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Ineffective Assistance of Counsel Claims: Toward a Uniform Framework for Review

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NOTES

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: TOWARD A UNIFORM FRAMEWORK FOR REVIEW

Strickland v. Washington[1]

Surveys indicate that judges believe at least one tenth of the lawyers in practice today are ineffective and harmful to their clients' cases.[2] Indigent criminal defendants appear to receive particularly poor representation from their appointed attorneys.[3] To deal with this problem, state supreme courts and federal circuit courts developed a conflicting array of tests for determining the standard of effectiveness counsel must meet to fulfill a criminal defendant's sixth amendment guarantee of the right to counsel.[4] Not only did these courts disagree on the standard to be used for judging attorney performance; they also split on whether a defendant making an ineffective assistance claim must show prejudice resulting from the constitutionally inadequate performance.[5]

In *Strickland v. Washington*, the United States Supreme Court attempted to develop a uniform framework for analyzing ineffective assistance claims. *Strickland* is significant because it is the first case in which the Court has broadly addressed the issue of actual ineffective assistance of counsel.[6] The Court held the proper standard for attorney performance is that of reasonably

1. 104 S. Ct. 2052 (1984).

2. Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 634 n.7 (1980).

3. Judge Bazelon of the United States Court of Appeals for the District of Columbia states that in his experience he has found that many—if not most—indigent defendants are represented by such ineffective lawyers that their constitutional right to counsel is violated. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

4. *See* 5 AM. JUR. PROOF OF FACTS 2D *Ineffective Assistance of Counsel* §§ 2, 13 (1975).

5. *Id.*

6. 104 S. Ct. at 2062.

effective assistance.[7] On the issue of prejudice, the Court held that a defendant making an ineffectiveness claim must show that there is a reasonable probability that the result of the challenged proceeding would have been different but for counsel's inadequate assistance.[8]

In September 1976, David L. Washington and two accomplices kidnapped and murdered three people.[9] After the arrest of his accomplices, Washington surrendered to police and confessed to one of the murders. Washington was indicted for kidnapping, robbery, and murder. The state of Florida appointed an experienced criminal lawyer to represent him. Against the lawyer's advice, Washington confessed to the other two murders, causing his counsel to feel hopeless about the case. At trial, defendant Washington ignored counsel's advice and pleaded guilty to all charges, including three capital murder charges.[10] Defendant told the judge that he had no significant prior criminal record and at the time of the murders was distressed by his inability to support his family. Defendant rejected counsel's advice to have an advisory jury at his capital sentencing hearing and chose to be sentenced by the trial judge alone.[11]

Counsel spoke with defendant about his background, but decided not to present character witnesses or psychiatric testimony at the sentencing hearing. Counsel believed defendant's prior plea colloquy provided enough information about defendant's background and mental state. Further, counsel wanted to avoid state cross-examination of defendant about his claim of mental distress and prevent the state from presenting its own psychiatric evidence. A presentence report was not prepared because counsel believed it would be harmful to defendant since it would contain a greater criminal history than defendant had related to the judge.[12]

At the sentencing hearing, counsel argued that several mitigating circumstances justified not imposing the death penalty in the case. First, defendant had no "significant" history of criminal acts.[13] Second, defendant was under

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7. *Id.* at 2064.
8. *Id.* at 2068.
9. *Id.* at 2056.
10. *Id.* at 2057.
11. *Id.*
12. To prepare for the sentencing hearing, counsel spoke with the defendant and the defendant's wife and mother, but did not seek out other possible character witnesses. Counsel chose not to seek a psychiatric examination of defendant because his conversations with defendant did not indicate defendant had any psychological problems. Counsel was successful in having potentially damaging evidence excluded from the sentencing hearing. He was able to exclude defendant's "rap sheet." Counsel's strategy at the sentencing hearing was based on the trial judge's remarks to defendant that the judge had a "great deal of respect for people who are willing to . . . admit responsibilty" for their acts and the judge's reputation as a sentencing judge who thought it important for defendants to admit responsibility for their crimes. *Id.*
13. In fact, defendant admitted that he had engaged in a course of burglaries and had stolen property for some time. However, no evidence of prior convictions was presented at the sentencing hearing. Washington v. State, 362 So. 2d 658, 663 (Fla.

extreme mental distress at the time of the murders. Third, his surrender, confession, and agreement to testify against a co-defendant showed defendant's good character and remorse. Nevertheless, the trial judge found the aggravating circumstances greatly outweighed any mitigating circumstances and sentenced defendant to death.[14]

Defendant then sought collateral relief in state court, asserting that counsel had rendered ineffective assistance at the sentencing hearing.[15] Defendant argued counsel's assistance was ineffective because he had failed to investigate non-statutory mitigating factors.[16] The case reached the Florida Supreme Court, but all state courts denied relief.[17] Defendant then filed for a writ of habeas corpus in federal district court, asserting the same ineffective assistance claim.[18] The district court denied relief, but the Eleventh Circuit Court of Appeals reversed and remanded the case so that the lower court could apply newly announced standards.[19]

The Supreme Court granted certiorari and reversed the court of appeals.

1978), *cert. denied*, 441 U.S. 937 (1979). For a list of statutory mitigating factors judges are to consider under Florida's capital sentencing law, see FLA. STAT. ANN. § 921.141(6) (West 1973).

14. The aggravating circumstances found by the court included the fact that the murders were especially heinous and cruel, involving multiple stabbings. All the murders were committed in the course of robberies and were committed for financial gain. In addition to imposing the death penalty for three counts of capital murder, defendant received numerous prison sentences for robbery, kidnapping, breaking and entering, assault, and conspiracy to commit robbery. The death sentence and prison sentences were affirmed by the Florida Supreme Court on direct review. Washington v. State, 362 So. 2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979).

15. 104 S. Ct. at 2058.

16. Specifically, defendant argued counsel's assistance was ineffective because he had failed to move for a continuance, to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate and cross-examine medical experts who testified as to the manner of the killings. In support of the claim, defendant submitted fourteen affidavits from friends, neighbors and relatives stating that they would have testified if asked to do so. He also submitted two psychological reports stating that defendant was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. *Id.*

17. Washington v. State, 397 So. 2d 285, 287 (Fla. 1981).

18. 104 S. Ct. at 2060.

19. The appeal from the district court was originally heard before the Fifth Circuit. 673 F.2d 879 (5th Cir. 1982). However, that decision was vacated when the circuits were realigned so that the case fell within the jurisdiction of the eleventh circuit. The Eleventh Circuit Court of Appeals reheard the case en banc and held that defendant was entitled to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2052 (1984). In addition, the court held defendant must show that counsel's errors resulted in actual and substantial disadvantage to the course of the defense. Such a showing of prejudice required a judgment for defendant unless the state proved beyond a reasonable doubt that counsel's ineffectiveness was harmless. *Id.* at 1262; *see infra* notes 68-70 and accompanying text.

The Court held the proper standard for attorney performance is that of reasonably effective assistance.[20] The Court, however, adopted a different standard of prejudice than that used by the court of appeals. The Court held defendant must show there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofesssional errors.[21] Applying these standards to the facts of this case, the Court held that counsel's performance was within the broad range of reasonableness and, alternatively, the defendant had not shown sufficient prejudice to justify setting aside his death sentence.[22]

Justice Marshall dissented. He believed the reasonably effective assistance standard was too vague for lower courts to apply and would prevent them from devising more precise standards.[23] Justice Marshall would dispense with the prejudice requirement and hold that if a defendant shows counsel departed from a standard of effectiveness, a new trial is mandated. He argued that both guilty and innocent defendants have a due process right to fundamentally fair procedures, and a prejudice requirement violates this right.[24]

The sixth amendment ensures that defendants in a criminal case shall have the right to the assistance of counsel for their defense.[25] In this century, the Supreme Court has greatly expanded the scope and meaning of the right to counsel[26] so that today no defendant may be imprisoned for any offense unless he was represented by counsel at his trial or made a valid waiver of that right.[27]

Prior to the 1960's, there were few ineffective assistance of counsel claims, but their number increased dramatically as that decade progressed.

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20. 104 S. Ct. at 2064.

21. *Id.* at 2068.

22. *Id.* at 2070. Justice Brennan concurred in that part of the opinion announcing the standards by which to judge a claim of ineffective assistance, but dissented from the Court's judgment. Because Brennan believed the death penalty is cruel and unusual punishment and violates the eighth and fourteenth amendments, he would have vacated defendant's death sentence and remanded the case for further proceedings. *Id.* at 2072 (Brennan, J., dissenting).

23. *Id.* at 2075 (Marshall, J., dissenting).

24. *Id.* at 2077.

25. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. There are other remedies available to a party who has received ineffective assistance. For example, the party may request that the bar discipline the attorney for incompetence. In addition, the party may sue the attorney for malpractice. However, malpractice suits are costly and damages are difficult to recover. Further, damages may be inadequate compensation to a defendant who has suffered a criminal conviction and incarceration (or a death sentence) because of counsel's ineffectiveness. *See* Schwarzer, *supra* note 2, at 633 and 646-49. Therefore, the sixth amendment right is necessary to provide additional protection in criminal cases.

26. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (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).

27. *Argersinger*, 407 U.S. at 37.

Courts became more willing to examine criminal trials for defects.[28] The requirement that indigents receive appointed counsel for their defense increased the number of attorneys handling criminal cases.[29] In addition, standards of professional conduct made it more difficult for attorneys to refuse appointment in a criminal case.[30]

The Supreme Court has stated clearly that the right to counsel is the right to "effective" counsel.[31] One commentator defines an effective counsel as one who makes certain the defendant receives the substantive and procedural protections mandated by law and ensures that the outcome of the case reflects a fair determination of the facts and the law.[32] Prior to *Strickland*, however, the Supreme Court had left the lower courts to develop standards for evaluating ineffective assistance claims. This resulted in a wide variation in tests and standards.[33]

Claims of ineffective assistance may be based on counsel's performance before, during, or after trial. The most common claim is that counsel was ineffective at the trial itself, even though this claim is the most difficult for defendants to prove.[34] Defendants have been most successful in arguing that counsel inadequately prepared the case or did not investigate it properly prior to trial.[35] Claims of ineffectiveness may also arise after conviction where, for example, the attorney is incompetent in foregoing or exercising a right to appeal.[36]

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28. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 444 (1977).

29. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

30. "All qualified trial lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant." A.B.A. STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 4-1.5(b) (2d ed. 1980).

31. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

32. Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299, 341 (1983).

33. The prior history of *Strickland* illustrates this problem. The state and federal courts which ruled on the case agreed that defendant has the burden to show counsel's performance fell below a standard of reasonable effectiveness, but they split on the issue of prejudice. The state courts held defendant must show counsel's ineffectiveness likely affected the outcome of the proceeding. By contrast, the federal court of appeals held defendant need only show counsel's ineffectiveness substantially disadvantaged the course of his defense. Both the state and federal courts held the state should have the opportunity to rebut defendant's showing of prejudice by proving beyond a reasonable doubt that counsel's ineffectiveness was in fact harmless to the proceeding's outcome. The case, therefore, presented the Supreme Court with the opportunity to clarify the law in this area. For a good discussion of the case's history, see Harper, *Effective Assistance of Counsel—Evolution of the Standard*, 58 FLA. B.J. 58, 59 (1984).

34. Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 488 (1976).

35. *Id.* at 485.

36. *Id.* at 492. Ineffectiveness claims also may arise in other contexts. For ex-

The first problem courts faced in deciding ineffective assistance claims was developing a standard for judging ineffectiveness. In devising any standard, courts must discount the effect of hindsight in judging the actions of counsel. In addition, courts must grant counsel wide discretion in making strategic and tactical decisions in the course of the case.[37]

The earliest standard to emerge in the federal courts was the "farce and mockery" standard.[38] This standard required defendant to show that the proceedings against him were reduced to a farce and mockery of justice because of counsel's ineffectiveness. The farce and mockery standard was based on the notion that the policy of finality in criminal cases should take precedence over claims of ineffective assistance except in the most severe cases of attorney incompetence.[39] The standard was adopted when the sixth amendment was interpreted to require only the appointment of counsel.[40] Courts had not then held that the sixth amendment guaranteed effective assistance.[41] Therefore, a federal defendant making an ineffectiveness claim had to base his claim on the fifth amendment's due process clause which guaranteed defendants the right to a fair trial.[42] Eventually, the farce and mockery standard was applied to sixth amendment claims as well.[43]

The farce and mockery standard was greatly criticized. Critics noted that the standard held attorneys to a lower standard of performance than that required in other professions.[44] The test was vague and ignored the fact that

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ample, the defendant in *Strickland* challenged counsel's preparation and performance preparing at a capital sentencing hearing. The Supreme Court chose to treat a capital sentencing hearing like a trial for the purpose of analyzing ineffectiveness claims. The Court believed a capital sentencing proceeding was like a trial in its adversarial format so that counsel's role in the proceeding would be the same as that in a trial, i.e., to ensure the adversarial process works to produce a just and reliable result. The Court noted that in less formal proceedings than a trial, a different approach to attorney ineffectiveness might be required by the Constitution. For example, the Court stated that an ordinary sentencing hearing might mandate a different test of effective assistance because informal procedures may be used and the sentencer may have standardless discretion. Thus, *Strickland* leaves open the possibility that the Court may develop other tests for judging attorney ineffectiveness in contexts other than a trial or capital sentencing proceeding. 104 S. Ct. at 2064.

37. Goodpaster, *supra* note 32, at 343.

38. For a discussion of the origin of the standard, see Beasley v. United States, 491 F.2d 687, 693-94 (6th Cir. 1974). This standard was announced in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

39. Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 929 (1973).

40. *Beasley*, 491 F.2d at 694.

41. *Id.*

42. *Id.* The farce and mockery test was derived from the traditional "sham or pretense" test used in old fair trial cases arising under the fifth amendment's due process clause. Strazzella, *supra* note 28, at 448-49.

43. 491 F.2d at 694.

44. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 238 (1979).

much of an attorney's work is done before trial.[45] The test was also criticized for imposing too heavy a burden on defendants since it required them to show that counsel's mistakes changed the nature of their trial into a farce and mockery.[46] After *Gideon v. Wainwright*[47] extended the right to appointed counsel to all indigents in felony cases, many courts found the farce and mockery standard for ineffectiveness was no longer consistent with the quality of representation to which defendants were entitled.[48] Courts began to devise new standards for judging ineffectiveness.

The United States Court of Appeals for the District of Columbia—the court which had originated the farce and mockery standard—abandoned it in 1967 and held that the appropriate standard for ineffective assistance is whether gross incompetence blotted out the essence of a substantial defense.[49] In 1970, the fifth circuit interpreted the right to counsel to mean counsel reasonably likely to render and rendering reasonably effective assistance.[50] By 1983, all the federal circuits had adopted some form of the reasonable attorney standard, although the language used by the courts implied that they had, in fact, adopted different standards.[51]

For example, the third circuit held counsel to a standard of normal competency.[52] The court held the defendant is entitled to the exercise of the cus-

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45. *Id.* at 239.

46. Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 34 (1983).

47. 372 U.S. 335 (1963).

48. Bines, *supra* note 39, at 929.

49. Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967).

50. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970).

51. The language used by the circuits in formulating their tests varied considerably. *See, e.g.*, United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978) ("reasonably competent assistance"); Trapnell v. United States, 725 F.2d 149, 153 (2d Cir. 1983) ("reasonably competent assistance"); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) ("counsel reasonably likely to render and rendering reasonably effective assistance"); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) ("reasonably effective assistance"); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.) ("minimum standard of professional representation"), *cert. denied*, 423 U.S. 876 (1975); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("customary skills and diligence" of "a reasonably competent attorney"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), ("reasonably competent and effective" assistance) *cert. denied*, 440 U.S. 974 (1979); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc) (reasonably competent assistance), *cert. denied*, 445 U.S. 945 (1980).

Justice Marshall, in his *Strickland* dissent, criticized the Court for its willingness to characterize these seemingly different standards as really the same standard of reasonableness. 104 S. Ct. at 2075, 2076 (Marshall, J., dissenting). Despite Marshall's objections, it is difficult to find a real case of ineffectiveness whose outcome would be different under the differing standards used by the circuit courts. *Cf.* 725 F.2d at 153-55. One judge has referred to the various standards used by the circuit courts as nothing more than a "semantic merry-go-round," suggesting the outcome of any case would be the same under any standard used. United States v. Decoster, 624 F.2d 196, 206 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979).

52. 725 F.2d at 151 (citing Moore v. United States, 432 F.2d 730, 737 (3d Cir.

tomary skill and knowledge which normally prevails at the time and place.[53] The advantage of this standard was that it was a familiar civil malpractice standard. Thus, its proponents argued courts could apply it more readily than the more vague reasonableness standard.[54]

The fourth circuit devised the most detailed test of ineffectiveness, adopting a checklist of duties counsel must perform. The court held counsel must confer with his client as often as is necessary, advise him of his rights, conduct appropriate investigations, and allow sufficient time for reflection and preparation for trial.[55]

There are at least three possible approaches to the prejudice issue.[56] The first approach is that a defendant need not show prejudice to obtain a reversal. A second approach uses a harmless error analysis for ineffectiveness claims. Once a defendant establishes that counsel's performance fell below the standard of effectiveness, the burden shifts to the government to prove lack of prejudice beyond a reasonable doubt. A third approach, and the one ultimately adopted by *Strickland*, requires a defendant to demonstrate that his counsel was ineffective and that this harmed him. The defendant must show that there is a reasonable probability that the result of the challenged proceeding would have been different but for counsel's ineffectiveness.[57]

Marshall's dissent advocates adoption of the first approach.[58] Indeed, this was the approach used by the sixth circuit.[59] The rationale for the no prejudice approach is that the right to counsel is too important to require defendants to also show harm flowing from abridgement of the right.[60] Moreover, determining whether there was prejudice may be difficult.[61] Finally, Marshall notes that the no prejudice approach ensures that both innocent and guilty defendants are tried using fundamentally fair procedures.[62] The chief disadvantage of this approach is that it could result in a large number of reversals in cases where the ineffectiveness did not affect the result of the proceeding. Judicial resources would be wasted in retrying cases.

1970) (en banc)).

53. Bines, *supra* note 39, at 932.

54. Gard, *supra* note 34, at 495.

55. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). The standards adopted by the court are virtually identical to those of the A.B.A. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION (1971), *quoted in* Gard, *supra* note 34, at 496. In later cases, the Fourth Circuit emphasized that its checklist approach was consistent with a "normal competency" standard. Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

56. Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1, 72 (1977).

57. 104 S. Ct. at 2068.

58. *Id.* at 2077 (Marshall, J., dissenting).

59. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

60. Comment, *supra* note 55, at 76.

61. *Id.*

62. 104 S. Ct. at 2077 (Marshall, J., dissenting).

The fourth circuit used the harmless error approach.[63] Proponents of this approach pointed to *Chapman v. California*[64] as mandating a harmless error analysis.[65] The advantage of the approach was that it avoided automatic reversals in cases where the ineffectiveness could be proven to have been harmless while relieving the defendant of the difficult burden of showing that the outcome of his trial would have been different.[66]

The third approach, requiring the defendant to prove both ineffectiveness and prejudice, was the most common among the circuit courts.[67] The chief advantage of this approach was that it deterred insubstantial claims by requiring defendants to prove the ineffectiveness affected the outcome of the proceedings.

The circuit court which ruled on *Strickland* devised a unique approach to prejudice which apparently falls in between the second and third approaches. The court rejected the outcome-determinative test of the third approach because it required defendant to carry too great a burden. The court rejected the second approach's shifting of the burden of proof to the state to show harmless error because evidence of counsel's performance was more accessible to the defendant.[68] Instead, the court held defendant need only show that counsel's ineffectiveness resulted in substantial disadvantage to the course of the defense, rather than changed the outcome of the proceeding.[69] After this showing, the state has the opportunity to prevail if it can show beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel.[70]

Strickland v. Washington announced a uniform framework for analyzing ineffectiveness claims. The Court held that the proper standard for attorney performance is that of reasonably effective assistance. The Court stated that the reasonableness test should be applied by deciding whether counsel's performance so impaired the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[71] The defendant must show that counsel's performance fell below this standard of reasonableness.[72] The Court rejected as inappropriate the checklist approach used by the fourth circuit for several reasons. First, the Court believed such an approach could hamper defense counsel's efforts by directing attention away from advo-

63. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).
64. 386 U.S. 18 (1967).
65. Comment, *supra* note 56, at 84.
66. *Id.* at 84, 85.
67. *Id.* at 73.
68. Washington v. Strickland, 693 F.2d 1243, 1261 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2052 (1984).
69. 693 F.2d at 1262.
70. *Id.*
71. 104 S. Ct. at 2064.
72. *Id.* at 2065.

cacy of the defendant's case.[73] Second, the Court noted that the purpose of the sixth amendment is to guarantee defendants a fair trial, not to improve the general quality of legal assistance.[74] Third, the Court feared that a checklist approach would encourage ineffective assistance claims since counsel's failure to perform any listed duty would give rise to a claim.[75] The Court believed the better approach was to judge counsel's actions by whether counsel performed reasonably considering all the circumstances of the case.[76]

The Court emphasized that the reviewing court must give wide discretion to counsel to develop trial strategy and tactics in order to discount the effect of hindsight.[77] Thus, there is a presumption that counsel's performance was reasonable.[78]

On the prejudice issue, the Court held that the defendant must show a

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73. *Id.*

74. *Id.*

75. *Id.* at 2066.

76. Justice Marshall in his dissent harshly criticized the Court's adoption of a reasonableness standard since Marshall believed this standard was too vague for lower courts to apply and would stunt the development of more specific standards. *Id.* at 2075 (Marshall, J., dissenting). Marshall favored the development of more particular standards like the fourth circuit's checklist approach. *See supra* note 54 and accompanying text. Marshall believed either the Supreme Court or the lower courts should attempt to develop guidelines for attorneys to follow to avoid claims of ineffectiveness. 104 S. Ct. at 2076. Marshall believed a guideline approach would help improve the quality of legal assistance, especially for indigent defendants who must rely on appointed attorneys. *Id.* at 2075. *See supra* notes 2-3 and accompanying text.

The majority disposed of Marshall's arguments by stating that the purpose of the sixth amendment is not to improve the quality of legal representation. Its purpose is to ensure criminal defendants receive a fair trial. 104 S. Ct. at 2065. The Court emphasized that a fair trial means one which can be relied on as having produced a just result. *Id.* at 2064. The Court believed that guidelines for attorney performance such as those proposed by the A.B.A. should not be made part of sixth amendment doctrine because any specific list of duties could not take into account all the possible cases that might arise. Finally, the majority suggested that imposing detailed guidelines on attorneys would impair counsel's constitutionally protected independence. *Id.* at 2065.

The Court's emphasis that the sixth amendment's purpose is to ensure that defendants receive a fair trial is reminiscent of the old cases decided under the farce and mockery standard. *See supra* notes 38-42 and accompanying text. However, *Strickland*'s reasonableness test is broader than the farce and mockery standard since *Strickland*'s test includes the attorney's performance both before and after trial. It is also true that the reasonableness standard is an easier test for parties making an ineffectiveness claim to meet than the stricter farce and mockery standard. *See supra* notes 43-47 and accompanying text.

77. 104 S. Ct. at 2065. *See supra* note 37 and accompanying text.

78. 104 S. Ct. at 2066. Justice Marshall objected to this presumption of reasonableness because he feared it would place too heavy a burden of proof on parties making an ineffectiveness claim. Marshall believed the real reason for the Court's imposing a presumption of reasonableness was the Court's belief that lower courts would be flooded with ineffectiveness claims without such a presumption for claimants to overcome. Marshall had confidence that the lower courts could root out meritless claims without such a presumption. *Id.* at 2078 (Marshall, J., dissenting).

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[79] The Court defined "reasonable probability" as that which would undermine confidence in the outcome.[80] Thus, the Court rejected both the no prejudice approach of the sixth circuit and the harmless error approach of the fourth circuit.

The Court stated that in a limited class of cases, defendant need not show prejudice to obtain a reversal of conviction. Prejudice is presumed in cases where a defendant has been denied the right to counsel altogether, either actually or constructively.[81] Prejudice is also presumed where the state has unduly interfered with counsel's assistance.[82] The Court believed these situations were so likely to be prejudicial that case-by-case inquiry was not necessary. The Court noted that these types of sixth amendment violations were easy to identify and prevent.[83]

Moreover, the Court stated that prejudice should be presumed where defendant's counsel was operating under an actual conflict of interest.[84] The Court noted that an attorney's duty of loyalty was perhaps the most basic obligation owed to a client. The Court believed that since attorneys had a duty to avoid conflicts and trial courts had the ability to make early inquiries in cases where conflicts were likely to arise, a rule of presumed prejudice was justified. However, the Court emphasized that the rule of presumed prejudice would not be applied as strictly in conflicts cases as it would in cases where a defendant was denied counsel or where the state impaired counsel's assistance. To have the benefit of the presumed prejudice rule, a defendant must show that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance.[85]

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79. *Id.* at 2068. The Court rejected a strict outcome-determinative test for prejudice as imposing too heavy a burden on defendants. *Id.* at 2069.

80. *Id.* at 2068.

81. *Id.* at 2067. The easiest case would obviously be one in which counsel is absent from an entire proceeding. More likely to occur, however, are cases in which the defendant is denied counsel at some critical stage. *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (Court held that a trial judge's order to a defendant not to consult with his lawyer during a regular overnight recess, called while the defendant was on the stand and before cross-examination was to begin, violated the defendant's sixth amendment right to counsel). For a discussion of the presumed prejudice rule by the Supreme Court, see United States v. Cronic, 104 S. Ct. 2039, 2047 (1984).

82. 104 S. Ct. at 2067. *See, e.g.*, Herring v. New York, 422 U.S. 853 (1975) (Court held that a total denial of the opportunity for final summation in a criminal case deprived the defendant of the basic right to make his defense and denied him the assistance of counsel under the sixth amendment).

83. 104 S. Ct. at 2067. The cases are easy to identify and prevent because in each of these types of cases it is the state which is unduly interfering with counsel's performance and counsel's relationship with the client. By contrast, in a typical ineffectiveness case, the state may have no knowledge that counsel is inadequate. For example, it would be difficult for a trial judge to know whether an attorney has adequately investigated a case.

84 *Id.*

85 *See* Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). Why the *Strickland*

Strickland v. Washington should end the confusion that has clouded the law of ineffective assistance. The Court's holding that the proper standard for attorney performance is that of reasonably effective assistance should stop the dispute over the standard required by the sixth amendment.[86] Most significant is *Strickland*'s resolution of the conflicting approaches on the issue of prejudice that were applied by the circuit courts.[87] All courts will now be able to follow the *Strickland* rule that a defendant making an ineffectiveness claim must show that there is a reasonable probability that the result of the challenged proceeding would have been different but for counsel's inadequate assistance.[88] By adopting a uniform framework for analyzing ineffectiveness claims, *Strickland* should allow lower courts to judge more confidently these sixth amendment cases.

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Court was willing to presume prejudice in cases where counsel has breached the duty of loyalty, but not in cases where counsel has breached the duty to investigate, is not entirely clear. The Court seemed to suggest that the duty of loyalty is more fundamental than the duty to investigate. A more likely reason may be that it is easier at an earlier stage in the proceeding to identify cases where a conflict of interest is present than cases where counsel has not investigated adequately. The Court may also have wanted to leave its *Cuyler* decision intact by drafting its *Strickland* opinion somewhat narrowly.

86. *See supra* note 51 and accompanying text.
87. *See supra* notes 56-57 and accompanying text.
88. 104 S. Ct. at 2068.