system of injustice that requires me to represent a client in a superficial and ineffective way and to have my name and my reputation attached to a miscarriage of justice."²¹

Professor Ogletree's sentiments suggest that tolerance of poor defense by members of the legal profession, and denial of essential resources²² are

²⁰ Charles Ogletree, *Gideon v. Wainwright's Application in the Courts Today: Assistance of Counsel—Is it Effective?*, 10 PACE L. REV. 387, 400 (1990).

²¹ *Id.*

²² *Strickland*, and its companion case *Cronic*, held that counsel was constitutionally required to do no more than provide meaningful "adversarial testing" of the case against the accused. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Cronic*, 466 U.S. 648, 656 (1984). The important issues of the imbalance of resources in a criminal case and availability of resources to the defense in that testing process were not discussed. The following year, however, the Court held that a criminal trial is fundamentally unfair if the state fails to provide an indigent accused with access to "the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (holding that where insanity is at issue, it is error not to make psychiatric expert available to the defense). Unfortunately, *Ake*'s mandate is triggered only when a defendant makes a very particularized and substantial pretrial showing that there can be no fair trial without the requested expert. Cases denying relief for failure to make such a showing are numerous. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320 (1985) (stating that a motion for investigator, fingerprint, and ballistics experts must be supported by more than "undeveloped assertions"); *Messer v. Kemp*, 831 F.2d 946 (11th Cir. 1987) (en banc) (finding an insufficient showing of role of requested psychiatric expert in relation to behavior of defendant), *cert. denied*, 485 U.S. 1029 (1988); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987) (en banc) (finding that motion for inde-

also relevant to the issue. *Strickland* is not *directly* responsible for the undermining of the right to counsel, but its doctrine has played a part. The degree of *Strickland*'s damage to the rule of law, expressed in doctrines carefully developed over years, the quantity of unjust, even fatal, consequences fostered in individual cases, and the disservice done to the very essence of the relationship between attorney and client, combine to issue their own trumpet call for response. We do no honor to an honorable profession if we ignore that call.

II. THE DESTRUCTIVE LEGACY OF *STRICKLAND V. WASHINGTON*²³

A. *Background: Presence v. Performance*

To appreciate the denigration of the right to counsel accomplished by *Strickland*, it is instructive to examine the old and familiar right to counsel cases with a new eye. The hypothetical indictment of *Strickland* provides a useful guide. What did these landmark prior cases indicate about the difference between the right to the presence of counsel and the right to effective assistance of counsel? How were the constitutional claims characterized and evaluated?

1. *Powell to Gideon*

a. *Is Powell in the Right Pigeonhole?*

Constitutional inquiry of the right to counsel usually begins with *Powell v. Alabama*,²⁴ the famous "Scottsboro Boys" capital rape cases. *Powell* could have been put in the "actual ineffectiveness" pigeonhole had *Strickland* been decided when *Powell* arose. Had *Strickland* been already decided, appellants in *Powell* probably would have lost.

pendent forensic experts was insufficient as to type of expert and roles they would play), *cert. denied*, 481 U.S. 1054 (1987).

Perhaps more importantly, the Court ignored the relationship between *Strickland* and *Ake*. *Strickland* did not discuss resources. *Ake* did not discuss what lawyers do or fail to do to secure resources and what use is made or not made of them if they are provided.

A very few states, in capital cases, mandate the provision of adequate resources to the defense by rule or statute. *See, e.g.*, TENN. SUP. CT. R. 13 § 2(B)(10) (stating that appointment of counsel is to be accompanied by provision of investigators, social service workers, mental health professionals, forensic experts, and other support services reasonably necessary for presentation of an adequate defense at every stage of the proceedings).

²³ 466 U.S. 668 (1984).

²⁴ 287 U.S. 45 (1932).

Powell was the first instance in which the United States Supreme Court reversed a state conviction because of unfair trial procedures.²⁵ The case was a consolidated appeal of seven young black out-of-state defendants who had been tried and sentenced to death within two weeks of the alleged rape of a white woman.²⁶

In the important search for guidance on the distinction between presence of counsel and performance of counsel, *Powell* is somewhat ambiguous. *Powell* is commonly viewed as a case in which capital defendants were denied the "effective appointment" of counsel at trial for either or both of two related reasons. First, the issue in *Powell* might be seen as an outright denial of counsel—a failure to appoint an attorney with responsibility for the fate of the clients. The trial court appointed the entire local bar to represent defendants at arraignment and to "continue to help them" if no counsel of record appeared at trial.²⁷ Whether there was ever formal appointment of counsel of record is unclear. A murky colloquy with the trial judge reveals that a Mr. Roddy from Chattanooga, Tennessee, not licensed in Alabama, declined to appear formally but wanted to "stay in" and not be ruled out of the case.²⁸ The colloquy further reveals that one Milo Moody, of the local bar, was apparently willing to be counsel of record if Mr. Roddy was not appointed.²⁹ Mr. Parks of the local bar, however, was apparently not happy about any obligation being placed on the bar as a whole.³⁰ Properly observing that what is everybody's duty is in fact nobody's duty, the Supreme Court stated that a proper appointment had not been made.³¹

Powell, however, is not a simple denial of counsel case and would not be viewed by the Court as such if it arose today. The Court in *Powell* made clear that its concern about the amorphous nature of the formal appointment was grounded in the belief that defendants did not have the actual assistance of counsel during the brief period between arraignment and trial.³² Further, the language of the issue on certiorari, to which the Court confined itself,

²⁵ LEWIS, *supra* note 1, at 108. There was an earlier case from Arkansas similar to *Powell* arising from a massive community uproar at the time of trial. In the Arkansas case, the Court did not reverse directly but did provide defendants with access to the federal courts. *Moore v. Dempsey*, 261 U.S. 86 (1923).

²⁶ *Powell*, 287 U.S. at 49-50. The case involved nine original defendants. *Id.* at 74 (Butler, J., dissenting). On the State's motion, four separate trials were conducted. *Id.* (Butler, J., dissenting). At the time of the opinion, two of the nine original defendants had gained relief in the Alabama court system. *Id.* (Butler, J., dissenting). Each trial that resulted in a conviction, however, did not last more than a day. *Id.* at 50.

²⁷ *Id.* at 47.

²⁸ *Id.* at 54.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 56.

³² *Id.* at 57.

was whether the accused were "denied the right of counsel, *with the accustomed incidents of consultation and opportunity of preparation for trial.*"³³ Finally, the holding of the case strongly suggests that the appointment of counsel was "ineffective" largely because of direct state interference with the ability of counsel to *perform* as the Constitution required. The Court stated that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."³⁴

If, however, *Powell* is to be seen as a species of direct state interference with counsel's function because of late appointment, then the *performance* of counsel cannot be overlooked. Today, performance review is dispositive of the late appointment right to counsel claim. The modern Court has refused to recognize as a per se violation of the right to counsel the brevity of *any* period available for trial preparation, or even to hold that defendants are entitled to an evidentiary hearing on the issue.³⁵ Instead, the Court has insisted that claims based on late appointment and impairment of preparation must be judged by evaluating the attorney's performance, as well as the nature and strength of the prosecution's case, under the *Strickland* standard.³⁶

If the actual performance of counsel had been relevant in *Powell*, as it would be today, then the seldom-cited dissenting opinion of Justice Butler in *Powell*,³⁷ and the opinions of the Alabama Supreme Court in *Patterson v. Alabama*,³⁸ *Powell v. Alabama*,³⁹ and *Weems v. Alabama*,⁴⁰ are most in-

³³ *Id.* at 50 (emphasis added).

³⁴ *Id.* at 71.

³⁵ *Chambers v. Maroney*, 399 U.S. 42, 54 (1970).

³⁶ *United States v. Cronin*, 466 U.S. 648 (1984); *see also infra* text accompanying notes 173-89. It is ironic that Justice Stevens in *Cronin* cited and described *Powell* at length as the paradigm of a case in which the circumstances of the appointment of counsel and the rush to trial were so presumptively in violation of the right to counsel that "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." *Cronin*, 466 U.S. at 660-61. The statement is ironic because *Cronin* earlier defined the right of the accused to counsel as no more than the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. As will be demonstrated, the attorneys who appeared for the Scottsboro Boys, however ambiguous their formal status, probably provided the testing required by today's standards. *See infra* text accompanying notes 315-412. In any event, *Cronin* demonstrates that actual performance of counsel, not discussed by the *Powell* majority, is today the critical issue in late appointment cases.

³⁷ *Powell*, 287 U.S. at 73 (Butler, J., dissenting).

³⁸ 141 So. 195 (Ala.) (affirming conviction and death sentence), *rev'd*, 287 U.S. 45 (1932).

³⁹ 141 So. 201 (Ala.), *rev'd*, 287 U.S. 45 (1932). Consolidated with the appeal of Ozie Powell were the appeals of William Roberson, Andy Wright, Olen Montgomery, and Eugene Williams. *Id.* at 203. All convictions and death sentences were affirmed, except that of Williams, whose case was reversed and remanded with instructions to

structive. These opinions strongly suggest that any claim that the representation actually afforded by Messrs. Roddy and Moody was constitutionally insufficient would fail the *Strickland* tests.

The above argument is not to suggest that the defense in *Powell* was a model of competence. Many of the acts and omissions of counsel were at best questionable. The most significant error may have been the failure to request a continuance.⁴¹ Such a failure, however, has yet to sustain a claim of ineffective assistance of counsel.⁴² Counsel in *Powell* also failed to preserve some issues for appeal, but these failures were relatively unimportant in light of Alabama's plain error rule.⁴³ In contrast, the *Strickland* doctrine permits counsel to default a literally life-saving issue in a capital case without being deemed ineffective.⁴⁴ It should also be noted that a dissenting

determine if he was amenable to retrial as an adult, or was a juvenile under sixteen years of age. *Id.* at 213.

⁴⁰ 141 So. 215 (Ala.) (affirming convictions and death sentences), *rev'd*, 287 U.S. 45 (1932). The appeal of Charlie Weems was consolidated with that of Clarence Norris. *Id.* at 216.

⁴¹ *Powell*, 287 U.S. at 48 (argument of the Alabama Attorney General). The Alabama Attorney General further noted, correctly, that capable counsel had conferred with the defendants prior to trial. *Id.* The Supreme Court of Alabama confirmed that at least Mr. Moody had enjoyed a "long and successful experience in the trial of criminal as well as civil cases." *Powell*, 141 So. at 213. Thus, there was at least circumstantial evidence that counsel would have recognized the need for a continuance had it existed. Further, there is no record of the information imparted to counsel at their meetings with defendants. *Strickland* makes this circumstance quite relevant: "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

Modern standards thus cast doubt on a major underpinning of *Powell*'s holding: Neither [defense counsel] nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.

Powell, 287 U.S. at 58.

⁴² Nor is it likely to. In *Avery v. Alabama*, 308 U.S. 444 (1940), defense counsel did request a continuance to avoid trial three days after they were appointed. *Id.* at 447-48. Noting the fine performance of the attorneys at trial, the Court found no constitutional error in denial of the request. *Id.* at 453. *Avery* is cited with approval in *Cronic*, 466 U.S. at 661.

⁴³ See, e.g., *Powell*, 141 So. at 204 (no timely challenge to sufficiency of indictment at trial, but court ruled on the issue). The court also ruled on the merits of the defaulted claim that blacks were systematically excluded from venire. *Id.* at 210.

⁴⁴ *Smith v. Murray*, 477 U.S. 527 (1986) (holding that under *Strickland* there was no ineffective assistance and that the federal courts properly refused to hear petitioner's meritorious claim of error because his counsel defaulted the claim under Virginia law

justice of the Alabama Supreme Court considered the defense to have been more pro forma than zealous, in large part because counsel waived closing argument.⁴⁵

However, it is assessment of those things that counsel did in defense of their clients that leads to more than a suspicion that the convictions and sentences in *Powell* would not be set aside based on the right to counsel issue if the cases arose today, *provided* that the evaluation was confined to evidence appearing in the record.⁴⁶ The dissenting opinion of Justice Butler and the opinions of the Alabama Supreme Court indicate that defense counsel:

1. Conducted a successful defense of one of the defendants at trial—Roy Wright was not convicted.⁴⁷

by failure to raise the claim on direct appeal, even though the claim was raised at trial). The Court in *Smith* accepted the trial counsel's assertion that he had chosen not to include the federal Fifth Amendment claim because it was unlikely to succeed in the Virginia Supreme Court. *Id.* at 531-32. The Court later characterized the winnowing of weaker claims and focusing on those more likely to prevail as "the hallmark of effective appellate advocacy." *Id.* at 536. Whatever the truth of this statement in non-capital cases, it is the *worst* advice any attorney could be given in death penalty litigation. Justice Stevens, in his dissent, characterized Smith's claim of error as unquestionably meritorious. *Id.* at 539 (Stevens, J., dissenting). No part of the majority opinion questioned Justice Stevens' assertion. Michael Smith was executed on July 31, 1986. *Execution Update*, Death Row, U.S.A. (NAACP Legal Defense and Education Fund) 693 (Fall 1994) [hereinafter *Execution Update*]. The Court decided *Smith* in the context of habeas corpus proceedings. The same rule would apply on certiorari, however, with the Court declining to decide claims not properly presented to and decided by the state courts. *See, e.g.,* *Riggins v. Nevada*, 112 S. Ct. 1810, 1814 (1992).

⁴⁵ *Powell*, 141 So. at 214 (Anderson, C.J., dissenting).

⁴⁶ The "record," where effective assistance at trial is at issue, refers to the record compiled by trial counsel themselves and supplemented or challenged only with further evidence and submissions from different defense counsel in state or federal collateral proceedings. It should be remembered, however, that there are severe limitations on presentation of new facts for the first time at federal habeas proceedings, *see* *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992), and that any failure of habeas counsel to conduct a proper investigation, develop an issue, or otherwise render competent representation is not redressable at all under the Sixth Amendment. There being no right to counsel in collateral proceedings, there is no right to effective assistance of counsel. *Coleman v. Thompson*, 501 U.S. 722 (1991).

⁴⁷ *Powell*, 287 U.S. at 74 (Butler, J., dissenting); *Patterson*, 141 So. at 198. Wright was also called as a witness in Patterson's trial and gave evidence favorable to Patterson. *Id.*

A look beyond the record puts counsel in a less favorable light. Wright was only thirteen years old. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 48 (1969). He could not be tried as an adult unless waiver proceedings were brought. *Id.* Roddy refused a prosecution offer for Wright to plead guilty and be sen-

2. Conducted a rigorous cross-examination of prosecution witnesses, particularly of the alleged victim Victoria Price.⁴⁸
3. Met and conferred with the clients prior to the trial.⁴⁹
4. Filed, argued, and supported with evidence a motion for change of venue.⁵⁰
5. Made and preserved objections to particular testimony and to allowing certain prosecution witnesses to testify.⁵¹
6. Moved for a special venire.⁵²
7. Filed a timely motion for a new trial.⁵³
8. Raised the ultimately successful claim that defendant Eugene Williams might be a juvenile and therefore not subject to the trial court's jurisdiction.⁵⁴

tenced to life in prison, but agreed to keep the defense brief. *Id.* In spite of the fact that the prosecutor did not ask for the death penalty, seven jurors voted for death. *Id.* The jury could not agree and a mistrial was declared. *Id.*

⁴⁸ *Powell*, 287 U.S. at 75 (Butler, J., dissenting); *Weems*, 141 So. at 217; *Powell*, 141 So. at 213; *Patterson*, 141 So. at 197. The cross-examination was on what later turned out to be the right theory, that Victoria Price and her companion Ruby Bates were women of less than virtuous character and were no strangers to sexual intercourse. CARTER, *supra* note 47, at 26-28, 36. The line of questioning, however, was inconsistent with the defendants' claim of *no* intercourse, and the possibility that the women had intercourse with several white youths, who were also on the train where the incident allegedly occurred, was not even suggested. *Id.* at 11-50. Again, it was only after the Supreme Court granted relief that further investigation suggested merit in this line of defense. *Id.* at 26-27, 36, 228-31.

⁴⁹ *Powell*, 287 U.S. at 75 (Butler, J., dissenting).

⁵⁰ *Id.* (Butler, J., dissenting); *Powell*, 141 So. at 205; *Patterson*, 141 So. at 196. Witness preparation on this issue, however, was far from perfect. The National Guard had been brought in because of the uproar over the charges, *see* CARTER, *supra* note 47, at 20-21, and one of its officers was called in support of the change of venue motion, *Powell*, 141 So. at 207. His testimony was not at all helpful to the defendants, *see id.*; CARTER, *supra* note 47, at 24, nor was the testimony of the Sheriff, *see Powell*, 141 So. at 207; CARTER, *supra* note 47, at 23-24.

⁵¹ *Weems*, 141 So. at 218; *Powell*, 141 So. at 209. Defendants objected to permitting Ruby Bates to testify. *Weems*, 141 So. at 218. Although the indictments charged only the rape of Victoria Price, *Powell*, 141 So. at 204, the evidence tended also to show the rape of Ruby Bates, *Weems*, 141 So. at 218.

⁵² *Patterson*, 141 So. 197.

⁵³ *Powell*, 141 So. at 209. This action apparently permitted the counsel who later took over the direct appeal to amend the motion. *Id.*; *Powell*, 287 U.S. at 76 (Butler, J., dissenting).

⁵⁴ *Powell*, 141 So. at 212.

Whether the performance of counsel for the Scottsboro Boys was "reasonable[] under [then] prevailing professional norms" and not "outside the wide range of professionally competent assistance"⁵⁵ is debatable, though it is never debated. However, when the case is examined under *Strickland*'s second prong, requiring a showing by the defendant that but for counsel's errors there is a reasonable probability that the outcome would have been different,⁵⁶ the odds against the Alabama defendants get much longer. *Strickland* invites reviewing courts to skip evaluation of attorney performance altogether and go directly to this second requirement.⁵⁷

If the minimum constitutional requirements of the right to counsel are to be defined in large part by consideration of the strength of the evidence, as determined only from the record, then the considerable weight of evidence at trial against the Scottsboro Boys might today seal their fate. In addition to direct evidence from the alleged victims, there was forensic testimony of multiple incidents of intercourse, and of bruises and scratches on their bodies.⁵⁸ Further, and most damaging, the defendants testified against one another. Roy Wright identified Eugene Williams and Clarence Norris as having a knife, and stated that he saw five other co-defendants commit the rape.⁵⁹ In a separate trial, Clarence Norris testified that he saw his co-defendant Charlie Weems rape one of the girls.⁶⁰

The finger pointing among defendants in *Powell* may suggest that the proper right to counsel pigeonhole in which to place *Powell* is really the one relating to multiple client conflicts of interest. There is no suggestion in the opinions that anyone except Roddy or Moody acted for defendants at trial.⁶¹ The Supreme Court has said that defendants are entitled to representation free of actual conflicts of interest.⁶² When, at the habeas stage, counsel defend their multiple representation at trial, however, the scope of even this seemingly self-apparent right is not clear.⁶³

⁵⁵ *Strickland*, 466 U.S. at 690.

⁵⁶ *Id.* at 694.

⁵⁷ The Court in *Strickland* stated:

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697.

⁵⁸ *Weems*, 141 So. at 218; *Patterson*, 141 So. at 198.

⁵⁹ *Patterson*, 141 So. at 198-99.

⁶⁰ *Weems*, 141 So. at 220.

⁶¹ Defense counsel Roddy was apparently surprised by the testimony of Norris and tried to repair the damage. CARTER, *supra* note 47, at 33-34. He did not, however, raise the conflict of interest issue. *Id.*

⁶² *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978).

⁶³ *Burger v. Kemp*, 483 U.S. 776 (1987) (accepting explanation of counsel who filed

The point of this examination of *Powell* is most definitely *not* to suggest that the state of Alabama has been wronged by the popular view of the Scottsboro cases, or that the defendants received adequate representation. Subsequent investigation by organizations, academics, lawyers, and journalists refutes the picture painted in the official record.⁶⁴ These investigations have revealed the climate of racial prejudice and intimidation in which the trials were conducted.

The investigations also revealed other facts important to *Strickland* analysis. The prosecutor may have made promises and threats to some defendants to encourage them to turn on others.⁶⁵ Stephen Roddy was drunk when he got to the courthouse on the day of trial;⁶⁶ he had spoken with the defendants for no more than half an hour;⁶⁷ his change of venue motion was half-hearted and ill-prepared.⁶⁸ Milo Moody was almost seventy and getting forgetful.⁶⁹ The law, however, has never required and does not encourage the exhaustive investigation that revealed these facts. Judgments about lawyering are confined to trial, appellate, and collateral proceeding records compiled and presented by lawyers. That the Scottsboro defendants received a fair trial, including adequate representation and meaningful state appellate review, is not the real truth. If the case arose today, however, it might be seen as the operative legal truth if the reviewing court chose to see the issue not as a flat denial of counsel, which it is not, or as a case of direct interference with counsel's function, which it might not be, but as a question of attorney performance to be evaluated from the official record according to *Strickland*'s standards. Stated more simply, the point is that the possibility that the actual performance of Roddy and Moody might be constitutionally sufficient today demonstrates graphically the magnitude of *Strickland*'s destructive legacy. Putting *Powell* in the performance pigeonhole of the right to counsel could well mean that we have gone *backward* in the sixty years since *Powell* was decided.

b. *Betts*: *Strickland* I

Just as *Powell* provides background on the critical distinction between the presence of a lawyer at trial and the effective assistance of counsel, *Betts v. Brady*⁷⁰ provides similar assistance in understanding how constitu-

appellate brief on behalf of two co-defendants where their relative culpability was at issue).

⁶⁴ A thoroughly documented account of the entire history of the case is found in CARTER, *supra* note 47.

⁶⁵ *Id.* at 74.

⁶⁶ *Id.* at 22.

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 24.

⁶⁹ *Id.* at 18.

⁷⁰ 316 U.S. 455 (1942) (holding that due process does not require appointment of

tional doctrines influence and shape the way right to counsel claims are characterized and evaluated. To understand the doctrine of "incorporation" as treated in *Betts*, how *Gideon* sought to overrule that treatment, and how *Strickland* has revived that treatment, a final look back at *Powell* is helpful.

If *Powell* can be faulted for a certain lack of clarity in defining the exact component of the right to counsel doctrine upon which it rested, it must also be faulted for some degree of ambiguity in its doctrinal basis. The Court acknowledged prior decisions which established that not every guarantee set out in the Bill of Rights was applicable to the states as a part of the Due Process Clause.⁷¹ From these prior decisions, however, the Court concluded that *some* guarantees of the Bill of Rights could be applicable to the states—those that were "fundamental."⁷² In this apparent endorsement of "selective incorporation," the Court presaged its approach in an important case five years later,⁷³ as well as the ultimate outcome of the "incorporation" battle within its ranks.⁷⁴ Rhetorically, the Court came close to the conclusion that the Sixth Amendment right to counsel is incorporated into the Fourteenth Amendment Due Process Clause:

The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with

counsel in every case).

⁷¹ *Powell v. Alabama*, 287 U.S. 45, 65-68 (1932). Specifically mentioned were *Hurtado v. California*, 110 U.S. 516 (1884) (holding that Fifth Amendment grand jury indictment requirement was not applicable to states), and *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that Fifth Amendment privilege against self-incrimination was not applicable to states).

⁷² Quoting *Twining* the Court stated:

[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

Powell, 287 U.S. at 67-68 (quoting *Twining*, 211 U.S. at 99 (citations omitted)).

⁷³ *Palko v. Connecticut*, 302 U.S. 319 (1937) (holding that Fifth Amendment double jeopardy guarantee, as violated in this case, was not incorporated into Fourteenth Amendment's Due Process Clause but that guarantees may be applicable, however, if of such a nature as to be "implicit in the concept of ordered liberty").

⁷⁴ See *infra* text accompanying notes 262-314.

in another part of the federal Constitution.⁷⁵

Powell then described the historical bedrock nature of meaningful opportunity to be heard as a component of due process and declared "the guiding hand of counsel" to be a part of it at every step of the proceedings.⁷⁶ It is important to note that this discussion is about institutional responsibility to provide basic guarantees and about the capabilities and relationships of attorneys and clients. No mention is made of outcome determination, harmless error, or the weight of evidence in a given case.

The *Powell* majority, however, perhaps inadvertently, opened the door for *Betts*, and later *Strickland*, by emphasizing that the failure to make an "effective appointment" of counsel was fundamental error because of the particular circumstances of the case—the ignorance and illiteracy of the defendants, their distance from friends and family, the atmosphere of public hostility, and the capital charge.⁷⁷ "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine," stated the Court.⁷⁸ The Court used a general Fourteenth Amendment due process analytical framework, whose practical implications are quite different from "selective incorporation."

The implicit limitation on *Powell*'s holding defeated the claim of Smith Betts. Betts was a farm laborer in rural Carrol County, Maryland, demonstrably too poor to retain counsel for his defense against a charge of robbery.⁷⁹ His request for appointment of counsel was denied.⁸⁰ A bench trial was conducted at which the issue was simple, as it is in most robbery cases: identity versus alibi.⁸¹ Betts cross-examined the prosecution witnesses and examined his own witnesses.⁸² Betts was convicted and sentenced to eight years in prison.⁸³ When the case reached the Supreme Court on the right to counsel claim, the majority upheld the denial.⁸⁴ Several aspects of the opinion would reappear, explicitly or implicitly, more than forty years later in *Strickland*:

1. The Sixth Amendment is *not* incorporated into Four-

⁷⁵ *Powell*, 287 U.S. at 67 (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

⁷⁶ *Id.* at 68-69.

⁷⁷ *Id.* at 71.

⁷⁸ *Id.*

⁷⁹ *Betts*, 316 U.S. at 456-57.

⁸⁰ *Id.* at 457.

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Id.* at 456-57.

⁸⁴ *Id.* at 473.

- teenth Amendment due process.⁸⁵
2. Due process is a concept "less rigid and more fluid" than those envisaged in the particular Bill of Rights guarantees. Accordingly, due process violation claims must be evaluated on a "shock the conscience" basis in light of the totality of circumstances in a given case.⁸⁶
 3. It is possible for those denied counsel to gain relief under the general due process rubric, but only if they bear the burden of establishing from the record that (a) their performance as their own counsel was deficient because of the complexity of the case, their limited intelligence, or similar factors, and (b) that these factors put them at a "serious disadvantage."⁸⁷
 4. Evaluation of right to counsel claims is to be conducted retrospectively by appellate courts looking at the trial record.⁸⁸

Betts received negative commentary from the time it was decided. Although the Supreme Court stuck with *Betts* for a time,⁸⁹ Anthony Lewis suggests that the avalanche of scholarly criticism may have resulted in a de facto abandonment of *Betts* a decade before *Gideon*.⁹⁰ *Betts* was overruled,

⁸⁵ *Id.* at 461-62.

⁸⁶ "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.* at 462.

⁸⁷ *Id.* at 472-73. The majority agreed with the state court that *Betts* was not unfamiliar with criminal procedure and had been able to take care of his own interest in this relatively simple case. *Id.* at 472.

⁸⁸ On a record consisting of some stipulated facts and the evidence taken at trial, a Maryland habeas court denied *Betts*' claim. *Id.* at 457. From this record, the Supreme Court evaluated *Betts*' performance as his own attorney and upheld the denial. *Id.* at 472-73. In dissent, Justice Black pointed out the unworkability of this analysis: "Whether a man is innocent cannot be determined from a trial in which . . . denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented." *Id.* at 476 (Black, J., dissenting).

Forty-two years later, the same point, equally valid, was made about retrospective evaluations of the performance of counsel:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. . . . The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).

⁸⁹ See, e.g., *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Foster v. Illinois*, 332 U.S. 134 (1947).

⁹⁰ LEWIS, *supra* note 1, at 117-22. The last decision upholding denial of counsel un-

but was later exhumed and lives again in *Strickland*.

c. Gideon: "*Your Presence is Required*"

Clarence Earl Gideon, a fifty-one year old Caucasian, not violent but described as "tossed aside by life" and a "used up man," was tried and convicted by a six-person all male Florida jury for the offense of breaking and entering with intent to commit petty larceny.⁹¹ His habeas petition, seeking relief from a five year sentence, became the vehicle for unanimously overruling *Betts* and imposing the requirement that counsel be appointed in serious criminal cases.⁹²

Doctrinally, the opinion of Justice Black, drawing on *Powell*, is a straightforward "selective" incorporation of the Sixth Amendment right to

der the *Betts* formula was *Quicksall v. Michigan*, 339 U.S. 660 (1950). LEWIS, *supra* note 1, at 191.

Not the least of the *Betts* problems was inconsistency. Lewis cited, as examples, two cases decided on the same day with opposite results. They were *Gryger v. Burke*, 334 U.S. 728 (1948), and *Townsend v. Burke*, 334 U.S. 736 (1948). LEWIS, *supra* note 1, at 119. Gryger's claim was that the trial judge had erroneously concluded that state law required a life sentence rather than a lesser term. *Gryger*, 334 U.S. at 731. The Court found no fundamental error in the absence of counsel to correct the error. *Id.* Townsend's claim was that the sentencing judge mistakenly believed that two earlier acquittals in his record were convictions. *Townsend*, 334 U.S. at 740. The Court held that an attorney was required. *Id.* at 740-41.

Adjusting the facts of *Gryger* hypothetically, and focusing on the performance of counsel rather than whether counsel was present at all, illustrates the progress of justice, or lack of it, today. Suppose the trial judge had erroneously concluded that the law required Gryger to be sentenced to *death*. Suppose further that counsel had been appointed for Gryger, but counsel was so incompetent as not to know that the law at the time had authoritatively been interpreted not to require such a sentence. Had counsel known the law and cited it to the court, Gryger would not have been sentenced to death and no appeal by the state of a lesser sentence would have been allowed. Finally, however, suppose that four years later, while Gryger sought habeas relief from his death sentence, the law changed, validating the judge's original view. Today, Gryger would be better off if counsel had been denied and he had been left to defend himself in a capital case. He would surely gain relief under *Gideon*. Once this incompetent attorney appeared, however, on these facts Gryger would be denied relief under *Strickland*'s second prong as was the case in *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993). See *infra* text accompanying notes 307-14.

⁹¹ LEWIS, *supra* note 1, at 7, 59-60, 101.

⁹² *Gideon v. Wainwright*, 372 U.S. 335 (1963). Construction of the Sixth or Fourteenth Amendments to require *appointment* of counsel for indigents under any circumstances, though not seriously contested in the trilogy of cases discussed in this section, was nevertheless an important step. Not disputed is an assertion by the *Betts* majority that the Sixth Amendment was probably a response to English common law bans on even retained counsel. *Betts v. Brady*, 316 U.S. 455, 466 (1942). Not until an 1836 statutory change in that country was counsel permitted to defend felony cases. *Id.*

counsel into Fourteenth Amendment due process because of the fundamental nature of the right.⁹³ Such an analysis necessarily repudiated the *Betts* formula that, in effect, permitted a determination that denial of counsel was harmless and placed the burden on prisoners to prove that it was not.

Practically, the saga of Clarence Gideon also tells an important story about the performance of attorneys and the importance of investigating the quality of that performance. At Gideon's first trial by jury, one Henry Cook testified that he returned to Panama City after being out all night at a dance in Apalachicola, that he saw Gideon in Ira Strickland's pool room at 5:30 a.m., that Gideon came out with a pint of wine in hand, made a phone call, and a little later got into a taxi.⁹⁴ Cook further testified that after observing these events he went back to the pool room, saw evidence of a break-in, and notified the police.⁹⁵ Gideon made an opening statement, cross-examined Cook and Ira Strickland, presented eight witnesses of his own, and made a closing argument emphasizing his innocence.⁹⁶ Gideon was convicted and sentenced to prison for five years.⁹⁷ The Supreme Court observed that Gideon conducted his defense about as well as could be expected from a layman,⁹⁸ while the trial judge went further and opined that Gideon did "as well as most lawyers could in handling his case."⁹⁹ If a lawyer had been present and done what Gideon did, it is doubtful that Gideon could later have successfully demonstrated that but for what the lawyer *did not* do there was a reasonable probability that the outcome would have been different.

In modern Gideons' cases, in which incompetent counsel are appointed, we are left to speculate on the effect competent lawyering might have had. Because he was denied *any* lawyer, however, the landmark Supreme Court

⁹³ *Gideon*, 372 U.S. at 336-45. Justice Douglas concurred, asserting that the theory of full incorporation was still open and that guarantees incorporated piecemeal were nevertheless applicable to the states by the same standard that applied to the federal government. *Id.* at 345-47 (Douglas, J., concurring). Justice Clark concurred in the result because the Court had already found counsel essential to due process in capital cases and the Fourteenth Amendment contained no meaningful distinction between denials of "life" and "liberty." *Id.* at 347-49 (Clark, J., concurring). Justice Harlan also concurred but wrote that *Betts* was entitled to a more respectful burial. *Id.* at 349 (Harlan, J., concurring). He pointed out that it was legitimate for the Court in *Betts* to recognize that special circumstances had played a role in *Powell*, but that the test set out in *Betts* for determining the presence of those circumstances was confusing, had brought the Court into disrepute, and should be abandoned. *Id.* at 351 (Harlan, J., concurring). The concurrence specifically rejected the incorporation of the Sixth Amendment as a proper basis for the result. *Id.* at 349-52 (Harlan, J., concurring).

⁹⁴ LEWIS, *supra* note 1, at 58.

⁹⁵ *Id.* at 60-61.

⁹⁶ *Gideon*, 372 U.S. at 337.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ LEWIS, *supra* note 1, at 165.

decision resulted in a new trial for Clarence Gideon. We are thus permitted to compare superficial lawyering with effective assistance of counsel.

Prior to the retrial, two Miami attorneys, Tobias Simon with the ACLU, and Irwin Block agreed to represent Gideon.¹⁰⁰ He had no confidence in them and, ironically, was ready to represent himself again, but he was able to secure appointment of a local attorney he preferred, W. Fred Turner.¹⁰¹

Although the judge denied him a continuance, Turner spent three days interviewing witnesses.¹⁰² Because of this investigation, Turner knew how to cross-examine Henry Cook effectively. In addition to an innocent explanation for Gideon's presence, Turner was able to show that it was unlikely that Gideon was carrying any of the fruits of the larceny, and more likely that Cook himself, looking for beer after all the stores closed in Apalachicola, was the person who committed the crime.¹⁰³ Gideon was acquitted.¹⁰⁴

Thus, it can be seen that landmark decisions about the right to have counsel present at trial were not and could not be free from evaluation of or

¹⁰⁰ *Id.* at 224-25.

¹⁰¹ *Id.* at 236-37. If Gideon were tried today, he would find that, in spite of the rhetoric of *Powell* and *Gideon* about the fundamental necessity of the "guiding hand of counsel," he has a Sixth Amendment right to represent himself. *Faretta v. California*, 422 U.S. 806 (1975). He would also find that, with the possible exception of California, states are not obligated to and have not elected to provide indigent defendants with counsel of their choice. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 11.4 (2d ed. 1992).

¹⁰² LEWIS, *supra* note 1, at 238.

¹⁰³ *Id.* at 236-37.

¹⁰⁴ *Id.* at 239-50. Turner's representation also presents an interesting twist on conflict of interest, but one for which the state apparently has no remedy upon an acquittal. Turner knew a lot about Henry Cook because he had represented Cook several times, including once on a robbery charge. *Id.* at 250.

An anecdote, perhaps true but perhaps a liberty taken by the screenwriter from the transcript of the retrial, illustrates the effectiveness of investigation and preparation by Turner at a level plainly not required of attorneys today by either the courts or the profession. In the film version of the case, Preston Bray, the cab driver who took Gideon from the scene was called by the prosecution. He testified that Gideon told him: "Just remember you haven't seen me. Don't tell anybody you saw me." Anthony Lewis, *The History of Gideon v. Wainwright: A Journalist's View*, 10 PACE L. REV. 384, 385 (1990). Although this is damaging, a tactical decision not to investigate this disinterested witness, or even not to cross-examine him would hardly be characterized as ineffective assistance today. But here is what followed:

Turner: "Mr. Bray, Did Gideon ever say that to you before?"

Bray: "Yes, he says it all the time."

Turner: "Mr. Bray, why do you suppose he says that?"

Bray: "I think it's woman trouble."

Turner: "I guess we know about that."

Id. at 385-86.

speculation about counsel's performance. *Gideon* established the right to the presence of an attorney, and did so through an absolute constitutional doctrine that admitted of no flexibility and eschewed harmless error inquiry. How was the intertwined question of performance separated out to the detriment of *Gideon*'s promise? Answering that question begins with examining the difference between the Court's rhetoric and its actual treatment of the proposition that defendants have a right to the *effective assistance* of counsel.

2. *The Not-So Established Right to Effective Assistance*

Given *Gideon*'s doctrinal approach to denials of the presence of counsel, it would be extremely difficult for the Court to facilitate the rejection of Sixth Amendment claims by prisoners if the right to have counsel present was equated with the right to have counsel give effective assistance. Determinations that effective assistance had been denied would, of course, be more complex than determinations that counsel had been denied altogether. Determining presence or absence is simpler than evaluating performance. Nevertheless, once the constitutional breach was established, relief would have to follow in both cases. It is only by dividing the right to counsel and putting the components in different doctrinal and procedural pigeonholes that the Court has been able to undermine *Gideon*.

That enterprise would be perhaps less surprising if, while engaged in it, the Court had not continued to insist that the right to counsel *is* the right to effective assistance of counsel. That is just what the Court has said, however, though the cases that say so are marvelous examples of the familiar difference between rhetoric and reality. In truth, at the time of *Strickland* the right to effective assistance of counsel was far from well established. This fact was not unimportant to the development of the unjust and unworkable *Strickland* framework for judging ineffective assistance claims. Even while giving lip service to prior rhetoric, the Court was able to pronounce its new standards by fiat.

After asserting that mere presence of a lawyer was constitutionally insufficient, the *Strickland* majority directly acknowledged its prior recognition that the right to counsel is the right to effective assistance by counsel.¹⁰⁵ The only case cited for this proposition was the one most often cited—*McMann v. Richardson*.¹⁰⁶ *McMann*, in the footnote cited in *Strickland*, indeed avers that in 1970 it had *long* been recognized that the right to counsel is the right to the effective assistance of counsel.¹⁰⁷

A closer look at *McMann* reveals a different story. First, petitioner Rich-

¹⁰⁵ *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).

¹⁰⁶ 397 U.S. 759 (1970).

¹⁰⁷ *Id.* at 771 n.14.

ardson lost.¹⁰⁸ The Court found that although his counseled guilty plea could have been influenced by the possibly erroneous advice he received about admissibility of his confession, counsel had performed within the range of competence demanded of attorneys in criminal cases.¹⁰⁹ Enforcement of the standard of competence, however, was wishfully assigned to trial judges.¹¹⁰ As fairly and competently as trial judges have striven to perform their other roles in the criminal justice system, it is nowhere argued that they have in fact become the guardians of defense counsel competence.

If *McMann*'s reality is suspect, so is its rhetoric. The footnote claiming the long history of parity between the right to counsel and the right to competent counsel cites several cases. None of them support the proposition. The oldest case cited was *Powell*, which we have seen hardly deals with assessing actual performance. The next cited case was *Avery v. Alabama*.¹¹¹ The rhetoric of *Avery* is moving. *Avery* spoke of the "peculiar sacredness" of the right to counsel.¹¹² *Avery* reminded us that "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."¹¹³ The reality of *Avery* is less moving. *Avery* was another Alabama death penalty case. Appointed defense counsel were forced to trial three days after appointment, even though both were involved with other trials in the interim, and even though *Avery*'s case involved issues of insanity and the murder/manslaughter distinction.¹¹⁴ Praising the actual performance of counsel under these circumstances, a unanimous Supreme Court denied the claim that the right to counsel had been violated.¹¹⁵

The next case cited by *McMann* was *Glasser v. United States*.¹¹⁶ Ironically, *Glasser* was a multiple-client conflict of interest case in which the Court, though discussing some questionable trial tactics, undertook no definitive assessment of counsel's performance and granted relief without considering the detrimental effect of any errors.¹¹⁷ In effect, the Court put *Glas-*

¹⁰⁸ *Id.* at 774-75.

¹⁰⁹ *Id.* at 770-75. There was also a preview of *Strickland*'s framework. Richardson was said to be bound by his guilty plea unless he could prove serious derelictions by counsel sufficient to show that his plea was not voluntary. *Id.* at 774. Obviously, a petitioner in Richardson's position who carried this burden would show that but for counsel's failures the outcome would have been different. Review of outcomes is, of course, more difficult when there has been a trial.

¹¹⁰ *Id.* at 771.

¹¹¹ 308 U.S. 444 (1940).

¹¹² *Id.* at 447.

¹¹³ *Id.* at 446.

¹¹⁴ *Id.* at 447-48.

¹¹⁵ *Id.* at 450, 452-53.

¹¹⁶ 315 U.S. 60 (1942).

¹¹⁷ *Id.* at 67.

Glasser wished the benefit of the undivided assistance of counsel Irrespec-

ser in what would be the *Gideon*, not the *Strickland*, analytical pigeonhole.

The final case cited in the *McMann* footnote, *Reece v. Georgia*,¹¹⁸ is perhaps the most instructive of all, in part because of another case decided the same day. *Reece* involved a simple claim by Amos Reece, another black defendant sentenced to death for rape of a white woman.¹¹⁹ The claim did not involve a complaint about the actual performance of his appointed counsel. Rather, the claim alleged that counsel was precluded from acting at all on a probably meritorious claim that negroes were excluded from the grand jury in Cobb County.¹²⁰ Georgia law required that objections to grand jury composition be made before an indictment was returned.¹²¹ Counsel for Reece was not appointed until one day after the indictment.¹²² The Supreme Court generously granted relief on *Powell* grounds, pronouncing grandly that "[t]he effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."¹²³

What would have been the result if counsel had been appointed in time to object to racial exclusion on the grand jury, but had failed to do so? How would the performance component of the right to counsel have been assessed? The answer is found in *Michel v. Louisiana*,¹²⁴ decided the same day as *Reece*. Although the grand jury challenge was plainly meritorious,¹²⁵ the Court refused to grant relief to yet another group of black prisoners sentenced to death for rape.¹²⁶ In response to the complaint of one co-defendant about the failure of his counsel to make the grand jury challenge, the Court cited the attorney's fifty years of experience and *general* reputation for competence, which included receipt of a plaque citing him as an "astute and honored criminal lawyer."¹²⁷ Twenty-three years after *Powell*, the Supreme Court was sounding a lot like the Alabama Supreme

tive of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Id. at 75-76.

¹¹⁸ 350 U.S. 85 (1955).

¹¹⁹ *Id.* at 86.

¹²⁰ *Id.* 87-88.

¹²¹ *Id.* at 88-89.

¹²² *Id.* at 86.

¹²³ *Id.* at 90.

¹²⁴ 350 U.S. 91 (1955).

¹²⁵ *Id.* at 102 (Black, J., dissenting).

¹²⁶ *Id.* at 92-102.

¹²⁷ *Id.* at 101 n.7.

Court in *Powell* when it praised Milo Moody as "an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases."¹²⁸

Respected authorities have accepted *McMann*'s often cited proposition.¹²⁹ On the issue of minimally acceptable trial performance, however, *McMann*'s citation is demonstrably not true. The right to effective assistance of counsel was not so well established at the time of *Strickland*. In spite of its own rhetoric, the Court at the time of *Strickland* was free to write on a blank page. Actual performance of counsel had seldom been the issue in the Court's most often cited cases. When it was the issue, defendants lost.¹³⁰ What has not been fully appreciated is that when the Court wrote on that page, it attempted to write out virtually everything *Gideon* stood for and reclaim everything possible of *Betts*.

B. Undermining the Right Through Doctrine

1. *Mother Strickland, Brother Cronin, and Son Burger*

Strickland announced an illogical and unworkable framework for evaluating whether the performance of defense counsel had fallen below a constitutionally required minimum.¹³¹ *United States v. Cronin*,¹³² decided the same day as *Strickland*, encouraged courts to characterize right to counsel claims as relating primarily to performance and therefore to evaluate them under the *Strickland* standard.¹³³ Both cases encourage passive reliance by defense counsel on investigations and "facts" developed by the government. *Burger v. Kemp*¹³⁴ demonstrated an early example of the kind of deficient

¹²⁸ *Powell v. Alabama*, 141 So. 201, 213 (Ala.), *rev'd*, 287 U.S. 45 (1932).

¹²⁹ See, e.g., LAFAYE & ISRAEL, *supra* note 101, § 11.7 (claiming that *Powell* was the first case to recognize the right to effective assistance, and that *Powell* and other cases cited established that the right extended to performance). Subsequent sections go on to examine the various pigeonholes into which the components of the right to counsel have been placed. The authors make no attempt, however, to explain or justify the critically important variations in doctrinal and procedural treatment of claims under these components. *Id.* §§ 11.7(d), 11.8-10. In fairness, however, neither did *Strickland* when it simply pronounced the rules for claims of deficient performance. See *infra* text accompanying notes 150-66.

¹³⁰ As has been seen, the basis for *Powell*'s holding is unclear, *Glasser* was a conflict of interest case, and *Reece* was a clear example of the state preventing effective assistance. Only *Avery* and *McMann* itself were decided as performance evaluations. In those cases, the prisoners lost.

¹³¹ See *infra* text accompanying notes 136-72.

¹³² 466 U.S. 648 (1984).

¹³³ See *infra* text accompanying notes 173-89.

¹³⁴ 483 U.S. 776 (1987).

lawyering that would come to be commonly approved under *Strickland* and *Cronic*.¹³⁵

It must be acknowledged that William Tunkey, appointed counsel for David Leroy Washington, faced a difficult task. Against Tunkey's advice, Washington had confessed and pled guilty to three brutal murders and waived the right to a jury, electing instead to be sentenced by the trial judge to either life in prison or death.¹³⁶ In one sense, however, Tunkey's task was simplified. There was nothing to defend on the question of guilt or innocence. The principal remaining value of the guiding hand of counsel at this point in *Strickland* was to maximize the chance that Washington would be sentenced to life in prison instead of death.

Motivated by what the Supreme Court would in retrospect determine was a sense of hopelessness, and a tactical decision to limit what the prosecution could present, counsel did virtually nothing with respect to the sentencing hearing.¹³⁷ On the issue of punishment, Tunkey conducted only the most cursory investigation, and presented no evidence.¹³⁸ Tunkey relied instead on an apparently favorable response by the trial judge during the plea colloquy to Washington's acceptance of responsibility for his acts, Washington's assertion that he had no significant prior record, and Washington's explanation that at the time of the crimes he had been under extreme stress caused by his inability to support his family.¹³⁹ In spite of counsel's arguments on these themes, the trial judge sentenced Washington to death.¹⁴⁰ The Supreme Court reversed the Eleventh Circuit's grant of re-

¹³⁵ See *infra* text accompanying notes 190-232.

¹³⁶ *Strickland v. Washington*, 466 U.S. 668, 671-72 (1984). For the details of Washington's crimes, see *Washington v. Florida*, 362 So. 2d 658, 660-61, 665 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). Washington's case arose in Florida, where the decision of a capital jury that defendant be sentenced to life in prison is a recommendation that can be, and often is, overridden by the trial judge in favor of death. See Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 32-33 (1985); Michael Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1411-13 (1985). Still, Florida case law requires that the trial judge not override a life recommendation unless facts calling for death are so clear that virtually no reasonable persons could differ. *Tedder v. Florida*, 322 So. 2d 908, 910 (Fla. 1975). Waiving the right to a jury trial was probably a bad choice by Washington, a choice which may have had at least a subconscious effect on the Court's evaluation of his right to counsel claim under the *Strickland* formula. Florida juries have recommended life in some quite aggravated cases. See, e.g., William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 18-22 (1988).

¹³⁷ *Strickland*, 466 U.S. at 672-74.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 675.

lief on Washington's right to counsel claim, finding both adequate performance by the attorney and absence of prejudice from any errors.¹⁴¹ Washington was executed two months later.¹⁴²

The doctrinal and logical framework established by *Strickland* is of paramount importance, but that framework is influenced by the Court's decidedly unrealistic view of trial practice. For that reason, a brief look at the lawyering approved by the Court in Washington's case is worthwhile. Counsel apparently knew little, and presented no evidence about, Washington's life and background.¹⁴³ For all that is known, then, Washington was physically or sexually abused as a child in a manner that bore some causal or explanatory relationship to the crimes he committed. Whether that is true will never be known because it was not investigated.¹⁴⁴ Similarly, because conversations with Washington gave no indication of psychological problems, and because defendant had been examined by the state, the Court excused counsel's failure to seek a psychiatric evaluation or otherwise investigate Washington's character and emotional state.¹⁴⁵

¹⁴¹ *Id.* at 700.

¹⁴² *Execution Update*, *supra* note 44, at 692.

¹⁴³ Tunkey spoke with Washington, and by telephone with Washington's wife and mother. *Strickland*, 466 U.S. at 672-73. He did not follow up on one effort to meet with them. *Id.* He declined to request a presentence report. *Id.*

¹⁴⁴ The Court has consistently held in capital cases that the sentencer may not be precluded from considering, and indeed must consider as mitigating, any aspect of the character and background of defendant or circumstances of the offense proffered as a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). For this reason, it is universally accepted among competent capital defense attorneys that every aspect of a client's life, from pre-birth to trial, must be investigated. See AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH-PENALTY CASES §§ 1.1, 11.4.1, 11.7.1 (1989). See generally William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273 (1990-91); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).

¹⁴⁵ *Strickland*, 466 U.S. at 673, 676-77. Aside from the common sense skepticism with which anyone might react to the proposition that a multiple murderer and kidnaper had no psychological problems, the record certainly does not settle the question. The statutory authority for the state ordered examination of Washington only extended to inquiry into his sanity and competency to stand trial. FLA. R. CRIM. P. 3.210 (1972) (sanity at time of offense and at time of trial); *id.* 3.211 (competency to stand trial); *cf.* VA. CODE ANN. § 19.2-264.3:1 (Michie 1990) (authorizing appointment of a mental health professional to assist defense in determining mitigating factors in capital cases).

Habeas counsel in *Strickland* did obtain psychiatric and psychological evaluations. *Strickland*, 466 U.S. at 673. Because the evaluations did not conclude that Washington, as he asserted at plea colloquy, was acting under extreme mental or emotional disturbance, but was only "chronically frustrated and depressed," the *Strickland* majority found no error. *Id.* at 675-76. In any event, said the Court, there was no prejudice be-

Habeas counsel presented fourteen affidavits of individuals who would have testified for Washington at sentencing.¹⁴⁶ The Court apparently held the view that the impact of the self-serving statements of a murderer was equal to the sworn testimony of fourteen people who were willing to go to bat for him knowing what he had done. The Court held that all the evidence alleged to have been overlooked would "barely have altered the sentencing profile presented."¹⁴⁷

Finally, at several points the Court lauded counsel for successfully moving to exclude Washington's "rap sheet," admission of which might have undermined his contention at the plea colloquy that he had no significant history of criminal activity.¹⁴⁸ The Court's opinion did not indicate whether this motion was made before another judge. It would be unusual if another judge had heard the prior conviction exclusion motion.¹⁴⁹ On the other hand, if the sentencing judge handled pretrial matters, as the opinion and customary practice suggest, then the successful motion gained only the dubious benefit of having the sentencer bound by law to put out of his mind the criminal record of which he had been made aware.

Minimal as it was, the representation afforded David Washington was far from the most deficient that would come to be approved under the standards established in *Strickland*. In addition to the shortcomings discussed in the sections that follow, *Strickland* is characterized by ad hoc pronouncements unsupported by prior law, unwarranted assumptions unsupported by empirical data, and a marked absence of plain logic.

The Court recognized that *Strickland* was the first case arising in the "actual ineffective assistance of counsel" pigeonhole.¹⁵⁰ The Court there-

cause the aggravating circumstances were so "overwhelming." *Id.* at 677; *cf.* Maynard v. Cartwright, 486 U.S. 356, 363 (1988) (reaffirming to trial and appellate courts that no particular set of facts, however shocking, are enough standing alone to justify imposition of the death penalty). The record does not reflect the breadth or quality of the examinations secured by habeas counsel. The counsel's performance in this respect is unreviewable. *See supra* note 46.

¹⁴⁶ *Strickland*, 466 U.S. at 675.

¹⁴⁷ *Id.* at 700.

¹⁴⁸ *Id.* at 673, 700.

¹⁴⁹ There is no requirement for a hearing before a different judge in the Florida rule governing pretrial motions and defenses, derived from the Federal Rules of Criminal Procedure. FLA. R. CRIM. P. 3.190. The grounds for disqualifying a judge are narrow, and apparently do not contemplate division of pretrial and trial matters. *Id.* 3.230.

¹⁵⁰ *Strickland*, 466 U.S. at 684. A useful history of lower court treatment of claims dealing with the performance of counsel up to the time of *Strickland* is found in Trapnell v. United States, 725 F.2d 149 (2d Cir. 1983). Citations from every federal circuit demonstrate that from the fifties until 1970, courts employed a standard that required a showing of ineffective assistance of a kind that "shock[ed] the conscience" and made the proceedings a "farce and mockery of justice." *Id.* at 151. By 1970, however, every circuit except the second had abandoned the "farce and mockery" standard and

fore felt free, after casually equating the right to counsel with the right to effective assistance of counsel, simply to pronounce that the purpose of the Sixth Amendment guarantee was not to improve the quality of legal representation, but only to ensure that a sufficient adversarial testing of the government's case takes place to permit confidence in the outcome.¹⁵¹ As Justice Marshall observed in dissent, this cramped vision of the purpose of the guarantee denies it the function of ensuring that even guilty persons are convicted only through fundamentally fair procedures.¹⁵²

Having thus pronounced this limited purpose of the Sixth Amendment guarantee, and thereafter adopting the "reasonably competent assistance" standard,¹⁵³ the Court pronounced the guarantee's relation to the standards of the legal profession: "The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."¹⁵⁴

This is a remarkable statement. At the time the Sixth Amendment was adopted, there were no formal standards of the legal profession.¹⁵⁵ The statement that "it" (the Sixth Amendment) relies on the legal profession surely cannot refer to any historical reliance. Neither can this invented rela-

held that defendants were entitled to "reasonably effective assistance." *Id.* at 151-52 (citations omitted). In adopting the latter standard, *Trapnell* observed that the distinction in the wording of the two standards had been unimportant to the actual determination of claims, but there was a perception that the "farce and mockery" standard was less demanding. *Id.* at 153. Significantly, the court also noted that, since *Gideon*, a threshold level of competence was now governed by the Sixth Amendment, not just the Due Process Clause, and a higher standard might be constitutionally required. *Id.* at 154-55; see *infra* text accompanying notes 276-87.

¹⁵¹ *Strickland*, 466 U.S. at 684-87, 689. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

¹⁵² *Id.* at 711 (Marshall, J., dissenting). Recently, in another context, the Court has shown less interest in the reliability of the outcome than in whether fundamentally fair procedures were employed at trial. In *Herrera v. Collins*, 113 S. Ct. 853 (1993), after ticking off the procedural guarantees afforded an accused at trial, including the right to effective assistance of counsel, the Court concluded that death sentenced prisoners are not necessarily entitled to any forum in which to litigate after-discovered evidence of innocence. *Id.* at 859-61.

¹⁵³ See *supra* note 150.

¹⁵⁴ *Strickland*, 466 U.S. at 688.

¹⁵⁵ See CHARLES WOLFRAM, MODERN LEGAL ETHICS § 2.6.1 (1986) ("Law was among the last of the professions to adopt a common code of behavior."). "When the American Bar Association was organized in 1878, no attention was paid to . . . standards to govern lawyer conduct." *Id.* § 2.6.2.

tionship between the profession and the Constitution provide support for the Court's view of the role of counsel envisioned by the Amendment.

The statement also invokes the unsupported presumption that counsel will perform in a manner that meets the guarantee. The only authority cited is *Michel*, the case of the lawyer who failed to make the meritorious objection to the grand jury's composition, but who enjoyed a good reputation in the profession.¹⁵⁶ Once the norms of the profession have somehow been enlisted to support a presumption of competence, however, they become superfluous, even potentially harmful to the Court's analysis. For the purpose of actually evaluating claims of ineffective assistance, the prevailing practice norms of the profession are relegated to the status of mere guidelines.¹⁵⁷

The Court went on to announce that even prisoners who demonstrated that the representation afforded them fell below an "objective standard of reasonableness"¹⁵⁸ were not entitled to relief unless they could also demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁵⁹ The Court did generously announce that a capital sentencing proceeding was the equivalent of a trial for right to counsel purposes.¹⁶⁰

In its guidelines for implementing the new test, the Court truly left logic and human experience behind. In judging the performance prong, whether

¹⁵⁶ See *supra* text accompanying notes 124-28.

¹⁵⁷ *Strickland*, 466 U.S. at 688. The Court asserted that it was impossible to set out detailed rules constituting minimally acceptable conduct by defense counsel. *Id.* at 688-89. This assertion is challenged in detail in Section III of this Article. See *infra* text accompanying notes 430-56.

¹⁵⁸ *Strickland*, 466 U.S. at 688.

¹⁵⁹ *Id.* at 694.

¹⁶⁰ *Id.* at 686-87. This is no small concession. The Constitution has traditionally been held to require fewer safeguards in sentencing proceedings than before guilt is established. Compare, for example, the holdings of the Court guarding the right of defendants at trial to put on evidence and contest the government's case in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987), with *FED. R. CRIM. P. 32(c)(3)* (at sentencing defendant entitled only to comment on presentence report and evidence to be relied upon in sentencing but anything further is at discretion of trial judge). Compare *In re Winship*, 397 U.S. 358 (1970) (prosecution must prove beyond reasonable doubt every fact necessary to establish guilt) with *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (fact necessary for imposition of mandatory minimum sentence may be established by preponderance of the evidence).

This equating of the guilt/innocence trial and the capital penalty trial for right to counsel purposes, however, further undermines the logic of the Court's conclusions concerning the desirability and capability of an appellate court determining whether a trial level result would have been different but for counsel's errors. Determining whether a different result might have been reached on guilt or innocence is extremely difficult. Determining whether a sentencer, particularly a jury, might have imposed life instead of death is virtually impossible. See *infra* text accompanying note 170.

counsel's assistance fell below an *objective* standard of reasonableness, the Court decreed that judicial scrutiny is to be "highly deferential."¹⁶¹ There is to be a "*strong* presumption that counsel's conduct f[ell] within the *wide* range of reasonable professional assistance."¹⁶² Counsel are strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The only support cited for the "strong presumption" and "highly deferential scrutiny" was *Michel*, along with what the Court termed the difficulties inherent in hindsight evaluation.¹⁶³ No empirical support was cited for the presumption of competence. There is none.¹⁶⁴ There was also no discussion of how an *objective* standard of reasonableness could be assessed with these interpretive and procedural thumbs on the scale.

The Court's final justifications for forbidding "intrusive" post-trial inquiry into performance were also a series of unsupported assumptions. The Court opined that the proliferation of claims that would result would adversely affect counsel's performance and willingness to serve, as well as "dampen the[ir] ardor."¹⁶⁵ Especially in capital cases, one hopes that the willingness to serve of attorneys who fear evaluation according to minimally acceptable professional standards *would* be adversely affected. How such a review could adversely affect their performance, however, is a mystery. What is also disingenuous about this analysis is that the Court discussed it against a hypothetical backdrop of "rigid requirements for acceptable assistance," when it had just forbidden the practice of identifying and applying any particular requirements at all.¹⁶⁶

Questionable logic and unsupported assumptions also pervaded the Court's treatment of the "prejudice" prong of the test. One of the first questions that arises is why have the performance prong at all, when reviewing courts have been invited to skip the prong and move right to the issue of whether the petitioner has made the mandatory showing of prejudice.¹⁶⁷ Further, the unwarranted deference mandated in the performance evaluation was continued in the discussion of prejudice. Attorney errors in a particular case were as likely to be "*utterly* harmless . . . as they [were] to be prejudicial."¹⁶⁸ In addition to failing to assert empirical, scientific, or even anecdotal support for this statement, the Court apparently gave no consideration to the kind of error that would have to be shown in order to meet the re-

¹⁶¹ *Strickland*, 466 U.S. at 689.

¹⁶² *Id.* (emphasis added).

¹⁶³ *Id.* at 689-90.

¹⁶⁴ In capital cases, anecdotal evidence would seem to indicate a reverse presumption.

See *infra* section III.

¹⁶⁵ *Strickland*, 466 U.S. at 690.

¹⁶⁶ *Id.* at 688-90.

¹⁶⁷ See *supra* note 57.

¹⁶⁸ *Strickland*, 466 U.S. at 693 (emphasis added).

quirements of the performance prong—overcoming deference, strong presumptions of competence, objectively unreasonable, etc. Surely, that type of error is not as likely to be harmless as prejudicial. Logic would seem to dictate that once a claimant has overcome the obstacles necessary to establish the performance prong, at the very least a circumstantial inference of prejudice arises.

Finally, the Court's logic was also backward on the question of hindsight. The difficulty inherent in hindsight is said to be of such a degree that it virtually precludes any objective evaluation of attorney performance.¹⁶⁹ In the application of the *prejudice* prong, however, these inherent difficulties apparently disappear. The same reviewing court previously cautioned to avoid hindsight in judging performance, for example, is deemed perfectly capable of judging the effect of that performance on the "reasoned *moral* response" of a capital sentencing jury.¹⁷⁰ Belatedly, the legal profession has developed generally accepted standards for criminal defense performance.¹⁷¹ While it is probably unwise simply to adopt these standards in their present form as the performance gauge of *Strickland*'s first prong,¹⁷²

¹⁶⁹ "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case." *Id.* at 689.

¹⁷⁰ *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."). The complexity of the capital sentencing decision is further illustrated in *Brown*:

While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's sympathy or mercy, human qualities that are undeniably emotional in nature. . . .

This Court . . . has recognized and even safeguarded the sentencer's power to exercise its mercy to spare the defendant's life.

Id. at 561-62 (Blackmun, J., dissenting).

The very definitions of "moral," aside from coupling the word with "reasoned," also illustrate the virtual impossibility of second-guessing such a decision: "[B]ased upon inner conviction . . . virtual rather than actual, immediate, or completely demonstrable . . . sanctioned by or operating upon one's conscience or ethical judgment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1468 (1986).

For further examination of the virtually immeasurable factors and procedures involved in the life/death sentencing decision, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

¹⁷¹ See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-1.1 to -8.6 (3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].

¹⁷² This Article argues that, while the American Bar Association Standards for the Defense Function are inappropriate as the sole measure of evaluating ineffective assis-

they do exist. In fact, the standards are crystal clear compared to the factors that go into a capital sentencing decision. With some degree of difficulty, attorney performance can be evaluated in hindsight. Prejudice from inadequate performance, especially as to sentencing, is not similarly amenable to second guessing.

Cronic, the companion case to *Strickland*, can be fairly criticized more for what was implicit than what was explicit in the majority opinion. A real estate attorney was given twenty-five days to prepare a defense against mail fraud charges arising from an alleged check-kiting scheme.¹⁷³ More than nine million dollars was transferred between interstate banks in a four month period.¹⁷⁴ The government had reviewed thousands of documents during its four year investigation.¹⁷⁵

Given the onerous burden placed on claimants in *Strickland*, in which attorney performance was at issue, the legal pigeonhole into which *Cronic*'s appeal of his conviction was placed would be virtually determinative of the success of his right to counsel claim. Was this an "ineffective appointment" case like *Powell*, or must *Cronic* satisfy the performance and prejudice prongs of *Strickland*? The Tenth Circuit had granted relief, using a perfectly logical circumstantial evidence matrix to determine whether to presume prejudice from the late appointment.¹⁷⁶ After reciting inspiring rhetoric from *Powell* and *Gideon*,¹⁷⁷ the Supreme Court disagreed. The Court characterized the case as a *Strickland* performance/prejudice case, with the presumptions of competence and the burden of proof on the claimant.¹⁷⁸

tance of counsel claims, minimum performance standards for constitutional purposes are nevertheless possible to formulate. See *infra* text accompanying notes 443-56.

¹⁷³ *United States v. Cronic*, 466 U.S. 648, 649 (1984).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ The court had examined five circumstantial categories that, depending on their strength, would suggest a *Powell* approach rather than performance analysis: (1) time afforded for preparation and investigation; (2) experience of counsel; (3) gravity of the charge; (4) complexity of possible defenses; and (5) accessibility of witnesses to counsel. *Id.* at 652.

¹⁷⁷ *Id.* at 653.

¹⁷⁸ The presumption of competence and allocation of the burden of proof was supported by yet another citation to *Michel*. *Id.* at 658. The Court's further discussion of why this was a *Strickland* and not a *Powell* case simply illustrated the wisdom of the Tenth Circuit approach. The Court set out the facts of *Powell* at some length as an example of a case where the likelihood that even a competent lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate, but also warned, citing *Avery* and *Chambers*, that not every late appointment and refusal to grant a continuance gives rise to such a presumption. *Id.* at 660-61. The Court concluded that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.* at 662.

In thus pigeonholing the claim, and then denying relief for failure to demonstrate specific errors of counsel or prejudice, the Court promoted an unhealthy view of the proper function of defense counsel. The Court announced that Sixth Amendment relief would be granted only when the criminal process "loses its *character* as a confrontation between adversaries."¹⁷⁹ Framing the analysis in this manner suggests only that a certain *type* of proceeding is required, and does not address the effect of imbalances that exist within such a proceeding.¹⁸⁰

Implicit in the analysis used to characterize the claim and deny relief was the notion that the Constitution requires no more than adversarial "testing" by passive, reactive defense attorneys who are free to rely on the prosecution's investigation to produce the facts of the case they are to test. For example, the Court found that defense counsel did not need time to examine the thousands of documents examined by the government because many of the documents were used to show the stream of checks between banks, a fact which was not disputed.¹⁸¹ Consequently, the Court deemed the only issue at trial to be the simple question of whether these undisputed transactions justified an inference of intent to defraud by Cronin.¹⁸² Twenty-five days was deemed an adequate amount of time to deal with that issue.¹⁸³ Thus, Cronin was required to point to specific errors satisfying *Strickland*. The case was remanded to give him an opportunity to do that.¹⁸⁴

One problem with Cronin's analysis is that the issue was not quite as

This examination of surrounding circumstances was, of course, the reason for the five-factor framework established by the Tenth Circuit. The Supreme Court did not undertake to discuss why, using those perfectly relevant factors, this was a *Strickland* and not a *Powell* case; the Court simply announced that it was. *Id.* at 660.

¹⁷⁹ *Id.* at 656-57 (emphasis added).

¹⁸⁰ Neither does the ambiguous citation with approval of language suggesting that a criminal trial does not require participants of near equal skill, but must not be a "sacrifice of unarmed prisoners to gladiators." *Id.* at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975)).

¹⁸¹ The time spent by the government in assembling, organizing, and summarizing the two streams of checks was said to have "unquestionably simplified the work of defense counsel in identifying and understanding the *basic character* of the *defendant's scheme*." *Cronin*, 466 U.S. at 663-64 (emphasis added).

¹⁸² *Id.* at 664.

¹⁸³ *Id.* at 665.

¹⁸⁴ *Id.* at 666-67. On remand, the Tenth Circuit again granted relief. *United States v. Cronin*, 839 F.2d 1401 (10th Cir. 1988). The court pointed to specific deficiencies in defense counsel's failure to assert an available defense and counsel's failure to investigate a matter that would have produced evidence to rebut the prosecution's contention that nothing had been paid on an overdraft. *Id.* at 1404. Tried and convicted again, Harrison Cronin won final relief from the Tenth Circuit based on failure of the government's proof. *United States v. Cronin*, 900 F.2d 1511, 1517 (10th Cir. 1990).

simple as whether criminal inferences could be drawn from unquestionably authentic documents. The government also made its case against Cronin through the testimony of two co-defendants, Cummings and Merritt. The two co-defendants had actually handled the transactions, but testified that Cronin had conceived and directed the entire scheme.¹⁸⁵ A proactive defense attorney conducting an independent investigation might very well have wished to examine the thousands of documents available to the government, including those not introduced at trial, for evidence that the characterization of the enterprise by Cummings and Merritt was not accurate.¹⁸⁶ The Court is correct, however, that the kind of defense attorney it envisions, one who merely "tests" what the state presents, could probably ensure in twenty-five days that the trial did not lose its "character" as a confrontation between adversaries.

Thus, *Cronin* encourages characterization of claims under the most difficult test for claimants, and adopts *Betts*' approach that the relative simplicity of the case is relevant to the right to counsel claim. An extreme consequence of *Cronin*'s message, that the effect of external factors on the likelihood of prejudice is to be minimized and claimants are to be required to point to specific trial errors under *Strickland*, is illustrated by *Gardner v. Dixon*.¹⁸⁷ In *Gardner*, the Fourth Circuit denied relief to a death sentenced prisoner who could not meet *Strickland*'s standards,¹⁸⁸ even though his attorney was a cocaine addict and was actively abusing that substance and other narcotics during preparation and conduct of the trial.¹⁸⁹

In *Burger v. Kemp*,¹⁹⁰ the Court's first major opinion applying the *Strickland* test to a claim of deficient attorney performance, the justices re-

¹⁸⁵ *Cronin*, 466 U.S. at 651.

¹⁸⁶ Without extensive elaboration, let it simply be observed here that the assurance offered by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), that exculpatory evidence casting doubt on the credibility of Cummings and Merritt would be disclosed by the government is no substitute for independent investigation.

Impeaching the credibility of Cummings and Merritt was important. Their testimony characterized themselves as mere footsoldiers in a scheme designed by Cronin. *Cronin*, 466 U.S. at 651. Defense counsel was able to establish on cross-examination that they had received considerable benefit from the government in return for their testimony. Brief for the United States at 4-5, *United States v. Cronin*, 466 U.S. 648 (1984) (No. 82-660). A complete investigation of company documents involving the three, including but not limited to those relating to the government's allegations, might have confirmed or cast doubt on their version of events. Such an investigation could not be conducted in 25 days.

¹⁸⁷ No. 92-4013, 1992 U.S. App. LEXIS 28147 (4th Cir. October 21, 1992) (per curiam).

¹⁸⁸ *Id.* at *34.

¹⁸⁹ *See id.* at *13.

¹⁹⁰ 483 U.S. 776 (1987).

jected the claim in a five to four decision.¹⁹¹ The Court also narrowed the conflict of interest pigeonhole in right to counsel claims, in effect imposing a modified *Strickland* test on this species of claim as well.

Christopher Burger was seventeen years old at the time of his crime.¹⁹² He had an IQ of eighty-two and functioned at the level of a twelve year old.¹⁹³ He had also suffered possible brain damage from beatings he received when younger.¹⁹⁴ Nevertheless, at the time Burger and Tom Stevens murdered Roger Honeycutt, all three were active duty members of the U.S. Army, stationed at Ft. Gordon, Georgia.¹⁹⁵ Honeycutt, a part time cab driver, was abducted by the other two and sexually assaulted by Stevens.¹⁹⁶ Honeycutt was then placed in the trunk of a car by Stevens.¹⁹⁷ After opening the trunk and asking Honeycutt if he was all right, Burger closed the trunk and ran the car into a pond.¹⁹⁸ Honeycutt drowned.¹⁹⁹ The evidence at Burger's trial was consistent with the assertion that Stevens, who was twenty years old at the time, was primarily responsible for the plan to abduct Honeycutt and the decision to kill him.²⁰⁰

Alvin Leaphart represented Burger through trial, appeal, resentencing, and a second appeal.²⁰¹ *Strickland* was decided during the pendency of

¹⁹¹ *Id.* at 776. Only Justice Marshall had dissented in *Strickland*. *Strickland*, 466 U.S. at 706 (Marshall, J., dissenting). Even Justice Brennan, while dissenting from the judgment in *Strickland*, endorsed the framework established by the majority for reviewing ineffective assistance claims, expressing the belief that its standards were "sufficiently precise" and would "provide helpful guidance" to the lower courts. *Id.* at 702-03 (Brennan, J., concurring in part and dissenting in part). Ironically, Justice Brennan cited with approval the stay just granted in Christopher Burger's case, *Burger v. Zant*, 466 U.S. 902 (1984) (stay of execution granted pending disposition of writ of certiorari), obviously expecting that this was a case which would call for relief under the *Strickland* tests. *Strickland*, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part). When that did not happen, Justice Brennan, along with Justices Blackmun and Powell, joined Justice Marshall as dissenters. *Burger*, 483 U.S. at 796 (Blackmun, J., dissenting).

¹⁹² *Burger*, 483 U.S. at 779.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 818 (Powell, J., dissenting).

¹⁹⁵ *Id.* at 778.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 779.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 780. Both Burger and Stevens were awarded new sentencing trials because the trial judge had failed to charge the jury on mitigation and had failed to make it clear that the jury could vote for life imprisonment even if it found statutory aggravating factors. *Stevens v. Georgia*, 247 S.E.2d 838, 841, 843 (Ga. 1978); *Burger v. Georgia*, 247 S.E.2d 834, 838 (Ga. 1978). Both were resentenced to death. *Stevens v. Georgia*, 266 S.E.2d 194 (Ga.), *cert. denied*, 449 U.S. 891 (1980); *Burger v. Georgia*, 265 S.E.2d 796

Burger's collateral federal appeals in which the lower federal courts affirmed the denial of Burger's right to counsel claims under *Strickland*.²⁰²

Burger's right to counsel claims included one in the "actual ineffectiveness" pigeonhole because Leaphart presented no evidence in mitigation at either sentencing trial, and another in the "conflict of interest" pigeonhole because Leaphart's two person law firm represented both Stevens and Burger even though the relative culpability of the two was a significant practical and legal issue.²⁰³ In rejecting the conflict of interest claim, the Court denigrated the protection afforded by an attorney's duty of loyalty. In doing so, the Court also established a modified *Strickland* framework. The Court declined to find a per se violation of the right to counsel in cases in which attorneys represent clients with conflicting interests, even though the Court recognized that the possibility of prejudice inheres in virtually every instance of multiple representation.²⁰⁴ Instead, the Court held that it would "presume" prejudice, i.e. grant relief, only when defendants bore the burden of establishing that (1) counsel "actively" represented conflicting interests, and (2) the actual conflict adversely affected counsel's performance.²⁰⁵ Just

(Ga.), *cert. denied*, 446 U.S. 988 (1980). Stevens was executed on June 29, 1993. *Execution Update*, *supra* note 44, at 695. Christopher Burger was executed on December 7, 1993. *Id.* at 696.

²⁰² *Burger*, 483 U.S. at 781-82.

²⁰³ *Id.* at 779-83.

²⁰⁴ *Id.* at 783.

²⁰⁵ *Id.* Here, the majority engaged in subtle, but important semantic manipulation of its precedent. The majority purported to rely on *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Cuyler*, however, is at best ambiguous on the subject of whether the proper question is whether an actual conflict, determined conceptually, affected performance, or whether there was "active" representation of a conflicting interest which affected performance. In two of the sections of *Cuyler* cited by the *Burger* majority, it would appear that a claimant who showed that a conflict adversely affected performance should prevail. *Cuyler*, 446 U.S. at 348, 350. Elsewhere, however, *Cuyler* refers to a showing of "active" representation of competing interests as a constitutional predicate to a successful claim. *Id.* at 350.

There is no question that Burger and Stevens had conflicting interests and that counsel must have known of the conflict. While there was evidence that Stevens instigated the killing of Honeycutt, *see supra* note 200, his confession blamed that circumstance on Burger and minimized his own role. *See Stevens*, 247 S.E.2d at 840. If this established actual conflict, the next step would be to move on to the second prong and evaluate the claim that Leaphart's advocacy was affected because he did not raise relative culpability on appeal and did not seek a plea bargain that would offer Burger's testimony against Stevens, who was represented by Leaphart's partner. *Burger*, 483 U.S. at 783-88. The majority, however, never acknowledged that there was an actual conflict. While giving its approval to joint representation, the majority simply moved on to considering whether what it termed a possible "overlap" in counsel adversely affected Leaphart's performance. *Id.* at 783-84. Justice Blackmun was sufficiently disturbed to take issue with the "overlap of counsel" versus "active representation" distinction, and

as showing deficient performance does not satisfy *Strickland*'s first prong, demonstrating the conflict of interest does not satisfy *Burger*'s first prong. Claimants must demonstrate "active" representation of conflicting interests. As Justice Blackmun acknowledged in dissent, the second *Burger* prong is not as substantively onerous as its *Strickland* counterpart.²⁰⁶ Like *Strickland* and *Cronic*, however, *Burger*'s second prong raises formidable procedural barriers, forcing claimants to identify and prove specific effects causally tied to the professional shortcoming.²⁰⁷

Although *Burger* clearly left the "conflict of interest" pigeonhole of the right to counsel claim a more hospitable abode than the "actual ineffectiveness" pigeonhole, the Court's application of the conflict standard suffers from the same *Strickland* ills: unwarranted and unsupported assumptions, faulty logic, ignorance of the realities of trial practice, and indifference to the standards of the legal profession. The majority's singularly unpersuasive response to *Burger*'s claim under the standards identified began with a recitation that was at once irrelevant to the claim and evocative of an issue left unsettled in *Strickland*:

Particularly in smaller communities where the supply of qualified lawyers willing to accept the demanding and unrewarding work of representing capital prisoners is extremely limited, the defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation. In many cases a 'common defense . . . gives strength against a common attack.'²⁰⁸

There was, of course, no common defense and no common attack in this

his opinion demonstrated that the joint representation was as active as that which occurred in *Cuyler*. *Id.* at 801, 803 (Blackmun, J., dissenting); see *Cuyler*, 446 U.S. at 338-39. Even if relief was to be denied on the "adversely affected advocacy" prong, it would appear the legal profession had a legitimate expectation that the *Burger* majority would at least recognize the representation of conflicting interests involved and condemn it as a matter of professional responsibility. See *infra* text accompanying notes 423-25.

²⁰⁶ *Burger*, 483 U.S. at 798-800 (Blackmun, J., dissenting).

²⁰⁷ When the conflict of interest issue was not before the Court, the *Strickland* majority recognized the difficulty of making such a showing in that context: "Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. In *Burger*, when the issue was before the Court, only Justice Blackmun in dissent made the point that prejudice is difficult to assess because conflicts compel an attorney to *refrain* from certain actions. *Burger*, 483 U.S. at 800 (Blackmun, J., dissenting).

²⁰⁸ *Burger*, 483 U.S. at 783-84 (citation omitted).

case.²⁰⁹ Neither was there any indication of a benefit to Burger from the fact that Leaphart and his partner, representing Stevens, helped each other out. The Court's pronouncement invites reconsideration of the unanswered question raised by Justice Marshall in *Strickland*: is the Sixth Amendment standard to vary according to differences in geography and local resources?²¹⁰ Is joint representation of clients with competing interests to be viewed with more tolerance when qualified lawyers are in short supply?

Continuing in the *Strickland* mold, the majority in *Burger* added an unwarranted and untested assumption. The majority presumed that counsel are aware of their overarching duty of loyalty to clients, and blessed the trial court's general reliance on the good faith and good judgment of defense attorneys as necessary and appropriate.²¹¹ Just as in *Strickland*'s presumption of competence, the validity of the presumption of loyalty is apparently not subject to the real world testing required by the Court for presumptions in other contexts.²¹²

The majority also added a requirement for conflict claims that could in some respects be more onerous than the *Strickland* formula for evaluating performance deficiencies. The Court held that finding an actual conflict of interest required a determination that Leaphart's *motivation* not to argue lesser culpability stemmed from the fact that Stevens was his partner's client.²¹³ This requirement of proof of improper purpose could be more difficult to establish than proof that a performance deficiency was not the result of a strategic choice made based on accurate information.²¹⁴

As Justice Blackmun pointed out in dissent, the essence of Burger's conflict of interest claim was that Leaphart failed to argue Burger's lesser culpability on appeal when the Georgia Supreme Court was statutorily required

²⁰⁹ *Id.* at 803 (Blackmun, J., dissenting).

²¹⁰ *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

²¹¹ *Burger*, 483 U.S. at 784.

²¹² *See, e.g.,* *Leary v. United States*, 395 U.S. 6, 36 (1969) (fact to be inferred must be more likely than not to flow from the proven fact); *Tot v. United States*, 319 U.S. 463, 467-68 (1943) (reason and common experience must support permissive presumption of one fact from the establishment of another). The proven fact in *Burger* was only that Leaphart was a generally well respected member of the legal profession acting as defense counsel in a capital case. *Burger*, 483 U.S. at 780. The majority did not discuss the question of whether this fact alone made it more likely than not that he did not represent conflicting interests to the detriment of Burger.

²¹³ *Burger*, 483 U.S. at 784-85.

²¹⁴ The majority went on, however, to find that relative culpability was argued at Burger's separate trial. *Id.* at 786-87. The Court then repeated its deadly advice that strategic decisions to winnow out weak claims on appeal are the "hallmark of effective appellate advocacy." *Id.* at 784 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The advice is deadly because of *Wainwright v. Sykes*, 433 U.S. 72 (1977) (claims defaulted under state law ordinarily not subject to federal review absent showing of "cause" and "prejudice"); *supra* note 44.

to consider the issue,²¹⁵ and that Leaphart failed to seek a non-capital plea bargain which included an offer of Burger's testimony against Stevens.²¹⁶ As noted, the majority's response to the first claim ignored the Court's own precedent on failure to raise issues on appeal.²¹⁷ Its response to the second demonstrated ignorance of trial realities.²¹⁸

Finally, in the *Strickland* mold, the majority denigrated the standards of the legal profession by ignoring the standards' minimal requirements that clients be informed of, and consent to, representation involving a conflict of interest.²¹⁹

While many aspects of *Strickland*'s restrictive view of the right to counsel were apparent in the *Burger* majority's treatment of the conflict of interest claim, *Burger*'s true impact was most clearly revealed in the Court's approval of the failure to present any mitigating evidence at either sentencing hearing. First, the Court approved Leaphart's failure to use what he *knew*: Burger's family history as related by his mother.²²⁰ She could have testified that: at age fourteen she married Christopher's father, who was sixteen; they were divorced when Christopher was nine; two succeeding stepfathers did not want Christopher; one beat Christopher's mother in his presence, and the other started Christopher on drugs as a child; after further beatings, Christopher's mother and he were thrown out of the house and hitchhiked to Tampa; on the way to Tampa, they were forced to sell Christopher's shoes to buy food.²²¹ In spite of this experience, Christopher's criminal record before enlistment in the army consisted only of shoplifting and truancy.²²² Leaphart was aware of some, but not all, of the family history.²²³ Amazingly, the majority's approval of Leaphart's failure to have Christopher's mother testify or to fully investigate the family history rested on the fact that she would have had to reveal Christopher's petty criminal record, and on the conclusion of a lower court judge, who heard her testimony, that her testimony would not have helped!²²⁴

²¹⁵ *Burger*, 483 U.S. at 804-06 (Blackmun, J., dissenting).

²¹⁶ *Id.* at 807-08 (Blackmun, J., dissenting).

²¹⁷ See *supra* note 211.

²¹⁸ The majority was satisfied that the claim lacked merit from evidence that Leaphart did try to plea bargain, and from its own determination that the prosecutor did not need the testimony of Burger because the evidence was overwhelming. *Burger*, 483 U.S. at 785-86. Justice Blackmun thoroughly instructed the majority concerning the myriad of factors in addition to strength of evidence that affect the conclusion of plea bargains in capital cases. *Id.* at 807 n.12 (Blackmun, J., dissenting).

²¹⁹ *Id.* at 797 n.4 (Blackmun, J., dissenting).

²²⁰ *Id.* at 789-90.

²²¹ *Id.* at 790; *id.* at 814 (Blackmun, J., dissenting).

²²² *Id.* at 790.

²²³ *Id.*

²²⁴ *Id.* at 792.

Next, there was the issue of what defense counsel *did not know* because he did not pursue the mitigation investigation. Several potential witnesses who could have further developed Burger's family history and impairment were located by habeas counsel.²²⁵ Trial counsel's failure to find these witnesses through investigation was excused because *every* component of their testimony would not have cast Burger in a positive light.²²⁶ A former neighbor, for example, in testifying that Christopher's father did not want to associate with Christopher would have had to reveal that it was because Christopher was on juvenile probation.²²⁷ His uncle would have revealed that Christopher was involved with drugs in Florida.²²⁸

The majority's position illustrates the gross unfairness of employing the *Strickland* prejudice prong in the context of a capital penalty trial, resulting in rank speculation concerning what factors might influence a jury to vote for life imprisonment rather than death.²²⁹ For example, would a jury, informed that adults had involved Burger in drug use when he was but a child, really consider his uncle's testimony that he used drugs in Florida to be aggravating, or would such evidence provide a critical explanatory link between an impairment for which he could not justly be held responsible and the circumstances of his offense?²³⁰

Evaluation of claims under the *Strickland* prejudice prong is potentially even more unfair when, as in both *Strickland* and *Burger*, the Court goes beyond speculation and considers the claim in light of its own constricted view of what is mitigating. Both defense counsel and the Court seemed to conclude that evidence of good acts and characteristics about a defendant define the limits of mitigation. Leaphart's own testimony confirms Justice Powell's conclusion that defense counsel did not understand even the relevance, much less the extraordinary importance, of Burger's mental and emotional immaturity, character, and background that counsel failed to investigate.²³¹ Defense counsel's ignorance on this point can be understood, but it should not have been forgiven judicially. The Court's blindness is more puzzling in light of its prior express recognition of the value of just the kind of evidence that Leaphart failed to uncover and present.²³²

²²⁵ *Id.* at 794-95.

²²⁶ *Id.* at 792-93.

²²⁷ *Id.* at 793.

²²⁸ *Id.*

²²⁹ See *supra* notes 160, 170.

²³⁰ See Geimer, *supra* note 144, at 286 n.55, 289.

²³¹ *Burger*, 483 U.S. at 820 (Powell, J., dissenting).

²³² *Id.* at 821 (Powell, J., dissenting) (citing *California v. Brown*, 479 U.S. 538 (1987) (holding to a societal belief that criminal acts attributable to disadvantaged background or emotional and mental problems are less culpable); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (maintaining the particular relevance of turbulent family history, beatings, and rejection by father as mitigating evidence)).

Perhaps for some justices who joined or concurred in *Strickland* the pernicious practical impact of the standards they were pronouncing was not readily apparent. The multiple murders, the guilty plea before a judge instead of a jury trial, and the unsettled situation on the right to counsel issue in the circuits all may have obscured the magnitude of the Court's misstep. *Burger*, however, provided a much clearer picture of the degree to which *Strickland* would undermine the right to counsel.

2. Harmless Error on its Head

In spite of the Court's recent pronouncement that *Strickland*'s application does not involve harmless error analysis,²³³ the contrary is obviously true. *Strickland* involves "unarticulated harmless-error,"²³⁴ and there are two possible explanations for the Court's refusal to articulate the analysis. First, the relative importance of the right abridged is significant in harmless error analysis.²³⁵ Second, even though harmless error doctrine can be, and

²³³ In *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993), the Court conceded that the deficient performance prong of *Strickland* had been satisfied when defense counsel failed to recognize and assert case law in the circuit that would have protected the client from a death sentence and barred appeal by the state. *Id.* at 840. Because that protective law was reversed four years later, however, the Court found that the death-sentenced prisoner had suffered no "prejudice" under *Strickland*. *Id.*; see *supra* note 90. The majority also observed:

Contrary to the dissent's suggestion, today's decision does not involve or require a harmless error inquiry. Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland v. Washington* an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice. Our opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the *Strickland* test. Since we find no constitutional error, we need not, and do not, consider harmlessness.

Lockhart, 113 S. Ct. at 842 n.2 (citation omitted).

²³⁴ Justice Powell aptly coined the term in a case where the majority refused to recognize the plain unconstitutionality of a statutory presumption given to the jury as authority to convict because there was ample additional evidence indicating guilt. *Ulster County Court v. Allen*, 442 U.S. 140, 177 (1979) (Powell, J., dissenting).

²³⁵ In the Court's basic harmless error case, *Chapman v. California*, 386 U.S. 18 (1967), the majority recognized that some rights were so essential to a fair trial that they were not properly subject even to harmless error analysis, and cited coerced confessions, the right to counsel, and the right to an impartial judge as examples. *Id.* at 23 n.8. It was, therefore, necessary for five members to resort to painfully lame rhetoric in order recently to hold that coerced confessions are now subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279 (1991). The *Fulminante* majority characterized *Chapman*'s citation of prior cases recognizing rights too fundamental for harmless error as merely "historical reference[s] to the holdings of these cases." *Id.* at 308. The Court would plainly have been more comfortable if it had not been forced to face harmless

is, widely employed to salvage criminal convictions and death sentences where the accused has been denied basic rights,²³⁶ the procedural and analytical rules are nevertheless burdensome for the government. If the doctrine is applicable, the prosecution is required to bear the burden of establishing beyond a reasonable doubt that a constitutional violation was harmless.²³⁷

Given these two factors, were the Court to arrive at the common sense recognition that *Strickland*'s second prong is in effect a harmless error inquiry, *Strickland*'s utility as a saver of convictions and death sentences would be significantly undermined. As noted previously, the right to counsel is almost universally viewed as the most fundamental of constitutional rights in criminal cases, and determination of what a capital sentencing jury might have done but for deficient representation is virtually impossible. Courts have been inept at determining the significance a jury places on particular evidence, even in non-capital cases in which the statutory elements of an offense are available as a guide.²³⁸ Not surprisingly, the Court has declined

error doctrine directly.

²³⁶ See, e.g., *Rose v. Clark*, 478 U.S. 570 (1986). In *Rose*, the Court held that a jury instruction erroneously shifting the burden of proof to the accused on a *contested* element of the offense was subject to harmless error analysis. *Id.* at 579-80. The error in this case was rooted in a bedrock prior holding that the minimum requirement of due process in criminal cases is that only the state must be required to prove beyond a reasonable doubt every fact necessary to establish guilt. *In re Winship*, 397 U.S. 358, 364 (1970). The error also fit within the Court's most restrictive interpretation of *Winship* regarding jury instructions. See *Patterson v. New York*, 432 U.S. 197 (1977) (holding that state law requiring defendant to prove by a preponderance of evidence the affirmative defense of emotional disturbance is not violative of due process). The majority also took the occasion to opine that not just some, but most, errors of constitutional magnitude were nevertheless subject to harmless error analysis. *Rose*, 478 U.S. at 578-79.

²³⁷ *Chapman*, 386 U.S. at 24. The Court recently moved to ease that burden in a significant class of cases. In *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), in addition to classifying the error as "trial error," citing *Fulminante*, the Court determined that the government would no longer be required to show harmless error beyond a reasonable doubt in cases arising on federal habeas. *Id.* at 1717. Instead, the Court found sufficient for constitutional trial errors the standard previously employed when the government failed to follow rules or statutes: whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1714 (citing *Kotteakas v. United States*, 328 U.S. 750, 776 (1946)).

In a holding of more limited quantitative significance, however, the Court has held recently that an erroneous instruction on reasonable doubt requires automatic reversal and is not subject to harmless error review. *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993). The majority reasoned that with such an error there has been no jury determination of guilt beyond a reasonable doubt as required by the Sixth Amendment, so that it is logically impossible to employ a model which asks whether that guilty verdict would have been different absent the error. *Id.* at 2082.

²³⁸ See, e.g., Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 129 n.196 (1988).

to acknowledge that its *Strickland* rules turn harmless error on its head.²³⁹ The semantic shell game employed to deny the applicability of harmless error is a conflation of the right and entitlement to a remedy.²⁴⁰ A state may afford an indigent defendant on trial for his life the most ignorant, incompetent, indifferent attorney ever granted a license to practice, and the attorney can try the case and demonstrate that ignorance, incompetence, and indifference. Nevertheless, the state has not committed any error. The Sixth Amendment is not violated unless the prisoner can demonstrate that counsel's deficiencies "undermined confidence in the outcome of the proceeding."²⁴¹ Ironically, under the Court's formulation, defendants who suffer denial of the *assistance* of counsel, explicitly guaranteed by text of the Sixth Amendment,²⁴² may nevertheless be found not to have suffered denial of *effective* assistance as judicially engrafted on the text.

This Article argues that ineffective assistance of counsel claims ought at the very least be included in the ambit of harmless error. Once a defendant bears the burden of demonstrating harmfully deficient performance, a fundamental right has been violated and a conviction or death sentence should be upheld only upon a showing by the prosecution that the denial was harmless beyond a reasonable doubt.²⁴³ Comparing the mitigation evidence in Chris-

²³⁹ The destructive impact of the *Strickland* framework on the right to counsel is only barely mitigated by the fact that it does not turn harmless error *completely* on its head. Defendants do not have to prove beyond a reasonable doubt that the outcome of the proceeding would have been different. However, it is the allocation of the burden, rather than the standard, that is important. The party who bears the burden of proof of the virtually unprovable, by any standard, can be expected to lose.

²⁴⁰ See *supra* note 233.

²⁴¹ Recall that *Strickland* adopted this standard as enunciated in *United States v. Bagley*, 473 U.S. 667 (1985), dealing with entitlement to retrial when the prosecution had withheld exculpatory evidence. Although the standard is subject to legitimate criticism even in the discovery context, see, e.g., Stacy & Dayton, *supra* note 238, at 124-25, the different sources of the right to counsel and the right to discovery make *Strickland*'s use of the standard even less defensible.

²⁴² "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

²⁴³ This is hardly an extreme position. If the right to counsel were considered a unitary one and not one fragmented into pigeonholes, denial of minimally effective assistance, by whatever standard might be formulated for that determination, would be no different than denial of the right to have counsel present. Indeed, that was Justice Marshall's position in *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 711-12 (1984) (Marshall, J., dissenting). *Chapman* apparently held that the right to counsel was so fundamental that denial was not even subject to harmless error review. *Chapman*, 386 U.S. at 23 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

The notion of automatic relief upon denial of minimally effective assistance also appears less radical when analogized to the Court's treatment of another specific Sixth Amendment guarantee in *Sullivan*, 113 S. Ct. at 2078. The Sixth Amendment guarantees a right to a jury trial just as specifically as it guarantees the right to "assistance" of

topher Burger's case²⁴⁴ with the mitigation evidence in James Hitchcock's case in *Hitchcock v. Dugger*²⁴⁵ demonstrates the lack of principled justification for the *Strickland* requirement. In Burger's case the jury did not hear an appreciable amount of the mitigating evidence, including evidence of mental impairment and a difficult upbringing, because Burger's appointed counsel did not present it.²⁴⁶ In Hitchcock's case the jury heard, but was instructed by the trial judge to ignore, an appreciable amount of the mitigating evidence, including evidence of mental impairment and a difficult upbringing.²⁴⁷ In both cases, the jury was precluded from considering evidence that might have convinced it that a life sentence was appropriate. Burger got no relief because he could not meet the burden imposed by *Strickland*. In contrast, a unanimous court mandated a new sentencing hearing for Hitchcock, noting in passing that the state had made no attempt to show that the judge's error was harmless.²⁴⁸

counsel. The text of the Amendment does not speak of "effective" assistance, or what that term might mean, though it is not illogical to infer that the term "assistance" itself assumes some degree of utility to the holder of the right. It is the judiciary that has, albeit unsatisfactorily, determined that the Amendment guarantees "effective" assistance. The language of the Amendment guaranteeing a right to jury trial could be seen to be even less informative about what judicially created refinements might be necessary to make it meaningful. Yet, a unanimous court in *Sullivan* held that a deficient instruction on reasonable doubt deprived the accused of his Sixth Amendment right to a jury trial, and that the deprivation was *not* subject to harmless error analysis. *Id.* at 2082. On the other hand, the Amendment does specifically require trial by an "impartial" jury. That component, however, may now have been "deincorporated" from the Due Process Clause. See *infra* text accompanying notes 289-97.

²⁴⁴ See *supra* notes 220-22 and accompanying text.

²⁴⁵ 481 U.S. 393 (1987).

²⁴⁶ See *supra* text accompanying notes 219-30.

²⁴⁷ *Hitchcock*, 481 U.S. at 397-99.

²⁴⁸ *Id.* at 399. There is, of course, a semantic way around this analogy. The trial judge's error was restricting mitigation to factors enumerated by Florida statute. This violated the Court's prior command that sentencers "not be *precluded* from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant *proffers* as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (first and third emphases added). In *Hitchcock*, the judge precluded consideration of *Lockett* evidence. In *Burger*, the evidence was not proffered. I find the distinction unpersuasive.

It should also be noted that the Court has applied *Chapman* harmless error analysis to capital sentencing. See *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that exclusion of jailers' and visitor's testimony was abuse of petitioner's right to place all relevant evidence before the sentencing jury for mitigation of punishment). However, under the curious rubric by which the Court recently determined itself free to decide that a lesser standard than *Chapman* will now be employed in collateral proceedings although it had been applying the higher standard to that category of cases, the issue is still open. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1712 (1993). For a discussion of the

A colleague of mine undertook, somewhat half-heartedly, to play devil's advocate and defend the Court's semantic evasion of harmless error doctrine in *Strickland*. Analogizing to a tort case, he argued that it was not unusual for courts to require more than a showing that a duty had been breached or a right violated before granting relief. In fact, every civil plaintiff must show not only that the party from whom she seeks relief has breached a duty owed to her, but also that the breach caused her harm. Perhaps, he said, it is not so surprising that before the courts will even recognize breach of the duty to provide reasonably competent assistance, the petitioner must show that the breach may have caused a harmful result in the proceedings.

There are a number of responses to this justification. First, *Strickland*'s framework is for appellate review, exactly analogous to that of harmless error doctrine and not to the trial level requirements placed on a party who, unlike the criminal defendant, voluntarily invokes the legal system. Second, proof of injury from breach of duty is not the same as proof that outcome might have been different. Thus, even under the tort analogy, *Strickland*'s prejudice requirement is at least quantitatively too onerous.²⁴⁹ Finally, while undermining confidence in the outcome through deficient representation is obviously a harm, it is not and should not be determined the only cognizable harm. There has not yet been a satisfactory response, other than the *Strickland* majority's fiat, to the argument that the Sixth Amendment right to counsel serves values in addition to the value of fostering reliable outcomes. What is the nature of the right to counsel for manifestly guilty persons?²⁵⁰ When such people have been represented by attorneys who could not or would not affirmatively advocate for them, but contented themselves merely with making the prosecution jump through required procedural hoops, has not the "fairness, integrity or public reputation" of the proceedings been impugned?²⁵¹

difficulty inherent in applying *Chapman* to capital penalty trials, apart from the ineffective counsel issue, see James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 754-57 (1987).

²⁴⁹ It would be possible to prove injury from deficient lawyering, for example, without proving likelihood of a different outcome by adopting the standard used by the Fifth Circuit in *Strickland*—requiring petitioners to show that counsel's errors resulted in "actual and substantial disadvantage to the course of the defense." *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984). Upon such a showing, the court would also have permitted the state to save the sentence by showing that the ineffective assistance would not have altered the outcome of the proceedings under the requirements of *Chapman*. *Id.*

²⁵⁰ See *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) ("A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.").

²⁵¹ See *United States v. Young*, 470 U.S. 1, 15 (1985). To appreciate the profound ethical dimensions of the constitutional debate over the role of criminal defense counsel, compare the distinctly *Strickland/Cronic* view discernible in Harry I. Subin, *Is This Lie*

Applying established harmless error analysis to ineffective assistance of counsel claims upon proof of seriously deficient advocacy is a middle ground between the automatic reversal urged by Justice Marshall in *Strickland*,²⁵² and the unjust framework established by the *Strickland* majority. The importance of the allocation of the burden of proof, however, cannot be overestimated. The government would occasionally be able to carry that burden, just as defendants are occasionally able to carry it under *Strickland*.²⁵³ In practical terms, however, the burden would be heavy. That is as it should be given the importance of the right violated, particularly if the predicate proof of deficient performance required of defendants continued to be assessed under the standard of *Strickland*'s first prong.²⁵⁴

While the *Strickland* majority declined to discuss harmless error at all, the Fifth Circuit did so in the case below, particularly on the critical issue of burden of proof.²⁵⁵ The Fifth Circuit's reasons for declining to endorse the procedure I now urge should be addressed. First, the court determined that harmless error doctrine's placement of the burden on the government was for the equitable and deterrent purpose of not permitting a party to profit from its violation of law.²⁵⁶ This purpose was not implicated in ineffective assistance of counsel cases, however, because the state did not cause the violation.²⁵⁷ Consistent with the position that constitutional guarantees serve multiple values, however, one can argue that the harmless error rule serves not only deterrence and reliability, but represents an attempt to reach

Necessary? Further Reflections on the Right to Present a False Defense, 1 GEO. J. LEGAL ETHICS 689 (1988) and Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections in the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) with the affirmative/advocate role envisioned in John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339 (1987).

²⁵² See *supra* note 243.

²⁵³ See, e.g., *Louisiana v. Sullivan*, 596 So. 2d 177 (La. 1992). Defense counsel admitted that he had conducted no investigation and made no preparation for the penalty trial because he was confident the jury would return a verdict of no more than second degree murder. *Id.* at 191. The court nevertheless had to determine, under *Strickland*, that there was mitigation to be found, that there was no tactical reason for not finding and presenting it, and that failure to present it undermined confidence in the sentence of death. *Id.* at 190-92. One judge dissented on this issue. *Id.* at 192-93 (Marcus, J., dissenting in part and concurring in part). Thus, under one state's understanding of *Strickland*, even if counsel is functionally *absent*, *Gideon* is not applicable. Rather, it is still necessary to employ *Strickland*'s prejudice test before determining that relief is appropriate.

²⁵⁴ There are more realistic and workable standards for assessing attorney performance. See *infra* text accompanying notes 323-46.

²⁵⁵ *Strickland*, 693 F.2d at 1260-62.

²⁵⁶ *Id.* at 1260.

²⁵⁷ *Id.*

a just result while protecting the substantial rights of the parties. Under this view, it is irrelevant that the state did not cause the error.²⁵⁸

The Fifth Circuit's argument has merit, but is incomplete. The notion that the state does not cause the violation is highly questionable. Indigent defendants are not entitled to counsel of their choice. Governments appointing counsel to represent indigent defendants are responsible for the selection/assignment system, minimum qualifications and training requirements, compensation levels, ethical standards, and provision of resources to the attorneys appointed.²⁵⁹ The government may not intend or promote *particular* defense counsel failings, but the concept of cause is hardly so cramped as to relieve states from responsibility for such failings altogether, especially if the only other place to lay the blame is upon the untrained and unsuspecting defendant. Given these factors, harmless error rules are particularly appropriate. Recognizing that the government does not directly cause particular errors, the government should be given the opportunity to salvage convictions and sentences gained as a result of such failings. Recognizing, however, that the competence of counsel is generally in the hands of the government, the opportunity to salvage should be a limited one.

Second, the Fifth Circuit panel envisioned an unfair situation to the government: if the complaint was based on defense counsel's failure to develop and present a certain line of evidence, the government would have to prove that failure to produce the evidence was harmless beyond a reasonable doubt even though the evidence was more readily accessible to petitioner.²⁶⁰ The court's concern ignores the fact that, in order to establish deficient performance, habeas defense counsel have to find and present evidence which the trial counsel should have found and presented. The other half of the equation, of course, is assessment of the persuasive weight of evidence available to and presented by the prosecution. Little inequity can be found here, especially given the courts' habit of generously crediting the prosecution's side of the equation.²⁶¹

There is no practical, logical, or constitutional justification for the

²⁵⁸ This point, and the essence of several others urged in this Article, are thoughtfully explored by a commentator whose name, ironically, is consistent with the trumpet/horn metaphor employed in writings on the right to counsel. See Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

²⁵⁹ For a comprehensive catalog of failures of the states and federal government in these areas, see Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

²⁶⁰ *Strickland*, 693 F.2d at 1261.

²⁶¹ E.g., *Strickland*, 466 U.S. at 699-700. ("[T]he aggravating circumstances were utterly overwhelming. . . . Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion.").

Court's anachronistic exception to the reach of harmless error analysis. Whatever the Court's motivation, it stands as a serious example of doctrinal undermining of the right to counsel.

3. "*Deincorporation*" of a Fundamental Right

The Court's recent tendency to devalue the settled resolution of its historic debate over the incorporation of the Bill of Rights guarantees into the Due Process Clause of the Fourteenth Amendment has also significantly undermined the right to counsel.²⁶² The Court has subtly but inexorably moved toward assessing specific constitutional claims in the general "totality of the circumstances," "shock the conscience," "fundamental fairness" mode of analysis which is characteristic of the pre-incorporation cases.²⁶³

The Court's shift has the practical significance of allowing a greater number of right to counsel claims to be rejected. This development implicitly rejects the principle that appellants whose claims spring from specific guarantees found in the text of the Bill of Rights, previously determined by the Court to be "fundamental," are entitled to a more charitable analytical framework than appellants whose claims are that the amorphous boundaries of due process were crossed in their case, rendering the proceeding "fundamentally unfair." Acceptance or rejection of this principle makes the resolution of the incorporation debate either a meaningful factor in the lives of criminal litigants or merely an interesting historical and academic controver-

²⁶² The idea that all the protections of the Bill of Rights were, and were intended to be, applicable to the states through the Fourteenth Amendment was advanced most vigorously by Justice Hugo Black and opposed with like fervor by Justice Felix Frankfurter. See JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK AND FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 171-79 (1989). The historical premise that the post-civil war drafters of the Fourteenth Amendment intended incorporation is rejected in Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140 (1949). A thoroughly researched and well argued view that incorporation was intended is found in MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). Whatever the truth of the drafters' intent, it is generally accepted that a doctrine of "selective incorporation" prevailed, making applicable to the states those Bill of Rights provisions deemed "fundamental" by the Court. See generally LAFAYETTE & ISRAEL, *supra* note 101, §§ 2.1-6 (examining the extension of guarantees in the Consitution to state proceedings).

²⁶³ For the flavor of this "fundamental fairness" analysis, see, e.g., the paradigm cases of *Rochin v. California*, 342 U.S. 165, 172 (1952) (administering emetic to protesting suspect, forcing him to regurgitate suspected narcotics capsules, "shocks the conscience" and violates Due Process Clause rather than Fifth Amendment guarantee against compulsory self-incrimination), and *Brown v. Mississippi*, 297 U.S. 278 (1936) (same rationale used to grant relief where confessions extracted from black suspects through torture).

sy.

The current Court's lack of attention to the analytical division that should flow from the incorporation doctrine is illustrated by its specific enlistment of *Strickland*'s prejudice prong to perform double duty: once in application of the specifically guaranteed right to counsel,²⁶⁴ and once in application of the specifically *not* guaranteed general due process right to disclosure of exculpatory evidence.²⁶⁵

Contrary to the Court's apparent position, the incorporation issue is significant. Analysis of claims that specific fundamental rights were breached should focus on whether the claimant received that which the Constitution promises. If not, a presumption of relief should arise.²⁶⁶ Under this analysis, it is irrelevant whether *other* rights may have been honored or whether, in retrospect, the proceeding did not shock the conscience or was not fundamentally unfair in its entirety.²⁶⁷ In contrast, a claim grounded only in the Due Process Clause, by its nature, invites consideration of the entire proceeding.

This section will not rehearse every aspect of the incorporation debate, though many are relevant to the Court's actions today.²⁶⁸ Rather, the section will focus on the language of both old and recent opinions to demonstrate that gains made by appellants as a result of "selective incorporation" are being rolled back.

Well before *Powell*, the Court acknowledged the possibility that some Bill of Rights guarantees were incorporated into the Fourteenth Amendment's Due Process Clause.²⁶⁹ The earliest cases accepting incorporation dealt with the First Amendment and provided much of the language that would later be used to sort out the criminal law guarantees.²⁷⁰ A key

²⁶⁴ *Strickland*, 466 U.S. at 694-95.

²⁶⁵ *United States v. Bagley*, 473 U.S. 667, 682 (1985) (*Strickland* prejudice standard adopted for all categories of claims that evidence was improperly withheld).

²⁶⁶ The only way to salvage the conviction or death sentence, in some but not all instances, would be by a governmental showing that the constitutional error was harmless. See *supra* text accompanying notes 243-61.

²⁶⁷ "Respondent's sentencing proceeding was not fundamentally unfair." *Strickland*, 466 U.S. at 700.

²⁶⁸ For a discussion of the notion that due process guarantees must encompass *more* than those set out in the Bill of Rights, and the question of the applicability of federal standards in the states' administration of the incorporated rights, see LAFAYE & ISRAEL, *supra* note 101, §§ 2.3, 2.6.

²⁶⁹ "[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

²⁷⁰ See, e.g., *De Jonge v. Oregon*, 299 U.S. 353, 366 (1937) (freedom of assembly incorporated as part "of the essence" of the liberty protected by the Fourteenth Amendment); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press incor-

point in incorporating the Bill of Rights' criminal guarantees was Justice Cardozo's opinion in *Palko v. Connecticut*.²⁷¹ Justice Cardozo rejected the incorporation of the Fifth Amendment's protection against double jeopardy because that protection could not be said to be "implicit in the concept of ordered liberty," nor to be "of the very essence of a scheme of ordered liberty."²⁷² Thus, violating double jeopardy was not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁷³

In spite of the First Amendment developments that helped shape the language of the criminal law incorporation debate, the Court was reluctant for a time to incorporate Fourth, Fifth, and Sixth Amendment guarantees. Prisoners were left with the fundamental fairness and totality of circumstances mode of analysis epitomized by *Betts v. Brady*.²⁷⁴ Success in persuading the Court to speak of the issue in *Palko* terms, directing attention to the nature of the right claimed, represented an important interim victory.

Ultimately, the Court did begin to incorporate criminal law guarantees—those deemed sufficiently "fundamental."²⁷⁵ Beyond the issue of incorporation itself, the Court acknowledged after some time that the *application* of incorporated rights was to be analyzed more favorably to the claimant after incorporation occurred. This acknowledgement was revealed in the Court's post-*Palko* treatment of double jeopardy issues.

porated, on assumption that they were fundamental "personal rights and liberties").

²⁷¹ 302 U.S. 319 (1937).

²⁷² *Id.* at 325.

²⁷³ *Id.* (quoting *Snyder v. Massachusetts*, 219 U.S. 97, 105 (1934)).

²⁷⁴ 316 U.S. 455 (1942).

[A] key element of the fundamental fairness doctrine was its focus on the factual setting of the individual case. Where a defendant contended that a state had denied him due process by failing to recognize a right that would have been protected by the Bill of Rights, the issue presented was not whether that right was . . . "implicit in the concept of ordered liberty." Rather, it was whether the state's action had resulted in a denial of fundamental fairness in the context of the particular case.

LAFAVE & ISRAEL, *supra* note 101, § 2.4(a). This is, of course, the *Strickland*, not the *Gideon*, approach.

²⁷⁵ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment Compulsory Process Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment speedy trial guarantee); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment Confrontation Clause); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment guarantee against compulsory self-incrimination); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment protection against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment). All of the cases discussed the fundamental nature of the incorporated right, and decreed that there be no difference between federal and state standards for its application.

*Benton v. Maryland*²⁷⁶ overruled *Palko* and incorporated the Double Jeopardy Clause into the Fourteenth Amendment Due Process Clause. *Benton* held that the Clause "represents a fundamental ideal in our constitutional heritage."²⁷⁷ Prior to *Benton*, double jeopardy questions that arose in state prosecutions were decided under general Fourteenth Amendment due process analysis. For example, in *Hoag v. New Jersey*²⁷⁸ the Court denied relief to an appellant who had been acquitted of robbing three people but was later tried and convicted of robbing a fourth person during the same occurrence.²⁷⁹ Observing that the question was always one of "fundamental fairness," the Court declined to hold that the Fourteenth Amendment always forbids prosecuting different offenses at separate trials when the offenses arose from the same occurrence.²⁸⁰ Significantly, the Court also declined to rule on Hoag's claim that collateral estoppel on the issue of his identity as one of the robbers precluded the second trial, holding that it must defer to the decision of the New Jersey Supreme Court against Hoag on the issue.²⁸¹

A year after *Benton* incorporated double jeopardy protection, however, the Court heard a case virtually identical to *Hoag* and looked at the issues quite differently. In *Ashe v. Swenson*,²⁸² petitioner had been acquitted of robbing one of six poker players.²⁸³ Petitioner was later tried and convicted of robbing another of the players.²⁸⁴ The Court reversed the conviction and held that the doctrine of collateral estoppel was integral to the now-incorporated Double Jeopardy Clause.²⁸⁵ The Court decided on the merits of the claim that the state was indeed estopped from bringing Ashe to trial a second time.²⁸⁶ Observing that a sympathetic lower federal court had nevertheless considered itself bound by *Hoag*, Justice Stewart wrote:

The doctrine of *Benton* . . . puts the issues in the present

²⁷⁶ 395 U.S. 784 (1969). Justice Marshall, writing for the Court, rejected *Palko*'s "fundamental fairness" test, observing that once a Bill of Rights provision was found to be sufficiently fundamental to the American scheme of justice, it was applicable to the states by the same standard as in the federal courts, and that the Court had been looking increasingly to the Bill of Rights to determine whether a state criminal trial was conducted with due process of law. *Id.* at 794-95.

²⁷⁷ *Id.* at 794.

²⁷⁸ 356 U.S. 464 (1958).

²⁷⁹ *Id.* at 466.

²⁸⁰ *Id.* at 467.

²⁸¹ *Id.* at 471.

²⁸² 397 U.S. 436 (1970).

²⁸³ *Id.* at 439.

²⁸⁴ *Id.* at 440.

²⁸⁵ *Id.* at 445.

²⁸⁶ *Id.*

case in a perspective quite different from that in which the issues were perceived in *Hoag* The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of "fundamental fairness," but a matter of constitutional fact we must decide through an examination of the entire record.²⁸⁷

Thus, "incorporation" appeared to be more than a judicial determination about the bedrock nature of a Bill of Rights guarantee. The initial decision to incorporate also prompted a different mode of analysis. It would be fair to say that "deincorporation" would involve reverting to fundamental fairness analysis, as well as otherwise treating a guarantee as if it had not been incorporated. That is what the present Court has done often, including *Strickland*'s treatment of the most fundamental guarantee of all.

Other examples of the trend toward "deincorporation" exist. A particularly illustrative example of the Court's internal divisions and inconsistencies involves incorporation of the Sixth Amendment right to trial by jury. The right to trial by jury was incorporated in *Duncan v. Louisiana*.²⁸⁸ However, in two recent cases dealing with the same issue—what is required

²⁸⁷ *Id.* at 442-43 (citations omitted).

²⁸⁸ 391 U.S. 145 (1968). An interesting and quite ironic sidelight, given what *Strickland* did to *Gideon*, can be found in the concurring opinion of Justice Fortas in *Duncan*. Justice Fortas, of course, was chief counsel for Clarence Gideon. What he wrote in the concurrence, however, provides at least partial underpinning for "deincorporation." Justice Fortas agreed that the right to a jury trial was fundamental and should be incorporated, but could not agree that "the tail must go with the hide." *Id.* at 213 (Fortas, J., concurring). He denied that, even as to an incorporated right, the Court was "bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings." *Id.* (Fortas, J., concurring).

Later, in spite of holdings in virtually every incorporation case that the guarantee at issue was to be enforced against states according to the same standards that apply to federal encroachment, *see, e.g.,* *Klopper v. North Carolina*, 386 U.S. 213 (1967); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Ker v. California*, 374 U.S. 23 (1963), the approach of Justice Fortas would be influential in decisions by the Court that the incorporated right did not require states to empanel twelve jurors, *Williams v. Florida*, 399 U.S. 78 (1970), or require unanimity in verdicts, *Apodaca v. Oregon*, 406 U.S. 404 (1972). The Court has again, however, employed an analytical framework more favorable to claimants when deciding a double jeopardy issue. *See Crist v. Bretz*, 437 U.S. 28 (1978) (holding that the rule on when jeopardy attaches is constitutionally mandated to be uniform and that the federal rules govern).

in state prosecutions to make the right to trial by jury meaningful—the *Ashe* mode of analysis was plainly absent.

Mu'Min v. Virginia,²⁸⁹ and *Morgan v. Illinois*,²⁹⁰ were capital cases in which defendants claimed that voir dire had been constitutionally insufficient to insure the right to an impartial jury. In *Mu'Min*, the Court rejected the claim that defendants must be permitted to question prospective jurors about the content of prejudicial pretrial publicity to which they had been exposed.²⁹¹ In *Morgan*, the Court agreed that state trial courts must permit prospective jurors to be interrogated on whether they would invariably impose the death penalty if defendant were convicted.²⁹²

The language of the various opinions in these cases makes it difficult to determine whether the claims were intentionally analyzed by the majority of justices as if *Duncan* had not been decided. A purely semantic question makes that determination difficult: is there any significance to the fact that a reference was made only to "Due Process" rather than a specific Bill of Rights provision in instances where "Due Process" has already been held to include the provision? Perhaps not. But if, as I have argued, the distinction is important in framing the analysis, the cases illustrate at least indifference to the question.

In *Mu'Min*, Justice Rehnquist wrote for the Court that the majority was rejecting petitioner's contention that "his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment" had been violated.²⁹³ That, however, is the last mention of the Sixth Amendment in the opinion. All other references are only to the Fourteenth Amendment, including: "For the reasons previously stated, we hold that the Due Process Clause of the Fourteenth Amendment does not reach this far."²⁹⁴ Further, the rationale of the majority was based on overall fairness of the jury selection proceeding,²⁹⁵ and contained familiar pre-incorporation phrases such as "the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."²⁹⁶

Interestingly, Justice O'Connor's concurring opinion, and the dissents of

²⁸⁹ 500 U.S. 415 (1991).

²⁹⁰ 112 S. Ct. 2222 (1992).

²⁹¹ *Mu'Min*, 500 U.S. at 431-32.

²⁹² *Morgan*, 112 S. Ct. at 2232.

²⁹³ *Mu'Min*, 500 U.S. at 417.

²⁹⁴ *Id.* at 431.

²⁹⁵ *Id.* at 431-32. The overall fairness of jury selection was not, incidentally, an uncontroversial finding. Justice Kennedy might well have joined the majority, but he could not abide by the fact that, under the procedure employed by the trial judge, jurors who had acknowledged exposure to massive pretrial publicity nevertheless were permitted to affirm their impartiality by merely remaining silent when asked if any of them could *not* be impartial. *Id.* at 452 (Kennedy, J., dissenting).

²⁹⁶ *Id.* at 425-26.

Justices Marshall and Kennedy analyzed the claim on the narrower *Sixth Amendment* question of whether the judge could properly credit a prospective juror's assertion of impartiality, thereby sufficiently guaranteeing an impartial jury. Reaching opposite conclusions, O'Connor and Marshall nevertheless specifically referred to the Sixth Amendment.²⁹⁷ Kennedy did not refer to the constitutional provision involved, but discussed it in the same way as Marshall and O'Connor.²⁹⁸ The general due process approach, apparent in Rehnquist's opinion, asked whether the jury selection process was fundamentally fair, thereby assuring that a constitutionally qualified jury was seated. The Sixth Amendment approach, apparent in the opinions of O'Connor, Marshall, and Kennedy, asked the narrower question of whether the trial court could reliably guarantee that Mu'Min's Sixth Amendment right to an impartial jury had been honored without knowing of the pretrial publicity to which prospective jurors had been exposed. The analytical difference is subtle, but may well have been important in this five to four decision.

Morgan made it even clearer that there is an analytical difference between "general due process required" and "due process required because of incorporation."²⁹⁹ The trial court in *Morgan*, although questioning prospective jurors generally about whether they would follow the law, refused to allow questions about whether they would automatically vote for death if Morgan was convicted.³⁰⁰ The Court reversed.³⁰¹ Justice White, for a six member majority, wrote the section of the opinion that discussed the constitutional basis for the decision. The Court held that the Sixth Amendment right and the Fourteenth Amendment right *were* different,³⁰² but impartiality had been held to be a necessary component of *both* guarantees.³⁰³ The

²⁹⁷ "I cannot conclude, however, that 'content' questions are so indispensable that it violates the Sixth Amendment . . ." *Id.* at 433 (O'Connor, J., concurring). "Today's decision turns a critical constitutional guarantee—the Sixth Amendment's right to an impartial jury—into a hollow formality." *Id.* (Marshall, J., dissenting).

²⁹⁸ "I fail to see how the trial court could evaluate the credibility of the individuals seated on this jury." *Id.* at 452 (Kennedy, J., dissenting).

²⁹⁹ *Morgan*, 112 S. Ct. at 2228-29.

³⁰⁰ *Id.* at 2226.

³⁰¹ *Id.* at 2229-30.

³⁰² *Id.* at 2235-36. "[O]ur decisions . . . have relied on the strictures dictated by the Sixth and Fourteenth Amendments to ensure the impartiality of any jury that will undertake capital sentencing." *Id.* at 2229 (citations omitted).

³⁰³ *Id.* at 2228-29. This discussion was probably prompted by Justice Scalia's dissent, which also emphasized the source of the right. According to Justice Scalia, the majority had conceded that the Sixth Amendment did not apply to capital sentencing proceedings. *Id.* at 2235 (Scalia, J., dissenting). (The majority did not explicitly make that concession.) Therefore, there being no Sixth Amendment right to a trial by jury, there was no right to a trial by an impartial jury. *Id.* (Scalia, J., dissenting). Citing *Mu'Min*, Justice Scalia went on to complain that the majority had reached the wrong result under

majority then grounded its ruling in favor of Morgan squarely in general due process.³⁰⁴

I have discussed *Morgan* because its language specifically acknowledges the different analytical approaches I detect. Though *Morgan* may be seen as contrary to my position that general due process deincorporation makes claims easier to reject, I do not agree. First, it is difficult to see how Morgan should have lost under either analytical framework. The Court had long ago held that jurors whose views prevented or substantially impaired their ability to *impose* the death penalty could be identified through voir dire and excluded on that basis.³⁰⁵ All Morgan sought was the reciprocal right to turn the coin over—surely a matter of “fundamental fairness” in the eyes of most, Sixth Amendment or not. Second, in spite of, or because of, the apparent merits of the claim, Justice Scalia, joined by Justices Rehnquist and Thomas, found it necessary to drive the question out of the Sixth Amendment’s reach and characterize the issue as a general due process matter in order to justify denying relief.³⁰⁶ The three members of the Court most committed to denying claims of criminal appellants apparently saw the advantage of deincorporation.

It is the prejudice prong of *Strickland*, of course, that effectively deincorporates the most fundamental right and deprives defendants of the effective assistance of counsel unless the trial in retrospect can be seen as “fundamentally unfair.” This development is starkly illustrated by *Lockhart v. Fretwell*.³⁰⁷ In *Fretwell*, the Court determined that even counsel’s errors that satisfy the deferential performance prong of *Strickland*, and but for which the outcome of the proceeding would *surely* have been different, do not constitute a denial of the Sixth Amendment right to counsel if the Court can determine somehow that the entire proceeding was neither unreliable nor unfair.³⁰⁸

Simply put, Bobby Ray Fretwell’s attorney failed to bring to the trial court’s attention a then-controlling case that invalidated the only factor on which Fretwell’s death sentence was based.³⁰⁹ Had the case been cited,

fundamental fairness analysis. *Id.* at 2239 (Scalia, J., dissenting).

³⁰⁴ “Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views.” *Id.* at 2229-30.

³⁰⁵ *Wainwright v. Witt*, 469 U.S. 412 (1985).

³⁰⁶ That characterization permitted the dissenters to enlist the maxims of deference to state judges, and the “manifest error” standard of review, *Morgan*, 112 S. Ct. at 2239 (Scalia, J., dissenting) (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1961)), which would not be available upon direct review of a specific federal question, *id.* at 2235-42 (Scalia, J., dissenting).

³⁰⁷ 113 S. Ct. 838 (1993); see *supra* note 86.

³⁰⁸ *Fretwell*, 113 S. Ct. at 842-43.

³⁰⁹ The only aggravating factor found by Fretwell’s jury was that the murder was

Fretwell would have been sentenced to life without parole and the state of Arkansas would have had no appeal.³¹⁰ The case was not cited. Four years later, while Fretwell was appealing his sentence, the case was overruled.³¹¹ In spite of the fact that Fretwell had met the stringent requirements of both prongs of *Strickland*, the Court reversed the Eighth Circuit's grant of relief on Fretwell's ineffective assistance of counsel claim and ordered reinstatement of his death sentence.³¹² The Court could do so only by treating the Sixth Amendment right to counsel as if it had never been incorporated:

Our decisions have emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." Thus, "the right to the effective

committed for pecuniary gain. *Id.* at 841. He was death-eligible in the first instance because the murder took place during a robbery. *Id.* At the time, an Eighth Circuit case, *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985), had held that a death sentence was unconstitutional if based on an aggravating factor that duplicated an element of the underlying felony. *Id.* at 1582.

³¹⁰ Surprisingly, given its practical importance, this point is not discussed. *Bullington v. Missouri*, 451 U.S. 430 (1981), forbade, on double jeopardy grounds, a second attempt to secure a death sentence where a jury, in an adversarial trial on aggravating and mitigating factors, had once imposed a life sentence. *Id.* at 446. In *Fretwell*, the jury imposed a death sentence after an adversarial proceeding that resulted in the finding of an impermissible aggravating factor. *Fretwell*, 113 S. Ct. at 841. Thus, accepting *Bullington's* holding that a capital penalty trial is the substantial equivalent of a non-capital trial, a more closely analogous situation might be found in the Court's pronouncements concerning the double jeopardy consequences of judicial dismissals. In double jeopardy dismissal cases, the Court has held that dismissals bar retrial if they are based on insufficiency (rather than weight) of evidence, and represent a determination by the court, correct or not, of some or all of the elements necessary to guilt. *See Tibbs v. Florida*, 457 U.S. 31 (1982); *United States v. Scott*, 437 U.S. 82 (1978); *Burks v. United States*, 437 U.S. 1 (1978). Further, the recent decision that a capital sentencing trial is not a successive prosecution for double jeopardy purposes would not appear applicable to Fretwell's situation. *Schiro v. Farley*, 114 S. Ct. 783 (1994). In Fretwell's case, the state's evidence entitling it to a death sentence would have been found legally insufficient had *Collins* been cited. *Fretwell*, 113 S. Ct. at 848 n.5 (Stevens, J. dissenting).

In any event, as a practical matter, the likelihood that Arkansas would have chosen Fretwell's case to take on both adverse double jeopardy precedent and the law forbidding use of the "double counting" aggravating factor by attempting to appeal a life sentence without parole must surely be seen as remote.

³¹¹ In the interim, the United States Supreme Court had decided *Lowenfield v. Phelps*, 484 U.S. 231 (1988), permitting use of aggravating factors that duplicate elements of the capital offense. This prompted, if not required, the Eighth Circuit to overrule *Collins*. The Eighth Circuit did so in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).

³¹² *Fretwell*, 113 S. Ct. at 845.

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. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."³¹³

Thus, when even *Strickland* was not sufficient to deny a right to counsel claim, it was necessary for the majority to drive the issue completely into the overall fundamental fairness arena, disregarding *Gideon* altogether. Having done so, they simply pronounced the proceeding "neither unfair nor unreliable."³¹⁴

Whether deincorporation of the right to counsel is part of a general move by the Court to return to fundamental fairness analysis on all constitutional criminal law issues has not, and cannot, be firmly established by this brief examination of a small number of opinions. If, as I believe, such a move is underway, it is a highly significant development and certainly worthy of further research. We should not belatedly discover one day that Justices Black, Frankfurter, and others were arguing over nothing. This Article, however, establishes that the right to counsel has been deincorporated, and that is a part of the destructive legacy of *Strickland*.

C. *Undermining the Right in Practice*

The sheer volume of cases demonstrating the practical harm of *Strickland*'s doctrine presents a formidable editing challenge.³¹⁵ Capital

³¹³ *Id.* at 842 (citations omitted).

³¹⁴ *Id.* at 843. There was a strained effort to reinterpret *Strickland* and analogize to a completely inapposite case about not having a right to have a lawyer assist perjury. *Id.* at 842-44. The brief majority opinion, however, invests little effort in defense of its remarkable result. The opinion's essence conveys only the simple message: We've got the votes.

³¹⁵ For samples of the many shocking cases, see generally Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 245-49 (1991) (describing the non-representation of Georgia capital defendants Jack House and Billy Mitchell); Paul Marcotte, *Snoozing, Unprepared Lawyer Cited*, A.B.A. J., Feb. 1991, at 14 (describing representation of black capital defendant by 83 year old former imperial wizard of the Ku Klux Klan); Roger Parloff, *Legal Aid, Barely*, HARPER'S MAG., Mar. 1993, at 26 (citing instances of denial of relief under prejudice prong in cases where defense attorneys were asleep, or using heroin and cocaine throughout the trial, or drunk during the trial).

The most stunning and persuasive examples of the kind of defense given those whose lives are at stake after *Strickland* is provided by Stephen B. Bright, Director of the Southern Center for Human Rights, and one of the finest capital defense attorneys in the country. Stephen provides real representation to capital defendants in the deep.

cases will be emphasized because the harm is most acute and the "hind-sight" doctrine is the most flawed in such cases. Case examples will concentrate on ineffective assistance of counsel claims arising in the United States Courts of Appeal for the Fourth, Fifth, and Eleventh Circuits because the states in these jurisdictions are responsible for almost 80% of the executions carried out in the last twenty years.³¹⁶

Several matters are apparent from observation of *Strickland* in practice. First, of course, is that many instances of dreadful lawyering are found to be acceptable. These, and even the few cases where relief is granted by the courts, illustrate that *Strickland*'s heavy presumption of competence is highly questionable. More disturbing, it will be seen, is that many of the cases involve not simply negligence or worse in preparation and presentation of a defense, but abandonment of clients by the one person on whom the law and the profession rely, not to abandon the clients, but to advocate vigorously for them.³¹⁷

It is also interesting to note, though detailed examination is not possible in this Article, that the injustices in *Strickland*'s prejudice prong and in *Cronic*'s insistence that the record show specific instances of inadequate performance are ironically but clearly made more apparent by the way both requirements are circumvented when some courts conclude that petitioners deserve relief. Seldom are the instances in which claimants prevail if their claims are analyzed in straight *Strickland* terms. Instead, the courts that grant relief claim that *Cronic* created an exception to the requirement that prejudice from deficient performance be demonstrated. These courts con-

South. I confess to bias. Stephen is a friend, and I am a great admirer of both his trial skills and his basic humanity. That admiration is shared, however, by many, including the past president of the ABA. See Talbot D'Alemberte, *The Heroism of Steve Bright*, A.B.A. J., Sept. 1991, at 8.

For chilling examples of inadequate capital defense, including one case of a since executed defendant whose defense passed *Strickland* muster even though defense counsel later apologized to the client for having been under considerable stress during trial because he was at the time on drugs and breaking up with both his wife and his gay lover and was really not focused on the trial, see Bright, *In Defense of Life*, *supra* note 15, at 857-62; see also Bright, *Death by Lottery*, *supra* note 15, at 689-94; *Death Penalty Legislation and the Racial Justice Act, 1990: Hearings on H.R. 4618 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 519 (1990) (statement of Stephen B. Bright, Southern Prisoners' Defense Committee).

³¹⁶ By the third quarter of 1994, Texas, Florida, Virginia, Louisiana, Georgia, Alabama, North Carolina, and South Carolina, in that rank, had carried out 78.25% of the executions since 1972. *Execution Breakdown by State*, Death Row, U.S.A. (NAACP Legal Defense and Education Fund) 697 (Fall 1994).

³¹⁷ Professional responsibility aspects of this type of ineffective assistance of counsel are dealt with briefly in the sections that follow. See *infra* text accompanying notes 413-29.

strue dicta in *Cronic* to provide that when there has been an actual breakdown of the adversarial process at trial, no showing of prejudice is required.³¹⁸ Of course, the distinction between *Cronic*'s dicta and *Strickland*'s requirement that claimants show that defense counsel failed to provide meaningful adversarial testing of the prosecution's case sufficient to justify confidence in the result, i.e., deficient performance that caused prejudice, is an extremely fine one at best. This distinction, however, may be one of the only ways to address Justice Marshall's legitimate dissent in *Strickland* that its test did not ensure that even persons against whom evidence appears overwhelming are convicted only through fundamentally fair procedures.³¹⁹

³¹⁸ See, e.g., *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). The court granted relief because Swanson's appointed counsel, David Ochoa, repeatedly conceded in his closing argument to the jury that there was no reasonable doubt that his client was guilty of bank robbery. *Id.* at 1077-79. The panel majority found that Ochoa had abandoned his client and joined the prosecution at a critical stage of the proceedings. *Id.* at 1075. The government argued that Swanson had not shown prejudice under *Strickland*. *Id.* at 1072. If *Strickland* applied, the government surely would have prevailed. The government's case that Swanson was the robber included four eyewitnesses, two photos from the bank surveillance camera, and defendant's fingerprints. *Id.* at 1079 (Wiggins, J., dissenting). Drawing on its own prior interpretation of *Cronic* dicta that certain circumstances could obviate the need to show prejudice, the court wrote that "*Cronic* presume[d] prejudice where there ha[d] been an actual breakdown in the adversarial process at trial." *Id.* at 1072 (emphasis added) (quoting *Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir.), cert. denied, 498 U.S. 960 (1990)).

Cronic, of course, involved a claim that an external factor, insufficient preparation time, precluded effective assistance. See *supra* text accompanying notes 173-85. The Court, however, did state that prejudice would be presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984) (emphasis added). *Swanson* found a crucial equivalence between an actual adversarial breakdown of some component of a trial, caused by inadequate performance of counsel, and complete failure to subject the prosecution's case to adversarial testing. Unfortunately, a more likely characterization of the "*Cronic* exception," if there is such an exception, can be found in *Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991). The Eleventh Circuit acknowledged the exception and its applicability to attorney performance, but in denying relief emphasized that the exception was quite narrow and the burden of establishing it quite heavy. *Id.* at 1152-53.

Less surprisingly, non-performance of defense counsel during all or part of a trial has permitted some courts to put the right to counsel claim in the *Gideon* complete denial pigeonhole and grant relief without a showing of prejudice. See, e.g., *Tucker v. Day*, 969 F.2d 155 (5th Cir. 1992) (counsel at resentencing hearing did nothing, observing that he was "just standing in for this one"); *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984) (counsel cross-examined and made appropriate objections during some portion of trial, but slept through most of it).

³¹⁹ See *supra* text accompanying note 152.

1. *Abandonment of Client*

Even to courts so inclined, innovation to avoid application of the *Strickland* test is available only in limited circumstances. *Strickland's* greatest practical harm may be the way both prongs of its test can be interpreted to permit abandonment of clients, especially in capital cases. This abandonment is often most apparent during opening statements and closing arguments. The performance and prejudice requirements are evaluated taking into account that arguments are not evidence and that jurors are instructed to that effect. Thus, it is easier to find that what may charitably be described as shortcomings in defense arguments are not prejudicial.³²⁰ Some abandonments by argument even survive the *Strickland* performance prong because the reviewing court views the argument as a tactical decision to maintain credibility with jurors, not to insult their intelligence, or to adopt a "low key" strategy.³²¹

Examples of defense attorneys disassociating themselves from clients are far too numerous. It is especially disturbing to find such disassociation in capital cases in which relief is denied under *Strickland* and the indigent defendant is subsequently executed. Whether vigorous advocacy would have brought a different result or not, and no matter how aggravated the crime, it must be particularly painful to go to one's death having been alone and friendless in the legal system.

A most dramatic example of abandonment is found in *Clozza v.*

³²⁰ See, e.g., *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990). Despite defendant's continued protestation of innocence at the penalty trial, Brown's counsel argued that his client was "still a human being with a soul despite the blackness of the crime that this man has committed." *Id.* at 499 n.17. The court concluded that the findings of the jury would have been the same regardless of what defense argued. *Id.* at 500-01.

The impact of argument has undergone little empirical testing. A recent study, however, indicates that improper *prosecution* argument in capital cases is influential. In *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *vacated*, 478 U.S. 1016 (1986), the prosecutor's penalty phase argument was condemned as a litany of unprofessional and unconstitutional remarks. *Id.* at 1408-14. The court, however, found the error harmless. *Id.* at 1416. Researchers submitted a summation of the evidence, and the prosecutor's closing argument to two groups of death-qualified mock jurors. Judith Platania et al., *Prosecution Misconduct During the Penalty Phase of Capital Trials: Harmless Error?*, THE CHAMPION, July 1994, at 19. One group heard the trial argument, the other heard the trial argument minus the objectionable portions. *Id.* at 20. A significantly higher number of jurors who heard the improper argument voted for death. *Id.* at 21.

³²¹ "[C]ounsel is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Murray.³²² Albert Clozza, convicted and sentenced to death for the rape and murder of a thirteen year old girl, claimed that Public Defender Peter Legler had abandoned his duty of loyalty.³²³ In particular, the record showed that defense counsel during the opening statement had told the jury that it had been very difficult to get to like Clozza enough to represent him, that he did not know what his defense would be, and that if the victim had been his son, who was in law school, he would want to kill Clozza also.³²⁴ His closing argument at the guilt phase of the trial referred to an earlier suicide attempt by Clozza and opined that "it would not have been the greatest tragedy" had the attempt succeeded.³²⁵ The court found this performance acceptable as part of a strategy to maintain credibility with the jury in hopes of advancing an intoxication defense, in spite of Clozza's testimony that he was sober, and in hopes of undermining Clozza's confession of rape.³²⁶

While it is possible that the court's characterization of Legler's remarks as tactical is accurate, other portions of the trial record strongly suggest that the tactic was not to maintain credibility with jurors but rather to *identify* with the jurors at Clozza's expense. Legler made sure the jurors knew that he did not want to defend his client and was present in court only because he was required to be.³²⁷ During voir dire, for example, he directly revealed his antipathy toward his client and his desire not to participate in the trial.³²⁸ He re-emphasized these points in his opening statement,³²⁹ and during direct examination of Clozza.³³⁰

³²² 913 F.2d 1092 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991).

³²³ *Id.* at 1098.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 1099.

³²⁷ *Id.* at 1098 (quoting counsel's closing argument that he did not want to put his client "back on the street").

³²⁸ "I can assure you that I am not interested in participating. It is my duty. I am about to, in this case, earn any income I may have had for the past ten years that I haven't earned already." Petition for a Writ of Habeas Corpus at 10, *Clozza v. Murray*, 913 F.2d 1092 (4th Cir. 1990) (No. 89-4009) (quoting Trial Transcript at 38, *Commonwealth v. Clozza* (Va. Cir. Ct. Va. Beach)), *cert. denied*, 499 U.S. 913 (1991).

³²⁹ Legler stated in his opening statement:

Quite frankly, I hope that the rest of the people that get involved in this type of offense can retain counsel. I hope that all have sufficient funds to retain counsel so my office does not become involved.

...
... I'm not going to stand here and tell you that I have learned to love this kid because I haven't. I have told Albert that. I have been telling him, Albert, one of the hardest things for me to do is going to be getting to like you enough so that I can do an adequate job representing you.

Id. at 11-12 (quoting Trial Transcript at 542-43).

³³⁰ While conducting the direct examination of Clozza, Legler asked this series of

Albert Clozza was executed in 1991.³³¹ More recently, citing *Clozza*, the Fourth Circuit rejected the claim of another prisoner, since executed, who alleged that his attorney had conceded in argument that death was the appropriate sentence.³³²

Strickland's generous deference to "tactical" decisions has also spawned approval of *Clozza*-type strategy in the Eleventh Circuit. In *Devier v. Zant*,³³³ another capital case, the court approved of what it determined to be a strategic decision to adopt a "low key" approach in order to maintain credibility with the jury. The case was a retrial, and counsel determined that a "confrontational" approach had not been successful.³³⁴ Part of this approved strategy involved refraining from objections during the prosecutor's guilt phase argument, which included dropping heavy rocks and an invocation to "agree with me" that defendant was guilty.³³⁵ As part of this strategy, a tactical decision was also made not to object to the prosecutor's penalty phase argument that included: comparing jurors to soldiers with an unpleasant duty to perform—returning a death verdict—and arguing that failure to do their duty would result in loss of their birthright; arguing that Devier was like a cancer who should be exorcised to protect society; and claiming that life in prison would be a pleasant retirement for Devier.³³⁶

questions:

Q. . . . Did you think that the good Lord sent some guardian angel down there and swept her up and clothed her and preserved her from the cold and stopped her wounds from bleeding and healed her mouth and said everything is fine and took her back home with her mom and dad, where she belonged?

A. No, sir.

Q. Do you believe in that kind of a miracle?

A. I don't know.

Q. It is going to take one like that for me to save you. Do you know that?

A. Yes, sir.

Q. It is really weird celebrating Halloween representing you.

A. Yes, sir.

Q. Do you know what it is like to walk out with your own kids and see people dressed up as spooks and ghouls and think about you?

A. No, sir, I don't.

Q. It kind of takes the grins out of Halloween, Albert. And these photographs are going to take the grins out of their lives. I can tell you that. I would show them to you, but I've probably done enough that I shouldn't do on this record.

Id. at 13 (quoting Trial Transcript at 1213-14).

³³¹ *Execution Update*, *supra* note 44, at 694.

³³² *Watkins v. Murray*, 998 F.2d 1011 (table), No. 92-4010, 1993 WL 243692 (4th Cir. July 7, 1993) (per curiam). Johnny Watkins was executed in 1994. *Execution Update*, *supra* note 44, at 696.

³³³ 3 F.3d 1445 (11th Cir. 1993).

³³⁴ *Id.* at 1451.

³³⁵ *Id.*

³³⁶ *Id.* at 1453.

The court found counsel's stated reason for failure to object to be reasonable: defense counsel believed that the *trial* judge would not control the prosecutor.³³⁷

Clozza and *Devier*, considered with an earlier Eleventh Circuit case, *Messer v. Kemp*,³³⁸ raise the disturbing possibility that the more aggravated the crime alleged, the more judicially forgivable it is for defense counsel to disassociate themselves, not just from the crime, but from their clients. Like Albert Clozza and Darrell Devier, James Messer was accused of rape and murder of a child.³³⁹ Though there was a considerable amount of evidence against him, he entered a plea of not guilty and never authorized his attorney, John Sawhill, to admit guilt.³⁴⁰ Just as in *Clozza* and *Devier*, the court approved of Sawhill's strategic decision to abandon the client in order to maintain credibility:

I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what [the prosecutor] indicates occurred on that day so I'm not going to. . . . I'm a parent too and I can't explain or give you some easy explanation for why so I won't try.

. . . I pray to God that none of you or myself . . . will ever see anything like this again.³⁴¹

Shortly after *Strickland*, the Fifth Circuit also recognized the "maintain credibility" strategy. In *Mattheson v. King*,³⁴² the defense theory was that a killing during a robbery was accidental rather than intentional. Only intentional killing carried the possibility of a death sentence under the law applicable at that time.³⁴³ During jury selection, Mattheson's counsel told the jury that he was appointed, referred to Mattheson as a murderer, and "described the crime as 'gross' and 'heinous.'"³⁴⁴ The court accepted the ex-

³³⁷ *Id.* at 1454. *Strickland*, of course, did not directly address the question of whether it is reasonable professional judgment to forgo meritorious objections because of a belief that the trial judge will erroneously refuse to sustain them.

³³⁸ 760 F.2d 1080 (11th Cir. 1985), *cert. denied*, 474 U.S. 1088 (1986).

³³⁹ *Id.* at 1082.

³⁴⁰ *Id.* at 1084.

³⁴¹ *Id.* at 1089 n.5. James Messer was executed July 28, 1988. *Execution Update*, *supra* note 44, at 693.

³⁴² 751 F.2d 1432 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138 (1986).

³⁴³ *See id.* at 1434.

³⁴⁴ *Id.* at 1440. With respect to defense counsel's description of the crime, it should be noted that the victim was killed by a single shotgun blast. *See id.* at 1434. The prosecutor made much of the effect of the shot, arguing for a death sentence in part because the victim's head had been blown off and was "in the ceiling." *Id.* at 1445. Though not mentioned in *Mattheson*, the Supreme Court, five years earlier in another single shotgun

planation of defense counsel that he had decided to be as candid as possible with the jury, given the overwhelming evidence of guilt, "presumably," said the court, "to build up his credibility and that of his theory of the case."³⁴⁵

No mitigating evidence was offered at the penalty trial, and no investigation was conducted into Mattheson's mental history or mental state at the time of the offense or at trial.³⁴⁶ Approving this conduct as a strategic decision, the court relied on *Strickland*'s admonition that when a client has given counsel reason to believe that investigation would be fruitless or harmful, the failure to investigate may not be challenged.³⁴⁷

Rarely do the right to counsel claims of death sentenced prisoners that counsel have abandoned them succeed in the important Fourth, Fifth, and Eleventh Circuits. Such claims fare somewhat better in the Ninth and Tenth Circuits.³⁴⁸

blast case, had held that the use of a particular weapon and the gruesome state of the crime scene could not be used to establish the "vileness" aggravating factor on which to base a death sentence. See *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980).

³⁴⁵ *Mattheson*, 751 F.2d at 1440.

³⁴⁶ *Id.* at 1439-41.

³⁴⁷ *Id.* at 1440. In another Fifth Circuit case, *Strickland* was employed to permit abandonment of the client, *at the client's request*. *Felde v. Butler*, 817 F.2d 281 (5th Cir.), *reh'g denied*, 820 F.2d 1223 (5th Cir.), *cert. denied*, 484 U.S. 873 (1987). Wayne Felde, suffering from Vietnam Post-Traumatic Stress Syndrome, killed a Louisiana policeman after escaping from custody following a manslaughter conviction in Maryland. *Id.* at 281-82. Felde and his counsel agreed that if they were not successful in an insanity defense, they would seek the death penalty. *Id.* at 283. They both argued for the death penalty, defense counsel apparently honoring Felde's stated wish to die rather than spend his life in prison. *Id.* at 284-85. The court sidestepped the performance prong argument that it is utterly inappropriate for an attorney actively to advocate for his client's death. Instead, the court denied relief using the prejudice prong conclusion that there was no reasonable probability that the sentence would have been different without defense counsel's complicity. *Id.* at 284. Wayne Felde was executed March 15, 1988. *Execution Update*, *supra* note 44, at 693.

³⁴⁸ See, e.g., *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). Kevin Osborn's attorney, Leonard Munker, made public statements that his client was playing a game to attract attention, and that he was not amenable to rehabilitation. *Id.* at 628-29. At the sentencing phase of the trial, he stressed the brutality of the crimes and analogized his client and co-defendants to "sharks feeding in the ocean in a frenzy." *Id.* (quoting *Osborne v. Schillinger*, 639 F. Supp. 610, 617 (D. Wyo. 1986)). Granting relief, the court found that Munker had "abandoned the required duty of loyalty to his client, . . . acted with reckless disregard for his client's best interest and, at times, apparently with the intention to weaken his client's case." *Id.* at 629; see also *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994) (error to deny evidentiary hearing where client alleged appointed counsel called him "stupid nigger son of a bitch" for insisting on trial, and expressed hope he would get life sentence in non-capital case.)

2. Deficient Performance

When the defendant claims deficient performance rather than client abandonment, the record appears only marginally better. *Strickland*'s influence in permitting denial of claims where the court may be so inclined because of revulsion at the offense is readily apparent.

The Fourth Circuit granted relief in *Hyman v. Aiken*.³⁴⁹ Hyman's attorney, Demetrious Stratos, had stopped subscribing to reporters and advance sheets years before the trial, did not own a copy of the South Carolina death penalty statute, and had not read any U.S. Supreme Court death penalty opinions.³⁵⁰ Stratos and his co-counsel also failed to review the testimony of key witnesses, including Hyman himself, or to review documents made available to them by the prosecutor.³⁵¹ Stratos later testified that "he could not recall doing anything to prepare for the sentencing phase," and that he had spoken with Hyman for maybe a half minute between the guilty verdict and the penalty trial.³⁵² That the Fourth Circuit granted relief on both prongs of *Strickland*³⁵³ could be encouraging, but for consideration of two facts. First is the realization that this level of lawyering had been found acceptable by the South Carolina Supreme Court, the lower federal court, and the Fourth Circuit itself prior to remand by the Supreme Court on another issue.³⁵⁴ Second is the fact that the Fourth Circuit has not granted relief to a death sentenced prisoner on an ineffective assistance of counsel claim in the seven years since *Hyman*.

A more typical and recent Fourth Circuit approach in capital cases may be found in *McDougall v. Dixon*.³⁵⁵ Although the court found some of defense attorney Jerome Paul's conduct to be "unethical, outrageous, and even illegal," the court determined that *Strickland*'s requirements for relief had not been met.³⁵⁶ Paul's license to practice law had been suspended for a second time prior to trial, but the court noted that the trial occurred before the effective date of the suspension.³⁵⁷ The court also found that if Paul suborned perjury from witnesses, such conduct surely was illegal, but no prejudice had been shown from it.³⁵⁸ Perhaps most interestingly, the court

³⁴⁹ 824 F.2d 1405 (4th Cir. 1987).

³⁵⁰ *Id.* at 1412-13.

³⁵¹ *Id.* at 1413-14.

³⁵² *Id.*

³⁵³ *Id.* at 1416.

³⁵⁴ *Id.* at 1412.

³⁵⁵ 921 F.2d 518 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991).

³⁵⁶ *Id.* at 533-39.

³⁵⁷ *Id.* at 534.

³⁵⁸ *Id.* at 535.

found no breach of *Strickland*'s performance prong in Paul's penalty phase argument to a death-qualified jury.³⁵⁹ To this group of twelve, all of whom had presumably affirmed their willingness to impose a death sentence in an appropriate case, Paul argued that the death penalty was a tool of totalitarians and fascists, and that believers in capital punishment love killing.³⁶⁰ Other experienced attorneys, including Paul's co-counsel, thought the argument was stupid or worse.³⁶¹ The trial judge, however, thought it was as good or better than other death penalty arguments he had heard.³⁶²

Examination of the Eleventh Circuit's "performance" cases illuminates the damaging effect of *Strickland*'s suggestion that communications with and observation of clients by untrained defense attorneys can render reasonable their decisions to conduct little or no investigation, and to present no evidence in mitigation. This influence was apparent in *Bush v. Singletary*.³⁶³ In *Bush*, defense counsel admitted that he prepared no mitigating evidence at all to present at the penalty trial, and that he never looked into Bush's psychological history.³⁶⁴ A majority of the Eleventh Circuit panel, however, concluded that he had done enough.³⁶⁵ Muschott, the defense counsel, discussed mitigation with the client and three members of his family.³⁶⁶ Two indicated they did not want to testify, and "no other family member came forward despite Muschott's willingness to talk with them."³⁶⁷ Similarly, Muschott testified that Bush "had no problems communicating and gave no indication that he was ever out of touch with reality."³⁶⁸ Even so, counsel discussed what he knew about his client with a psychiatrist, Dr. Tingle, who said he could be of no help.³⁶⁹ The court concluded that the decision not to investigate more thoroughly, or to have Bush examined by a mental health professional, was within *Strickland*'s wide range of professional competence, "[g]iven what Muschott could readily observe about Bush, what Muschott knew of Bush's background, and the advice of Dr. Tingle."³⁷⁰

³⁵⁹ *Id.* at 536-39. In a capital case, the prosecution is permitted to strike for cause any prospective jurors whose reservations about imposition of the death penalty would prevent or substantially impair their ability to follow the law. *Wainwright v. Witt*, 469 U.S. 810 (1985).

³⁶⁰ *McDougall*, 921 F.2d at 536.

³⁶¹ *Id.* at 535.

³⁶² *Id.* at 536.

³⁶³ 988 F.2d 1082 (11th. Cir. 1993), *cert. denied*, 114 S. Ct. 705 (1994).

³⁶⁴ *Id.* at 1094 (Kravitch, J., dissenting).

³⁶⁵ *Id.* at 1091-92.

³⁶⁶ *Id.* at 1091.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 1092.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

Fortunately, the dissenting opinion revealed what defense counsel could easily have found and presented.³⁷¹ Readily available mitigation evidence included psychological and mental health factors, as well as family history and personal factors.³⁷² An available prison report stated that Bush sometimes lost touch with reality, and suggested that he may have suffered from severe emotional disturbance at the time of the murder, a statutory mitigating factor.³⁷³ Defense counsel, however, spoke with Dr. Tingle about mitigation for no more than ten minutes, and not at all with other court appointed mental health professionals.³⁷⁴ Counsel did not request that Bush be examined.³⁷⁵ Finally, counsel did not show the doctors the prior report or refer to it because he did not know of its existence.³⁷⁶

It must nevertheless be acknowledged that, unlike the Fourth Circuit, capital petitioners in the Eleventh Circuit do sometimes prevail on claims similar to those that failed in *Bush*.³⁷⁷ Apart from changes in court and panel membership, a major part of this apparent inconsistency may be attributable to *Strickland*'s refusal to acknowledge that there are specific, very basic, identifiable actions that must be taken in every case in order to render reasonably effective assistance. In capital cases, with due deference to tactical decisions, those requirements include a mitigation investigation that at least extends to collecting every available document on which the client's name appears—medical records, school records, prison records, military records, etc.—before making any tactical decisions about the penalty trial.³⁷⁸

In the Fifth Circuit, the court has granted relief in a non-capital case on facts similar to those of *Bush*.³⁷⁹ Likewise, in a capital case where

³⁷¹ *Id.* at 1093 (Kravitch, J., dissenting).

³⁷² *Id.* at 1094 (Kravitch, J., dissenting).

³⁷³ *Id.* (Kravitch, J., dissenting).

³⁷⁴ *Id.* at 1095 (Kravitch, J., dissenting).

³⁷⁵ *Id.* (Kravitch, J., dissenting).

³⁷⁶ *Id.* (Kravitch, J., dissenting).

³⁷⁷ See, e.g., *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) (lack of preparation for sentencing phase of trial resulted in prejudice to defendant and required resentencing); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) (counsel was ineffective because of no reasonable investigation of mitigating evidence at sentencing phase), *cert. denied*, 112 S. Ct. 2282, and *cert. denied*, 112 S. Ct. 2290 (1992); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (holding that insufficient investigation failed to uncover wealth of mitigating evidence and resulted in ineffective assistance and prejudiced defendant).

³⁷⁸ I also argue that reasonably effective assistance cannot be given unless *some* evidence is presented in mitigation at the penalty trial, with one narrow exception. See *infra* text accompanying notes 448-56.

³⁷⁹ See, e.g., *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987) (relief granted where counsel in aggravated rape case failed to secure records or make other inquiries at mental institution from which client escaped, relying instead on report of court appointed

counsel's failure to present any evidence at penalty trial was patently unreasonable on the face of the record, the court has granted relief under the *Strickland* standard. In *Jones v. Thigpen*,³⁸⁰ no mitigation evidence was presented by counsel for a seventeen year old who was severely mentally retarded (I.Q. 41), and was an accomplice to a robbery but was not proven to have had any intent or role in the homicide.³⁸¹ *Jones*, like *Hyman*, was determined on facts that would appear to call for a remedy under any legal standard.

More recently, however, the Fifth Circuit has displayed extreme reluctance to pronounce a defense attorney's performance deficient under *Strickland*. In *Kyles v. Whitley*,³⁸² the court declined to find deficient performance even though counsel admitted that he failed to interview or call a key witness because he mistakenly believed that state law would require him to vouch for the credibility of the witness.³⁸³ Curtis Kyles was convicted and sentenced to death for a murder during a robbery.³⁸⁴ His defense was that Joseph "Beanie" Wallace committed the murder and framed him.³⁸⁵ There was circumstantial evidence supporting that line of defense.³⁸⁶ Defense counsel testified at the habeas hearing that he failed to interview and call "Beanie" because of his misunderstanding of Louisiana law.³⁸⁷ The majority, however, concluded that "[t]he *Strickland* analysis . . . judges the conduct of the defense [attorney] according to the objective standard of the reasonable attorney."³⁸⁸ The court thereupon provided what it considered to be several legitimate tactical reasons for not calling "Beanie," reasons that might have been, but were not, advanced by counsel.³⁸⁹ The court then concluded that "[s]ince Beanie did not testify and we are not convinced that he should have been called to testify, Regan's failure to interview Beanie had no apparent bearing on the conduct of the trial."³⁹⁰

psychiatrist, filed the day before trial, that client was sane).

³⁸⁰ 788 F.2d 1101 (5th Cir. 1986), *cert. denied*, 479 U.S. 1087 (1987).

³⁸¹ *Id.* at 1103.

³⁸² 5 F.3d 806 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1610 (1994).

³⁸³ *Id.* at 818-20.

³⁸⁴ *Id.* at 820.

³⁸⁵ *Id.* at 809.

³⁸⁶ *Id.* at 808-10, 813-16.

³⁸⁷ *Id.* at 819.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 818-19.

³⁹⁰ *Id.* at 819. Here is *Strickland* hindsight at its most curious. The attorney could provide no reasonable explanation for his tactical decision, but the court, examining the record, could. Another issue required that the majority analysis be even more convoluted. Kyles claimed error under *Brady v. Maryland*, 373 U.S. 83 (1963), because of the state's failure to disclose contradictory statements taken from "Beanie." *Kyles*, 5 F.3d at 811; *id.* at 834-35 (King, J., dissenting). Thus, it was necessary to conclude that the *Brady* violation was harmless. *Id.* at 818. That could be done since "Beanie" was not

Finally, in summary fashion, the court rejected a claim based on failure of counsel to interview the eyewitnesses against Kyles prior to trial.³⁹¹ The majority apparently found close enough for government work the fact that counsel cross-examined three of the four witnesses during a pretrial suppression hearing.³⁹²

Another recent Fifth Circuit case again raised the disturbing possibility that the aggravated facts of some capital cases result in review of defense attorney performance that is far more charitable than the rule of law should allow, however understandable a visceral human disinclination to grant relief of any kind might be. In *King v. Puckett*,³⁹³ the victim was an eighty-four year old widow who had been struck on the head, strangled, and drowned in her bathtub.³⁹⁴ King was tried and sentenced to death.³⁹⁵ On appeal to the Fifth Circuit, the court remanded the case to the Mississippi Supreme Court because of the invalid application of an aggravating factor.³⁹⁶ Recognizing, however, that the state court was authorized to cure that error without affording King a new sentencing hearing, the court reached the merits of his ineffective assistance of counsel claim.³⁹⁷

To the familiar allegation that he was ineffective for failing to investigate and present readily available mitigating evidence, defense counsel asserted, without further explanation, that he had made a tactical decision.³⁹⁸ The lower courts, in similar conclusory fashion, had agreed.³⁹⁹ The Fifth Circuit found that "the superficial investigation and decision not to offer witnesses" was reasonable.⁴⁰⁰ As in *Kyles*, the court itself furnished some of the tactical reasons.⁴⁰¹ One of them was quite remarkable. It was that defense counsel knew that Porter, the man King accused of committing the crime, was also King's uncle.⁴⁰² Therefore, the court concluded, interviewing and calling him or other family members to testify would have caused

called, there were good reasons not to call him, and the withheld statements were useful only to impeach his credibility. *Id.* at 818-19. A lengthy dissent illuminates these and further deficiencies in the *Strickland* and *Brady* analyses by the majority. *Id.* at 820-44 (King, J., dissenting).

³⁹¹ *Kyles*, 5 F.3d at 820.

³⁹² *Id.* at 819. The opinion was silent on whether counsel had done any investigation that would inform the cross-examination.

³⁹³ 1 F.3d 280 (5th Cir. 1993).

³⁹⁴ *Id.* at 282. The victim in *Kyles* was a 60 year old woman shot to death as she loaded groceries into her car. *Kyles*, 5 F.3d at 808.

³⁹⁵ *King*, 1 F.3d at 283.

³⁹⁶ *Id.* at 284.

³⁹⁷ *Id.* at 284-85.

³⁹⁸ *Id.* at 283.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 284.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

tension within the family.⁴⁰³

Denying the second part of King's claim required resort to *Strickland's* prejudice prong.⁴⁰⁴ Defense counsel, Joe Sams, Jr., had been assisted by a recent law school graduate, Thomas Kesler.⁴⁰⁵ When Kesler interviewed King, he determined that King was "slow" and "dull-witted."⁴⁰⁶ Consequently, Sams sought a mental examination of King that, inter alia, specifically addressed his level of intelligence.⁴⁰⁷ In due course, Sams received from the state hospital a one paragraph report that King was sane and competent to stand trial.⁴⁰⁸ The court was disturbed that Sams simply dropped the matter at this point.⁴⁰⁹ The court could not come up with a tactical reason for failure to pursue a matter counsel himself had identified as potentially mitigating.⁴¹⁰ The court, however, concluded that it was not necessary to decide whether this failure was professionally unreasonable under *Strickland*, because King had not shown prejudice.⁴¹¹

Having thus been forced to stretch *Strickland* close to the limit in order to protect counsel whose death sentenced client protested his innocence, who conducted at best a superficial investigation, and who presented no evidence at either phase of the trial, the court appealed to the Mississippi Supreme Court for help: "While acknowledging that we are without authority to order a new sentencing hearing, we recommend that the holding of such a proceeding be given serious consideration in this case, given the failure of King's counsel to pursue potentially mitigating evidence."⁴¹²

The *legal* and *practical* effect of the court's action in *King* was this message from a federal to a state court: in spite of a constitutional error in the basis for this man's death sentence, and in spite of the deficient performance of his attorney, you are free to execute him without further proceeding. We hope you will not.

At best, *Strickland* in practice is no better than *Betts*, failing to provide reviewing courts with even a semblance of a bright line to minimize inconsistent application. At its worst, *Strickland* permits the worst lawyering to pass muster, especially in the "worst" cases. Doctrinally and practically, *Strickland* is *Betts* and should suffer a similar fate. Whether or not that hap-

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 285.

⁴⁰⁵ *Id.* at 282.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 284.

⁴¹⁰ *Id.* at 284-85.

⁴¹¹ *Id.* at 285. The court also found no error in the denial of an evidentiary hearing on these claims. *Id.*

⁴¹² *Id.* at 287.

pens, the legal profession, having been drafted by *Strickland* into the role of accomplice to injustice, should respond.

III. REVIVING THE RIGHT

A. *Response from the Organized Profession*

As noted, *Strickland* erroneously referred to a sufficient link between the standards of the legal profession and the Sixth Amendment to justify the heavy presumption of adequacy that the Court read into the Amendment.⁴¹³ The Court further involved the profession by decreeing that the proper measure of performance was to be "reasonableness *under prevailing professional norms*."⁴¹⁴ Even before adding the infamous prejudice prong, however, the Court undermined the logic of its pronouncement by designating the norms of the profession as no more than guidelines to reasonableness.⁴¹⁵ One would assume that the performance norms of the profession would be recognized as at least relevant to the Sixth Amendment inquiry. The language of *Strickland* does not appear to make them any more than that. Further, in aid of its apparent purpose to fashion a permissive constitutional standard, the Court's reference to professional norms was only to *aspirational* norms, such as the sections of the *ABA Standards for Criminal Justice* dealing with the defense function.⁴¹⁶ Surely the norms of the profession are also reflected in its *disciplinary* standards, many of which are implicated in the issue of effective assistance of counsel. The disciplinary standards should not have been ignored.

The highest court in the land has thus involved the organized bar in the fashioning of a constitutional standard that is damaging to respected doctrine, unworkable, and unjust. It is incumbent upon the profession to make this matter a priority and to fashion an appropriate response. Thus far, there is little evidence that it has done so.

1. *Incompetence is Unethical*

The organized profession's most influential voice is the American Bar Association. The conduct of virtually every attorney in the nation is ostensibly governed by a state-adopted version of the *ABA Model Code of Professional Responsibility (Code)*, the *ABA Model Rules of Professional Conduct*

⁴¹³ See *supra* text accompanying notes 153-57.

⁴¹⁴ *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (emphasis added).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*; see STANDARDS FOR CRIMINAL JUSTICE, *supra* note 171, §§ 4-1.1 to -8.6. *Strickland* referred to the 1980 edition, which does not differ significantly from the 1993 edition.

(*Rules*), or a combination of the two. These "professional norms" contain provisions that cover, or should cover, some of the more egregious forms of ineffective assistance of counsel. If the profession enforced these norms, it is not inconceivable that *Strickland* would at least be modified to include removal of the requirement to show prejudice in cases in which a disciplinary rule had been violated. Sadly, there is little indication that the organized legal profession is concerned with this issue, or indeed with criminal law in general. While the existence of unreported disciplinary action is certainly a possibility, a computer search indicates no reported case of an attorney being disciplined for failures related to criminal defense.⁴¹⁷

This neglect is disturbing, given the applicability of many disciplinary norms to the defense function. The *Code*, for example, forbids attorneys to handle legal matters they know, or should know, they are not competent to handle, unless competent counsel is associated.⁴¹⁸

A related provision of the *Rules* is particularly instructive on the question of accepting appointments to defend those charged with capital murder. Rule 6.2 is written in affirmative language designed to encourage pro bono service in such cases. It contains a general prohibition against avoiding appointed cases, but permits attorneys to decline appointment in three situations, identified as "good cause":

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the rules of professional conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.⁴¹⁹

Two of these "good cause" situations are particularly relevant to appointed capital defense counsel. First, representing the client well is virtually certain

⁴¹⁷ There are indications, however, that attorneys appointed in capital cases run afoul of the profession's rules in matters other than capital defense. At one time, a quarter of death row inmates in Kentucky had been represented at trial by attorneys who were later disbarred or resigned after being charged with professional responsibility violations. Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 74 n.92 (1989).

⁴¹⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1983). The provision also forbids neglect of a case and inadequate preparation. *Id.* The *Rules* counterpart contains the affirmative commands that "[a] lawyer shall provide competent representation to a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1993).

⁴¹⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1993).

to result in an unreasonable financial burden on the lawyer.⁴²⁰ Second, as demonstrated in the "abandonment" cases discussed above,⁴²¹ in many instances, the client or the cause is likely to be so repugnant to the lawyer as to adversely affect the adequacy of defense. Even if it is unrealistic to expect that Rule 6.2 will ever be translated into a practical disciplinary tool, the integrity of the profession will be far better served if attorneys would pause and give thought to its caveats before accepting appointment in capital cases.⁴²²

Official commentary to Rule 6.2 also acknowledges an important link to another disciplinary standard. The commentary accurately refers to the "repugnant client or cause" exception as a conflict of interest.⁴²³ This link is important and is often overlooked. Although there are disciplinary *Rules* and *Code* sections prescribing a duty of loyalty and avoidance of conflicts,⁴²⁴ these sections are generally addressed by the profession as if they were relevant only to multiple client representation or direct financial conflicts.⁴²⁵ Once the concept of conflict of interest is viewed as encompassing the issues addressed in Rule 6.2, however, a greater truth may be seen. In capital cases, where appointed counsel are often sole practitioners or members of small firms in rural areas, counsel's conflicting interests may include an interest in not alienating potentially fee-paying clients, trial judges, or prosecutors.

⁴²⁰ Citing factors present in several of the most active death penalty states, including fee limits and absence of any indigent defense system, Steven Bright advised Congress that an attorney doing a competent job of capital defense in those states, overhead considered, can expect to lose \$20-50 per hour. *Death Penalty Legislation and the Racial Justice Act, 1990: Hearings on H.R. 4618 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 536 (1990) (statement of Stephen B. Bright, Southern Prisoners' Defense Committee).

The situation has become, if anything, worse since Bright's testimony, as demonstrated in authorities cited by Justice Blackmun in a recent opinion. See *McFarland v. Scott*, 114 S. Ct. 2785 (1994) (Blackmun, J., dissenting from denial of certiorari).

⁴²¹ See *supra* text accompanying notes 320-48.

⁴²² There is no counterpart to Rule 6.2 in the *disciplinary* sections of the Code. Similar admonitions, however, are found in Ethical Considerations 2-29 and 2-30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29, -30 (1983).

⁴²³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. (1993).

⁴²⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1983).

⁴²⁵ Commentary to Rule 1.7 reflects this focus. Rule 1.7's comment does not contain a cross-reference to Rule 6.2, but advises that "a lawyer ordinarily may not act as advocate against a [client] the lawyer represents in some other matter, even if [the other matter] is wholly unrelated." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. [3] (1993). The comment also advises that "[a] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest." *Id.* Rule 1.7 cmt. [6].

All of the various *Code* and *Rules* provisions implicate the first and great commandment of the profession: the *Code*'s Canon 7 commands that attorneys shall represent their clients zealously within the bounds of the law.⁴²⁶ Regrettably, indeed inexplicably, there is no direct counterpart in the *Rules*. The preamble to the *Rules*, however, designates zealous advocacy as part of a lawyer's professional responsibility.⁴²⁷ Similar language is found in the commentary to Rule 1.3.⁴²⁸ In addition to the admonition to engage in zealous advocacy, however, the commentary also contains a limitation that reveals the *Rules* were not written with criminal law in mind: "However, a lawyer is not bound to press for every advantage that might be realized for [the] client."⁴²⁹ In many facets of civil litigation this limiting language would be entirely appropriate. So long as the government is seeking through the legal system to kill one's client, however, any intentional failure by an attorney to press for every advantage that might be realized for the client within that system should be viewed as unprofessional.

The organized legal profession has not re-examined the applicability of its disciplinary norms, nor considered enforcement efforts, in response to the ineffective assistance of counsel problem. Rather, the profession has done little more than promulgate guidelines that urge lawyers to do better. This is no more of a role for the profession than that envisioned by *Strickland* when it co-opted professional norms to help justify its regrettable constitutional standard. Even if the constitutional standard were meaningful, it would be inexcusable for the profession to operate as if its fundamental disciplinary tenets had no application to criminal defense. To continue to operate that way for a decade after *Strickland*'s demonstrated inadequacy is collectively unethical. The issue deserves to be made a priority by officers of the organized bar in every jurisdiction, and by the appropriate committees of the ABA.

2. *Refashioning a Minimal Constitutional Standard*

In addition to addressing incompetent criminal defense as a professional responsibility matter, the organized bar could make a great contribution by helping to fashion a realistic constitutional standard. Much of what has been proposed as an alternative to *Strickland* has, in fact, asked too much. Any

⁴²⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

⁴²⁷ "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1993).

⁴²⁸ The commentary provides: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. [1] (1993). The Rule itself only commands "reasonable diligence and promptness." *Id.* Rule 1.3.

⁴²⁹ *Id.*

constitutional standard is, after all, a bedrock minimum. Much of what *Strickland* said about allowing defense attorneys some leeway to make tactical decisions, and to be wrong in those decisions, is valid. The *Strickland* standard is a farce, but its replacement should be realistic. With the help of competent practitioners, the organized profession could put an alternative to *Strickland* on the table for consideration by the courts or legislatures.

Years before *Strickland*, David Bazelon, the highly respected Chief Judge of the United States Circuit Court for the District of Columbia Circuit identified and discussed many of the doctrinal and practical difficulties that would result from adoption of a *Strickland* model. He attempted to establish for the circuit an analytical framework far superior to that which would later come down from the high court. His majority opinion for the panel in *United States v. DeCoster*⁴³⁰ noted the impact on ineffective assistance claims of the incorporation of the Sixth Amendment into the Fourteenth Amendment's Due Process Clause.⁴³¹ The decision also held that if defendants established a violation of what would later become the performance prong of *Strickland*, the burden would then shift to the government to establish a lack of prejudice.⁴³² The District of Columbia Circuit Court, sitting en banc, rejected Judge Bazelon's position in a lengthy opinion.⁴³³ In the interim, Judge Bazelon elaborated his doctrinal positions on the poor state of criminal defense and on the attitude of trial judges in an article in the *Georgetown Law Journal*.⁴³⁴

While the folly of rejecting Judge Bazelon's position on incorporation and burden of proof of prejudice has been amply demonstrated by a decade under *Strickland*, and, it is hoped, illustrated by this Article, Judge Bazelon and others failed to deal adequately with another pillar upon which *Strickland* rests. In his *DeCoster* opinions and *Georgetown* article, Judge Bazelon purported to identify and detail the objective standards by which

⁴³⁰ 487 F.2d 1197 (D.C. Cir. 1973) [hereinafter *DeCoster I*].

⁴³¹ *Id.* at 1202. (addition of Sixth Amendment source of right to effective assistance of counsel to due process source means "more stringent requirements" and entitles defendant to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

⁴³² *Id.* at 1204. Judge MacKinnon dissented from this proposition. He was concerned that evidence of non-prejudice might be in the hands of defendants who could lawfully keep it from the government. *Id.* at 1205 (MacKinnon, J., dissenting). The concern, if not misplaced, is also a further illustration of the importance of the location of the burden of proof in this context.

⁴³³ *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1976) [hereinafter *DeCoster III*]. The case covers 150 pages in the federal reporter, including a 36 page dissenting opinion by Judge Bazelon, joined by Judge Skelly Wright. *Id.* at 264-300 (Bazelon, J., dissenting).

⁴³⁴ David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976).

defense attorney performance could be evaluated when determining the Sixth Amendment issue.⁴³⁵ Judge Bazelon's approach was specifically rejected in *Strickland*'s pronouncement that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."⁴³⁶

Judge Bazelon had essentially adopted the ABA Standards for the Defense Function as the constitutional benchmark, while conceding that the duties outlined in those standards were to be only a starting point for case by case development of clearer guidelines.⁴³⁷ While this approach can occasionally be found, even today,⁴³⁸ it is inadequate in two related respects. First, the ABA Standards were and are largely aspirational or advisory—they are replete with "shoulds."⁴³⁹ As unjust as *Strickland* has been, it must be remembered that it deals with a bare constitutional minimum. However desirable better-than-minimal effectiveness may be, it is inappropriate to adopt advisory standards as constitutional commands. Second, the ABA Standards are necessarily vague and insufficiently detailed to define minimally acceptable performance in the constitutional sense because they are advisory. To be sure, *Strickland*'s statement that no set of rules can account for every circumstance or tactical situation faced by counsel is beside the point. Conceding the truth of the Court's assertion, the question remains whether minimally acceptable performance requirements can be identified and communicated with some degree of clarity. I believe that task is not insurmountable.

That is not to say that the task is not difficult. Consciously or not, Judge Bazelon identified the dilemma. At one point, referring to replacement of the "farce and mockery" test with requirements that counsel provide "reasonably effective assistance" or exercise "customary skill and knowledge," he observed that this development was less than meets the eye—that the new tests were themselves empty vessels into which content must be poured.⁴⁴⁰ Judge Bazelon claimed that the *DeCoster* panel opinion had tak-

⁴³⁵ *Id.* at 823-24.

⁴³⁶ *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

⁴³⁷ *DeCoster III*, 624 F.2d at 304-06 (order of Judge Bazelon granting relief after remand of *DeCoster II* included as appendix).

⁴³⁸ See, e.g., *Harris v. Blodgett*, 853 F. Supp. 1239, 1254 (W.D. Wash. 1994) (describing the ABA standards as "[a]n objective standard of attorney performance, under prevailing professional norms at the time of this case").

⁴³⁹ See, e.g., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 171, § 4-3.6. ("Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps . . .").

⁴⁴⁰ Bazelon, *supra* note 434, at 820 (citations omitted).

en the test to a "third plateau" by enunciating prophylactic rules.⁴⁴¹ Those rules, as previously noted however, are scarcely clearer than requirements that counsel act "reasonably."⁴⁴²

Acknowledging that Judge Bazelon did not solve every problem associated with this issue does not diminish his contribution or the prophetic force of his wisdom. There would be a lot more justice in the criminal justice system if the D.C. Circuit and the Supreme Court had accepted his *DeCoster* approach. It is the profession's responsibility, however, to address further the assertion of *Strickland* that performance can *only* be measured by a standard as vague as "reasonably effective assistance."

Martin C. Calhoun is less well known than Judge Bazelon. Certainly that was true in 1988, when he was an Executive Editor of the *Georgetown Law Journal*. In an excellent note, Mr. Calhoun sought to refine and build upon Judge Bazelon's checklist approach to determining reasonably effective performance by defense counsel.⁴⁴³ Calhoun modified the trial level ABA Standards for the Defense Function by considering what he termed "other authorities and . . . common sense."⁴⁴⁴ Although neither he nor Judge Bazelon articulated the problems inherent in fashioning objective performance requirements in precisely the way that I have, Calhoun's effort makes a real contribution and deserves more attention than that usually accorded student notes.⁴⁴⁵ Comparative references to Calhoun's checklist are included in my own proposal which follows.

I confine my proposed checklist to the trial level in capital cases. The checklist is offered as a contribution to dialogue rather than a definitive solution to the problem. The checklist differs most from Bazelon's approach in its omission of many basic components of good lawyering because they could arguably involve tactical decisions. The checklist attempts to establish with clarity some very minimum requirements so that *some* of the egregious performance that has been permitted under *Strickland* will be more difficult to condone. Because of bad lawyering, which for the sake of clarity is not addressed in the checklist, and because courts sometimes have granted relief

⁴⁴¹ *Id.* at 823.

⁴⁴² In fairness, it must be noted that Judge Bazelon recognized that it is virtually impossible to fashion terminology for performance standards from which judges disinclined to grant relief could not escape. *Id.* at 827-28. He believed adoption of the ABA Standards would make such judges more uncomfortable, but the thrust of his article was an affirmative plea to judges to make the Sixth Amendment guarantee meaningful, along with administrative guidance on how to do so with minimal disruption of the docket. *Id.* at 821-23, 830-35.

⁴⁴³ Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988).

⁴⁴⁴ *Id.* at 438 n.157.

⁴⁴⁵ For Calhoun's complete 11 point checklist, see *id.* at 438-40.

by evaluating the entire trial context under the *Strickland* standard, failure to render "reasonably effective assistance" under all the circumstances should be retained as a residual basis for granting relief. In addition, this residual standard should require that a finding that defense counsel has violated a *disciplinary* norm of the legal profession is a per se finding of failure to render reasonably effective assistance. Also, as I and many others have argued, it is critical that any consideration of prejudice resulting from unsatisfactory performance be addressed under the *Chapman* harmless error test. Furthering that essential reform should be easier if the requirements of the performance prong are truly minimal and are stated as clearly and objectively as possible.

Use of one imprecise term remains necessary in performance evaluations. A court's determination that a violation of minimal checklist duties, or overall reasonableness, is "substantial" should shift the burden of proving absence of prejudice to the government.⁴⁴⁶ At the trial level in a capital case, very few violations of the duties described in the following list should be required to trigger the finding required to bring about this shift.

MINIMAL DUTIES OF CAPITAL DEFENSE COUNSEL

- (1) To read and become familiar with every capital opinion by the Supreme Court, the appropriate federal circuit court, and appropriate state courts since 1972.
- (2) To collect every document relevant to the life of the client, and to the offense with which he is charged. For example: medical records, school records, social service reports, military records, prison records.
- (3) To ensure that the following persons are interviewed:⁴⁴⁷
 - a. The client.⁴⁴⁸

⁴⁴⁶ This was Judge Bazelon's position, except that he would require proof that the violation of defense counsel duties was substantial and *unjustified*. Bazelon, *supra* note 434, at 824-25. I have endeavored to make my list of duties so basic that there can be no justification for violations.

⁴⁴⁷ Defining investigative duties so as to define minimum requirements is the most difficult aspect of fashioning a performance checklist. Calhoun suggested: "[D]efense counsel must promptly investigate the circumstances of the case by pursuing all avenues that might lead either to facts or witnesses that could affect the merits of the case or the potential severity of the sentence." Calhoun, *supra* note 443, at 438.

The remainder of the requirement went on to provide more specific guidance for investigation of various lines of defense. *Id.* Calhoun's general language was substantially equivalent to the command of the current ABA standard. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 171, § 4-4.1. With some trepidation, I have undertaken to further particularize the investigative duty in capital cases.

⁴⁴⁸ Calhoun's list required that all relevant facts known to defendant be determined

- b. All members of the client's family, employers, teachers, friends, and all private or government personnel who have or at one time had a legally recognized obligation to the client. For example: doctors, social workers, public assistance officials, jail personnel.
 - c. All law enforcement officers involved in the case.
 - d. If they consent, all prospective prosecution witnesses, including family members of the victim.
 - e. All prospective defense witnesses identified by client and by investigative steps outlined in this checklist.
- (4) To secure every resource to which the client is entitled, without reciprocal obligation, by rule, statute, or constitution.⁴⁴⁹
 - (5) To secure all information regarding the prosecution's case and all exculpatory evidence to which the client is entitled, without reciprocal obligation, by rule, statute, or constitution.⁴⁵⁰
 - (6) In every case that an investigation leads counsel to

and explanations of confidentiality be made. Calhoun, *supra* note 443, at 438. The ABA standards attempt to provide further guidance in the nature of the proper attorney-client relationship. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 171, §§ 4-3.2, 4-3.8. Deferring to attorneys, at least in the constitutional sense, to advance the client's cause by investigation through various approaches, I simply insist that the client, and the other parties listed herein, be interviewed.

⁴⁴⁹ For example, the client is constitutionally entitled to expert assistance in various fields upon a showing that particular expert assistance is a "basic tool[] of an adequate defense" in the case. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Some statutory provisions for resources in capital cases have reciprocal obligations, thus rendering failure to use them a tactical choice in some cases. Typically, however, these statutes provide some resources without triggering reciprocal provisions. *E.g.*, VA. CODE ANN. § 19.2-264.3:1 (Michie 1990) (indigent capital defendant entitled to assistance of mental mitigation expert without reciprocal obligation until decision to have expert testify at trial).

⁴⁵⁰ Similar to the law applicable to securing resources, discovery rules usually have reciprocal requirements, but require providing some information without triggering the requirements. See, *e.g.*, FED. R. CRIM. P. 16; VA. RULE 3A:11. There are also, however, statutory entitlements to information that do not contain reciprocal obligations. See, *e.g.*, VA. CODE ANN. § 2.1-434.11 (Michie Supp. 1994) (most forensic reports also covered by Rule 3A:11 available directly from labs without reciprocal obligation imposed by the rule); VA. CODE ANN. § 19.2-264.3:2 (Michie Supp. 1994) (prosecution must disclose unadjudicated acts of misconduct evidence to be used at penalty trial in capital cases).

conclude that the prosecution can prove some criminal offense, to seek to negotiate a non-capital disposition of the case.⁴⁵¹

- (7) To refrain from entering on client's behalf a plea of guilty to an offense for which death is a possible penalty without formal or strong informal prior assurances that death will not be the sentence.⁴⁵²
- (8) To examine every prospective juror regarding attitude toward imposition of the death penalty and, where applicable, exposure to pretrial publicity; thereafter, to challenge for cause or peremptorily every prospective juror whose responses indicate to counsel that the prospective juror would be substantially impaired in considering the particular evidence to be offered in mitigation on behalf of the client, or whose responses disclose a bias toward imposition of the death penalty. To direct further questions to all jurors who express reservations about imposition of the death penalty, with a view toward ensuring that no such jurors are excused for cause unless, under existing law, they are truly unqualified to sit.

⁴⁵¹ The minimal nature of this requirement is illustrated by comparison with a related standard on Calhoun's list. Calhoun's standard would go on to require not only that prosecution plea offers be promptly communicated to the client, but that counsel not recommend a plea agreement before learning the relevant facts and law and providing client a candid estimate of probable outcomes. Calhoun, *supra* note 443, at 439. While I would hope that counsel who failed Calhoun's requirement would frequently be found ineffective under the residual "reasonableness" standard, all I absolutely require is that some effort be made. There can be no tactical excuse for not doing so.

⁴⁵² The profession recognizes the importance of client autonomy, and ordinarily commits final word on entry of a plea to the client. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1993) (lawyer to abide by client decisions concerning objectives of representation); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983) (final decision to forego legally available objectives because of non-legal factors is ultimately for client). A plea of guilty to a capital offense, however, waives virtually all appellate issues and can be tantamount to suicide. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Strickland*, 466 U.S. at 668; *DuBois v. Commonwealth*, 435 S.E.2d 663 (Va. 1993), *cert. denied*, 439 U.S. 1006 (1994); *Chabrol v. Commonwealth*, 427 S.E.2d 374 (Va. 1993). Capital cases require more emphasis on the thrust of EC 7-11 (advising that attorney's responsibilities may vary according to intelligence and mental condition of client), and EC 7-12 (providing that any mental or physical condition of client that renders him incapable of making considered judgment on his own behalf casts additional responsibilities on lawyer). For these reasons, I have included the minimal required duty of counsel to not allow or encourage client merely to throw himself on the mercy of the court.

- (9) To refrain at all times from distancing himself from the client in the presence of others, or communicating in any manner to the judge or the jurors anything less than complete commitment to the client's cause.⁴⁵³
- (10) At the guilt or innocence phase of trial, to advance by affirmative evidence, cross-examination, or other challenge to the prosecution's evidence, some theory of defense suggesting that the client is not guilty or is guilty of a non-capital offense or offenses.
- (11) Where the client is convicted of an offense punishable by death, to put on evidence and argument, not solely argument, in support of an articulable theory of mitigation developed from prior investigation.

These responsibilities are not insignificant, but they are certainly minimal. Recognizing that a constitutional standard is being fashioned, and attempting utmost deference to anything that could legitimately be termed a tactical decision, has meant that these requirements leave room for much poor performance. Except for a requirement to seek available resources and information, for example, they do not address pretrial motions practice, or timely objections and motions during trial that may be necessary to preserve the rights of the client on appeal.⁴⁵⁴ For the same reasons, I do not require an opening statement or a closing argument, though I cannot imagine a capital case in which competent counsel would waive them.⁴⁵⁵

Real attempts to fashion acceptable performance standards that make it more difficult for courts to excuse ineffectiveness as tactical decision making necessarily move us toward a bare constitutional minimum rather than the promotion of the kind of defense that persons accused of a crime deserve. Nevertheless, it can be done. *Strickland* was wrong in asserting that it cannot be done. Judge Bazelon offered a blueprint. I have identified one further contribution to judge Bazelon's blueprint, and offered my own checklist as applicable to capital cases. The organized profession should address the issue and seek to formulate basic requirements that defer to every legitimate concern but eliminate tolerance for the kind of ineffectiveness that

⁴⁵³ The "strategy" of distancing one's self from the client in order to establish a relationship with the jury in a capital case should be recognized as fraudulent. *See supra* text accompanying notes 321-44.

⁴⁵⁴ *But see* Calhoun, *supra* note 443, at 439 (requiring that counsel make timely objections that further the defendant's interests both at trial and in the event of appeal).

⁴⁵⁵ *But see id.* (requiring that counsel make an opening statement and "a closing argument that does not hurt the defendant's case and points out any weaknesses in the government's case").

this Article has shown is permitted to flourish under *Strickland*. Returning the prejudice inquiry to *Chapman*⁴⁵⁶ will do much to alleviate the “guilty anyway” excuse for Sixth Amendment violations. Refashioning minimum performance standards will alleviate the worst of the “tactical decision” excuses.

B. *Response from Individual Members of the Profession*

1. *All Members: Report Unethical Incompetence*

As is true of all professions, the legal profession includes a segment of membership that does not make us proud. Certainly a minority, that segment has for years included attorneys who seek out appointment in criminal cases in order to pocket the meager fees awarded while doing little or no work in return. Such attorneys do not represent clients, they simply aid in processing them. Unfortunately, there are also judges interested more in processing than in representation, who will appoint such attorneys even in capital cases. Yet, even though incompetence is unethical, these attorneys are almost never disciplined for that incompetence. To be sure, many of their number are included among those who run afoul of the profession's other rules. In his final written opinion, Justice Harry Blackmun took note that capital defense attorneys in eight states were disbarred, suspended, or disciplined at rates 3 to 46 times greater than the general rates of discipline for attorneys.⁴⁵⁷

One reason attorneys are not disciplined for grossly incompetent performance, especially in capital cases, may be the understandable reluctance of all of us to recognize our own ethical obligation to bring the matter to the bar's attention. That obligation is found in Model Rule 8.3,⁴⁵⁸ and in Disciplinary Rules 1-102 and 1-103.⁴⁵⁹ The obligation can be distasteful. Giv-

⁴⁵⁶ See *supra* notes 233-48 and accompanying text.

⁴⁵⁷ *McFarland v. Scott*, 114 S. Ct. 2785, 2786 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 434 (1993); Marcia Coyle et al., *Fatal Defense*, Nat'l L.J., June 11, 1990, at 30, 44).

⁴⁵⁸ “A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1993).

⁴⁵⁹ Disciplinary Rule 1-102 commands that attorneys not violate or circumvent disciplinary rules, or engage in conduct prejudicial to the administration of justice. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1983). Disciplinary Rule 1-103(A) provides: “A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” *Id.* DR 1-103(A). Thus, at least in extreme situations akin to some discussed in this Article, lawyers violate Disciplinary Rules 1-102 and 1-103 by

en the minimal protection offered to clients by the *Strickland* standard, however, it is even more important that we as individual members of the profession do our part to address the problem in every responsible and legitimate manner.

2. *Competent Defense Counsel: Litigate Competence Prior to Trial; Consider Non-Participation*

Predominantly in capital cases, trial judges sometimes will refuse to appoint aggressive, competent counsel and instead appoint unqualified counsel. Motives for such action are, of course, impossible to pinpoint: maybe because competent counsel are known generally by the judge to demand more court resources and generally refuse to allow the client to be processed; maybe because competent counsel in a particular case have vigorously and skillfully represented their client, obtained appellate relief, and the case is back for a new trial or a new sentencing hearing;⁴⁶⁰ maybe because some indigent clients simply do not recognize when they are being poorly served. However the question arises, there is a legal basis for pretrial litigation of the competence of appointed counsel and it is far better to examine the qualifications and performance of counsel at that point than retrospectively under the *Strickland* reverse-harmless error standard.

In both *United States v. Woods*,⁴⁶¹ and *Monroe v. United States*,⁴⁶² indigent defendants raised pretrial objections to going forward with their appointed counsel and made specific allegations of what they perceived to be inadequate representation. Given the choice by the trial judge of proceeding with appointed counsel or representing himself, Woods chose the latter course.⁴⁶³ Woods' conviction was reversed by the Fifth Circuit because the trial court relied on the general competence of appointed counsel and denied the request without conducting any inquiry into the merits of Woods' allegations.⁴⁶⁴ In *Monroe*, the court stated that:

failure to report.

⁴⁶⁰ That was the situation faced by Stephen Bright, a most competent capital defense attorney, *see supra* note 315, upon the retrial of Tony Amadeo for capital murder. Bright and William Warner had obtained relief for Amadeo from the United States Supreme Court. *Amadeo v. Zant*, 486 U.S. 214 (1988). The trial court nevertheless denied, without a hearing, Amadeo's request that Bright and Warner be appointed for the retrial and appointed two other attorneys. *Petition for Interlocutory Review to Georgia Supreme Court, Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989) (No. 46844).

⁴⁶¹ 487 F.2d 1218 (5th Cir. 1973).

⁴⁶² 389 A.2d 811 (D.C. Cir.), *cert. denied*, 439 U.S. 1006 (1978).

⁴⁶³ *Woods*, 487 F.2d at 1219.

⁴⁶⁴ *Id.* The court also refused to construe Woods' election to represent himself under the circumstances as a waiver of the right to counsel. *Id.*

[A]llegations of the inability of counsel to render effective assistance at trial due to lack of preparation rise to the level of a claim of a Sixth Amendment deprivation. In that situation, it is incumbent upon the trial court to determine the validity of the assertions and to take whatever course of action is thereby mandated.⁴⁶⁵

An option, if not an obligation, of competent counsel, when extreme instances of poor representation come to their attention prior to trial, is to seek termination of such representation. There are attorneys experienced and capable in this unique litigation who will provide advice and assistance on how to proceed.⁴⁶⁶

Another more painful choice to be considered by competent attorneys is non-participation. Arguably, one of the factors explaining the profession's quiet tolerance of *Strickland* for a decade, compared to its resistance to *Betts*, is that capable counsel have in effect subsidized injustice; that they have given skillful and vigorous defense at great personal and financial cost to themselves; that, faced with provision of inadequate resources with which to mount a defense, they have done the best they could with what they had.⁴⁶⁷ That is an honorable choice by competent attorneys, but it is not the only choice.

In 1988, a trial judge in Kentucky sent an open letter to all members of the Northern Kentucky bar, begging for a volunteer to represent a man charged with capital murder. The letter concluded: "PLEASE HELP. DESPERATE."⁴⁶⁸ No member of the bar was ethically obligated to answer the

⁴⁶⁵ *Monroe*, 389 A.2d at 820.

⁴⁶⁶ Two such attorneys are: Stephen Bright, Southern Center for Human Rights, 83 Poplar St., N.W., Atlanta, GA 30303, and Kevin McNally, P.O. Box 1243, Frankfort, KY 40602.

⁴⁶⁷ In *Murray v. Giarratano*, 492 U.S. 1 (1989), Justice Kennedy cast his vote with the majority holding that death sentenced prisoners did not require the assistance of counsel to realize the constitutional guarantee of meaningful access to the courts in post-conviction proceedings. *Id.* at 10. Apparently, he did so in part because no death sentenced prisoner in Virginia had been unable to secure volunteer representation. *See id.* at 14 (Kennedy, J., concurring).

The gross inadequacy of payment to attorneys for representing indigent defendants and of the resources provided for defense is a well-documented and continuing scandal. *See, e.g.,* Green, *supra* note 457, at 489-94; Klein, *supra* note 259, at 364-75; Mark Curriden, *Indigent Defense in the South: Begging for Justice*, A.B.A. J., Jan. 1991, at 64; J. Michael McWilliams, *The Erosion of Indigent Rights*, A.B.A. J., Mar. 8, 1993, at 8.

⁴⁶⁸ Letter from Honorable Raymond E. Lape, Presiding Judge, First Division, Kenton Circuit Court, Covington, Kentucky, to members of Northern Kentucky Bar (May 17,

judge's call.⁴⁶⁹ In a recent murder case from California, counsel was found ineffective even under the *Strickland* standard.⁴⁷⁰ Part of the evidence supporting the defendant's claim was that appointed counsel had billed only twelve and one half hours prior to trial.⁴⁷¹ The Ninth Circuit, however, found this evidence credibly rebutted by the trial attorney's testimony that he had spent many more hours on the case but billed only twelve and a half because, as other testimony also indicated, the county courts were very frugal with funds for appointed counsel in capital cases.⁴⁷²

Competent or not, no attorney should have been placed in counsel's position in the California case. Professor Klein has reported on several litigation strategies undertaken by attorneys for indigent criminal defendants. He concluded:

Court officials . . . and judges have rarely concerned themselves with the *quality* of counsel provided indigent defendants. Absent some completely unforeseeable event, the prognosis for any additional funding for defense services is poor indeed—it is almost inconceivable that elected politicians would call for or provide additional funding to represent indigents accused of crime. . . .

Systematic litigation attacking the constitutionality of the system for delivering defense services, however, offers hope and promise.⁴⁷³

Perhaps. Perhaps, however, it is legitimate for competent counsel to consider whether their laudable efforts are helping to mask injustice,⁴⁷⁴ and there-

1988) (on file with author).

⁴⁶⁹ Disciplinary Rule 2-110(B)(2) commands withdrawal from representation if an attorney knows or it is obvious that continuing will result in violation of a disciplinary rule. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(2) (1983). Disciplinary Rule 6-101 forbids handling a matter that the attorney is not competent to handle without associating competent counsel; or handling a matter without preparation adequate in the circumstances. *Id.* DR 6-101. Surely a fair reading of the command to withdraw would extend to forbidding representation when an attorney knows or it is obvious that violation of Disciplinary Rule 6-101 will result because time and resources permitting adequate preparation will not be forthcoming.

⁴⁷⁰ *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995).

⁴⁷¹ *Id.* at 1317.

⁴⁷² *Id.*

⁴⁷³ Klein, *supra* note 259, at 432.

⁴⁷⁴ In 1991, Michael Mello, a most capable and experienced capital defense attorney, advised those contemplating reinstatement of the death penalty in New York—which in fact came about in March 1995—to consider the issue. Michael Mello, Facing Death

fore delay the day when "close enough for government work" will be rejected by the courts and by the profession.

3. *Academics: Campaign to Have Strickland Overruled*

As Anthony Lewis demonstrated, the demise of *Betts* was hastened by scholarly criticism exposing its injustice, illogic, and unworkability.⁴⁷⁵ In *Gideon*, academics also assisted in the remarkable amicus brief on behalf of twenty-three state attorneys general, calling for *Betts* to be overruled.⁴⁷⁶ All of those factors call equally today for *Strickland* to be eventually overruled.

It may be true that academics are far less influential in these highly politicized times, especially in criminal justice matters. Nevertheless, do we as members of the organized profession, and as practitioners and former practitioners, not have an obligation to call attention to a legal standard that demeans our profession and permits citizens to face state imposed death virtually alone and defenseless? In one sense, we have more organizational avenues available than our predecessors did in 1962. There are ABA committees, AALS committees, bar task forces, etc. to deal with the issue if we see fit to put the matter on our professional agenda.

If there is a single academic or practitioner who will undertake to defend the doctrine, logic, or practical consequences of ten years of *Strickland*, I hope that person will be prompted to undertake a response to this Article and the many others that condemn *Strickland*. At least the issue will be responsibly joined. But if *Strickland* has no real defenders, why has it lived this long? How much longer will it be allowed to continue?

IV. CONCLUSION

In the early 1970s, a man named Dannie Sallie was tried on a charge of first degree murder in North Carolina. Allegedly, Sallie, a soldier at Ft.

(Pretty Much) Alone: Some Thoughts on the Counsel Crisis that Will Follow New York's Restoration of Capital Punishment, Paper Presented at Conference, The Death Penalty: Perspectives on the Past and Future in New York State, Albany Law School (Apr. 5, 1991) (on file with author). Mello asked whether competent defense counsel might, in fact, be "the mask of the executioner?":

[Y]ou should make no mistake: The participation of good defense lawyers . . . makes the system—legal and beyond—feel more comfortable about executions. . . . Like it or not, by participating in this process we to some extent inevitably become enablers, the Doctors Feelgood of the death penalty assembly line. This is our expected role.

Id. at 5.

⁴⁷⁵ LEWIS, *supra* note 1, at 120, 137-38.

⁴⁷⁶ *Id.* at 144-48.

Bragg, had used his combat boots to kick to death his girlfriend's three year old daughter. Sallie was represented by a young attorney who nevertheless had defended, as one of the original attorneys in the North Carolina public defender system, a number of jury trials in felony cases and enjoyed a good reputation for competency among members of the local bar. In fact, after his public defender service, he was invited to join one of the more well known and respected firms in Fayetteville as a litigator.

Sallie's attorney considered that he had done a more than effective job by persuading the jury to return a guilty verdict of the lesser included offense of second degree murder. His only real self-criticism was his inability to prepare Sallie to testify in his own behalf in denying the offense without coming across as a hothead who appeared fully capable of committing it. But the attorney had made another serious mistake. Out of ignorance of a part of the law, he failed to object to a warrantless entry of the trailer where the victim was killed. The entry produced photographs that impeached Sallie's trial testimony. Sallie eventually sought relief in the federal courts, claiming ineffective assistance of counsel.

In *Sallie v. North Carolina*⁴⁷⁷ the Fourth Circuit was troubled by defense counsel's failure to object. The court also noted that it had upgraded the "farce and mockery" standard to "whether defense counsel's representation was within the range of competence demanded of attorneys in criminal cases,"⁴⁷⁸ observing that this standard did not require flawless performance. But the court denied relief. The court strained to come up with a reason to validate the entry, a reason that never crossed the mind of the attorney, and then observed:

Counsel did not testify in the post-conviction hearing and so we do not know what he may have done to investigate the validity of the search and why he raised no formal objection to it and admission into evidence of its fruits. But even if counsel did nothing, we are constrained to conclude that Sallie suffered no prejudice thereby.⁴⁷⁹

If the legality of the entry and admissibility of the photographs had been properly litigated prior to trial, quite possibly the trial court would not have gone to the lengths that the Fourth Circuit went retrospectively to fashion an "exigent circumstances" justification. The photographs might have been suppressed. The jury might have believed Sallie's denial. In any event, the

⁴⁷⁷ 587 F.2d 636 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979).

⁴⁷⁸ *Id.* at 640.

⁴⁷⁹ *Id.* at 641.

lawyer got lucky. The pre-*Strickland* deference to generally competent counsel and what would later become the *Strickland* prejudice prong effectively mooted the question of whether he had made a basic error for which there was no tactical justification. The opinion did not mention the defense attorney's name. You have probably guessed it by now.