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The Ineffective Assistance of Counsel Quandry: The Debate Continues Strickland v. Washington

Susan K. VanBuren

CONSTITUTIONAL LAW

THE INEFFECTIVE ASSISTANCE OF COUNSEL QUANDRY: THE DEBATE CONTINUES

STRICKLAND V. WASHINGTON

104 S. Ct. 2052 (1984)

An accused's right to representation by counsel is a fundamental component of the American system of criminal justice.[1] The criminal defendant is assured this right through the sixth amendment which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[2] Although the Supreme Court has construed this clause as embodying "effective assistance of counsel;"[3] it declined to articulate in entirety the accompanying criteria which satisfy this constitutional guarantee.[4]

In recent years, dissatisfied criminal defendants have increasingly resorted to claims alleging actual ineffectiveness of counsel as a vehicle for challenging their convictions.[5] Prior to *Strickland v. Washington*,[6] the Supreme Court had not delineated the "proper standards"[7] for reviewing claims of actual ineffectiveness of counsel.[8] The lack of a national standard for assessing defense counsel's performance, as it relates to the constitutional requirement,

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[1]Unites States v. Cronic, __ U.S. __, 104 S. Ct. 2039, 2043 (1984).

[2]U.S. CONST. amend. VI.

[3]*Cronic*, 104 S. Ct. at 2044 (citing McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970) (right to counsel is a right to effective assistance of counsel).

[4]*McMann*, 397 U.S. at 770-71; Knight v. State, 394 So. 2d 997, 1000 (Fla. 1981); Note, *Identifying and Remedying Effective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752, 754 (1980); Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, n. 2 (1983). The Supreme Court has recognized that the defendant's right to effective assistance of counsel is violated in the following situations: actual or constructive denial of assistance, *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (absence of counsel at trial); cases involving governmental interference with defense counsel's ability to make independent decisions, *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (order preventing defense counsel from conferring with client during a 17-hour overnight recess); defense counsel rendered inadequate performance, *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980). The Supreme Court has not elaborated as the constitutional requirement of this third class of cases — cases presenting a claim of actual ineffectiveness — until Strickland v. Washington, __ U.S. __, 104 S. Ct. 2052 (1984). This casenote deals solely with ineffective assistance claims arising from the third class of cases, unless stated otherwise.

[5]*See* Comment, *supra*, note 4, at 1381.

[6]Strickland v. Washington is an appeal from a series of decisions: Washington v. State, 397 So. 2d 285 (Fla. 1981); Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982); Washington v. Strickland, 679 F.2d 23 (5th Cir. 1982) (Unit B en banc), Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), *cert. granted*, 103 S. Ct. 2451 (1983).

[7]*Strickland*, 104 S. Ct. at 2056.

[8]*Id.* at 2063.

generated extensive deliberation by lower courts[9] and commentators.[10] Faced with a deluge of actual ineffectiveness claims, the lower courts were forced to formulate standards to distinguish effective from ineffective assistance.[11] However, the ensuing diverse standards employed by the courts resulted in an unjust jurisdictional discrepancy in the adjudication of those claims.[12] This ad hoc treatment demonstrated the exigence for a resolution of these conflicting standards. In order to rectify the problematic situation confronting the criminal judicial system,[13] the Supreme Court in *Strickland* espoused homogeneous standards for judging a criminal defendant's contention that the Constitution mandates reversing a conviction because of actual ineffectiveness of counsel at the trial or sentencing phase.[14]

THE FACTS

During a ten day crime spree in September 1976, David Washington committed three brutal murders and multiple associated crimes of lesser gravity.[15] He surrendered to investigating police[16] and confessed to one charge of first degree murder. The State of Florida appointed William Tunkey, an experienced criminal defense attorney,[17] to represent Washington. Acting against Tunkey's specific advice, Washington confessed to the remaining murders, pleaded guilty to all crimes and waived his right to a jury trial.

At trial, Washington testified that he had no significant criminal history. He testified that his brief criminal behavior was attributable to acute emotional suffering spurred by his family's financial deprivation during his prolonged unemployment.

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[9]For a review of lower court decisions attempting to develop standards for assessing counsel's performance, *See* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 237-42 (1979).

[10]*See generally id.;* Gard, *Ineffective Assistance of Counsel — Standards and Remedies*, 41 MO. L. REV. 483 (1973).

[11]*See* Note, *supra* note 4, at 756-58; Comment, *supra*, note 4, at 1386-87, 1399-1401, 1408-10; Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659, 661 (1980).

[12]Conflitti, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of the Rights Standard*, 21 AM. CRIM. L. REV. 29, 32-40 (1983); Comment, *supra*, note 4, at 1381-85; Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV.299, 300-05, 339-60 (1983).

[13]Members of the Supreme Court have expressed displeasure with the resulting conflict among the circuits. Trapnell v. United States, 725 F.2d 149, 152-53 (2d Cir. 1983). *See also* Maryland v. Marzello, 453 U.S. 1011, 1011-13 (1978) (White J., dissenting from denial of certiorari).

[14]*Strickland*, 104 S. Ct. at 2056.

[15]*Washington*, 673 F.2d at 883. Unless stated otherwise, the facts are derived from the Supreme Court opinion of *Strickland*, 104 S. Ct. at 2056-2058.

[16]Washington surrendered to the investigating police after he was aware that his accomplices had been apprehended and that he was sought by the police. *Washington*, 362 So. 2d at 667.

[17]In its order denying Washington's motion for postconviction relief, the eleventh judicial circuit court of Florida characterized Tunkey as "one of the leading criminal defense attorney in Dade County . . . ." *Strickland*, 693 F.2d at 1247 n.2.

Tunkey, in preparing for the sentencing phase, neither sought character witnesses nor requested a psychiatric examination. At the sentencing hearing, Tunkey offered no evidence concerning Washington's character or emotional state, but rather relied on Washington's testimony and the trial judge's reputation of assigning value to a defendant's admission of guilt. At the conclusion of the sentencing phase, the trial judge sentenced Washington to death on each count of first degree murder.

After exhausting his state remedies, Washington sought habeas corpus relief[18] by challenging the effectiveness of Tunkey's representation.[19] Washington contended that Tunkey's failure to investigate his character, background and emotional state deprived the trial judge of potentially mitigating evidence.[20] Rather than addressing the issue of attorney performance, the district court[21] denied relief based solely on the lack of prejudice to Washington.[22] The district court contended that although Tunkey made judgmental errors concerning the investigation of mitigating evidence, those errors were not prejudicial to the outcome of the sentencing proceedings.[23] This finding of no prejudice was ultimately reversed on appeal.[24]

The court of appeals for the Eleventh Circuit expressly abandoned the

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[18]Washington filed a writ of habeas corpus under 28 U.S.C. § 2254 (1976). A federal habeas corpus writ exists to redress fundamental unfairness in state criminal proceedings. Rose v. Lundy, 455 U.S. 509 (1982). This statutory remedy may not be identical to the common law writ of habeas corpus. *See* Wainwright v. Sykes, 433 U.S. 72, 78 (1977).

[19]Washington specifically declined to challenge Tunkey's effectiveness with respect to Washington's guilty pleas. All of Washington's grounds for habeas corpus relief related solely to Tunkey's representation at the sentencing proceedings and appeal, and the propriety of death sentences for Washington's crimes. In particular, Washington contended that Tunkey had failed to: (1) request a psychological or psychiatric examination to determine if mitigating circumstances were present at the time of Washington's criminal behavior; (2) investigate available character witnesses to testify on Washington's behalf; (3) request a presentence investigation since the record contained no background information; and (4) present a meaningful and factually supported closing argument and sentencing memorandum. *Strickland*, 673 F.2d at 885 nn. 2-3.

[20]*Id.* at 885. The two statutory mitigating circumstances which might have been established are (1) "that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (FLA. STAT. § 921. 141(6)(b) (supp. 1981)), and (2) "that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" (FLA. STAT. § 921.141(6)(f) (supp. 1981)).

[21]United States district court for the southern district of Florida.

[22]Upon determining that Washington's claim failed for lack of prejudice, the district court observed it was not required to decide whether Tunkey's performance was constitutionally ineffective. However, the court found that Tunkey should have independently investigated areas relevant to the litigation and that such investigation would have produced generally favorable information in Washington's behalf.

[23]The district court relied on the outcome-determinative test for the prejudice standard. The court of appeals for the District of Columbia originally enunciated the outcome-determinative test in United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979)(en banc), *cert. denied*, 444 U.S. 944 (1979). The State of Florida adopted this test in *Knight*, 394 So. 2d at 1001.

[24]On appeal, a panel for the United States court of appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework developed by the court for analyzing claims of ineffective assistance of counsel. *Strickland v. Washington*, 673 F.2d 879. The panel decision was vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc, *Washington*, 679 F.2d 23. The full court of appeals articulated its standards, reversed the judgement of the district court, and remanded the case for new fact finding, *Washington*, 693 F.2d 1243.

"outcome-determinative" prejudice standard adopted by the district court[25] and held the defendant satisfied the prejudice requirement by proving "that the decision making process of a rational sentencer would have been substantially or materially altered had counsel properly produced the omitted mitigating evidence."[26] The court's examination of attorney performance yielded a "reasonableness" standard, supplemented with structured guidelines.[27] The Supreme Court granted the petition for certiorari filed by the officials of the State of Florida.[28]

THE PROPER STANDARDS FOR JUDGING A CLAIM OF INEFFECTIVE ASSISTANCE

For a reversal to occur, a defendant's claim of ineffective assistance of counsel must survive the dual part test articulated by the Supreme Court in *Strickland.*[29] The two components of this test are (1) deficient attorney performance and (2) prejudice to the defense caused by the deficient performance.[30] In framing the Court's opinion as to the proper standards for each component, Justice O'Connor referred to the underlying rationale of the constitutional right to counsel as a guide.

In prior landmark decisions,[31] the Supreme Court recognized the right to counsel as facilitating the fundamental right to a fair trial. The Constitution defines the core elements of a fair trial mainly through the counsel clause of the sixth amendment.[32] However, the sixth amendment does not envision the mere presence of counsel.[33] Rather, to satisfy the constituional dictates, the

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[25]For a review of the reasoning of the court of appeals in rejecting this test, *see Washington*, 693 F.2d at 1271-73.

[26]*Id.* at 1273.

[27]The Eleventh Circuit canvassed the case law and proposed five general principles to supplement the vague concept of reasonableness: (1) Counsel who fails to conduct a "reasonably substantial" investigation into the sole "plausible line of defense" in the case has not rendered effective assistance; (2) where counsel chooses to rely on one major line of defense, he must conduct a "reasonably substantial" investigation into that line of defense; (3) where counsel conducts a "reasonably substantial" investigation into each potential line before choosing one to rely on at trial "courts will seldom if ever" find the choice constitutes ineffective assistance; (4) counsel may choose not to "substantially" investigate one plausible line of defense because of a "reasonable strategic choice" to rely on another plausible line of defense; and (5) counsel who fails to conduct a "substantial investigation" into any plausible line of defense for reasons besides strategic choice renders ineffective assistance. *Id.* at 1252-57.

[28]*Strickland*, 103 S. Ct. at 2451.

[29]*Strickland*, 104 S. Ct. at 2064, 2068.

[30]*Id.* at 2064.

[31]Argersinger v. Hamlin, 407 U.S. 25, 29-33 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

[32]*Strickland*, 104 S. Ct. at 2063; United States v. Morrison, 449 U.S. 361, 364 (1980); Herring v. New York, 422 U.S. 853, 857 (1975) (fundamental rights of the sixth amendment extended to state criminal defendants through the fourteenth amendment).

[33]Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Gard, *supra* note 10, at 483, citing Powell v. Alabama, 287 U.S. 45 (1932).

counselor must play the role of advocate,[34] a role crucial to the reliable functioning of the adversarial system in producing just results.[35] Guided by those prior holdings, the *Strickland* Court stated "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."[36]

THE ATTORNEY PERFORMANCE STANDARD

The *Strickland* Court adopted the reasonably-effective-assistance standard, variations of which are currently followed by all the federal courts of appeal.[37] To sufficiently comply with this standard, as enunciated by the *Strickland* Court, a habeas petitioner must establish that counsel was deficient and not functioning as a counsel guaranteed by the sixth amendment.[38] Although the Court in *Strickland* declined embellishing on this standard in terms of specific requirements,[39] it did outline the appropriate considerations for courts administering this test. The Court reaffirmed a prior Supreme Court holding of *Michel v. Louisiana*[40] where the Court concluded that the difficulties inherent in evaluating counsel's performance necessitate a favorable presumption that counsel's conduct fell within the domain of professionally reasonable assistance.[41] Therefore, a habeas petitioner alleging a claim of ineffective assistance must overcome the presumption that counsel's representation was reasonable, given the timely circumstances of the case and as viewed from counsel's perspective.[42] Additionally, a reviewing court must consider pertinent acts or statements of the defendant in assessing the reasonableness of counsel's investigative or tactical decisions.[43]

THE PREJUDICE STANDARD

The Court, in *Strickland*, elected to perpetuate the duality of ineffective

[34] *Cronic*, 104 S. Ct. at 2045, quoting Anders v. California, 386 U.S. 738, 743 (1967).

[35] *Herring*, 422 U.S. at 862 (ultimate objective of the adversary system is that the guilty are convicted and the innocent are set free).

[36] *Strickland*, 104 S. Ct. at 2064.

[37] *Id. See* Trapnell v. United States, 725 F.2d 149, 151-52, 153 (2d Cir. 1983) for a listing of the particular variations of the reasonably-effective-assistance standard employed by the different circuit courts.

[38] *Strickland*, 104 S. Ct. at 2064.

[39] The Court declined to adopt more specific guidelines for the following reasons:
- the adopted standard respected self-regulating norms of the legal profession;
- the adopted standard accommodates wide latitude afforded defense counsel for making strategic choices;
- a rigid standard negated constitutionally protected independence of counsel;
- the adopted standard fulfilled the purpose of the sixth amendment in ensuring a fair trial; and
- detailed guidelines distracted counsel from providing zealous advocacy.

[40] 350 U.S. 91 (1955).

[41] *Id.* at 101.

[42] *Strickland*, 104 S. Ct. at 2065, citing Engle v. Isaac, 456 U.S. 107, 133-34 (1982).

[43] *Strickland*, 104 S. Ct. at 2066-67, citing *Decoster*, 624 F.2d at 209-10.

assistance claims by reiterating that a professionally unreasonable error does not warrant reversal of a criminal judgment unless the error elicited prejudice.[44] The Supreme Court has held that prejudice is presumed where the unique circumstances of the case compel a prophylactic guarantee.[45] For example, prejudice is presumed in cases involving actual or constructive denial of counsel and cases presenting various types of governmental interference with counsel's assistance.[46]

The Supreme Court has not extended the per se rule of prejudice to cases addressing claims of actual ineffectiveness.[47] However, in *Cuyler v. Sullivan*,[48] a case involving actual ineffectiveness based on a conflict of interest, the Court held that a limited presumption of prejudice is warranted in conflict of interest cases.[49] With the exception of conflict of interest claims, defendants alleging actual ineffectiveness claims based on deficiency in counsel's representation must affirmatively prove prejudice.[50]

The *Strickland* Court explicitly rejected the prejudice tests employed by the lower courts.[51] The prejudice standard newly enunciated in *Strickland* originated from the holdings of two recent Supreme Court cases: *United States v. Agur*[52] and *United States v. Valenzuela-Bernal*.[53] The *Agur* test relates to the proper standard of materiality of exculpatory evidence suppressed by the prosecution.[54] The *Agur* Court held the prosecutor has committed constitutional error if the omitted evidence creates a reasonable doubt that did not otherwise exist.[55] The Court qualified this standard by requiring the omission to be viewed in the "context of the entire record."[56] The *Valenzuela-Bernal* Court established a test for materiality of testimony made inaccessible by the governmental practice of deporting illegal alien witnesses.[57] The test requires the criminal defendant make a "plausible showing that the testimony of the deported

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[44]*Strickland*, 104 S. Ct. at 2067. *See Morrison*, 449 U.S. at 364-65 for a review of the case law supporting this view.

[45]*Cronic*, 104 S. Ct. at 2046-47 n. 25; Goodpaster, *supra*, note 12, at 349, 350 n. 191; Note, *Ineffective Assistance of Counsel*, *supra* note 11, at 682-83.

[46]*Supra* note 4.

[47]*Strickland*, 104 S. Ct. at 2067.

[48]446 U.S. 335 (1980).

[49]*Id.* at 348-50. Prejudice is presumed in conflict of interest cases only if the defendant proves counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

[50]*Strickland*, 104 S. Ct. at 2067.

[51]*Id.* at 2068. *See* Conflitti, *supra* note 12, at 36-37; Note, *supra*, note 4, at 757-58.

[52]427 U.S. 97 (1976).

[53]458 U.S. 858 (1982).

[54]*Agurs*, 427 U.S. at 112-13.

[55]*Id.* at 112.

[56]*Id.*

[57]*Valenzuela-Bernal*, 458 U.S. at 872-74.

witnesses would have been material and favorable to his defense. . . ."[58]

The *Strickland* Court, by extracting the applicable elements of these tests, formulated a prejudice standard that requires the defendant show "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[59] The Court defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome."[60] The Court supplemented the prejudice standard with attendant criteria that should govern a reviewing court's assessment of the prejudice inquiry. According to the *Strickland* opinion, a court determining an ineffectiveness claim must review the summation of evidence before the factfinder.[61] Additionally, the factfinder is presumed to have acted in accordance with the law.[62]

THE HOLDING IN STRICKLAND: APPLICATION OF THE STANDARDS

In a seven-one-one decision,[63] the *Strickland* Court held that Washington failed to make the requisite showing in either the performance or prejudice prong of the dual part test.[64] The majority stated Tunkey's tactical choice to argue extreme emotional distress and to rely on Washington's testimony was reasonable given the totality of circumstances viewed from Tunkey's perspective.[65]

In the Court's opinion, Washington's claim was blatantly meritless under the prejudice standard.[66] Given the overwhelming aggravating factors, the Court felt there was no reasonable probability that, but for the omissions, the result of the proceeding would have been different.[67] Rather, the Court observed that presenting the omitted evidence for the trial court's consideration appeared strategically more detrimental to Washington's case.[68]

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[58] *Id.* at 873.

[59] *Strickland,* 104 S. Ct. at 2068.

[60] *Id.*

[61] *Id.* at 2069.

[62] *Id.* at 2068. (The prejudice assessment proceeds on the assumption that the decisionmaker acted reasonably and impartially in applying the governing standards — idiosyncracies of a particular decisionmaker are irrelevant to the prejudice inquiry, but may affect the performance inquiry to a limited extent).

[63] Justice Brennan joined the Court in its opinion, but dissented from its judgement based on his position that the death penalty is cruel and unusual punishment prohibited by the eighth and fourteenth amendments. *Strickland,* 104 S. Ct. at 2071-74.

[64] *Id.* at 2071. Although the Court discussed the performance component prior to prejudice, a court deciding a claim of ineffective assistance is not required to adhere to that sequence, nor address both components if a defendant makes an insufficient showing on one. *Id.* at 2069.

[65] *Id.* at 2070-71. Furthermore, nothing in the record indicates that Tunkey's sense of hopelessness regarding Washington's prospects distorted his professional judgement. *Id.* at 2071.

[66] *Id.* at 2071.

[67] *Id.* Omitted evidence would barely have changed the sentencing profile presented to the sentencing judge.

[68] *Id.* Specifically, the Court asserts that Washington's potentially damaging rap sheet would probably have been admitted into evidence and psychological reports would have contradicted Washington's claim that extreme emotional distress was a mitigating circumstance. *Id.*

Faced with recurring issues rigorously battled in the lower courts, the Supreme Court in *Strickland* substantially resolved those issues by establishing standards for gauging claims of actual ineffectiveness of counsel. For years, the constitutional requirements of "effective" assistance of defense counsel in criminal cases has plagued the lower courts.[69] This quandary is evidenced by the lingering debate initiated by various proposed standards for the performance and prejudice queries. Historically, the predominant tests adopted by courts struggling with the proper constitutional standard for attorney performance has been either the "farce and mockery standard"[70] or variations of the reasonable competence standard.[71] The coexisting issue of prejudice generated a multitude of tests in the past, ranging from the arduous "outcome-determinative test"[72] to the lenient rule that compelled automatic reversal upon any showing of attorney incompetence.[73] The *Strickland* opinion resolved the reverberating debate in the lower courts by formulating uniform performance and prejudice tests. However, the tests embraced by the Court are themselves debatable and susceptible to misapplication by the lower courts.

As a capital case, *Strickland* posed questions concerning the degree to which the constitutional shields, theoretically available to the capital defendant, exist in fact.[74] In earlier decisions,[75] the Supreme Court bestowed unique constitutional protections[76] to capital defendants to guard against arbitrary or unreliable death sentences.[77] As a result, sentence reliability and constitutional validity have heightened meaning in a capital proceeding.[78] Intermingled with those shields are the intensified role and accompanying duties assigned to a defense attorney.[79] Pragmatically, the efficacy of those constitutional

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[69]*See supra* notes 11, 12.

[70]*Strickland*, 104 S. Ct. at 2078 (Marshall, J., dissenting). *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945); Conflitti, *supra* note 12, at 32-36; Erickson, *supra* note 9, at 237-39.

[71]*Strickland*, 104 S. Ct. at 2078 (Marshall, J., dissenting). *See supra* note 37; Conflitti, *supra* note 12, at 36-40; Erickson, *supra*, note 9, at 239, 242.

[72]*Strickland*, 104 S. Ct. at 2078 (Marshall, J., dissenting). *See Decoster*, 624 F.2d at 208 & n. 74; (The district court adopted this standard for reviewing Washington's claim).

[73]*Strickland*, 104 S. Ct. at 2078 (Marshall J., dissenting). *See* United States v. Yelardy, 567 F.2d 863, 865 n. 1 (6th Cir. 1978) (harmless error approach inappropriate in ineffective assistance cases).

[74]Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COL. L. REV. 1544, 1544 (1983).

[75]Eddings v. Oklahoma, 455 U.S. 104 (1982) (unconstitutional risk presented by sentencer's refusal to consider mitigating evidence); Lockett v. Ohio, 438 U.S. 586 (1978) (statute limiting mitigating factors held unconstitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentences for first degree murder held unconstitutional); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty held unconstitutional when arbitrarily imposed).

[76]*See* Goodpaster, *supra* note 12, at 316-17; Comment, *supra* note 73, at 1549-49. Examples of constitutional protections: bifurcated trials, sentencer discretion exercised in accordance with specific guidelines, right of defendant to present mitigating evidence at the penalty phase.

[77]Comment, *supra* note 73, at 1549.

[78]*See* Goodpaster, *supra* note 12, at 303-17; Comment, *supra* note 73, at 1545-49.

[79]*See* Goodpaster, *supra* note 12, at 317-39.

safeguards relates proportionally to the effectiveness of defense counsel.

The most crucial failing of the emitted standards evolves from the *Strickland* Court's failure to formulate tests that sufficiently reflect the unique character of capital cases.[80] In defining the performance and prejudice tests, the *Strickland* Court did not specifically address the issues of sentence reliability or constitutionality. Furthermore, the Court suggested that, for purposes of an account of counsel's duties, a capital sentencing parallels an ordinary trial.[81]

The majority asserted[82] that the Supreme Court indirectly endorsed the *Strickland* performance standard in the earlier decision of *McMann v. Richardson.*[83] The *McMann* Court held that a guilty plea based on reasonably competent advice of the defense attorney was immune from post-conviction attack.[84] In defining "reasonably competent advice," the *McMann* Court stressed that the issue was not "whether a court would retrospectively consider counsel's advice to be right or wrong but . . . whether the advice was within the range of competence demanded of attorneys in criminal cases."[85] Twelve years later in *Engle v. Isaac,*[86] the Supreme Court alluded to the reasonably-effective-assistance test as satisfying the constitutional demands when the Court noted "that the Constitution guarantees criminal defendants only a fair trial and a competent attorney."[87] However, both cases are distinguishable from *Strickland* in that neither *McMann* nor *Isaac* involved the death penalty.[88] Therefore, the appropriateness of those respective standards is questionable in the context of the penalty phase of a capital trial.

In lieu of narrowly defining the constitutional contours of attorney performance,[89] the *Strickland* Court adopted the reasonably-effective-assistance standard.[90] In his dissent, Justice Marshall criticized the majority for failing to determine the quality of representation the Constitution mandates.[91] Justice Marshall asserted that by evading this constitutional issue the Supreme Court "abdicated its own responsibility to interpret the Constitution [and] impaired

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[80] *Id.* at 304. The author suggests that capital cases require reflective standards.

[81] *Strickland,* 104 S. Ct. at 2064.

[82] *Id.*

[83] 397 U.S. 759 (1970).

[84] *Id.* at 770.

[85] *Id.* at 771.

[86] 456 U.S. 107 (1982).

[87] *Id.* at 134.

[88] Both cases involved three defendants sentenced to imprisonment.

[89] Justice White, a concurring justice in *Strickland,* recognized the importance of defining the constitutional minimums of attorney performance in Romero v. United States, 459 U.S. 926, 927 (1982) (White J., dissenting).

[90] *Strickland,* 104 S. Ct. at 2064.

[91] *Id.* at 2074 (Marshall, J., dissenting).

the ability of the lower courts to exercise theirs."[92] While adamantly rejecting the *Strickland* performance standard, Justice Marshall endorsed the "particularized standard" developed by the Eleventh Circuit in this case.[93] The performance standards adopted by the Eleventh Circuit and the *Strickland* Court, however, share a common flaw, in that neither court considered the capital nature of the *Strickland* proceedings in formulating the respective standards.

Presumably, the *Strickland* majority theorized that the flexible nature of the performance standard would accommodate all criminal cases, including a capital proceeding. However, the cogency of that presumption is undermined by the inherent failings of the standard. The flexible performance standard heralded by the *Strickland* Court is susceptible to conflicting interpretation by the lower courts. For although affording necessary latitude to defense counsel, it requires the reviewing judge to assert unrestrained discretion as to what constitutes "professional" representation.[94] Additionally, the reasonableness of attorney performance is gauged by the circumstances as viewed from the attorney's perspective.[95] Therefore, the seemingly "objective" reasonably-effective-assistance test is poisoned with obtrusive subjectivity.[96] The resulting implication signals that the *Strickland* performance standard may perpetuate the ad hoc treatment of ineffectiveness claims that the Court sought to renounce.

The imposition of the prejudice requirement in *Strickland* reveals an inconsistency in the Court's opinion. On one hand, the Court identifies the sixth amendment's inclusive guarantee of a fair trial to the criminal defendant.[97] The Court underscored that ultimate goal by declaring that fundamental fairness was the central concern of both a writ of habeas corpus and an ineffectiveness claim.[98] The *Strickland* prejudice test, in the abstract, seems fair when compared with the unduly burdensome tests requiring "actual prejudice."[99] However, the defendant's burdensome task of proving both performance and prejudice seems to eviscerate the fair trial guarantee.[100]

The allocation of the burden of proof poses questions regarding the func-

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[92] *Id.*

[93] *Id.* at 2076.

[94] *Id.* at 2075. *See* Conflitti, *supra* note 12, at 40; Erickson, *supra* note 9, at 241 (community standards of effective representation are highly subjective).

[95] *Strickland,* 104 S. ct. at 2065-66.

[96] Critics of the "farce and mockery" standard contend it is too subjective to sustain uniform application because according to the farce and mockery standard, the counsel's must shock the conscience of a court and make the proceedings a farce and mockery of justice. United States v. Wight, 176 F.2d 376, 379 (2d. Cir. 1949), *See* Note, *A Functional Analysis of the Effective Assistance of Counsel,* 80 COL. L. REV. 1053, 1059 (1980); Erickson, *supra* note 9, at 240-41 ("Community standards of effective representation" share common failing of subjectivity with the "farce and mockery" standard).

[97] *Strickland,* 104 S. Ct. at 2063.

[98] *Id.* at 2070.

[99] Goodpaster, *supra* note 12, at 349.

[100] Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 93 HARV. L. REV. 752, 770 (1980).

tion of the harmless error rule in capital cases involving ineffectiveness claims. The rule, as enunciated in *Chapman v. California,*[101] asserts that upon a showing of constitutional error by the defendant, the burden of proof shifts to the government to prove beyond a reasonable doubt that the constitutional error was harmless.[102] The *Chapman* Court acknowledged that an infraction of the right to assistance of counsel "can never be treated as harmless error."[103] Then in *McMann*[104] this right to counsel was deemed to be the right to effective counsel.[105] Arguably then, a showing of counsel's ineffectiveness should not be treated as harmless error, regardless of whether prejudice occurred.[106] However, in *United States v. Morrison,*[107] the Supreme Court adopted a contrary stance. The *Morrison* Court stated "certain violations of the right to counsel may be disregarded as harmless error,"[108] without specifying the precise violations that constituted harmless error. The Supreme Court in *Strickland* did not define the harmless error issue. As a result, the status of harmless error in capital cases involving actual ineffectiveness of counsel remains obscure.[109]

The Supreme Court in *Strickland* substantially performed the crucial task of framing national standards designed to gauge claims of actual ineffectiveness. Augmenting the value of the Court's opinion are the incidental rulings that accompany the *Strickland* tests. Two key considerations[110] are outlined by the Court to facilitate a reviewing court's application of the dual-tier *Strickland* standard. The principal consideration is that both the performance and prejudice issues pose mixed questions of fact and law.[111] The Court ruled that "in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the

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[101]386 U.S. 18 (1976).

[102]*Id.* at 24.

[103]*Id.* at 23, n.8.

[104]397 U.S. 759 (1970).

[105]*Id.* at 771.

[106]Justice Marshall endorsed this view in his dissent; he favored a new trial upon the showing that counsel's performance deviated from "the constitutionally prescribed standards." *Strickland,* 104 S. Ct. at 2077. (Marshall, J., dissenting).

[107]449 U.S. 361 (1981).

[108]*Id.* at 365.

[109]*See* Goodpaster, *supra* note 12, at 352-55.

[110]A third incidental ruling of the *Strickland* Court does not relate to the application of the emitted test. Rather this incidental ruling relates to the total exhaustion rule derived from the landmark decision of Rose v. Lundy, 455 U.S. 509 (1982). The *Rose* Court held that a district court must dismiss habeas petitions containing unexhausted and exhausted claims. Considerable debate has surfaced in the lower courts regarding whether the exhaustion doctrine is jurisdictional or based on principles of comity. Lower courts struggling with the total exhaustion rule of *Rose* have interpreted the comity principle underlying exhaustion as allowing exceptions. The *Strickland* Court affirmed this practice where the Court noted that the "exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional." *Strickland,* 104 S. Ct. at 2063.

[111]*Strickland,* 104 S. Ct. at 2070.

federal court to the extent stated by 28 U.S.C. section 2254(d)."[112] Section 2254(d) provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction . . . evidenced by a written finding, written opinion or other reliable and adequate written indica, shall be presumed to be correct. . . ."[113] The Supreme Court initially examined the section 2254(d) "issues of fact" phrase in *Townsend v. Sain.*[114] The *Townsend* Court noted that "issues of fact" denotes "basic, primary or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'. . . ."[115] Seventeen years later, in *Cuyler,* the Supreme Court held that ineffectiveness, in the context of conflict of interest cases, "is a mixed determination of law and fact that requires the application of legal principles to the historical facts of the case."[116] The *Strickland* opinion extended the *Cuyler* holding by ruling that "[i]neffectiveness is not a question of 'basic primary, or historical fact.' Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact."[117] In a federal collateral proceeding, such as *Strickland,* conflicting state and individual interests become paramount contentions.[118] Traditionally, a strong presumption gives precedence to the state's interest in finality over an individual's interest in a fair adjudication of the claim in a federal court.[119] However, the *Strickland* mixed question holding tips the balance in a direction more favorable to the individual's interest.

The second consideration, though interrelated with the first, rates isolated appraisal. Although the Court in *Strickland* noted the impropriety of special standards for habeas proceedings involving claims of ineffectiveness, it underscored fundamental fairness as being the crux of an ineffectiveness claim and a writ of habeas corpus.[120] The potential difficulties in the application of *Strickland* standard indicate the probability of future decisions struggling with the precise issues presented in *Strickland.* Conceivably, the Court's notation of fundamental fairness will potentially mobilize the formulation of standards that properly assess the situation while promoting the concept of fundamental fairness.

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[112] *Id.*

[113] 28 U.S.C. § 2254(d) (1982).

[114] 372 U.S. 293 (1963).

[115] *Id.* at 309, quoting Brown v. Allen, 344 U.S. 443, 506 (1953).

[116] *Cuyler,* 446 U.S. at 342.

[117] *Strickland,* 104 S. Ct. at 2070.

[118] *See* United States v. Frady, 456 U.S. 152, 162-69 (1982); *Engle,* 456 U.S. at 126-29.

[119] *See supra* note 117.

[120] *Strickland,* 104 S. Ct. at 2070.

CONCLUSION

Historically, the meaning of effective assistance of counsel, as envisioned within the contours of the sixth amendment, has plagued lower courts and commentators. The *Strickland* case presented the Supreme Court with an opportunity to articulate uniform standards to resolving the lingering debate and ensuing discrepant treatment of claims alleging actual ineffectiveness of counsel. Unfortunately, rather than alleviating the problematic situation, the emitted standard may potentially contribute to the chaotic and confused state of the lower courts.

The crux of the standard's failing centers on the inappropriate selection of *Strickland* as a potentially landmark decision for future ineffectiveness claims. From the onset, the capital nature of the proceedings necessitated reflective rather than homogeneous standards applicable to all claims alleging constitutionally ineffective counsel. The appropriateness of the performance and prejudice test in the capital context is a recurring inquiry throughout this casenote, an inquiry neglected by the *Strickland* majority.

The Supreme Court espoused a dual standard for judging claims of actual ineffectiveness. The two components of the ineffectiveness claims are deficient attorney performance and prejudice to the defense. The Court's query on the issue of attorney performance yielded the reasonably-effective-assistance test. Although the standard purports to be objective, an analysis of the pragmatic functioning of the test reveals its highly subjective nature. The prejudice query yielded a test that required a "reasonable probability" of prejudice rather than actual prejudice to the defense. For a reversal to occur, the criminal defendant alleging actual ineffectiveness must satisfy both the performance and prejudice test as enunciated by the *Strickland* Court.

SUSAN K. VANBUREN