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THE CONSTITUTIONALIZATION OF *INEFFECTIVE* ASSISTANCE OF COUNSEL

RICHARD KLEIN*

Many scholars and professionals have identified a crisis in the provision of defense services in this country. In *Strickland v. Washington*,¹ the first time the Supreme Court considered what standard should be used to assess the constitutionally required effective assistance of counsel,² the Court had the opportunity to issue an opinion that would have mandated widespread reforms at the state level similar to those inaugurated by *Gideon v. Wainwright*³ and *Argersinger v.*

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1. 466 U.S. 668 (1984).

2. *Id.* at 683. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend VI. Whereas several colonies in America, long before the Revolutionary War, acknowledged the defendant's right to assistance of counsel when he requested it, only Connecticut actually provided for the appointment of counsel for the indigent defendant. See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 14-18 (1955) ("[In Connecticut,] the custom of appointing counsel if the accused requested this assistance apparently existed after 1750. In addition, the court usually advised the prisoner of this right to have counsel, and appointed one without request where the accused seemed to labor under some handicap."). After America achieved independence, eleven of the thirteen colonies adopted new constitutions, and seven of these new constitutions made some provision for the right to the assistance of counsel. *Id.* at 18-21. For nearly 150 years, the Sixth Amendment was not understood to require the provision of counsel to those who could not afford to hire their own. In 1932, the Supreme Court held that an indigent defendant in a capital case had the right to an appointed attorney. *Powell v. Alabama*, 287 U.S. 45, 73 (1932). Six years later, the Court held that any indigent defendant in a federal prosecution must be provided counsel because the assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462, 467-68 (1938).

3. 372 U.S. 335, 342-45 (1963) (holding that, for felony prosecutions, the Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment and requires the appointment of counsel for indigent defendants); see also *Nichols v. United States*, 511 U.S. 738, 743 n.9 (1994) (noting that, under *Gideon*, "the Constitution requires that an indigent defendant [in all felony cases] be offered appointed counsel"); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (stating that counsel should be provided where a probationer or parolee requests counsel, based on a timely and colorable claim that he has not committed the alleged violation of the conditions of his liberty); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (plurality opinion) (finding that Alabama's preliminary hearing is a critical stage of the criminal process and thus requires counsel); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (holding that "a lawyer must be afforded at [a] proceeding whether it be labeled a revocation of probation or a deferred sentencing"); *In re Gault*, 387 U.S. 1, 41 (1967) (finding that the Due Process Clause requires appointment

Hamlin.⁴ Although commentators were quick to offer sharp criticisms of *Strickland*,⁵ the negative impact of that decision, from the vantage point of fifteen years later, is even greater than feared.⁶

I. THE DEVELOPING THREAT TO THE SIXTH AMENDMENT

The Supreme Court's decision in *Gideon v. Wainwright* was long overdue. The Court had previously refused to mandate counsel for indigent defendants in all felony cases, but instead had instituted a vague standard requiring counsel only when the denial of an attorney

of counsel in juvenile delinquency proceedings that can result in commitment to an institution).

4. 407 U.S. 25, 36-37 (1972) (holding that "no person may be imprisoned for any offense, classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); see also *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that *Argersinger* requires the appointment of counsel in misdemeanor cases only when the judge determines that the defendant will be sentenced to jail if convicted). But see NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *Task Force Report on the Courts*, Standard 13.1 (1973) [hereinafter TASK FORCE REPORT], reprinted in NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *THE OTHER FACE OF JUSTICE* app. 158, 158 (1973) [hereinafter LEGAL AID] (asserting that "[p]ublic representation should be made available to eligible defendants . . . in all criminal cases" from the time of arrest through the exhaustion of all avenues of relief from conviction); STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-5.1, at 61 (3d ed. 1992) [hereinafter STANDARDS FOR CRIMINAL JUSTICE] (calling for counsel to be appointed in cases where, even though a conviction for the offense would not lead to immediate incarceration, the conviction might subject the defendant to future imprisonment were he to be convicted of a subsequent offense).

5. See 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, 639 (1986) (charging *Strickland* with "seriously undermin[ing] the remedy available to a defendant receiving ineffective representation"); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 139 U. PA. L. REV. 1259, 1288 (1986) (criticizing the *Strickland* Court for "fashion[ing] a test for ineffective assistance of counsel that sacrifices the explicit rights stated in the sixth amendment on a judicially created altar of fairness").

6. The negative impact that *Strickland* has had may be illustrated by *People v. De Pillo*, 565 N.Y.S.2d 650 (App. Div. 1990). The District Attorney initiated prosecution of the defendant after the applicable period set forth by the New York state statute of limitations had expired. *Id.* at 650. Counsel for the defendant, however, failed to move to dismiss the indictment on the ground that it was time-barred. *Id.* The defendant was convicted, and appealed on the basis that the defendant would not have been prosecuted at all were it not for counsel's ineffectiveness. *Id.* The New York Appellate Division acknowledged that the indictment indeed would have been dismissed but for counsel's incompetence; however, in this post-*Strickland* world, the court refused to vacate the judgement of conviction because "[t]he failure to make a pretrial motion, even one that might be successful, does not, per se, constitute ineffective assistance of counsel." *Id.* (citing *People v. Rivera*, 525 N.E.2d 698 (N.Y. 1988)). The court seemed almost to go out of its way to commend the attorney, observing that "trial counsel moved to dismiss . . . posttrial." *Id.* at 651. At that point, the motion was useless because the New York statute required that such a motion be made within forty-five days of the arraignment, a period of time that had long expired. See *id.* at 650 (citing N.Y. CRIM. PROC. LAW §§ 210.20, 255.10).

would be “shocking to the universal sense of justice.”⁷ Immediately after *Gideon* was decided, Congress passed the Criminal Justice Act of 1964 in order to provide remuneration in federal cases for the representation of indigent defendants.⁸ The Supreme Court, however, did not concern itself with either the manner in which states would comply with *Gideon* or how they would finance their new obligation.⁹ States were loathe to spend what was necessary, and often chose to provide counsel in a manner driven exclusively by considerations of cost. A crisis was predictable.¹⁰

Within several years of the *Gideon* decision, a Presidential Commission warned that there was a “severe” shortage of lawyers representing indigent defendants which was “likely to become more acute in the immediate future.”¹¹ The Report of the Commission sharply criticized the representation provided to defendants and described them as “numbers on dockets, faceless ones to be processed and sent on their way.”¹² Several years later, the National Legal Aid and Defender Association published the results of a nationwide study, which concluded that “the resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation.”¹³

7. *Betts v. Brady*, 316 U.S. 455, 462 (1942).

8. Pub. L. No. 88-455, § 2, 78 Stat. 552 (1964), codified as amended at 18 U.S.C. § 3006A (1994).

9. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (noting that 22 states argued as amici for the result achieved in *Gideon*, that two states opposed it, but failing to address the costs to the states of appointing counsel for indigent defendants in felony cases). See generally EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES* 13 (Greenwood Press 1971) (1951) (discussing isolated examples of indigent defense systems before *Gideon*, including the Legal Aid Society in New York, which has operated since 1917, and early public defenders in Los Angeles and Columbus).

10. See *Argersinger v. Hamlin*, 407 U.S. 25, 55-56 (1972) (Powell, J., concurring) (noting the Solicitor General's prediction that the rule in *Argersinger* would result in “backlogs,” “bottlenecks” and “chaos” at the state court level). But see *id.* at 44 (Burger, J., concurring) (stating with optimism that “[t]he holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it”).

11. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 151 (1967) [hereinafter PRESIDENT'S COMMISSION].

12. *Id.* at 128 (internal quotation marks omitted) (quoting Dean Edward Barrett).

13. LEGAL AID, *supra* note 4, at 70; see Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667, 684 (1975) (discussing this study and asserting in its light that “[t]he scope of representation provided for indigent defendants in many jurisdictions does not meet specific construction directives of the Supreme Court”); C. Anthony Friloux, Jr., *Equal Justice Under the Law: A Myth, Not a Reality*, 12 AM. CRIM. L. REV. 691, 707 (1975) (stating that “there has been little awareness

In 1979, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants began a three year study analyzing thirty-seven indigent defense systems;¹⁴ this study revealed an "exceedingly depressing picture of insufficient defense financing."¹⁵ This alarming conclusion led three committees of the American Bar Association, in conjunction with the National Legal Aid and Defender Association, to hold hearings and to issue another report: *Gideon Undone: The Crisis in Indigent Defense Funding*.¹⁶ The Report focused in part on the inequalities that result when indigent defendants have to rely on public defenders and court-appointed counsel who are so inadequately funded as to threaten the "constitutional mandate" of *Gideon*.¹⁷

In 1986 the American Bar Association formed a special committee to analyze the relationship between efforts to control crime and the constitutional rights of citizens.¹⁸ Two years later, the Committee's Report concluded that the quality of counsel provided to indi-

in many cities, counties, and states of the obligation to the indigent, and even less affirmative action to incur the financial cost to rectify the failure of the obligation").

14. This study was begun after the American Bar Association's House of Delegates voted to approve the following resolution:

Resolved, that the American Bar Association supports in principle the establishment of an independent federally funded Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings.

See Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, 1982 A.B.A. STANDING COMM. ON LEGAL AID i (reprinting the 1979 resolution).

15. *Id.* at 15. The Report's Introduction stated:

Millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There are also intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained.

Id. at 2.

16. AMERICAN BAR ASS'N & NAT'L LEGAL AID & DEFENDER ASS'N, *GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING* (John Thomas Moran ed., 1983) [hereinafter *GIDEON UNDONE*]. The Report itself somewhat hedged on the title, indicating that the promise of *Gideon* "will indeed be undone" if the enumerated problems are not addressed. *Id.* at 1 (emphasis added).

17. *Id.* at 3.

18. AMERICAN BAR ASS'N SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, *CRIMINAL JUSTICE IN CRISIS* 1 (1988) [hereinafter *CRIMINAL JUSTICE IN CRISIS*].

gents is “too often inadequate because of the underfunded and overburdened public defender offices.”¹⁹

The quality of counsel provided in death penalty cases has been subjected to particularly harsh criticism. Witnesses appearing before the American Bar Association’s special Task Force on Death Penalty Habeas Corpus characterized the quality of counsel provided indigents as “shameful,” “abysmal,” “pathetic,” and “deplorable.”²⁰ The Report of the Task Force concluded:

Without any doubt, the inadequacy of representation at the trial level greatly increases the risk of convictions that are flawed by fundamental factual, legal, or constitutional error. Too often, due to inadequacies of counsel, the jury never gets to hear evidence that could thoroughly alter its view of a case. . . . It is simply unrealistic to expect the system to operate better when its most fundamental component—informed, diligent, and effective advocacy—is missing at the trial level, the “fountainhead of justice.”²¹

One of the nation’s foremost capital case litigators and scholars, Stephen Bright, has written that as a result of the lack of funding for counsel in capital cases, “there is simply no functioning adversary system in many states.”²² In a particularly damning attack on our justice system, Bright concludes that it is not the facts of the crime, but instead the quality of the representation which determines who gets the death penalty, and that often “the poor were defended by lawyers who lacked even the most rudimentary knowledge, resources, and capabilities needed for the defense of a capital case.”²³ Justice Blackmun, dissenting from a recent decision by the Supreme Court to deny certiorari in a death penalty case where the defendant claimed ineffective assistance of counsel at trial, provided one reason why he would no longer uphold the sentence of death in any case: “My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt . . . whether the constitutional re-

19. *Id.* at 9.

20. AMERICAN BAR ASS’N, CRIM. JUST. SEC., BACKGROUND REPORT ON DEATH PENALTY HABEAS CORPUS ISSUES 69 (1989) [hereinafter BACKGROUND REPORT], reprinted in Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 53 (1990).

21. *Id.* (quoting Warren Burger, *The Courts on Trial*, 22 F.R.D. 71, 79 (1958)).

22. 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, 1844 (1994).

23. *Id.* at 1842. Bright, the Director of the Southern Center for Human Rights in Atlanta, Georgia, describes the system for providing financing for indigent capital defendants as “a process that lacks fairness and integrity.” *Id.* at 1837.

quirement of competent legal counsel for capital defendants is being fulfilled.”²⁴

In response to the continuing nationwide crisis in indigent defense services, the American Bar Association’s Criminal Justice Section again formed an ad hoc committee to analyze the situation.²⁵ The 1993 Report of the Ad Hoc Committee on the Indigent Defense Crisis concluded that “[t]he long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country.”²⁶ Although this Report focused on the representation provided indigents in state courts, the same unfortunate conditions exist in federal courts.²⁷ The Judicial Conference of the United States formed a Committee that same year to assess the effectiveness of counsel provided indigents under the Criminal Justice Act.²⁸ The Reporter to the Committee, Charles J. Ogletree, Jr., subsequently observed that there was a great deal of testimony from public defenders “who explained how their inability to provide effective

24. *McFarland v. Scott*, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial of certiorari). Blackmun added the obvious, yet horrid truth: “The consequences of such poor trial representation for the capital defendant, of course, can be lethal.” *Id.* at 1259; see also *Hearings on H.R. 3 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (testimony of Gerald H. Goldstein, President, Nat’l Ass’n of Criminal Defense Lawyers) (arguing that there is a high level of constitutional error caused by under-compensated, unprepared attorneys because the states have failed to meet their obligations at the trial level of capital cases).

25. See RICHARD KLEIN & ROBERT SPANGENBERG, *INDIGENT DEFENSE CRISIS* (1993) (establishing the Ad Hoc Committee on the Indigent Defense Crisis). The formation of this Committee was prompted in part by conditions like that in Atlanta, where a local newspaper characterized indigent defense representation as “slaughterhouse justice.” Meet ‘Em and Plead ‘Em, *FULTON COUNTY DAILY REPORT*, Sept. 18, 1990, at 2. The caseloads of each defender averaged 530 felonies, and the lawyers responded to this burden by terming arraignment day as “meet ‘em and plead ‘em.” One staff defender who nevertheless picked up forty-five new cases from working one arraignment session made a motion to the court to limit her new cases in the future to six cases a week. *Id.* The Director of the Public Defender Office, knowing perhaps that his job would be at risk if his office were not processing the required number of cases, demoted the staff defender, who subsequently resigned. *Id.*

26. KLEIN & SPANGENBERG, *supra* note 25, at 25. See generally Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74-75 (1993) (proposing reforms because “the results of existing indigent defense methods are often abysmal and because the need for effective reform is acute”); J. Michael McWilliams, *The Erosion of Indigent Rights*, A.B.A. J., March 1993, at 8, 8 (proposing various reforms to ensure that the rights of indigent defendants are not violated).

27. KLEIN & SPANGENBERG, *supra* note 25, at 1-2 (noting that “all components of the criminal justice system are suffering from the lack of adequate resources”).

28. See COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, *REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT* (1993), reprinted in 52 CRIM. L. REP. 2265 (1993).

assistance of counsel was a direct result of the inadequate resources made available to them under federal law.”²⁹

In the mid 1990s, when many states were confronted with reduced revenues due to a sluggish economy, indigent defense delivery systems were one of the first places that states and counties looked to reduce costs.³⁰ A Special Committee of the American Bar Association minced no words in describing the situation: “[T]he justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding.”³¹ No place perhaps was as hard hit as Orange County, California—the fifth largest county in the United States—which filed for bankruptcy in December 1994.³² That county, which had been the country’s fourth richest,³³ decided to save money on indigent defense³⁴ by drastically reducing the program for court-appointed private attorneys to represent indigent defendants where an impermissible conflict of interest would arise if the Public Defender’s Office were to represent two or more co-defend-

29. Charles Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS., Winter 1995, at 81, 86; see *State v. Peart*, 621 So. 2d 780, 784, 789 (La. 1993) (finding unconstitutional a local public defender system under which one attorney had represented 418 clients in seven months with 70 felony cases pending trial, and noting the trial judge’s remark that “not even a lawyer with an ‘S’ on his chest could effectively handle this docket”).

30. See David J. Carroll, *1997 State Legislative Sessions Scorecard: Developments Affecting Indigent Defense*, THE SPANGENBERG REP. (West Newton, Ma.), Nov. 1997, at 1, 2.

31. AMERICAN BAR ASS’N, SPECIAL COMMITTEE ON FUNDING THE JUST. SYS., FUNDING THE JUSTICE SYSTEM: A CALL TO ACTION ii (1992).

32. See *Merrill Lynch, Orange County Settle*, ASSOC. PRESS ONLINE, June 2, 1998, available in 1998 WL 6674881 (discussing the bankruptcy of Orange County). Orange County was not the only area in California to suffer. In San Diego, the 1992 budget shortfall led to the Public Defender’s Office losing \$538,000 and the Alternate Public Defender losing \$100,000. See *No Layoffs at S.D. Court, but Offices Face Cutbacks*, L.A. DAILY J., Oct. 15, 1992. Even before the cut, the Public Defender Office had no funds available to fill fourteen vacant positions. *Id.* In 1992 in Alameda County (Oakland), the county sharply cut its budget and the public defender’s office was scheduled to suffer the greatest reduction. The defenders had had their budget cut in each of the two preceding years, even though caseloads had increased. The Alameda County Public Defender reacted sharply to the proposed reductions: “No reasonable person can look at this budget cut and say it’s doable. We couldn’t handle the caseload. We just couldn’t.” *Less Money Fights More Crime*, L.A. DAILY J., Apr. 6, 1992.

33. John Greenwald, *The California Wipeout*, TIME, Dec. 19, 1994, at 55, 56.

34. See Sonia Y. Lee, Comment, *OC’s PD’s Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1913 & n.135 (1996) (noting that, after bankruptcy, the council formed to operate the county’s budget proposed the most severe reductions in programs affecting the poor, including defense attorneys, and that the budget of the Alternate Defense Fund, which provided private attorneys to indigents in conflict of interest cases, was cut 29%, and restructured in its relation to the public defender office, in sharp contrast to the minimal reductions in the budget of the District Attorney).

ants.³⁵ The County instituted a system of questionable constitutional³⁶ and ethical³⁷ legitimacy by setting up a "Chinese Wall" within the county Public Defender's Office.³⁸ Two additional programs *operated* by the Office handled conflict of interest cases,³⁹ with the "Wall" supposedly insulating one group of attorneys from the other groups, thereby "satisfying" the constitutional concerns.⁴⁰

The ethical and constitutional problems presented by Orange County's reduction of funds for indigent defense were greater than just conflict of interest issues. The caseload of the Office of the Public Defender increased by an estimated 6000 (ten percent) in fiscal year

35. See "Conflict Case-Swapping": *Alternative Methods of Providing Representation in Conflict of Interest Cases*, THE SPANGENBERG REP. (West Newton, Ma.), Nov. 1998, at 13, 13 (discussing the restructuring of Orange County's public defender's office as a result of cutbacks); Jodi Wilgoren, *Private Lawyers Left Dry as County Work Evaporates*, L.A. TIMES, Jan. 9, 1995, available in 1995 WL 2003625 (noting that "officials have virtually gutted the alternate defense fund, cancelling contracts with [private] lawyers and splitting the public defender's office in three so that it can handle the conflict cases itself").

36. See *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980) (stating that when a defendant raises no objection at trial, he must demonstrate than an actual conflict of interest adversely affected his lawyer's performance); *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) (noting that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic" (citing *Glasser v. United States*, 315 U.S. 60 (1942))); *Glasser*, 315 U.S. at 76 (overturning the conviction of a defendant on the ground of ineffective assistance of counsel in light of a conflict of interest between the defendant and his co-defendant, who was also represented by the same attorney), *limited on other grounds by* *Bourjaily v. United States*, 483 U.S. 171, 178 (1987).

37. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) & cmt. [1] (1998) (providing that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client," and commenting that "[l]oyalty is an essential element in the lawyer's relationship to a client"); Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 (1978) (reporting results of author's study that approximately 70% of public defender offices maintain a strong policy against multiple representation, with 49% of offices having an outright ban); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1428 (1979) (stating that when a client is represented by an attorney in a legal services office, "the client employs the legal services as a firm and not a particular lawyer" for purpose of conflict of interest issues).

38. See *Lee*, *supra* note 34, at 1913-14 (discussing the County establishment of a system designed to avoid a conflict of interest).

39. See *id.* at 1914 (explaining that the Alternate Defender's Office would be assigned a case where there was a conflict of interest existing with the defendant represented by the Public Defender Office; if there were a third defendant involved, that case would be assigned to the Associate Defender's Office).

40. *Id.*; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(D) (1980) (explaining that restrictions on a lawyer representing conflicting interests apply to any lawyer or partner associated with him). This rule implies that if the Orange County Chief Public Defender were to be the head of the three component parts of the Office, then it would be unethical to have any two lawyers working for him, separated by a wall or not, representing co-defendants with conflicting interests.

1995-96, resulting in a caseload of 610 cases for each staff defender.⁴¹ This number is in sharp contrast to the maximum allowable caseload figure of 150 felony cases per year per attorney that has been adopted by the National Advisory Committee on Criminal Justice Standards and Goals⁴² and endorsed by the National Legal Aid and Defender Association.⁴³ The American Bar Association's Criminal Justice Section has gone even further, warning, with respect to the numbers set by the National Advisory Committee, that "[e]mphasis should be placed on the fact that these guidelines set the *maximum conceivable* caseload that an attorney could reasonably manage."⁴⁴

There was no increase in staff at the Orange County Office of the Public Defender to handle the additional number of cases.⁴⁵ As a result, the Office has operated "below the objective reasonable standard for effectiveness."⁴⁶ The constitutional right of the client to the effective assistance of counsel has been denied. This situation also violates the ethical guidelines promulgated by the American Bar Association's Committee on Ethics and Professional Responsibility.⁴⁷ The Commit-

41. See Anna Cekola, *Defender's Office Meets Cuts but Seeks Relief*, L.A. TIMES, June 24, 1995, available in 1995 WL 2059192; see also Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1997, at 17 (1998) [hereinafter Indigent Defense Report] (demonstrating that Orange County's shockingly high caseload was surpassed by the average number of cases—650—assigned to the staff attorneys of the New York City Legal Aid Society in 1997); cf. Rorie Sherman, *Was Unique in Nation: New Jersey Shuts Down its Advocate*, NAT'L L.J., July 20, 1992, at 3, 3 (stating that in New Jersey, the legislature, in an override of the Governor's veto, sharply cut funds for the Department of Public Advocate, resulting in a loss of public defenders in that office).

42. See TASK FORCE REPORT, *supra* note 4, Standard 13.12, at 160 (allowing for attorneys handling felonies to handle 150 per year, attorneys handling misdemeanor cases to handle 400 cases per year, counsel working on juvenile matters 200 per year, and lawyers handling appeals 25 per year); see also Indigent Defense Report, *supra* note 41, at 14 (explaining that the Supreme Court department in New York which governed cases prosecuted in Manhattan and the Bronx promulgated a Guideline that no individual attorney should be assigned more than 150 felony cases or more than 400 misdemeanor cases).

43. See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENT CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984) (endorsing the 150 figure for felony cases per year, but recommending a maximum of 300, as opposed to the National Advisory Committee's suggested 400, misdemeanor cases per attorney per year). Any determination of a national standard for maximum caseloads is a difficult one primarily because the policies of the prosecutor, the frequency of plea bargaining, the level and quality of investigative, paralegal, and secretarial assistance, and the extent of institutional assignments such as arraignments vary from locality to locality.

44. CRIMINAL JUSTICE IN CRISIS, *supra* note 18, at 68 (emphasis added).

45. Lee, *supra* note 34, at 1916.

46. *Id.* at 1917.

47. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981) (stating that if the number of lawyers in a legal services office declines, the office "must, with limited exceptions, decline new legal matters . . . only to the extent that the duty of competent, nonneglectful representation can be fulfilled").

tee opines that "[a]cceptance of new clients, with a concomitant greater overload of work, is ethically improper."⁴⁸

The ethical and professional failings were not just those of the Orange County Office. As the Opinion of the ABA Ethics Committee stated, the legal services lawyer "who attempts to continue responsibility for substantially more matters than the lawyer can competently handle thereby violates DR 6-101 (A)(2) and (3)" of the *Model Code of Professional Responsibility*.⁴⁹ The cited rule provides that a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances," and shall not "[n]eglect a legal matter entrusted to him." The very first rule of the *Model Rules of Professional Conduct* similarly requires a level of competence that a defender who is assigned 610 cases per year is hardly likely to achieve:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁵⁰

Moreover, Rule 1.16 prohibits an attorney from accepting the assignment of a new case if "the representation will result in violation of the rules of professional conduct."⁵¹

Hard times for the representation of indigent defendants did not end, however, once the bad times for states' economies turned around. It seems to take quite a lot to get a state legislature to say, "Let's give *more money* than we did last year to defend poor people accused of crimes."⁵² Even as states attained budget surpluses in 1995, indigent defense organizations reported reduced appropriations for

48. *Id.*; see also STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 5-5.3 (warning that defender organizations should not "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations").

49. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347.

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1998).

51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1998); see also STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 5-5.3 (mandating that defense counsel should not carry "workloads that, by reason of their excessive size, interfere with the rendering of quality representation"); Wisconsin Committee on Professional Ethics, Formal Opinion E-84-11, Sept. 1984 (advising that when an attorney is confronted with a workload that "makes it impossible to prepare adequately for cases and to represent clients competently," he should refuse to accept additional cases).

52. See, e.g., Gary Spencer, *18-B Rate Plan Seen Delaying Pay Increases*, N.Y.L.J., Jan. 29, 1999, at 1, 1 (reporting that the legislature in New York has failed to provide any increase in fees paid to court-appointed counsel since 1986).

the fiscal year of 1996.⁵³ In certain localities, continued budget cuts have created very serious problems. For example, an oversight committee of the New York State Supreme Court found in 1998 that the severe reduction in funding has caused the Legal Aid Society in New York City to “handle too many cases with too little staff” and that “clients are not receiving the services they deserve.”⁵⁴ The Committee concluded that either additional funding or reductions of caseloads were desperately needed.⁵⁵ The Committee’s advice not only went unheeded, but the Mayor’s budget proposal for 1999-2000 called for a *reduction* of one million dollars (9.2%) in funding for agencies representing the indigent.⁵⁶

There have been some recent innovations in the means for raising additional funds for indigent defense. User fees require the defendant to pay some fee toward the cost of counsel.⁵⁷ These fees may be called “Registration Fees”⁵⁸ or “Application Fees”⁵⁹ if the defendant must pay money up front before being assigned a public defender or court-appointed counsel. Other states have regulations providing for “Recoupment Fees,” which require the defendant to pay the fee upon final disposition of the case.⁶⁰ Whereas one might expect that

53. See Carroll, *supra* note 30, at 2 (“Despite the budget surpluses, many indigent defense providers reported that their budget appropriations for FY 1996 were less than they were in FY 1995.”).

54. Indigent Defense Report, *supra* note 41, at 5; see also *id.* at 6 (explaining that the Committee was formed at the request of a number of bar associations to monitor the organizations that represent indigent defendants in the geographic area covered by the Appellate Division, First Department of the New York State Supreme Court, and concluding that the standards of representation promulgated by the court were not being complied with by the Legal Aid Society in New York City).

55. *Id.* at 5-7.

56. *Today’s News Update*, N.Y.L.J., Feb. 1, 1999, at 1, 1.

57. See KLEIN & SPANGENBERG, *supra* note 25, at 13 (noting that user fees serve to “obtain a portion of the costs of representation from indigent defendants”).

58. See *id.* at 14 (noting that public defender offices in Colorado, Connecticut, Massachusetts, New Jersey, and Washington employ registration fees).

59. See Carroll, *supra* note 30, at 7-8 (stating that, in 1997, two new states—Kansas and Tennessee—passed legislation providing for defendants to pay application fees, with Kansas calling its \$35 fee an “administrative fee” and imposing it on any defendant receiving state-paid counsel).

60. KLEIN & SPANGENBERG, *supra* note 25, at 14. For an example of a recoupment fee statute, see CAL. PENAL CODE § 987.8(b) (West, Supp. 1998) (providing that whenever a defendant is provided with a public defender or private counsel appointed by the court, when the criminal proceedings in the trial court end or the public defender withdraws, “the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof”). See also *People v. Amor*, 523 P.2d 1173, 1175-77 (Cal. 1974) (in bank) (finding that such recoupment statutes are constitutional unless “they arbitrarily discriminate against indigents as a class”).

The difficult problem of ascertaining an individual’s ability to pay was dealt with in CAL. PENAL CODE § 987.8(g)(2) (West Supp. 1998), which states:

the money raised will be earmarked for additional, supplemental funds for indigent defense services, some states simply have put the money raised back in their general funds.⁶¹

The small amount of money obtained by these approaches has not led to any appreciable gains. A special report published at the end of 1997 by the National Association of Criminal Defense Lawyers concluded that "criminal defense for the poor—an absolute constitutional mandate—has *deteriorated markedly* in recent years."⁶² The President of this Association testified before a House of Representatives Appropriations Committee in 1998 that the lack of adequate funding for indigent defense "renders a mockery of any Sixth Amendment right to counsel or Fifth Amendment right to due process."⁶³ In what may be all too typical a situation, the Public Defender of Baltimore admitted to the Circuit Court for Baltimore, in 1998, that because of increases in caseloads, "the attorneys' ability to provide adequate representation is seriously challenged."⁶⁴

It is not only the defense bar that is conscious of the lack of adequate representation provided to the indigent accused. In 1998, United States Attorney General Janet Reno joined the critics, acknowledging that indeed the "promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel . . . sometimes it is caused by a lack of resources . . . such failings inevitably erode the community's sense of justice and the aspiration of our system to equal justice under the law."⁶⁵ And a unique study by the State Bar of Texas, completed in 1998, focused on how

"Ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:

- (A) The defendant's present financial position.
- (B) The defendant's reasonably discernible future financial position
- (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.
- (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.

61. See Carroll, *supra* note 30, at 7 (discussing the practices of various states).

62. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, LOW-BID CRIMINAL DEFENSE CONTRACTING: JUSTICE IN RETREAT, 1, 6 (1997) (emphasis added).

63. National Association of Criminal Defense Lawyers News Release, Adequate Defender Services Funding Needed to Counter Prosecutorial Excesses, Apr. 1, 1998.

64. Memorandum from Michael N. Gambrell, District Public Defender, Baltimore, Md., to the Circuit Court for Baltimore City (June 22, 1998) (noting a 20.8% increase in cases at the Circuit Court level between 1997 and 1998).

65. Janet Reno, *Legal Service for the Poor Needs Renewed Vigilance*, U.S.A. TODAY, Mar. 19, 1998, at 12A; see also U.S. Attorney General Reno Demonstrates Her Commitment to Indigent Defense Issues, THE SPANGENBERG REP., *supra* note 30, at 14 (discussing the efforts of Attorney Gen-

district attorneys throughout the state viewed indigent defense representation.⁶⁶ The study found that ninety percent of the prosecutors believed that lawyers representing the indigent devoted less time to their clients' cases than did other defense counsel, and sixty-five percent of the D.A.s were of the opinion that indigent defendants received a less vigorous defense.⁶⁷ Because of the obvious familiarity that prosecutors attain with the failings of indigent defense representation, the President's Commission on Law Enforcement and Administration of Justice recognized, in 1967, the possible impact of prosecutors advocating changes in the procedures for the appointment of counsel.⁶⁸

II. A VERDICT ON *STRICKLAND* FIFTEEN YEARS AFTERWARDS: A DISASTER OF CONSTITUTIONAL PROPORTIONS

In 1984, the United States Supreme Court was presented with an opportunity to issue a decision that could have had a substantial impact on the crisis just described.⁶⁹ Prior to this case, lower courts had been divided over the standard that should be used to determine when a claim of ineffective assistance of counsel should require the vacating of a conviction on appeal.⁷⁰ In *Strickland*, the Court held that, in order to have his conviction reversed on Sixth Amendment

eral Reno and other members of the Justice Department to address the issue of funding for indigent defense).

66. *State Bar Completes Survey on the Status of Indigent Defense in Texas: The Prosecutor's Perspective*, THE SPANGENBERG REP. (West Newton, Ma.), June 1998, at 10, 10.

67. *Id.* at 11.

68. PRESIDENT'S COMMISSION, *supra* note 11, at 147; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980) ("A Lawyer Should Assist in Improving the Legal System.").

69. See *Strickland v. Washington*, 466 U.S. 668 (1984).

70. See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) (finding that "[i]n order to obtain his release on federal habeas . . . [the defendant] must . . . establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))); *Johnson v. United States*, 506 F.2d 640, 645, 646 (8th Cir. 1974) (asserting that the standard for assessing ineffective assistance of counsel "is not easily reduced to any formula" and should be based on a "professional standard" that "tests for the degree of competence prevailing among those licensed to practice at the bar"); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949) (stating that the lack of effective assistance must shock the conscience of the court and cause the proceedings to be a "farce and a mockery" of justice in order to warrant relief); see also *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983) (noting that, by 1962, "nine of the eleven circuits were applying the . . . 'farce and mockery'" standard, and that, after some fluctuations, "[s]ince 1970, every circuit except [the Second] has adopted a 'reasonably competent assistance' standard, in one of its many formulations" (citations omitted)).

grounds, a defendant must show that his counsel's performance was not effective, viewed as of the time of counsel's conduct, and that the errors committed were prejudicial to the defendant.⁷¹ Had the Court set a more stringent requirement for the performance of counsel that was similar, for example, to the recommendations of the American Bar Association,⁷² governments would have had to dedicate substantially more funds to the defense of the indigent. The Court, however, refused to adhere to the ABA Criminal Justice Standards⁷³ which, as the Introduction to the Standards states, reflect "the profound changes in interpretation of the constitutional right to counsel," and which "should serve as a useful tool to both the policy-maker and the litigator who seeks legal and ethical guidance on the provision of defense services in state and federal courts."⁷⁴ Instead, the *Strickland Court* interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel⁷⁵ in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant.⁷⁶

71. *Strickland*, 466 U.S. at 690-92.

72. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, at ix, xii (discussing the history of the articulation and adoption of the Standards, and their revision in light of a number of changes, including "growth in public defender caseloads"). These Standards are respected because they are:

the result of careful drafting and review by representatives of all segments of the criminal justice system—judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise guaranteed a rich array of comment and criticism which has greatly strengthened the final product.

Id. at ix.

73. See *Strickland*, 466 U.S. at 688 (referring to the Standards as "guides to determining what is reasonable, but . . . only guides"). The Court attempted to explain its decision without giving more weight to the ABA Standards: "Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689. No explanation or elaboration of this most puzzling and disturbing comment is provided. Would informing counsel of the need to communicate with his client, or to contact appropriate witnesses, somehow affect *negatively* his vigorous advocacy?

74. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, at xii; see *United States v. Decoster*, 624 F.2d 196, 276-78 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting) (giving great weight to the standards).

75. See *Strickland*, 466 U.S. at 686-96 (holding that, in order to show constitutionally ineffective assistance of counsel, a defendant must establish that his counsel's performance was unreasonably deficient according to prevailing professional norms, and that the performance was prejudicial in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

76. The Supreme Court, over 40 years earlier, had warned against exactly this possibility. See *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (noting that inadequate assistance "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of

Consider, for example, the Supreme Court's recent denial of a hearing to a defendant sentenced to death whose trial attorney, according to court observers, "seems to have slept his way through virtually the entire trial."⁷⁷ (The "entire" trial was not that long. Opening statements took place on August 10; the jury returned its guilty verdict August 12; and on August 14, the defendant was sentenced to death).⁷⁸ As the Houston newspaper covering the trial wrote of the defense attorney: "His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes, a different prosecution witness was on the stand"⁷⁹ When the journalist inquired of the lawyer why he had fallen asleep repeatedly, the "counsel" explained: "It's boring."⁸⁰ One wonders if three other attorneys who slept during significant parts of the trials of their clients—who all also received the death penalty—would have responded similarly.⁸¹ The Texas Court of Appeals turned down the appeals in all three of these cases, as it had in the case of Carl Johnson who was executed in 1996 even

counsel," and concluding that "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by *mere formal appointment*" (emphasis added)); see also *Anders v. California*, 386 U.S. 738, 743 (1967) (noting that, under the Sixth Amendment, the defendant has the right to have "counsel acting in the role of an advocate"). Despite whatever right the defendant may have legally, the *reality* may become like the indigent defense representation described in New York City: "What passes for 'representation' in this system is the presence of a body, any body, next to the defendant. It is not simply a question of incompetence, though that exists. It is not a question of poor quality or ineffective representation. In operational and structural terms, it is a system of *non-representation* under which the defendant is disoriented and the judge may eventually lose patience and relieve the attorney (especially so with Legal Aid)." DRAFT REPORT OF THE COMMITTEE IN CRIMINAL ADVOCACY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DEFENSE OF THE POOR IN NEW YORK CITY: AN EVALUATION 333 (1985). Not all attorneys who provide the warm body believe that defendants benefit *at all* from their presence. Take the trial counsel in *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977), *modified*, 586 F.2d 1325 (9th Cir. 1978), for instance. Counsel had had a caseload while working at the Public Defenders Office of approximately 2000 cases per year and resigned from the office upon reaching the conclusion that she was "actually doing the defendants more harm by just presenting a live body than if they had no representation at all." *Id.* at 1163 n.1 (internal quotation marks omitted).

77. Bruce Shapiro, *Sleeping Lawyer Syndrome*, THE NATION, Apr. 7, 1997, available in 1997 WL 8866360; see also *McFarland v. Texas*, 519 U.S. 1119 (1997) (mem.) (denying review of McFarland's capital conviction).

78. Shapiro, *supra* note 77.

79. See *id.* (reporting the *Houston Chronicle's* story about the trial).

80. *Id.* (reporting that the lawyer added that he customarily takes "a short nap in the afternoon").

81. See *id.* (noting that over a one year period, "the Texas Court of Appeals has turned down three petitions from death-row inmates whose lawyers slept through significant parts of their trials").

though his counsel was also reported to have slept during jury selection and portions of the testimony as well.⁸² The Texas courts' application of *Strickland* has had a significant impact on capital cases in this country. From 1976, when the Court in *Gregg v. Georgia*⁸³ lifted the death penalty prohibition which had been announced by the Supreme Court in the 1972 case of *Furman v. Georgia*,⁸⁴ to 1994, approximately one third of all those executed in this country were put to death in Texas.⁸⁵

Texas is not the only state to hold that the constitutional requirement of effective assistance can be met by a sleeping lawyer. In *People v. Tippins*,⁸⁶ the Appellate Division of the New York State Supreme Court recognized that "a defense counsel's sleeping during the course of a trial is reprehensible," but, applying the traditional *Strickland* analysis, upheld the conviction anyway.⁸⁷ And if a lawyer is awake, there is no requirement that he be sober. In *People v. Garrison*,⁸⁸ a California case where the defendant was sentenced to death, the defense attorney not only "consumed large amounts of alcohol each day of the trial," but on the second day of jury selection "was arrested for driving to the courthouse with a .27 blood-alcohol content."⁸⁹ The trial judge attempted to reassure the defendant: "I personally can assure you that you probably have one of the finest defense counsel in this county."⁹⁰ The hearing on the defendant's habeas corpus petition claiming ineffective assistance before the California Supreme Court, sitting in bank, included expert witness testimony that a chronic alcoholic such as the defense counsel (who had by that time died of the disease) is often unable properly to make judgment calls and to think through problems.⁹¹ Nonetheless, the court, relying on *Strickland*, denied this claim of the defendant.⁹²

82. *Id.*

83. 428 U.S. 153, 187 (1976) (plurality opinion) (finding no per se constitutional prohibition against the death penalty).

84. 408 U.S. 238 (1972) (per curiam).

85. *See* *McFarland v. Scott*, 512 U.S. 1256, 1262 (1994) (Blackmun, J., dissenting from denial of certiorari).

86. 570 N.Y.S.2d 581 (App. Div. 1991).

87. *Id.* at 582-83.

88. 765 P.2d 419 (Cal. 1989) (in bank).

89. *See id.* at 440 (noting further that the lawyer "drank in the morning, during court recesses, and throughout the evening" and that the bailiff testified that the lawyer "always smelled of alcohol").

90. *Id.* (internal quotation marks omitted).

91. *Id.* at 441.

92. *Id.* The court did set aside some parts of the judgment and reversed the death sentence. *Id.* at 446.

Strickland also apparently permits a lawyer to be appointed on the morning of a trial that finishes the same day with a guilty verdict followed immediately by a sentence of life imprisonment. The Fifth Circuit, in *Avery v. Procunier*,⁹³ concluded that: "A review of the state trial record does not disclose any failing of defense counsel of constitutional proportions. . . . The performance of counsel met the standard as elucidated in *Strickland v. Washington*."⁹⁴ This decision, like so many other post-*Strickland* cases, indicates that minimally effective assistance hardly requires that defense counsel actively challenge the prosecution's case. After all, the prosecutor's case in *Avery* was "straightforward," and an eyewitness made an "unqualified identification of [the defendant] in court."⁹⁵ But most experienced, competent defense attorneys will acknowledge that eyewitness testimony is one of the *weakest* forms of evidence and is certainly susceptible to aggressive and often persuasive attack. It is all the more troubling that the Fifth Circuit relied on in-court identification: Who else *but the accused* is going to be sitting next to the defense attorney?

Or consider the recent case of *State v. Wille*.⁹⁶ The defendant, who was sentenced to death upon a conviction for murder, was represented by an attorney who had been convicted of a felony and sentenced to a three year suspended period of incarceration and 416 hours of community service.⁹⁷ Because Louisiana at this time was having difficulty finding lawyers to represent indigents in capital cases, the convicted-felon-attorney was ordered to fulfill his community service by representing Mr. Wille.⁹⁸ There was no evidence that the attorney had ever tried a capital case before,⁹⁹ and he had expressed no

93. 750 F.2d 444 (5th Cir. 1985).

94. *Id.* at 447 (citation omitted).

95. *Id.*

96. 595 So. 2d 1149 (La. 1992).

97. *Id.* at 1151. Counsel's conviction was for conspiring to defraud an agency of the United States. *Id.*; cf. *Bellamy v. Cogdell*, 974 F.2d 302, 303-06 (2d Cir. 1992) (in banc) (finding no ineffective assistance of counsel in the case of a lawyer under investigation by a disciplinary committee who argued to the committee that he was mentally incompetent to prepare for his disciplinary hearing, but who was nonetheless permitted to represent a criminal defendant, who was unaware of his lawyer's mental difficulties until the defendant was informed of the lawyer's suspension from law practice at his sentencing for murder).

98. *Wille*, 595 So. 2d at 1151.

99. There is widespread acceptance of the need for lawyers in capital cases to receive special training. See, e.g., ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES B-2 (1990) (calling upon states to set strict standards for the appointment of counsel in capital cases to ensure that only qualified, experienced, and competent counsel receive assignment); *Fatal Defense: Firsthand Accounts of Capital Justice*, NAT'L L.J., June 11, 1990, available in Westlaw, 6/11/90 Nat'l L.J. 40 (noting the near unanimity among lawyers interviewed in six states that specialized instruction for capital representation is needed); Stephanie Saul, *When*

willingness to take on this case.¹⁰⁰ The defendant was never informed by either his attorney or the court of the facts surrounding his counsel's appointment.¹⁰¹ Even more significantly, perhaps, his counsel had been a former state senator whose indictment and sentence had received "substantial publicity" in the local area of Louisiana where Wille was tried.¹⁰²

On appeal, the defendant claimed that the jurors' knowledge of his counsel's notoriety may have affected their view of the defense, thereby depriving defendant of his right to an unbiased jury.¹⁰³ Counsel had never asked the potential jurors on voir dire whether they had known of his conviction, because, the defendant maintained, counsel was embarrassed to publicize that information and question jurors about it.¹⁰⁴ The defendant claimed that his counsel had had a conflict of interest that prevented him from being dedicated solely to his client's interests at the critical stage of jury selection.¹⁰⁵ The Supreme Court of Louisiana rejected the defendant's appeal of his death sentence, apparently accepting counsel's statement that he "did his best" in representing his client.¹⁰⁶

The Supreme Court of Louisiana could not, however, dismiss too quickly the conflict of interest issue. Counsel admitted at the post-trial hearing that, "[H]e sees the conflict as he looks back. He was not conscious of suppressing any information about his conviction, but that *may have been what he was doing*."¹⁰⁷ The court had to acknowledge, therefore, that counsel "*should have* asked the prospective jurors about their knowledge and attitude toward him because if they had something against him it *would hurt the defendant*."¹⁰⁸ One might think, therefore, that the court would overturn the conviction (or at

Death is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill, NEW YORK NEWSDAY, Nov. 25, 1991, at 8 (discussing the unique law that governs all aspects of capital cases—from jury selection to the penalty phase to appeal—and noting that, in those states where the standards for appointment of counsel in capital cases are minimal or nonexistent, the entire trial will typically last for only two or three days).

100. See *Wille*, 595 So. 2d at 1152 (noting that the attorney "did not want to accept the appointment, but the judge insisted"); see also *Coleman v. Kemp*, 778 F.2d 1487, 1522 (11th Cir. 1985) (involving a lawyer who declared: "I despise [the appointment], I'd rather take a whipping.").

101. *Wille*, 595 So. 2d at 1152 (noting that the defendant maintained that his attorney's failure to disclose deprived the defendant of his right to object to the appointment).

102. *Id.* at 1151.

103. *Id.* at 1152.

104. *Id.* at 1151.

105. *Id.*

106. *Id.* at 1152.

107. *Id.* (emphasis added).

108. *Id.* (emphasis added).

least the death sentence). Astonishingly, however, the court concluded that counsel's "hindsight reflections on what he should have done and what might have been subconsciously motivating him during voir dire, although certainly made in good faith, *have little relevance* to a consideration of whether an actual conflict of interest existed during trial."¹⁰⁹ Under the prejudice prong of *Strickland*, the court affirmed the defendant's death sentence.

The Louisiana Supreme Court's opinion is most peculiar in one additional respect. In a previous review of the defendant's appeal,¹¹⁰ the court conditionally affirmed defendant's conviction, but remanded his case for an evidentiary hearing on the conflict of interest issue. The hearing was held before the same judge who had appointed the counsel to represent the defendant.¹¹¹ That judge had also been the trial judge and, at the subsequent hearing over which he presided to determine conflict of interest, *testified* about the circumstances that led to his appointment of the counsel.¹¹² Louisiana had a statute, modeled after Federal Rule of Evidence 605,¹¹³ that prohibits a judge from testifying as a witness at the proceeding over which he presides.¹¹⁴ The court confirmed the judge's finding that the very counsel whom he had appointed had no conflict of interest and was effective because, in accordance with *Strickland*, the defendant was not prejudiced.¹¹⁵ The court did note, however, that "it was error for the judge to testify at the evidentiary hearing over which he presided."¹¹⁶ Thus, it appears that when confronted with a violation of the law, a court must at least acknowledge that fact, but it certainly does not mean the defendant's death sentence will not stand.

Strickland v. Washington has led to the holdings described above because of the two-prong test that the Supreme Court required a defendant to satisfy before a reviewing court will overturn the conviction based on ineffective assistance. The defendant must show (1) that

109. *Id.* at 1153 (emphasis added).

110. *State v. Wille*, 559 So. 2d 1321 (La. 1990), *aff'd*, 595 So. 2d 1149 (La. 1992).

111. *Wille*, 595 So. 2d at 1154-55. The judge was, somehow, objectively and impartially to decide whether his own choice to appoint the defendant's counsel was inappropriate.

112. *Id.* at 1155.

113. FED. R. EVID. 605 ("The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.").

114. LA. CODE EVID. ANN. art. 605 (West 1995) ("The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.").

115. *Wille*, 595 So. 2d at 1153-54.

116. *Id.* at 1155. The court declared that "if a judge is to take the stand as a witness, regardless of the nature or materiality of his testimony, he should be recused from presiding at the trial or hearing." *Id.* at 1156.

counsel's performance was deficient¹¹⁷ and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹¹⁸ As to the first prong, the *Strickland* Court ruled that there was to be a *strong* presumption that the representation provided by the attorney was constitutionally adequate.¹¹⁹ Not only was there to be the strong presumption of effectiveness, but judicial review of counsel's representation was to be "*highly deferential*."¹²⁰

In light of the widespread acknowledgment of the existence of a crisis in the quality of representation provided to indigent defendants, the presumption in favor of counsel's effectiveness is somewhat hard to fathom, especially when the Court emphasizes that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."¹²¹ If the norms are that counsel, due to overwhelming caseloads, typically fail to do much of what ought to be done to provide a competent and effective defense, then in any given case involving such failings, that counsel's work would *not* be deemed deficient. Is this all that the Sixth Amendment now stands for?

Perhaps. In *Lockhart v. Fretwell*, the Supreme Court recently permitted a death sentence to stand even though it acknowledged that counsel's error was responsible for the defendant receiving the death penalty instead of a sentence of life imprisonment.¹²² The counsel in this case failed, during the sentencing procedure in state court, to raise the claim that a sentence of death would have been unconstitutional under the Eighth Circuit rule established in *Collins v. Lockhart*.¹²³ *Collins* held that the sentencing court could not consider as an aggravating factor one that duplicates an element of the crime that

117. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment").

118. *Id.* at 694.

119. See *id.* at 690-91 (stating that reviewing courts "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). But see *id.* at 713 (Marshall, J., dissenting) (observing that "'strongly presuming' that [defense counsel's] behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel").

120. *Strickland*, 466 U.S. at 689 (emphasis added); see also Klein, *supra* note 5, at 640-41 (arguing that this view of assessing the adequacy of an attorney's performance differs from that of evaluating the work of other professionals).

121. *Strickland*, 466 U.S. at 688.

122. 506 U.S. 364, 371 (1993).

123. 754 F.2d 258 (8th Cir. 1985), *overruled by* *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir. 1989).

was committed, because such “double counting” would not genuinely narrow the group of persons eligible for the death penalty.¹²⁴ The statute that *Collins* found unconstitutional was the very statute under which defendant Fretwell was in fact sentenced.¹²⁵ Upon review, the United States District Court held that Fretwell’s counsel “had a duty to be aware of all law relevant to death penalty cases”¹²⁶ and that counsel’s failure to object to the submission to the jury of a “duplicative” aggravating factor constituted prejudice under *Strickland v. Washington*.¹²⁷ Thus, the District Court granted the habeas corpus relief and vacated the defendant’s death sentence.¹²⁸

The Court of Appeals for the Eighth Circuit upheld the District Court, emphasizing that had counsel known the law and provided effective assistance, the defendant would not have received the death sentence.¹²⁹ The Supreme Court, however, held that the Eighth Circuit’s ruling would grant the defendant “a windfall to which the law does not entitle him.”¹³⁰ The Court focused on the fact that since the time of the sentencing the Eighth Circuit had overruled its *Collins v. Lockhart* holding and that “double counting” was to be permitted.¹³¹ But the Eighth Circuit decision to which the Supreme Court referred—*Perry v. Lockhart*¹³²—had occurred *after* the sentencing phase of the defendant’s trial; the Court reached this result despite the Eighth Circuit’s holding that, *at the time* the defendant was sentenced, “double counting” was prohibited, and that the sentence of death was impermissible because it was invalid at the time it was imposed.¹³³

In dissent, Justice Stevens called the decision of the majority “astonishing,” and added that the “Court’s aversion to windfalls seems to disappear, however, when the State is the favored recipient.”¹³⁴

124. *Id.* at 263-65.

125. *Fretwell*, 506 U.S. at 367-68.

126. *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1337 (E.D. Ark. 1990), *aff’d*, 946 F.2d 571 (8th Cir. 1991), *rev’d*, 506 U.S. 364 (1993).

127. *Id.* at 1337-38.

128. *Id.* at 1338.

129. *See Fretwell*, 946 F.2d at 577 (noting that “fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney’s error”).

130. *Fretwell*, 506 U.S. at 370 (citing *United States v. Cronin*, 466 U.S. 648, 658 (1984)).

131. *See id.* at 371 (noting that “[h]ad the trial court chosen to follow *Collins*, counsel’s error would have ‘deprived [defendant Fretwell] of the chance to have the state court make an error in his favor’” (quoting Brief for United States as *Amicus Curiae* at 10, *Fretwell*, 506 U.S. 364 (No. 91-1393))).

132. 871 F.2d 1384 (8th Cir. 1989).

133. *See Fretwell*, 946 F.2d at 578 (concluding that Fretwell “was sentenced while *Collins* was good law, and was entitled to its benefits *at the time of his sentencing*”).

134. *Fretwell*, 506 U.S. at 376 (Stevens, J., dissenting).

Characterizing the Court's reasoning as "unconvincing and unjust,"¹³⁵ Justice Stevens wrote that: "The fact that counsel's performance constituted an abject failure to address the most important legal question at issue in his client's death penalty hearing gives rise, without more, to a powerful presumption of breakdown in the entire adversarial system."¹³⁶

A fascinating postscript to the *Fretwell* case occurred in early 1999. Eleven days before Bobby Ray Fretwell was scheduled to die, the Governor of Arkansas, a strong supporter of the death penalty, commuted Fretwell's sentence.¹³⁷ A juror in the trial, which had taken place fifteen years earlier, called for mercy for Fretwell and claimed that he had voted for the death sentence only because he was fearful that otherwise he would be ostracized in the hometown that he had shared with the deceased.¹³⁸ The juror did what the Supreme Court had refused to do—sharply criticize the quality of the defense: "The only thing I remember is that the lawyer asked [the defendant Fretwell] about his childhood, and he said, 'It was pretty bad' and that was it."¹³⁹ The Governor stated that it was the juror's comments about defense counsel that led him to commute the sentence.¹⁴⁰

Another problem with *Strickland*'s "reasonableness under prevailing professional norms" standard is that the lawyers who routinely represent indigent defendants may not be among the nation's best and brightest.¹⁴¹ The fees paid appointed counsel are so low that experienced lawyers who have been able to build their own practice will commonly stop taking assigned cases. The burnout rate in public defender offices due to the overwhelming caseloads causes many experienced defenders to leave. And the federal judiciary knows this. The Federal Judicial Center conducted a survey and issued a report which

135. *Id.* at 377; *see also id.* at 386-87 (adding that "the court's decision makes a startling and most unwise departure from our commitment to a system that ensures fairness and reliability by subjecting the prosecution's case to meaningful adversarial testing").

136. *Id.* at 386. *See generally* Bright, *supra* note 22, at 1864 (arguing that it is particularly inappropriate to use the prejudice standard at the penalty phase of a capital case).

137. *See* Steve Barnes, *Death Row Inmate Spared After Juror Makes Plea*, N.Y. TIMES, Feb. 6, 1999, at A12 (reporting that Governor Huckabee is a Republican and former Baptist minister who had not granted clemency to any other individual who had been scheduled to die since he had become Governor in 1996, and that he had stated while announcing the commutation that "I had rather face the anger of the people than the wrath of God").

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* Irving R. Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A. J. 308, 308 (1983) (concluding, from 21 years experience on the Court of Appeals for the Second Circuit, that court-appointed private counsel who represent indigent defendants are the most incompetent of defense attorneys).

concluded that 41.3% of the federal judges responding believed there to be a "serious problem of inadequate trial advocacy in their courts."¹⁴² When Warren Burger was Chief Justice of the Supreme Court, he reflected on the numerous discussions he had had with federal district court judges regarding incompetent representation of indigent defendants and concluded that from one-third to one-half of counsel in serious criminal cases are "not really qualified to render fully adequate representation."¹⁴³ Burger added that Americans are "more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians."¹⁴⁴

Nowhere perhaps is the norm lower than among the lawyers who try cases in which the death penalty may be imposed. Justice Blackmun, shortly before resigning from the Supreme Court, took the opportunity to "address the crisis in trial and state postconviction legal representation for capital defendants."¹⁴⁵ He noted that "the attorneys assigned to represent indigent capital defendants at times are *less qualified* than those appointed in ordinary criminal cases."¹⁴⁶ Blackmun presented two primary reasons for the lack of qualification: (1) the absence of any standards, and (2) the fact that the compensation for lawyers in capital cases is "perversely low."¹⁴⁷ As Blackmun observed, "The prospect that hours spent in trial preparation . . . will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client."¹⁴⁸ It was this same concern about the lack of available resources and the resulting incompetency of

142. See Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253, 256 (1979) (internal quotation marks omitted) (citing A. Partridge & G. Bermant, *THE QUALITY OF ADVOCACY IN FEDERAL COURTS* 16 (1978)).

143. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973); see also PAUL B. WICE, *CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS* 88 (1985) (noting that "judges were generally very negative in their evaluation of the competence of private criminal lawyers").

144. Burger, *supra* note 143, at 230. But see Marvin E. Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 616 (1977) (presenting an alternative view that the problem in representation is not a lack of skill or training, but of "sloth, dishonesty, indifference, and seeming psychopathology").

145. *McFarland v. Scott*, 512 U.S. 1256, 1256 (1994) (Blackmun, J., dissenting from denial of certiorari).

146. *Id.* at 1257 (emphasis added) (citations omitted).

147. *Id.*; see also *In re Berger*, 498 U.S. 233, 235-36 (1991) (per curiam) (concluding that the maximum fees permitted by statute to be paid to attorneys representing capital defendants before the Supreme Court may "deter otherwise willing and qualified attorneys from offering their services to represent indigent capital defendants").

148. *McFarland*, 512 U.S. at 1258 (Blackmun, J., dissenting from denial of certiorari); see also Bright, *supra* note 22, at 1883 (arguing that "[n]o poor person accused of any crime

counsel in capital cases that led the National Legal Aid and Defender Association in 1997 to call for the abolition of the death penalty.¹⁴⁹

Another portion of the *Strickland* decision, viewed with the benefit of hindsight, has had disastrous consequences. The Supreme Court in *Strickland* informed courts which in the future might be reviewing ineffectiveness claims that “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”¹⁵⁰ To emphasize its point, the Court added, “There are *countless ways* to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”¹⁵¹ If, after all, there are countless ways to represent a defendant, how can one attorney’s approach be faulted?

For some courts, the response seems to be, “it can’t.”¹⁵² In 1994, the New York Court of Appeals, refusing to find ineffectiveness, labeled as a tactical decision a counsel’s failure to make a post-trial motion that surely would have led the trial court to set aside the conviction.¹⁵³ The prosecutor in the case had failed to comply with the requirement of New York’s criminal procedure law to provide defense counsel with all statements made by a witness before he or she testifies.¹⁵⁴ The court, in finding that the counsel’s decision did not constitute ineffectiveness, reasoned that setting aside the conviction would only have accomplished delay because the defendant would have been likely to be convicted at the retrial. “Defense counsel could have reasonably considered that his client’s interest would best be served by no further delay in the resolution of the case against the

should receive the sort of representation that is found acceptable in the criminal courts of this nation today”).

149. *NLADA Board of Directors’ Resolution Calls for End to Death Penalty*, THE SPANGENBERG REP. (West Newton, Ma.), Dec. 1998, at 5, 5. The Defender Association had, years earlier, enacted Standards for Appointment and Performance of Counsel in Death Penalty Cases. *Id.*

150. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

151. *Id.* (emphasis added) (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983)).

152. See Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1931 n.87 (1994) (stating that in the years 1991, 1992, and 1993, the reliance by Texas courts on characterizing as “strategy” that which might be error was a major factor in the rejection of nearly 407 of the *Strickland* claims filed by death row inmates).

153. *People v. Flores*, 639 N.E.2d 19, 20-21 (N.Y. 1994).

154. See *id.* at 20 (discussing the requirement of *People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961), that defense counsel personally examine a document to determine for himself whether it may be helpful for the purpose of cross-examining a witness).

client.”¹⁵⁵ The dissenting judge responded critically to the labeling of counsel’s failure as a strategic decision: “Delivering up one’s client for incarceration sooner rather than later—with no concrete advantage discernible—obviously does not fall within that category.”¹⁵⁶ Even more significantly, this judge revealed his exasperation with the highest court of New York’s repeated characterizations of the failings of defense counsel as “tactical” or “strategic”: “Although we may have gone a long way in the direction of tolerating apparent professional blunders in the name of ‘trial strategy,’ even that doctrine *must have some limits*.”¹⁵⁷

Odd, as well, is the decision of the court in *People v. Wise*.¹⁵⁸ The defense counsel, in the presence of the jury, announced that he was refusing to continue with the trial, berated the judge in a manner that the appellate court characterized as “improper and unprofessional,” and departed from the courtroom.¹⁵⁹ The appellate court, refusing to vacate the resulting conviction on defendant’s claim that he was denied effective assistance, proceeded to label counsel’s conduct as “part of a tactic intended to force the court to declare a mistrial.”¹⁶⁰ Moreover, if the concept of treating an error or a lack of professionalism as a strategic decision is not a sufficient excuse for a court that does not wish to find incompetence of counsel, courts place the burden on the defendant to prove “the *absence* of strategic or other legitimate explanations for counsel’s failure.”¹⁶¹

Consider also the case of Kenneth Earl Gay, convicted of first degree murder of a police officer and sentenced by the jury to death.¹⁶² Even though the Supreme Court of California determined in 1998 that Gay’s lawyer was incompetent because he had failed to adequately investigate potentially mitigating evidence for the penalty phase and

155. *Id.* at 21. The court did note that, when the lawyer did review the withheld material after the verdict, he stated on the record that it would have made no difference to the way in which he conducted the trial. *Id.* at 20.

156. *Id.* at 23 (Titone, J., dissenting).

157. *Id.* (emphasis added); see also *Fatal Defense—Effective Assistance: Just A Nominal Right?*, NAT’L L.J., June 11, 1990, available in Westlaw, 6190 Nat’l L.J. 42 (reporting that the former President of the Louisiana Association of Criminal Defense Lawyers described the *Strickland* message to appellate courts as follows: “We direct you to pretend everything was done for tactical reasons.”).

158. 409 N.Y.S.2d 877 (App. Div. 1978).

159. *Id.* at 878, 880.

160. *Id.* at 880.

161. *People v. De Pillo*, 565 N.Y.S.2d 650, 651 (App. Div. 1990) (emphasis added). Counsel in *De Pillo* had failed to file a written motion to dismiss the indictment, which would have been granted, based on the claim that the statute of limitations had expired. *Id.* at 650.

162. *In re Gay*, 968 P.2d 476, 478 (Cal. 1998).

because he failed to interview or prepare the witnesses that he did present,¹⁶³ the conviction stood.¹⁶⁴ The court did not consider it important that prior to trial, the defendant's counsel had advised Gay to admit his complicity in several robberies, falsely assuring him that his confession would be inadmissible at trial.¹⁶⁵ In addition, the counsel was subsequently disbarred for misappropriating another client's funds.¹⁶⁶ The court's decision not to reverse the judgment of conviction allowed the previous judgment of the appellate court to stand; in *this* case, the Supreme Court of California has determined that "[b]ecause the record is inadequate to enable us to state that Gay's counsel had *no tactical reason* for the manner in which this aspect of the defense was conducted, the judgment must be affirmed."¹⁶⁷

How can a defendant prove a negative?¹⁶⁸ How can one successfully convince a court what the motive of the lawyer *was not*? For example, how could the defendant in *People v. Jones*¹⁶⁹ have rebutted the court's finding that his lawyer's failure to make a valid pretrial motion to suppress incriminating statements was not ineffective because the failure "may have been part of counsel's trial strategy"?¹⁷⁰ Three Supreme Court Justices, perceiving the characterization of "error" as "strategy" to be an abuse, dissented from a denial of certiorari in *Mitchell v. Kemp*, a death penalty case.¹⁷¹ Justice Marshall responded to the majority's decision: "[A] failure to investigate the merit of accepted and persuasive defenses[] cannot be characterized as 'sound trial strategy.'"¹⁷²

163. *Id.* at 509.

164. The court did conclude, however, that Gay had received constitutionally inadequate representation at the penalty phase, granted habeas relief on this issue, and remanded the case for a new penalty trial. *Id.*

165. *Id.* at 480.

166. *Id.* at 479 n.5; see *id.* at 513-14 (Werdegarr, J., concurring) (explaining that counsel, having to repay a former client whose funds he had misappropriated, engineered his assignment by the court in Gay's case in order to quickly obtain compensation, and that the lawyer spent little time or effort on the case).

167. *People v. Cummings*, 850 P.2d 1, 71 (Cal. 1993) (in bank).

168. See *People v. Nix*, 569 N.Y.S.2d 677, 678 (App. Div. 1991) (refusing to find ineffectiveness because the defendant had not "*proved the absence* of a strategic or other legitimate explanation for counsel's failure to make a pretrial motion to suppress his statements to the police" (emphasis added)).

169. 480 N.Y.S.2d 601 (App. Div. 1984).

170. *Id.* at 602; see also *People v. Duvall*, 593 N.Y.S.2d 712, 712 (App. Div. 1993) (indicating that in order to show ineffective assistance, defendant "must demonstrate that there was no legitimate explanation for counsel's failure to make the motion" (citing *People v. Garcia*, 555 N.E.2d 902 (N.Y. 1990); *People v. Rivera*, 525 N.E.2d 698 (N.Y. 1988))).

171. 483 U.S. 1026 (Marshall, J., dissenting from denial of certiorari) (joined by Justices Brennan and Blackmun).

172. *Id.* at 1030 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Can't *every* decision that an attorney makes be characterized as part of the lawyer's strategy? If a lawyer fails to interview and call witnesses for the defense, how can it be shown that this lack of preparation was not strategic, e.g., because counsel may have believed that the witnesses would not be found credible? A poor strategic choice based on bad judgment is incompetence, especially when counsel's decision was based on inadequate knowledge of the facts due to the counsel's failure to conduct the needed investigation. And if an attorney decides on a course of action because of an inadequate understanding of the law applicable to the charge against the defendant, this decision also is ineffectiveness, despite *Strickland*'s claim that "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made *all significant decisions* in the exercise of reasonable professional judgment."¹⁷³

In *Strickland*'s discussion of how appellate courts should assess strategic choices, the indigent defendant fares poorly. The Court indicates that the appellate court considering the claim of ineffectiveness should expect—and require—less from counsel for the indigent.¹⁷⁴ The Court asserts that "[l]imitations of time and money" may affect strategic decisions, *and* that these choices "are owed deference."¹⁷⁵ Not only do public defenders, to the dismay of professionals evaluating the quality of assistance provided,¹⁷⁶ have less time and money to devote to their clients' representation, but, upon becoming experienced, defenders tend to leave this office, and experienced private counsel tend not to take court assignments because of the outrageously low pay.¹⁷⁷ Therefore, when the *Strickland* Court states that "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the *experience* of the attorney,"¹⁷⁸ the Court once again is instructing appellate courts to expect and require less from counsel for the indigent.¹⁷⁹

Concern about the impact of *Strickland* existed on the Supreme Court bench itself within a few years after the decision. In a case just

173. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (emphasis added).

174. *See id.* at 681 (explaining that deference is owed to strategic decisions that are made as a result of financial limitations).

175. *Id.*

176. *See supra* notes 11-68 and accompanying text.

177. *See supra* notes 147-148 and accompanying text.

178. *Strickland*, 466 U.S. at 681 (emphasis added).

179. The lower courts took this advice. *See, e.g., Kimball v. State*, 490 A.2d 653, 657 (Me. 1985) (acknowledging the need for counsel to conduct an investigation, but implying that this obligation must be considered in light of the fact that "[t]rial counsel ha[s] a limited budget for investigation").

noted,¹⁸⁰ *Mitchell v. Kemp*, Justice Marshall, joined by Justices Brennan and Blackmun, wrote that, "Since *Strickland* was decided, the Court has never identified an instance of attorney dereliction that met its stringent standard."¹⁸¹ Justice Marshall concluded that "the Court should now give life to the *Strickland* standard."¹⁸² This case that prompted the dismay of three Justices was yet another one in which the Supreme Court denied certiorari, despite the conclusion of these three Justices that counsel had neither pursued a vigorous defense nor prepared adequately for the penalty phase of the capital case.¹⁸³ Counsel admitted that he did not interview the police officer who claimed to have witnessed the defendant's confession,¹⁸⁴ nor the sole witness to the crime itself.¹⁸⁵ The attorney filed no pretrial motions.¹⁸⁶

The dissenters severely criticized counsel's failure to present mitigating evidence in the punishment phase of the case. The affidavits of those who would have testified on the defendant's behalf consisted of 170 pages and included supportive statements from a former prosecutor, a bank Vice-President, a city councilman, and several teachers.¹⁸⁷ The Justices' sharp criticism of the overall lack of representation provided by defense counsel implicitly extended to the other Supreme Court Justices' use of *Strickland* to deny review of the conviction and death sentence:

As a result of counsel's nonfeasance, no one argued to the sentencing judge that petitioner should not die. . . . Prejudice to the petitioner's case is obvious when not even a suggestion that his life had some value, that his crime was aberrational, or that he was suffering from severe depression reached the ears and the conscience of the sentencing judge. The judge heard not even a plea for mercy.¹⁸⁸

A recent case from Texas illustrates yet another weakness of *Strickland*. In *Maestas v. State*,¹⁸⁹ the court accepted *Strickland's* mandate

180. See *supra* notes 171-172 and accompanying text.

181. See 483 U.S. 1026, 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

182. *Id.*

183. *Id.* at 1029-31.

184. See *id.* at 1027 (noting that the confession formed the basis for establishing certain aggravating circumstances in support of the death sentence). The attorney's reason for not speaking to the officer was that, "I personally don't like the man." *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1031 (citation omitted).

189. 963 S.W.2d 151 (Tex. App. 1998, pet. granted), *aff'd*, 987 S.W.2d 59 (Tex. Crim. App.), *cert. denied*, 120 S. Ct. 93 (1999).

that a reviewing court assess the totality of counsel's performance and not just one instance of a failing by counsel.¹⁹⁰ Thus, although the *Maestas* court cited and accepted numerous errors of counsel, the court failed to find ineffectiveness because "the trial as a whole must be reviewed and not isolated incidents of counsel's performance."¹⁹¹

Similarly, in *People v. De Pillo*,¹⁹² the court conceded that defense counsel failed to file a pretrial motion to dismiss the indictment for being filed more than two years after the commission of the crime, in violation of a statute of limitations.¹⁹³ Although such a motion would have resulted in dismissal of the indictment, the court held that the defendant had not been denied effective assistance of counsel.¹⁹⁴ The court reasoned that, once the trial did occur, counsel performed competently by filing omnibus motions, making cogent opening and closing statements, making appropriate objections, and obtaining dismissal of the other counts of the indictment, which were felonies.¹⁹⁵ Thus, "[u]nder the circumstances, counsel's representation, viewed in its entirety, was meaningful."¹⁹⁶ It is unconvincing, however, to assert that counsel's performance at trial was constitutionally adequate when the very claim of ineffectiveness consists in the fact that there should not have been a trial at all.

Courts seem to believe that if they do acknowledge and criticize counsel's "isolated" error, then somehow they can proceed to conclude that the overall performance was effective.¹⁹⁷ This is exactly what happened in *People v. Tippins*.¹⁹⁸ Although it was clear that counsel had fallen asleep during the trial, the court asserted, "Although a defense counsel's sleeping during the course of a trial is reprehensi-

190. *See id.* at 161 ("Effective assistance of counsel is gauged by the totality of the representation from the pretrial representation of the accused through the punishment stage of the trial." (citing *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *Ex parte Walker*, 777 S.W.2d 427, 431 (Tex. Crim. App. 1989))).

191. *Id.* (citing *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984)); *see People v. Noble*, 647 N.Y.S.2d 304, 305 (App. Div. 1996) (stating that the failure of counsel to have communicated with his client until the eve of trial did not constitute ineffective assistance because the required cumulative errors were not present).

192. 565 N.Y.S.2d 650 (App. Div. 1990).

193. *Id.* at 650.

194. *Id.*

195. *Id.* at 650-51.

196. *Id.* at 651 (citing *People v. Carter*, 545 N.Y.S.2d 856 (App. Div. 1989)).

197. *But see Mitchell v. State*, 974 S.W.2d 161, 165-67 (Tex. App. 1998), *vacated*, No. 849-98, 1999 WL 152265 (Tex. Crim. App. Mar. 17, 1999) (holding that the failure of counsel to prevent his client from wearing the same distinctive T-shirt at trial that the perpetrator had worn in a videotape of the crime so "permeated the trial" that the error alone constituted ineffectiveness).

198. 570 N.Y.S.2d 581 (App. Div. 1991).

ble, the transcript of the trial and the hearing on the motion to vacate . . . , when viewed in totality, reveal that the defendant was provided with meaningful representation.”¹⁹⁹ The Supreme Court, predictably, denied certiorari.²⁰⁰ Similarly, in *McFarland v. State*,²⁰¹ a case in which the defendant was sentenced to death, the court determined that, because ineffectiveness cannot “be established by isolating one portion of trial counsel’s performance,”²⁰² the defendant was not entitled to relief, even though the court found that trial counsel’s error had permitted the prosecutor to comment impermissibly on her client’s failure to testify and his post-arrest silence.²⁰³

Courts may combine the characterization of an error as trial strategy with the analysis that the counsel’s performance as a whole was competent. The result may be deadly—especially for defendants, such as the one in *Romero v. Lynaugh*.²⁰⁴ After the jury returned its guilty verdict in this case, the punishment phase began for the jury to determine whether or not the defendant should receive the death penalty.²⁰⁵ This phase is expected to be time consuming, with defense counsel permitted, in accordance with the Supreme Court’s decision in *Lockett v. Ohio*,²⁰⁶ to call witnesses—lay and expert—to present anything and everything that a jury might consider as mitigating factors calling for a sentence other than death.²⁰⁷ The *entire* case of the sentencing proceeding presented by counsel in *Romero* was as follows:

Defense Counsel: Ladies and Gentlemen, I appreciate the time you took deliberating and the thought you put into this.

199. *Id.* at 582-83.

200. *Tippins v. New York*, 502 U.S. 1064 (1992).

201. 845 S.W.2d 824 (Tex. Crim. App. 1992) (en banc), *overruled by* *Bingham v. Texas*, 915 S.W.2d 9 (Tex. Crim. App. 1994) (en banc).

202. *Id.* at 843.

203. *See id.* at 844 (stating that the defendant satisfied the first part of the *Strickland* test, but failed to demonstrate that his defense was prejudiced by counsel’s failure to object).

204. 884 F.2d 871 (5th Cir. 1989). The defendant in this case participated in the rape and beating-to-death of a 15-year-old girl. *Id.* at 873.

205. *Id.* at 872.

206. *See* 438 U.S. 586, 604, 604-09 (1978) (plurality opinion) (finding unconstitutional a statute limiting the factors that can be considered as mitigating in a capital sentencing proceeding on the ground that the Eighth Amendment requires that “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” must be able to be presented as mitigating factors).

207. *See, e.g.*, N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney Supp. 1998) (complying with *Lockett* by allowing “[a]ny other circumstance concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background or record” to be introduced as mitigation in a capital sentencing proceeding).

I'm going to be extremely brief. I have a reputation for not being brief. Jesse, stand up. Jesse?

The Defendant: Sir?

Defense Counsel: Stand up.

You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.²⁰⁸

The federal district court vacated the death sentence, finding that both prongs of *Strickland*²⁰⁹ were met.²¹⁰ The district court found that counsel had precluded the jury from consideration of valid mitigating factors in violation of the constitutional rights guaranteed in *Lockett*.²¹¹ The district court mentioned three examples of mitigating evidence that counsel could have presented: that defendant Romero was just a teenager when the incident occurred, that he was intoxicated at the time, and that his family background might have made his acts more "understandable" to the jury.²¹²

The Fifth Circuit reversed, concluding that counsel's "representation" at the sentencing phase of the trial was not ineffective.²¹³ The court found that although counsel "did not present evidence at the sentencing phase of trial,"²¹⁴ the attorney was "an experienced trial lawyer" who had "engaged in substantial preparation for trial."²¹⁵ In rather oblique language that seemed almost to compliment the counsel for his "strategy" at the sentencing phase, the Fifth Circuit asserted that "we are not prepared to fault [counsel's] effort to highlight the heavy responsibility of the jury by not burdening them" with presenting specific factors of mitigation.²¹⁶

The court added a truism that could apply to any performance labeled "strategic," regardless of how incompetent, ineffective, or absurd the representation was: "Had the jury returned a life sentence the strategy [of highlighting the jury's heavy responsibility in sentenc-

208. *Romero*, 884 F.2d at 875.

209. *See supra* notes 117-118 and accompanying text.

210. *Romero*, 884 F.2d at 876.

211. *Id.*

212. *Id.*

213. *Id.* at 879.

214. *Id.* at 877.

215. *Id.*

216. *Id.* The court did note that the mitigating factors of the defendant's youth was obvious to the jury, that his sister had presented some information about his family life during her trial testimony, and that the trial record belied any suggestion that he was so intoxicated as to be less morally culpable, so that "evidence of possible mitigating factors was before the jury." *Id.*

ing without presenting potentially mitigating evidence] might well have been seen as a brilliant move.”²¹⁷ If counsel had done *virtually nothing* for the entire trial, as opposed to just at the sentencing phase, the court could have deemed *that* to be strategic—perhaps counsel had been hoping that no jury would sentence a defendant to death when he had been so poorly represented. Then, the court could have reasoned, as it did in *Romero*, that the representation could not be considered ineffective because, had the “strategy” worked, it would have been brilliant.

Any expectation that an appeal based on an appropriate ineffectiveness claim will be successful relies, of course, on the belief that appellate counsel will be competent. In any direct appeal of right, a defendant is entitled to the effective assistance of counsel.²¹⁸ Standard 4-8.6(a) of the ABA Criminal Justice Standards instructs appellate counsel that if they are “satisfied that another defense counsel . . . did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.”²¹⁹ Yet appellate counsel suffer from the same excessive caseloads that have rendered trial counsel ineffective.²²⁰ This problem became so severe in 1996 in Illinois that the United States District Court had to intervene. In *United States ex rel. Green v. Washington*, the Illinois Office of the State Appellate Defender (OSAD) represented a class of indigent defendants challenging delay in the appellate process.²²¹ The class claimed that the Illinois legislature had known of the severe backlog of unbrieffed appellate cases for years, and that the “funding level is plainly insufficient to enable OSAD to employ enough staff to address the growth in appointments and backlog that OSAD’s district offices have experienced in the last three years.”²²² The caseload problems had also

217. *Id.*

218. See *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that “[a] first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney”).

219. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 4-8.6(a) & cmt. (warning that appellate lawyers must ensure that their personal regard for the trial lawyer not influence their judgment because “[n]othing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose their inadequacy”).

220. *Cf.*, e.g., *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) (involving an appellate lawyer who was so neglectful and careless as to fail to raise a “well-established, straightforward, and obvious double jeopardy claim”).

221. 917 F. Supp. 1238, 1240-41 (N.D. Ill. 1996).

222. *Id.* at 1248; see Randall Samborn, *Funding Cuts Spark Court Crisis*, NAT’L L.J., Aug. 31, 1992, available in Westlaw, 8/31/99 Nat’l L.J. 3 (reporting that the state appellate defender in Chicago sought to withdraw from ten capital cases because inadequate funding prevented the office from filing timely briefs); see also Indigent Defense Report, *supra* note 41,

impacted upon the appeals by defendants other than those represented by that Office.²²³

A similar set of problems caused by inadequate funding existed in Florida. In *In re Order on Prosecution of Criminal Appeals By Tenth Judicial Circuit Public Defender*,²²⁴ the Florida Supreme Court informed the state legislature that if sufficient funds were not appropriated and additional appellate defenders hired within three months of the court's opinion, it would hear habeas corpus petitions from defendants whose appeals were delayed due to the case overload.²²⁵

Needless to say, the more time between the date of conviction and the commencement of the appeal on ineffectiveness grounds, the less chance there will be for appellate counsel to provide effective representation. For example, if the allegation of ineffectiveness concerns trial counsel's failure to investigate witnesses, then delay makes it even more difficult for appellate counsel to locate those witnesses required to show how the defendant was prejudiced by his trial counsel's inadequate investigation.²²⁶ Increased delay makes it more difficult both to find the witnesses and for those witnesses to remember details relevant to the defendant's case. And, the more unmanageable any particular appellate lawyer's caseload is, the less able the lawyer will be to do the work needed to illustrate that a defendant has been prejudiced.²²⁷

Appellate counsel's task is also made more difficult by courts' adopting *Strickland*'s caveat that "[a] fair assessment of attorney per-

at 54 (explaining that excessive caseloads in New York City have caused the Criminal Appeals Bureau of the Legal Aid Society to require so much time to file the appeal brief after receiving assignment of the case that the Performance Standards enacted by the appellate court were routinely violated).

223. See *Green*, 917 F. Supp. at 1248 (quoting Illinois Supreme Court Chief Justice Michael Bilandic in his annual report to the General Assembly, which indicated lengthy delays for "indigent defendants represented by the state appellate defender and the Cook County public defender"). A particularly interesting aspect of this federal litigation was the testimony of an expert witness—a forensic psychiatrist—that the severe delays in waiting for the processing of the appeals had put the incarcerated individuals "at an increased risk of suffering a range of adverse psychological reactions (including anxiety, mistrust, fear, hopelessness and depression)." *Id.* at 1264.

224. 561 So. 2d 1130 (Fla. 1990).

225. *Id.* at 1138-39.

226. See, e.g., *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987) ("Under usual circumstances, we would expect that such information [concerning testimony that missing witnesses would have offered] would be presented to the habeas court through the testimony of the potential witnesses.").

227. See *Wingate v. United States*, 669 A.2d 1275, 1287 (D.C. 1995) (indicating that the task of proving prejudice is substantial because "[a] court cannot engage in sheer speculation about what an investigation by counsel might have revealed or what witnesses he might have called" (citing *Williams v. United States*, 421 A.2d 19, 25 (D.C. 1980))).

formance requires every effort be made to eliminate the *distorting effects of hindsight*.”²²⁸ Why is it “distorted” to look back and see that counsel should have made motions that were not made,²²⁹ should not have been intoxicated throughout the trial,²³⁰ should have had at least some time to prepare,²³¹ should have contacted potentially important witnesses,²³² should not be representing a client who was being prosecuted by the same office that was prosecuting counsel,²³³ should have been receiving at least some compensation for the unsolicited and undesired court appointment,²³⁴ should have presented *some* evidence of mitigation in the punishment phase of death penalty case,²³⁵ or at least should have been *awake* during the trial of his client?²³⁶

Another problem is presented at the appellate level by *Strickland*’s second “*but for*” or prejudice prong. Frequently, appellate courts, at the Supreme Court’s invitation, first examine the strength of the prosecutor’s case to determine the likelihood of the defendant’s having been found not guilty.²³⁷ If the court determines that the case was so strong that the defendant’s attorney could not have at-

228. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (emphasis added).

229. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993) (holding that defense counsel’s failure to make an objection at a sentencing hearing did not render counsel’s representation ineffective).

230. See, e.g., *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (in bank) (holding that defendant must show that counsel’s alcoholic tendencies adversely affected his ability to provide defendant with effective assistance of counsel).

231. See, e.g., *Avery v. Procnier*, 750 F.2d 444, 447 (5th Cir. 1985) (stating that effective assistance of counsel was provided under *Strickland*, even though counsel was only appointed on the morning the trial was set to begin).

232. See, e.g., *State v. Aplaca*, 837 P.2d 1298, 1305-08 (Haw. 1992) (discussing defense counsel’s failure to contact potential defense witnesses).

233. See, e.g., *Foy v. United States*, 838 F. Supp. 38, 43-45 (E.D.N.Y. 1993) (holding that defense counsel’s representation of a defendant while another U.S. attorney’s office was investigating defense counsel did not satisfy either prong of *Strickland*).

234. See, e.g., *Madden v. Township of Delran*, 601 A.2d 211, 212-13 (N.J. 1992) (declining to order the government to pay attorneys who are assigned to represent indigent defendants by the court).

235. See, e.g., *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989) (holding that counsel’s failure to offer any mitigating evidence during the penalty phase of a capital case did not constitute ineffective assistance).

236. See, e.g., *People v. Tippins*, 570 N.Y.S.2d 581, 582-83 (App. Div. 1991) (holding that defendant received meaningful representation even though defense counsel slept during portions of the trial).

237. See *Strickland v. Washington*, 466 U.S. 668, 694, 697 (1984) (defining prejudice as a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” advising that 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,” and noting that “[i]f 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” (emphasis added)).

tained a not-guilty verdict, then it is not necessary to “grade counsel’s performance” to determine if there was any deficiency.²³⁸

One problem with this prejudice standard is that the record may not reveal weaknesses in the prosecutor’s case *because of* counsel’s incompetence. For example, counsel might fail to raise an issue on appeal.²³⁹ Or, the transcript may reveal no indication of reasonable doubt in those instances where counsel has failed most horrendously. A lawyer who would have investigated his client’s case carefully, consulted with experts, sought out defense witnesses, filed appropriate discovery motions and devoted the time needed adequately to prepare for trial, may have both attacked the prosecutor’s claims and presented a case for the defendant that may have led to a not-guilty verdict. The transcript, of course, will *not* reflect what ought to have and would have been done by counsel had he been competent.²⁴⁰ As Justice Marshall observed in his strong and often caustic dissent²⁴¹ in *Strickland*: “Seemingly impregnable cases can sometimes be dismantled by good defense counsel.”²⁴²

The second serious problem with the prejudice prong is that appellate courts since the *Strickland* decision may find that when the prosecutor’s case is strong, the verdict would have been a guilty one regardless of how effective counsel’s representation was. Therefore, however *incompetent* a defendant’s lawyer may have been, and however *unfair* the trial itself may have been as a result, there will be no remedy for the “clearly guilty” defendant; the conviction will stand.²⁴³ Yet it is the defendant confronted with the strongest case against him who is *most* in need of a competent, aggressive, and effective defense.²⁴⁴ Since when is it no longer a cardinal principle of American

238. *Id.* at 697.

239. *See, e.g.,* Smith v. Murray, 477 U.S. 527, 533-39 (1986) (refusing to grant relief from a sentence imposed after inadmissible testimony was admitted because defense counsel failed to raise the issue on appeal).

240. *See, e.g.,* Powell v. Alabama, 287 U.S. 45, 58 (1932) (commenting that “neither [counsel] nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts”).

241. *See Strickland*, 466 U.S. at 707 (Marshall, J., dissenting) (characterizing the majority’s two-prong approach as “unhelpful” and “unacceptable”).

242. *Id.* at 710.

243. *See supra* notes 237-238 and accompanying text (noting that under *Strickland* a court need not consider the deficiency of the lawyer’s performance if it finds that the conduct did not prejudice the defendant). *But see* Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (“[T]his Court has concluded that the assistance of counsel is among those ‘constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.’” (quoting Chapman v. California, 386 U.S. 18, 23 (1967))).

244. In a rare and insightful opinion, the Court of Appeals of Texas, in *Mitchell v. State*, 974 S.W.2d 161 (1998), recognized that some defendants are especially in need of effec-

justice that *all*—the guilty as well as the innocent—have a right to effective counsel?²⁴⁵ And is a “fair trial”—which certainly requires that the defendant have had an effective lawyer—no longer required before an individual may be deprived of his liberty or receive a sentence of death? We have long recognized the vital importance not only of a trial which is actually fair,²⁴⁶ but also one which is “perceived to be fair by those affected.”²⁴⁷

For the defendant to shoulder the burden of having to demonstrate a reasonable probability that he would have been acquitted but for counsel’s ineffectiveness, is just another way of saying that the defendant must show that he was innocent.²⁴⁸ Placing the burden on the defendant flies in the face of many considered decisions from courts at all levels, even those that accept the relevance of the concept of prejudice.²⁴⁹ In traditional harmless error analysis, once the error has been shown by the defendant to have occurred, then the state has the burden of proving the absence of prejudice beyond a reasonable doubt.²⁵⁰ The Chief Judge for the D.C. Circuit Court of Appeals held

tive, competent counsel. Mitchell had an IQ of 68, had been diagnosed as having a typical psychosis (not being in touch with reality), had been hospitalized in a state institution for 19 years, and was unable to communicate with his attorney. *Id.* at 166. The appeals court concluded that the defendant “desperately required” effective assistance. *Id.* But see *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970) (noting that “[w]hen, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do,” and finding no ineffectiveness even though counsel had fallen asleep twice and remarked that he “would rather walk out on this case and not be on it,” and was “not very happy about the entire thing” but was “just doing a duty”).

245. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 4-7.6 Commentary (stating that even when the defendant is guilty and has admitted his guilt to counsel, “were counsel in this circumstance to forgo vigorous cross-examination of the prosecution’s witnesses, counsel would violate the clear duty of zealous representation that is owed the client”).

246. See *Engle v. Isaac*, 456 U.S. 107, 134 (1982) (referring to the constitutional guarantee for a criminal defendant to have “a fair trial and a competent attorney”).

247. PRESIDENT’S COMMISSION, *supra* note 11, at viii. Needless to say, a defendant whose counsel is clearly unprepared for, and inept at, trial is hardly likely to perceive the trial to have been a fair one.

248. But see *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (focusing on the need for the trial itself to be a fair one and explaining that, in many instances, the absence of proper, effective counsel ought to result in the reversal of a conviction without regard to prejudice).

249. See, e.g., *Glasser v. United States*, 315 U.S. 60, 76 (1942) (“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.”).

250. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that “the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment”). But see *Brecht v. Abrahamson*, 507 U.S. 619, 630, 637-38 (1993) (holding that the *Chapman*

in *United States v. DeCoster*²⁵¹ that once a defendant demonstrates that there was a substantial violation of the required duties of counsel, including the duty to conduct an appropriate investigation, then the state would have the burden of showing *lack of prejudice*.²⁵² At least this is consistent with the basic concept of American justice that the state has the burden of proving the defendant's guilt, as opposed to the totalitarian regimes we all condemn because they assume guilt and require the defendant to prove innocence.²⁵³

In the death penalty context, the prejudice prong applies not just to the defendant's conviction, but also to the penalty phase; the defendant must show to a reasonable probability that he would not have been sentenced to death but for counsel's ineffectiveness.²⁵⁴ Under this prong, an appellate court could conclude that, even if the jurors had heard mitigating evidence at the sentencing proceeding, which the defendant's counsel should have uncovered and presented, the jurors still would have determined the death sentence to be appropriate. This conclusion, however, is not necessarily accurate. As any experienced counsel knows, juries act subjectively. It is extraordinarily difficult, if not presumptuous, to guess what might lead someone else to decide to spare the life of an individual. It would be far preferable for an appellate court to reverse any death sentence once the court determines that counsel failed to act competently and effectively in his representation at the penalty phase of a capital case.

In *Cronic v. United States*, the Tenth Circuit determined that there was no need to show prejudice once it had been established that "circumstances hamper[ed] a given lawyer's preparation of a defendant's

standard of harmless error beyond a reasonable doubt is not applicable to habeas petitions).

251. 487 F.2d 1197 (D.C. Cir. 1973).

252. See *id.* at 1204 (arguing that the state should bear the burden of showing prejudice in this circumstance because the state has the burden of establishing guilt, and because proof of prejudice may be absent from the record precisely because counsel was ineffective).

253. The Supreme Court proudly pronounced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

Id. at 344.

254. See, e.g., *In re Gay*, 968 P.2d 476, 511 (Cal. 1998) (applying this "reasonable probability" standard to counsel's failure to present mitigating evidence at defendant's sentencing proceeding, and reversing defendant's death sentence for ineffectiveness).

case.”²⁵⁵ The court explained that: “This is an eminently reasonable rule, for there is *no way* an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.”²⁵⁶ The Supreme Court reversed on the same day it decided *Strickland v. Washington*.²⁵⁷ The Court held that even though the Tenth Circuit had found that counsel had not had adequate time to prepare and investigate the case,²⁵⁸ which had taken the government four and one-half years to prepare and which had led to a thirteen-count indictment involving thousands of documents,²⁵⁹ the only way that the conviction could be overturned was for the defendant to show, under *Strickland*, that his trial counsel made specific errors that prejudiced him, i.e. led to the guilty verdict.²⁶⁰

The ramifications of *Strickland* need not have been as great as actually has been the case. State courts are free to interpret rights provided by their own state constitutions (as the right to counsel invariably is) differently than the Supreme Court’s interpretations of federal constitutional rights.²⁶¹ As Justice Brennan counseled:

255. 675 F.2d 1126, 1128 (10th Cir. 1982), *rev’d*, 466 U.S. 648 (1984).

256. *Id.* (emphasis added).

257. *Cronic*, 466 U.S. at 667.

258. *See id.* at 649-50 (noting that after defendant’s retained counsel withdrew, the trial court appointed a young inexperienced lawyer whose practice was in real estate law to represent the defendant in a very complex case involving an alleged nine million dollar fraud, but that counsel was allowed only twenty five days to prepare for trial).

259. *Id.* at 649-50.

260. *Id.* at 666 & n.41. The *Cronic* cases provide a fascinating and rather incredible tale. The defendant was initially convicted in Federal District Court on 11 counts of the 13-count indictment and received a 25-year prison sentence. The Tenth Circuit overturned the conviction, holding that *Cronic* did not have the assistance of counsel guaranteed by the Sixth Amendment. *Cronic*, 675 F.2d at 1129-30. The Supreme Court reversed and remanded for a consideration of the ineffectiveness claim “under the standards enunciated in *Strickland v. Washington*.” *See Cronic*, 466 U.S. at 666 n.41, 666-67. The District Court upheld the conviction, but the Tenth Circuit again reversed, finding that the *Strickland* prejudice requirement was satisfied because counsel should have raised the defense of “good faith,” which would have constituted a complete defense to the charges. *United States v. Cronic*, 839 F.2d 1401, 1403 (10th Cir. 1988). A new trial was ordered, *id.* at 1404, at which *Cronic* was again convicted. *See United States v. Cronic*, 900 F.2d 1511, 1512 n.1 (10th Cir. 1990) (noting the district court trial). The Tenth Circuit again vacated the conviction, finding that the defendant’s acts did not come within the scope of the United States mail fraud statute. *Id.* at 1517. The court made it clear that this, finally, was to be the end of it: “Our holding that the evidence was legally insufficient renders a retrial upon these charges impermissible under the Fifth Amendment’s Double Jeopardy Clause.” *Id.* at 1517 (citing *Burks v. United States*, 437 U.S. 1, 18 (1978)). The defendant’s alleged crime had occurred in 1975; this final decision was reached 15 years later. *Id.* at 1512 n.1.

261. *See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977) (observing that “examples abound where state courts have

[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.²⁶²

States, however, almost uniformly have adopted the *Strickland* standard.²⁶³ The one notable exception is the Supreme Court of Hawaii which, in the 1993 case of *Briones v. State*, proudly stated: "We have explicitly rejected the federal standard of review in ineffective assistance of counsel cases. . . . [We] have also rejected the double burden imposed, as well as the remainder of *Strickland's* and its federal progeny's unduly restrictive view of what actions or omissions of counsel would constitute 'ineffective assistance.'"²⁶⁴ The Hawaii court specifically noted that it had previously rejected the prejudice prong as a "requirement almost impossible to surmount."²⁶⁵ In another previous case, *State v. Aplaca*,²⁶⁶ where the defense lawyer failed to contact or call to the stand potentially important witnesses for the defendant,²⁶⁷ the same Hawaii Court held that, "Although we, as an appellate court, cannot predict the *exact effect* these prospective witnesses would have had on the trial court's assessment of [another witness's and the defendant's] credibility, we firmly believe that such testimony *could have had* a direct bearing on the ultimate outcome of the case."²⁶⁸

The Hawaii Supreme Court is unique not only in the standard it uses to evaluate ineffectiveness claims, but, unfortunately, unique also in finding that there *was* incompetence by counsel. A 1995 study of nine states and the corresponding federal district courts revealed that these courts granted only one percent or fewer of the claims of ineffective assistance.²⁶⁹ Justice Blackmun, explaining in *McFarland v.*

independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased").

262. *Id.* at 502.

263. *See, e.g., Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (en banc) (noting that "our [state] constitutional and statutory provisions do not create a standard in ineffective cases that is more protective of a defendant's right than the standard put forward by the Supreme Court in *Strickland*").

264. 848 P.2d 966, 977 n.12 (Haw. 1993).

265. *Id.* at 976 n.11 (citing *State v. Smith*, 712 P.2d 496, 500 n.7 (Haw. 1986)).

266. 837 P.2d 1298 (Haw. 1992).

267. *Id.* at 1305-07.

268. *Id.* at 1308 (emphases added).

269. Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259-60 (1995); *see also* Floyd Feeney & Patrick G. Jack-

Scott why, in part, he would not sustain any further sentences of death, offered a biting attack on *Strickland*: "Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'"²⁷⁰ Blackmun is not completely alone among the judiciary. The Seventh Circuit Court of Appeals in *Sullivan v. Fairman* observed that few individuals seeking relief due to ineffectiveness of counsel "will be able to pass through the 'eye of the needle' created by *Strickland*."²⁷¹ The Chief Justice of Georgia, in his 1993 Annual State of the Judiciary Address, said of the manner in which courts review ineffectiveness claims: "We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. . . . To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."²⁷²

No justice at all is perhaps what the defendant received from the Seventh Circuit in the 1996 case of *Holman v. Page*.²⁷³ The court assumed that counsel had been ineffective in failing to pursue the claim that post-arrest statements of the defendant were obtained in violation of his Fourth Amendment rights.²⁷⁴ But, reiterating the view of *Strickland* that the absence of fairness is no longer the *sine qua non* that leads to a reversal of a conviction, the court held that "although counsel may be ineffective in dealing with a defendant's Fourth Amendment claims, the defendant suffers no prejudice under *Strickland* as a result."²⁷⁵ The court determined that an error related to the exclusionary rule could not be in itself prejudicial, even when it may be

son, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 426 (1991) (explaining that an earlier analysis restricted to Federal Circuit Courts of Appeals found that only four percent of post-*Strickland* ineffectiveness claims were upheld) (citing Martin C. Calhoun, Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414 n.11 (1988)).

270. 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). But see *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (noting that *Strickland's* standard is highly demanding but "by no means insurmountable").

271. 819 F.2d 1382, 1391 (7th Cir. 1987) (footnote omitted); see also *Fatal Defense*, *supra* note 157 (explaining that the Fifth Circuit in the years 1984-1990 denied relief 31 times to those sentenced to death who claimed that they did not receive effective assistance, and found ineffectiveness only once).

272. See Stephen B. Bright, *Glimpses at a Dream Yet To Be Realized*, THE CHAMPION, Mar. 1998, at 65 (quoting then Chief Justice of Georgia Harold Clarke).

273. 95 F.3d 481 (7th Cir. 1996).

274. *Id.* at 492.

275. *Id.* at 491-92.

clear that an effective lawyer would have managed to suppress the unconstitutionally-obtained statements and thus precluded any conviction.²⁷⁶ The court made this determination because “[f]airness to the accused has nothing to do with the purpose of the exclusionary rule.”²⁷⁷

One-half justice (or less) is perhaps what the defendant in *Foy v. United States*²⁷⁸ received. Unbeknownst to Foy, who was being prosecuted by the Eastern District of the United States Attorney’s Office, his attorney was being investigated by the Southern District at the same time.²⁷⁹ During the period in which the lawyer was providing counsel to Foy, the lawyer entered into a plea agreement with the United States Attorney’s Office for the Southern District of New York.²⁸⁰ On appeal, the defendant claimed that his counsel “used Foy as leverage to make a deal for himself . . . for a lighter sentence.”²⁸¹ The Federal District Court, applying *Strickland*, found no prejudice and therefore refused to vacate Foy’s conviction.²⁸²

The Court in *Strickland* was fully aware of the effect that its decision would have on the operation of indigent defense systems in the future.²⁸³ The Court, however, had the wrong priorities and misplaced concerns. The Court rejected the use of “detailed guidelines”²⁸⁴ to assess the effectiveness of counsel because such serious assessment of defense counsel performance “would encourage the proliferation of ineffectiveness challenges.”²⁸⁵ However, careful scrutiny and evaluation of the adequacy of representation is absolutely

276. See *id.* at 492 (noting that, although unprofessional conduct at a suppression hearing can be used as evidence of counsel’s overall incompetence, the admission of evidence obtained in violation of the Fourth Amendment is not itself prejudicial under *Strickland*).

277. See *id.* at 491 (noting further than the purpose of the exclusionary rule is to deter police misconduct, not to ensure fair trials, which is why “Fourth Amendment claims cannot be raised on habeas review” (citing *Stone v. Powell*, 428 U.S. 465, 486 (1976))).

278. 838 F. Supp. 38 (E.D.N.Y. 1993).

279. *Id.* at 44.

280. *Id.* The lawyer was being prosecuted for fraud in the filing of a mortgage application; the prosecutors withdrew their initial cooperation agreement with the lawyer after they concluded that the lawyer was not being truthful. *Id.* The lawyer ultimately did plead, however, and received a sentence of 12 months imprisonment and three years supervised release. *Id.*

281. *Id.* (internal quotation marks omitted) (ellipsis in original).

282. *Id.* at 43-45.

283. See *Strickland v. Washington*, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) (arguing that *Strickland*’s objective reasonableness standard for assessing representation is vague, that it will discourage the development of minimum standards of defense counsel performance, and that it overlooks the difference in quality between paid representation and appointed or public representation).

284. *Strickland*, 466 U.S. at 690.

285. *Id.*

necessary given the widely acknowledged crisis discussed above.²⁸⁶ If such a “proliferation” were to occur it would indicate that the Sixth Amendment had been given some teeth. The challenges would be made because it would become clear that many counsel simply were not, for whatever reason, *doing what they should*. Given all that is known about the inadequacies of defense counsel, could one legitimately fear that appeals based on that claim would be uniformly *without merit*?

Justice O'Connor's opinion in *Strickland* strains credibility in reaching for reasons to avoid a decision that would establish the need for appellate courts to conduct a careful analysis of defense counsel's representation. Justice O'Connor claims that:

Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.²⁸⁷

The “ardor” of public defenders is dampened alright, on a day to day basis, by the horrific caseloads counsel are carrying due to the underfunding that has resulted from counties which know that they need not provide appropriate funding because *Strickland* requires so little to be done by counsel.²⁸⁸ It is not only the defenders themselves whose ardor is dampened. A recent survey of public defender offices by the National Institute of Justice revealed that sixty percent of the heads of public defender offices stated that heavy caseloads have led to difficulty in *recruiting new lawyers* to join their offices.²⁸⁹ Eighty percent of the defenders surveyed believed that the increase in caseloads has not led to a corresponding increase in defenders.²⁹⁰ And as for

286. See *supra* notes 11-68 and accompanying text. The Justices would not even have had to engage in extensive research to have discovered the problem of adequate indigent defense counsel. Prior to *Strickland*, one of their own—former Chief Justice Warren Burger—wrote, “In some places it is the observation of judges that the Criminal Justice Act has not brought about improvement in the general quality of criminal defense and that *performance has not been generally adequate*—either by assigned private counsel or by the public defender office.” Burger, *supra* note 143, at 237 (emphasis added). Similar criticism had also been made by the Chief Judge of the D.C. Circuit Court of Appeals, see generally David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973), and the Chief Judge of the Court of Appeals for the Second Circuit, see generally Kaufman, *supra* note 141.

287. *Strickland*, 466 U.S. at 690.

288. See *supra* notes 30-68 and accompanying text.

289. NATIONAL INSTITUTE OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: PRELIMINARY SURVEY RESULTS OF PUBLIC DEFENDERS 1-4 (1990).

290. *Id.*

“discouraging the acceptance of assigned cases” by counsel,²⁹¹ most states, because of *Strickland*’s failure to require much work, time, and preparation by counsel, have instituted “caps,” or maximum amounts of payment to assigned counsel for any one case.²⁹² These caps often provide reimbursement for serious felony cases at a maximum of ten to fifteen hours per case.²⁹³ O’Connor’s *Strickland* opinion had things in reverse, because higher standards would have required *more* funding for the additional time the assigned counsel would have had to devote to each case.²⁹⁴ The work, therefore, would become *more* attractive. Furthermore, attorneys who are expected to work so few hours on a case lose respect for themselves and their work, and fewer new lawyers wish to join their ranks. *Strickland* professed concern that lawyers may not wish to take cases if their effectiveness may be challenged; yet *Strickland* allows (or caused) such routine ineffectiveness that many lawyers most certainly do shun court assignments to represent the indigent defendant.²⁹⁵

At least when they can. In parts of New Jersey, they cannot. In a recent decision that again illustrates how the message of *Strickland* is virtually “anything goes,” the Supreme Court of New Jersey upheld a system under which *all* lawyers licensed to practice in New Jersey and doing so in the Township of Delran were required to accept, with no

291. See text accompanying note 287.

292. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364-75 (1993).

293. See Stephanie Saul, *When Death is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, NEW YORK NEWSDAY, NOV. 25, 1991, at 8 (suggesting that although many states do permit counsel to charge for a higher number of hours in a death penalty case, the permissible time in no way approaches the 400 to 1000 hours that experts estimate are required to conduct the investigation and research required for a capital case).

294. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (asserting that higher standards would discourage attorneys from accepting assigned cases).

295. The American Bar Association has repeatedly expressed concern about the lack of desire by attorneys to accept court assigned cases. For example, the A.B.A.’s Special Committee on Criminal Justice in a Free Society stated that, with the exception of public defenders and a very small private bar:

the trial bar is not fulfilling its obligation to participate through the representation of indigent defendants, and as a result, the status of the practice of criminal law suffers. Moreover, the shunning of criminal practice deprives the criminal justice system of a powerful voice for criminal justice reform, because the influential lawyers are unfamiliar with the working of the criminal justice system.

CRIMINAL JUSTICE IN CRISIS, *supra* note 18, at 7-8. As to the goal of recruiting the powerful to demand reforms, one commentator has called for prohibiting any individual regardless of wealth from utilizing privately retained counsel in a criminal case. Acknowledging that the indigent have no political power, “[t]his proposal is a way to recruit the wealthy into becoming advocates for the improvement of our impoverished defense system.” See Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 78 (1997).

compensation whatsoever, court appointment to represent indigent defendants.²⁹⁶ All lawyers—those who had no criminal experience, those who detested the practice of criminal law (if not defendants themselves), those whose knowledge and practice of law never encompassed the courtroom at all—were included.²⁹⁷ The Supreme Court of New Jersey upheld a system whereby uninterested (if not antagonistic) lawyers with no knowledge of or experience in criminal law would, against their will and without pay (to further dampen their enthusiasm), provide representation to indigent defendants whose liberty was at stake.²⁹⁸ The court obviously thought that such nonadequate representation would not be prohibited under *Strickland*, so why worry if, for example, this system would violate the National Legal Aid and Defender Association's Guidelines for Criminal Defense Representation²⁹⁹ and the ABA Standards for Criminal Justice.³⁰⁰

296. *Madden v. Township of Delran*, 601 A.2d 211, 212, 221-23 (N.J. 1992). This approach directly violates the ABA Standards for Criminal Justice, which provide in pertinent part that "[a]ssigned counsel should receive prompt compensation at a reasonable hourly rate." STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 5-2.4, at 39. In spite of this ABA Standard, a similar situation to that in New Jersey has occurred in Tennessee. The judges in Knoxville, knowing that the state indigent defense fund providing for payment of court assigned counsel had been virtually depleted, ordered every licensed attorney—including the mayor—to take cases of indigent defendants even if the attorney had absolutely no experience in criminal matters. *Tennessee Indigent Defense System in Crisis*, CRIMINAL JUSTICE, Spring 1992, at 42.

297. *See Madden*, 601 A.2d at 217, 219 (noting the "certainty[] that some attorneys will be assigned who have no experience either in municipal court or indeed in any court").

298. *Id.* at 212, 217. The court had before it a case brought by a lawyer who had been appointed, against his will, to represent indigent defendants. *Id.* at 213-14. Because there was no compensation provided, the lawyer claimed that the mandated assignment was an unconstitutional taking of property without due process or just compensation, and that it violated equal protection because the only lawyers who would be assigned by the court were those counsel who regularly appeared in municipal court. *Id.* at 216-17. Treating the latter claim as the primary one, the court disagreed, noting that the assignment system appeared to select attorneys randomly from among all licensed practicing attorneys. *Id.* at 217. Consequently, the New Jersey Supreme Court did not grant the requested relief, but instead modified the system slightly to ensure the random nature and fairness of the assignments. *Id.* at 218.

299. *See* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 1.2(b) (1997) ("Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.").

300. *See* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, Standard 5-2.2 & cmt., at 34 (rejecting the idea that all members of the bar should be required to provide representation to indigent defendants because only "qualified" members should do so); *see also* Indigent Defense Report, *supra* note 41, at 11 (indicating that the vital importance of training in the law and art of criminal defense was recognized even by the impoverished New York City Legal Aid Society, which even in the hardest of times realized the need to continue its extensive and intensive training program).

The New Jersey Supreme Court explained that it was aware that lawyers who had never stepped foot in a courtroom would now be in charge of cases affecting freedom of their clients.³⁰¹ The court was also aware that “financial pressures on unpaid counsel *can* affect their performance.”³⁰² But the court responded to the expected criticisms by stating that the Sixth Amendment provided only for the “right to counsel” and certainly “not to the *best* counsel.”³⁰³ One can rest assured that indigents in that town will *not* be receiving “the best counsel.”

In *Strickland*,³⁰⁴ the Supreme Court was confronted for the first time with the task of determining the standard to be used for assessing the effectiveness of counsel in a criminal case. The Court had the opportunity to render an opinion that could have benefitted untold numbers of indigents represented by court-appointed private attorneys or public defenders.³⁰⁵ The competency of defense counsel had long been of concern³⁰⁶ and the Court’s decision was eagerly awaited by those associations of attorneys most involved with providing and assessing defense services.³⁰⁷ The opinion of the Court, while immediately subjected to harsh analysis and criticism,³⁰⁸ has had an impact even the strongest critics had not imagined.

The *Strickland* opinion seemed to ignore the lofty language of previous decisions. In *Kent v. United States*, the Court had opined that “[t]he right to representation by counsel is *not* a formality. It is *not* a grudging gesture to a ritualistic requirement. It is of the essence of justice.”³⁰⁹ So too the sentiment that “the lawyer is the one person to whom society as a whole looks as the *protector* of the legal rights of that person in his dealings with the police and the court.”³¹⁰ The *Strick-*

301. *Madden*, 601 A.2d at 219; cf. Mark Hansen, *Criminal Crash Course*, 78 A.B.A. J., Apr. 1992, at 14, 14 (reporting a similar occurrence in Knoxville, Tennessee, where a caseload crisis led judges in general sessions court to appoint 1200 practicing and nonpracticing lawyers to represent defendants without compensation).

302. *Madden*, 601 A.2d at 219 (emphasis added).

303. *Id.* at 215 (emphasis added).

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

305. Approximately 75% of all inmates in state prisons were indigents represented by court-appointed defenders in 1991, the most recent year that the Department of Justice conducted such a survey. Bureau of Justice Statistics, *Selected Findings: Indigent Defense*, Feb. 1996, at 1. The study also revealed that almost 50% of all inmates were black. *Id.* at 3.

306. See *supra* notes 12-18.

307. See, for example, the amicus curiae brief submitted by the National Legal Aid and Defender Association urging Supreme Court affirmance of the Fifth Circuit’s holding in *Strickland*.

308. See *supra* note 5.

309. 383 U.S. 541, 561 (1966) (emphasis added).

310. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (emphasis added).

land Court's holding that the conviction of a defendant who was incompetently represented need not be reversed³¹¹ certainly seems to fly in the face of the forceful language in *In re Gault*:³¹² "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."³¹³

Our criminal justice system must be effectively adversarial.³¹⁴ The *Strickland* Court's clear diminution of the import of effective counsel, especially for the defendant who appears to be guilty,³¹⁵ has led to a situation in the state and federal courts of this country wherein defense counsel are routinely denied the time and resources with which to challenge the prosecutor's case.³¹⁶ Analysts of our system for delivering defense services often refer to the post-*Strickland* standard for effectiveness of defense counsel as the "foggy mirror test": If a mirror is placed in front of defense counsel during the trial and it does in fact fog, then counsel is deemed to be effective.³¹⁷ The Court has reduced the Sixth Amendment right to one of form over substance.³¹⁸

Efficiency, rather than justice, may well be the most important attribute and goal of our criminal justice system. The rapid process-

311. According to the Court, such a reversal is to occur only if the defendant has shown that but for counsel's errors, there would have been no guilty verdict. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

312. 387 U.S. 1 (1967).

313. *Id.* at 20. The Court itself gave a caveat in *Estelle v. Williams*, 425 U.S. 501 (1976), that it may have failed to honor in *Strickland*: "[C]ourts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.* at 503.

314. Just three years before *Strickland*, the Court reminded us of the critical import of our reliance upon the adversarial system: "The [criminal justice] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

315. The Sixth Amendment constitutional right to effective assistance of counsel applies, of course, to the guilty as well as to the innocent, and the mandates of the ABA Code of Professional Responsibility that counsel act diligently to provide zealous representation and never neglect one's client apply to the guilty as well as the innocent accused of crime. The Court itself in *Anders v. California*, 386 U.S. 738 (1967), recognized that every defendant is entitled to a lawyer who is "an active advocate in behalf of his client." *Id.* at 744; see also *Wheat v. United States*, 486 U.S. 153, 158 (1988) (noting that the purpose of the Sixth Amendment is to guarantee an effective counsel for every defendant).

316. See *supra* notes 19-68.

317. See, e.g., RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 148 (1995).

318. The *Gideon* Court had recognized what the *Strickland* Court failed to: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . ." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

ing of cases, the emphasis on pleas, and the evaluation of judges based on their rate of disposition have long been the *modus operandi* in the state criminal courts.³¹⁹ One might have expected more from the Supreme Court, yet *Strickland*'s emphasis on the need for the Court to avoid any holding which might "encourage the proliferation of ineffectiveness challenges"³²⁰ just adds the Supreme Court to the list of those who consider fairness and justice to be of only secondary import. The Court's fear of providing a holding which might promote post-trial inquiries into the effectiveness of counsel, or to set detailed standards or guidelines to assess counsel competency, has enabled those who determine funding for counsel for the indigent to set budgets which prevent attorneys from providing effective representation.

The Court may well have had the support of the public if it had provided a decision that would have given meat to the Sixth Amendment requirement for effective counsel. Unlike some of the Court's holdings on Fourth or Fifth Amendment procedural concerns, the decision in *Gideon*³²¹ is considered to be one of the Court's most popular.³²² The right to effective counsel is in many ways the most fundamental of all constitutional protections; it is through counsel that all the other rights are asserted and preserved. By failing to "proscribe second-class performances by counsel,"³²³ the Court has led us down a path which has constitutionalized the inadequate, incompetent, ineffective assistance of counsel. And the individual whose counsel does not provide adequate, competent and effective representation may be no better off than the defendant who simply has no lawyer at all.

319. See, e.g., Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531 (1988).

320. *Strickland v. Washington*, 466 U.S. 668, 690 (1989).

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

322. Professor Yale Kasimar, for instance, has observed that *Gideon* is "one of the most popular decisions ever handed down by the United States Supreme Court." Yale Kasimar, *The Gideon Case 25 Years Later*, N.Y. TIMES, Mar. 10, 1988, at A27.

323. Judge David Bazelon, former Chief Judge of the Court of Appeals for the D.C. Circuit and a lifelong advocate of quality representation for the indigent defendant, has written that "[i]f the Sixth Amendment is to serve a central role in eliminating second-class justice for the poor, then it must proscribe second-class performances by counsel." *United States v. DeCoster*, 624 F.2d 196, 275 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting) (emphasis added). Instead of seeking to condemn ineffective representation, the Court's *Strickland* decision may be read as lending support to a comment such as that made by the President of the New York City Legal Aid Society. While defending the Society from sharp criticism regarding the quality of representation provided by Legal Aid, the president said, "If *Gideon* meant that someone should have a lawyer who can devote all the time required for a case, we fall somewhat short." *The Legal Aid Society on the Defensive*, N.Y. TIMES, Aug. 4, 1995, § 4, at 7. Of course, effective lawyering means doing all that is required; in recent years, however, courts have systematically accepted far less.