

# THE CONSTITUTIONALIZATION OF *INEFFECTIVE ASSISTANCE OF COUNSEL*

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Recognition of a crisis in the provision of defense services in this country has long been acknowledged by many scholars and professionals in the field. The Supreme Court had the opportunity in Strickland v. Washington,<sup>1</sup> the first time the Court considered what standard should be used to assess the constitutionally required effective assistance of counsel,<sup>2</sup> to issue an opinion which would have had the effect of mandating widespread reforms in the manner in which states complied with the holdings of Gideon v. Wainwright<sup>3</sup> and Argersinger v. Hamlin.<sup>4</sup> Although commentators were quick to offer sharp critiques of Strickland,<sup>5</sup> the negative impact of that decision, from the vantage point of fifteen years later, is even greater than feared.<sup>6</sup>

I. THE DEVELOPING THREAT TO THE SIXTH AMENDMENT

The Supreme Court's decision in Gideon v. Wainwright<sup>7</sup> was long overdue. The Court had previously refused to mandate counsel for indigent defendants in all felony cases, but had instead instituted the vague standard requiring counsel only when the denial of an attorney would be "shocking to the universal sense of justice."<sup>8</sup> The (Criminal Justice Act was passed by Congress immediately after the Gideon decision to provide remuneration in federal cases for the representation of indigent defendants.<sup>9</sup> (8a) The Supreme) Court, however, did not concern itself with either the manner in which *states* would comply or how the states would finance their new obligation.<sup>10</sup> States were loathe to spend what was necessary and the mode elected to comply with providing counsel was often unsatisfactory and driven by exclusively by considerations of cost.<sup>11</sup> A crisis was predictable.<sup>12</sup>

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."<sup>13</sup> The Report of the Commission

was sharply critical of the representation provided and described defendants as “numbers on dockets, faceless ones to be processed and sent on their way.”<sup>14</sup> The National Legal Aid and Defender Association, several years later, published the results of a nationwide study and concluded that “the resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation.”<sup>15</sup>

In 1979, the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants commenced a three year study analyzing 37 indigent defense systems<sup>16</sup> which, it was concluded, revealed an “exceedingly depressing picture of insufficient defense financing.”<sup>17</sup> The alarming conclusion led to three committees of the American Bar Association in conjunction with the National Legal Aid and Defender Association to hold hearings and to issue a *another* report: Gideon Undone! The Crisis in Indigent Defense Funding.<sup>18</sup> The focus this time was, in part, the inequalities that result when indigent defendants have to rely on public defenders and court-appointed counsel because the financing was so inadequate that the “constitutional mandate” of Gideon was threatened.<sup>19</sup>

A special committee was formed by the American Bar Association in 1986 to analyze the relationship between efforts to control crime and the constitutional rights of citizens. Two years later, the Report of the Committee, Criminal Justice in Crisis<sup>20</sup> concluded that the quality of counsel provided to indigents is “too often inadequate because of the underfunded and overburdened public defender offices.”<sup>21</sup>

The quality of counsel provided in death penalty cases has been subjected to particularly harsh criticism. Witnesses appearing before a special American Bar Association Task Force on Death Penalty Habeas Corpus characterized the quality of counsel provided indigents as “shameful”, “abysmal”, “pathetic” and “deplorable”.<sup>22</sup> The Report of the Task Force concluded that:

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 affect its view of a case. . . It is simply unrealistic to expect the system to run better when its most fundamental component – informed, diligent, and effective adequacy – is missing at the trial level, the “fountainhead of justice.”<sup>23</sup>

One of the nation’s foremost capital case litigators and scholar, Stephen B. 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.”<sup>24</sup> In a particularly damning attack on our justice system, Bright concluded that it is not the facts of the crime, but rather the quality of the representation that determines who gets the death penalty, and 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.”<sup>25</sup> Justice Blackmun, in McFarland v. Scott,<sup>26</sup> dissenting from the Supreme Court’s 1994 decision to deny certiorari in a death penalty case where the defendant was claiming 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 death penalty from this Court have left me in grave doubt. . . whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.”<sup>27</sup>

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.<sup>28</sup>(26a) 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.”<sup>29</sup> Yet although that report focused on the representation provided indigents in state courts, the same unfortunate conditions exist in federal courts.

A Committee was instituted that same year to assess the effectiveness of counsel provided indigents under the Criminal Justice Act.<sup>30</sup> The Reporter to the Committee observed that there was a great deal of testimony from public defenders “who explained how their inability to provide effective assistance of counsel was a direct result of the inadequate resources made available to them under federal law.”<sup>31</sup>

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 states and counties looked to reduce costs.<sup>32</sup> 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.”<sup>33</sup> 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 of 1994.<sup>34</sup> That county which had been the country’s fourth richest,<sup>35</sup> decided to save money on indigent defense<sup>36</sup> by eliminating the program for court-appointed private

attorneys to represent cases where there are co-defendants and an impermissible conflict of interest would result if the Public Defenders Office were to represent two or more codefendants.<sup>37</sup> The County instituted a system of questionable constitutional<sup>38</sup> and ethical<sup>39</sup> legitimacy by setting up a “Chinese Wall” within the county Public Defender Office. There would be two additional programs *operated by* the Office to handle conflict of interest cases,<sup>40</sup> and the “Wall” would supposedly insulate one group of attorneys from the others, thereby “satisfying” the constitutional concerns.<sup>41</sup>

The ethical and constitutional problems presented by the cutbacks by Orange County of funds for indigent defense were greater than just issues raised by conflict of interest matters. The caseload of the Office of the Public Defender increased by an estimated 6,000 (10%) in fiscal year 1995-96 -- resulting in a caseload of 610 cases for each staff defender.<sup>42</sup> 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 Goals<sup>43</sup> and endorsed by the National Legal Aid and Defender Association.<sup>44</sup> The American Bar Association’s Criminal Justice Section has gone even further and warned regarding the numbers set by

the National Advisory Committee that “emphasis should be placed on the fact that these guidelines set the *maximum conceivable* caseload that an attorney could reasonably manage.”<sup>45</sup>

There was no increase in staff at the Orange County Office of the Public Defender to handle the additional number of cases. The result was that the Office operated “below the objective reasonable standard for effectiveness.”<sup>46</sup> The constitutional right of the client to the effective assistance of counsel has been denied. The American Bar Association’s Committee on Ethics and Professional Responsibility has clearly indicated that the ethical obligations of the Office of the Public Defender would also be violated. The Formal Opinion 347 of the Committee concluded that “Acceptance of new clients, with a concomitant greater overload of work, is ethically improper.”<sup>47</sup>

The ethical and professional failings were not just those of the California *office*. As the Opinion of the ABA Ethics Committee stated, the *staff attorney* “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.<sup>48</sup> The cited rule provides as follows:

Disciplinary Rule 6-101 Failing to Act Completely

A) A lawyer shall not:

- 1) Handle a legal matter which he knows or should know that he is not competent to handle. . .
- 2) Handle a legal matter without preparation adequate in the circumstances
- 3) Neglect a legal matter entrusted to him.<sup>49</sup>

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.<sup>50</sup>

And 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.”<sup>51</sup>

Hard times did not end, however, once the bad times for the 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 crime.”<sup>52</sup>(49a) Even as states attained budget surpluses in 1995, indigent defense organizations reported reduced appropriations for the fiscal year of 1996.<sup>53</sup> 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.”<sup>54</sup>(50a) The Committee concluded that either additional funding or limitations of caseloads were desperately needed.<sup>55</sup>(50b) The Committee’s advice not only went unheeded, but the Mayor’s 1999 budget proposal for 1999-2000 called for a *reduction* of 1 million (9.2%) in funding for agencies representing the indigent.<sup>56</sup>(50c)

There have been some recent innovations in an attempt to raise additional funds for indigent defense. User fees require the defendant to pay some fee toward the cost of counsel. These fees may be called “Registration Fees”<sup>57</sup> or “Application Fees”<sup>58</sup> if the defendant must pay money up front before being assigned a public defender or court-appointed counsel. States having regulations providing for “Recoupment Fees”, require the defendant to pay the charges upon final disposition of the case.<sup>59</sup> Whereas the expectation maybe that the money raised will be earmarked for additional, supplemental funds for indigent defense services, some states have just put the money raised back in the general fund.<sup>60</sup>

The small amount of money received by these approaches have 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.”<sup>61</sup> The President of that 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.”<sup>62</sup> 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.”<sup>63</sup>(56a)

It is not only the defense bar that is conscious of the lack of adequate representation provided 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."<sup>64</sup> And a unique study by the State Bar of Texas, completed in 1998, focused on how district attorneys throughout the state viewed indigent defense representation.<sup>65</sup> The study found that 90% of the prosecutors believed that lawyers representing the indigent devoted less time to their clients' cases than did other defense counsel, and 65% of the D.A.s were of the opinion that indigent defendants received a less vigorous defense.<sup>66</sup> 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 specifically noted the need for prosecutors to press for changes in the procedures for the appointment of counsel.<sup>67</sup>

## II. AVERDICT ON STRICKLAND FIFTEEN YEARS AFTERWARDS: A DISASTER OF CONSTITUTIONAL PROPORTIONS

In 1984, the U.S. Supreme Court was presented with an opportunity to issue a decision which could have a substantial impact on "the crises."<sup>68</sup> The Court set about articulating general standards to be used in judging and evaluating ineffectiveness claims. The lower courts had not been united in determining the standard that should be used in

determining when an ineffective assistance of counsel claim should lead to the vacating of a conviction on appeal.<sup>69</sup> Were the court to have set a requirement for the performance of counsel that would have, for example, complied with the recommendations of the American Bar Association,<sup>70</sup> governments would have had to dedicate substantially more monies to the defense of the indigent. The Court, however, refused to adhere to the ABA Criminal Justice Standards<sup>71</sup> which, as the Introduction to the Standards states, reflect a “consensus view of all segments of the criminal justice community about what good, professional practice is and should be. . . [and] are extremely useful standards for consultation by lawyers and judges who want to do ‘the right thing’ or as important to avoid doing ‘the wrong thing.’”<sup>72</sup> Instead, the Court in Strickland v. Washington<sup>73</sup> interpreted the requirements of the Sixth Amendment’s right to effective assistance of counsel<sup>74</sup> in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant.<sup>75</sup>

Consider, for example, the Supreme Court’s 1997 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.”<sup>76</sup> (The “entire” trial wasn’t that

long: Opening statements took place on August 10, on August 12 the jury returned its guilty verdict, and on August 14, the defendant was sentenced to death).<sup>77</sup> As the Houston newspaper covering the trial wrote of the defense attorney: “His mouth kept falling open and his head rolled 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. Everytime he opened his eyes, a different prosecution witness was on the stand.”<sup>78</sup> When the journalist inquired of the lawyer why he had continuously fallen asleep, the “counsel” explained: “It’s boring.”<sup>79</sup> One wonders if the 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. The Texas Court of Appeals had turned down the appeals in all three of these cases, as they had in the case of Carl Johnson who was executed in 1996 even though his counsel was also reported to have slept during jury selection and portions of the testimony as well.<sup>80</sup> The Texas courts’ application of Strickland to the “sleeping lawyer” has a significant impact on capital cases in this country -- from 1976 (when the court in Gregg v. Georgia<sup>81</sup> lifted the death penalty prohibition which had been announced by the Supreme Court in the 1972 case of Furman

v. Georgia<sup>82</sup>) to 1994, approximately one third of all those executed in this country were put to death in Texas.<sup>83</sup>

Texas isn't the only state to hold that the constitutional requirement of effective assistance can be met by a sleeping lawyer. In People v. Tippins,<sup>84</sup> the Appellate Division of the New York State Supreme Court determined that "[a]lthough a defense counsel's sleeping during the course of a trial is reprehensible", the court, applying the traditional Strickland analysis upheld the conviction.<sup>85</sup> And if a lawyer is awake, there's no requirement that he be sober. In People v. Garrison,<sup>86</sup> another case where the defendant was sentenced to the death penalty, 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 on his way to the courthouse and had a .27 blood alcohol content level."<sup>87</sup> 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 country."<sup>88</sup> The hearing on the defendant's habeas corpus petition claiming ineffective assistance before the California Supreme Court, sitting en banc, included expert witness testimony that a chronic alcoholic such as the defense counsel (who had by that time died of the disease) often

can't properly make judgment calls and loses an ability to think through problems.<sup>89</sup> The Court, relying on Strickland, denied defendant's claim.<sup>90</sup>

And Strickland apparently sanctions a lawyer being appointed on the morning of a trial which concluded that same day with a guilty verdict followed immediately by a sentence of life imprisonment. The Fifth Circuit, in Avery v. Procunier,<sup>91</sup> 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."<sup>92</sup> This decision, like so many others post – Strickland, indicates that there is hardly any requirement that a defense counsel, as part of his representation, will actively challenge the prosecution's case. After all, the prosecutor's case here was "straightforward" with the alleged victim making an "unqualified identification of him [the defendant] in court."<sup>93</sup> But most experienced, competent, defense attorneys will acknowledge that eyewitness testimony is amongst the *weakest* forms of evidence and is most certainly susceptible to aggressive and often persuasive attack. And what about the in-court identification relied on here by the Fifth Circuit -- who else *but the accused* is going to be sitting next to the defense attorney?

Or consider the recent case of State v. Wille.<sup>94</sup> 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.<sup>95</sup> Since Louisiana at the 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. The attorney had never before tried a capital case<sup>96</sup> and had expressed no willingness to take on this one either.<sup>97</sup> The defendant was never informed by either his attorney or the court of the factors leading up to his counsel's appointment<sup>98</sup> and even more significantly perhaps, his counsel had been a former state senator and his indictment and sentence had received "substantial media coverage" in the local area of Louisiana where Wille was tried.<sup>99</sup>

The defendant on appeal claimed that the jurors' knowledge about his counsel's notoriety may have impacted upon their view of the defendant's defense, thereby depriving defendant of his right to an unbiased jury.<sup>100</sup> 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 and question jurors about

that information.<sup>101</sup> The defendant claimed, therefore, that his counsel had had a conflict of interest preventing him from being dedicated solely to his client's interests at the critical stage of jury selection. The Supreme Court of Louisiana rejected the defendant's appeal of his death sentence, because, among other reasons, counsel "did his best" in representing his client.<sup>102</sup>

The Supreme Court could not, however, too quickly dismiss the conflict of interest issue. Counsel admitted at the post-trial hearing that "he 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*."<sup>103</sup> 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*.<sup>104</sup> One might think, therefore, that the Court would overturn the conviction (or at least the death sentence). Loathe, like courts are, to ever find ineffectiveness, Strickland and the prejudice consideration came in to play. The Court astonishingly 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.”<sup>105</sup>

The Louisiana Supreme Court’s opinion is most peculiar in one additional respect. The evidentiary hearing on whether or not there was a conflict of interest and therefore ineffective assistance was held before the same judge who had appointed the counsel to represent the defendant.<sup>106</sup> That judge had also been the trial judge *and testified*, at the hearing to determine ineffectiveness, about the circumstances that led to his appointment of the counsel.<sup>107</sup> Louisiana had a statute modeled after Federal Rule of Evidence 605 that prohibited a judge who is to be a witness at the proceeding from also sitting as the presiding judge.<sup>108</sup> The Supreme 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.<sup>109</sup> The Supreme Court did note, however, that “we conclude that it was error for the judge to testify at the evidentiary hearing at which he presided.”<sup>110</sup> When confronted with a violation of the law, a Court has to at least acknowledge that fact, but it sure doesn’t mean the defendant’s death sentence won’t remain.

Strickland v. Washington has led to the above holdings because of the two-prong test that the Supreme Court required to be satisfied before a conviction will be overturned based on ineffective assistance. The defendant must show a) that counsel's performance was deficient<sup>111</sup> and b) that the deficient representation resulted in a guilty verdict which would not have resulted but for counsel's inadequacies.<sup>112</sup> As to the first prong, the Court ruled that there was to be a *strong* presumption that the representation provided by the attorney was constitutionally adequate.<sup>113</sup> Not only was there to be the strong presumption of effectiveness, but the judicial review of counsel's representation was to be *highly deferential*.<sup>114</sup>

In light of the widespread acknowledgment of the existence of a crisis in the quality of representation provided indigent defendants,<sup>115</sup> the Court's presuming 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."<sup>116</sup> If the norms are for counsel, due to overwhelming caseloads, to fail to do much of what ought to be done to provide a competent and effective defense, then in any given case of such failings, that counsel's

work would *not* be deemed deficient. Is this all that the Sixth Amendment now stands for?

Perhaps. The Supreme Court recently permitted a death sentence to remain even though it was acknowledged that counsel's error was responsible for the defendant receiving the death penalty instead of a sentence of life imprisonment. The counsel in Lockhart v. Fretwell<sup>117</sup> 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.<sup>118</sup> Collins had held that the sentencing court could not consider as an aggravating factor one that duplicates an element of the crime which was committed, because that "double counting" would not narrow the group of persons who commit the crime who would be eligible for the death penalty.<sup>119</sup> The statute which had been under review in Collins and found unconstitutional was the very statute that defendant Fretwell was in fact sentenced under. In the Lockhart v. Fretwell case, the United States District Court had held that Fretwell's counsel "had a duty to be aware of all law relevant to death penalty cases"<sup>120</sup> and that this failure of counsel did

constitute prejudice under Strickland v. Washington.<sup>121</sup> The District Court proceeded to grant the habeas corpus relief and vacated the defendant's sentence of death.<sup>122</sup>

The Court of Appeals upheld the District Court, emphasizing that had counsel known the law and provided effective assistance, the defendant would not have received the death sentence.<sup>123</sup> However, the Supreme court held that the Eighth Circuit's holding would grant the defendant "a windfall to which the law does not entitle him."<sup>124</sup> The Court in its decision focused on the fact that since the time of the sentencing of the defendant, the Eighth Circuit had overruled its Collin v. Lockhart<sup>125</sup> holding and that "double counting" was to be permitted.<sup>126</sup> But the Eighth Circuit decision the Supreme Court referred to -- Perry v. Lockhart<sup>127</sup> -- had occurred before the Eighth Circuit affirmed the defendant's habeas petition and the Circuit held nonetheless that at the time the defendant was sentenced, "double dipping" *was* prohibited and therefore the sentence of death was impermissible and invalid when it was imposed.<sup>128</sup>

Justice Stevens' dissent called the decision of the majority "astonishing", adding that the "Court's aversion to windfalls seems to disappear, however, when the State is the

favored recipient.”<sup>129</sup> Stevens deemed the holding “extraordinary”,<sup>130</sup> and characterized the Court’s reasoning as “unconvincing and unjust.”<sup>131</sup> 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.”<sup>132</sup>

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,<sup>133</sup>(125a) commuted Fretwell’s sentence. A juror in the trial that had taken place fifteen years earlier called for mercy for Fretwell and claimed that he had voted for the death sentence only because he’d been fearful that otherwise he’d be ostracized in the hometown that he had shared with the deceased.<sup>134</sup>(125b) The juror did what the Supreme Court had refused to do — sharply criticized the quality of the defense: “The only thing I remember is that the lawyer asked him [the defendant Fretwell] about his childhood, and he said, ‘It was pretty bad’, and that was it.”<sup>135</sup>(125c)

Another problem with the “reasonableness under prevailing professional norms” standard is that the lawyers who routinely represent indigent defendants may not be amongst the nation’s best and brightest. 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.<sup>136</sup> And 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 concluded that 41.3% of the federal judges responding believed there to be a “serious problem of inadequate trial advocacy in their courts.”<sup>137</sup> 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.”<sup>138</sup> Burger added that America was more casual “about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians.”<sup>139</sup>

Nowhere perhaps is the norm lower than amongst the lawyers who do trials in cases where the death penalty may be imposed. Justice Blackmun, shortly before resigning from the Supreme Court, took the opportunity in McFarland v. Scott<sup>140</sup> to “address the crisis in trial and state post-conviction legal representation for capital defendants. . . the attorneys assigned to represent indigent capital defendants at times are *less qualified* than those appointed in ordinary criminal cases.”<sup>141</sup> Blackmun presented two primary reasons: the absence of any standards and the fact that the compensation for lawyers in capital cases is “perversely low.”<sup>142</sup> Blackmun observed that “[t]he prospect that hours spent in trial preparation . . . will be uncompensated unquestionably chills even a qualified attorney’s zealous representation of his client.”<sup>143</sup> It was this same concern about the lack of available resources and the resulting incompetency of counsel in capital cases that led the National Legal Aid and Defender Association in 1997 to call for the abolition of the death penalty.<sup>144</sup>(133a)

Lack of zealousness certainly seemed to be the problem in the recent capital case of Miranda v. Nevada.<sup>145</sup> The defendant spent fourteen years in prison due to the ineffectiveness of his counsel who had failed to “pursue and discover witnesses who

would have provided exculpatory evidence and testimony thereby casting doubt on the veracity of the State's primary witness."<sup>146</sup> The Nevada District Court, which ultimately did find prejudice under Strickland's second prong, also concluded that counsel's failure to perform the requisite legal research resulted in his making a mistake of fact and of law that prevented his client from testifying on his own behalf.<sup>147</sup>

This unfortunate case is illustrative not only of the devastating damage to a client's life that can result from incompetence, but also of the difficulty in obtaining relief. The trial judge had found that the counsel was *not* ineffective, as did the Nevada Supreme Court.<sup>148</sup> And because this was a case in which the defendant was sentenced to death, one would expect that there was *greater* scrutiny than the routine matter would have received. It was only after a new appellate counsel had been appointed for the defendant that the witness was found and the legal arguments developed.<sup>149</sup> One can only wonder in how many other cases the needed witness was never discovered because an overburdened, poorly compensated counsel made no attempt to do so.

Another portion of the Strickland decision, viewed with the benefit of hindsight, has proven to have 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.”<sup>150</sup> To emphasize its point, the Court added that “there are *countless* ways to provide effective assistance in any case. Even the best criminal defense attorneys would not defend a particular client in the same way.”<sup>151</sup> And, after all, if 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.”<sup>152</sup>(140a) In 1994, the New York Courts of Appeals in People v. Flores<sup>153</sup> refused to find ineffectiveness and labeled as a tactical decision, a counsel’s failure to make a motion post-trial which would have surely led to a setting aside of the conviction.<sup>154</sup> The prosecutor in the case had failed to comply with the requirement of New York State’s Criminal Procedure Law to provide defense counsel with all statements made by a witness before they testify. The Court in finding that counsel’s decision didn’t constitute ineffectiveness, reasoned that all that the

setting aside of the conviction would have meant would be delay since the defendant would have been likely to be convicted at the retrial. 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."<sup>155</sup> And, more significantly, the Judge revealed his exasperation with the repeated characterizations by the highest court of New York 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*."<sup>156</sup>

Odd, as well, is the decision of the court in People v. Wise.<sup>157</sup> The defense counsel, in the presence of the jury, announced that he was refusing to continue with the trial, berated the judge in what was characterized as an unprofessional and insulting way, and departed from the courtroom.<sup>158</sup> 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 "strategy."<sup>159</sup> And if just the concept of being able to treat an error as a strategic decision is not enough of an out for a court that doesn't wish to find

incompetence of counsel, courts place the burden on the defendant to prove “the *absence* of strategic or other legitimate explanation for counsel’s failure.”<sup>160</sup>

Consider the case of Kenneth Earl Gay, convicted of first degree murder and sentenced by the jury to the penalty of death.<sup>161</sup>(159a) Even though the Supreme Court of California determined in 1998 that Gay’s lawyer was incompetent because he had failed to adequately investigate and had misled the defendant into confessing to having committed a series of robberies,<sup>162</sup>(159b) the conviction stood. It was not considered of import that the defendant’s counsel had been subsequently disbarred.<sup>163</sup>(159c) It was determined on direct appeal that “because 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.”<sup>164</sup>(159d)

How can a defendant prove a negative?<sup>165</sup> How can one successfully convince a court what the motive of the lawyer *was not*??? How could the defendant in People v. Jones<sup>166</sup> have rebutted the Court’s finding that his lawyer’s failure to make a valid pretrial motion to suppress incriminating statements was not ineffective since the failure

“may have been part of counsel’s trial strategy”?<sup>167</sup> Three Supreme Court Justices, reacting to their perceived abuse of characterizing “error” as “strategy”, dissented from a denial of certiorari in Mitchell v. Kemp,<sup>168</sup> a death penalty case, and responded to the majority’s decision: “[A] failure to investigate the merit of accepted and persuasive defenses, cannot be characterized as sound trial strategy.”<sup>169</sup>

Can’t *every* decision 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. counsel believed the witnesses wouldn’t be found credible? A poor strategic, tactical choice based on bad judgment, *is* incompetence. Especially when the decision of counsel was based on an inadequate knowledge of the facts *because* the counsel failed 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 that defendant, that also *is* ineffectiveness in spite of 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.”<sup>170</sup>

In Strickland's discussion of how appellate courts should assess strategic choices, the indigent defendant comes out poorly. The Court indicates that the appeals court considering the claim of ineffectiveness should *expect less* from counsel for the indigent. Not only to expect less, but to *require less*. The Court informs that "limitations of time and money" may affect strategic decisions *and* those choices, therefore, "are owed deference."<sup>171</sup> Not only does the public defender, to the dismay of professionals evaluating the quality of assistance provided,<sup>172</sup> have less time and money to devote to his client's representation, but experienced defenders leave the office<sup>173</sup> and experienced private counsel don't take court-assignments because of the outrageously low pay.<sup>174</sup> Therefore, when the Court states that "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the *experience* of the attorney,"<sup>175</sup> the Court once again is instructing appellate courts to expect and require less from counsel for the indigent.<sup>176</sup>

Concern about the impact of Strickland existed on the Supreme Court bench itself within a few years after the decision. In Mitchell v. Kemp<sup>177</sup>, Justice Marshall was joined by Justices Brennan and Blackmun in noting that "[s]ince Strickland was decided, the

Court has never identified an instance of attorney dereliction that met its stringent standard.”<sup>178</sup> And, the Justices concluded: “[T]he Court should now give life to the Strickland standard.”<sup>179</sup> The case which prompted the Justices to express their dismay was one in which the Supreme Court had denied, once again, certiorari even though these three Justices concluded that counsel had neither pursued a vigorous defense nor prepared adequately for the penalty phase of the capital case. Counsel admittedly had not interviewed the police officer who claimed to have witnessed the defendant’s confession,<sup>180</sup> nor was the sole witness to the crime itself interviewed. No pretrial motions were filed.<sup>181</sup>

Counsel’s failure in Mitchell v. Kemp to present evidence in mitigation for the punishment phase was severely criticized. The affidavits of those who would have testified on the defendant’s behalf took up 170 pages and included supportive statements from a former prosecutor, a bank Vice-President, a city councilman, and several teachers.<sup>182</sup> The Justices were sharply critical of the overall lack of representation provided by defense counsel, and implicitly, of 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 defendant's case is obvious when not even a suggestion that petitioner's 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.<sup>183</sup>

A 1998 case from Texas is illustrative of yet another weakness of Strickland. In Maestas v. State of Texas,<sup>184</sup> the Court accepted Strickland's emphasis that the totality of counsel's performance should be assessed and not just one instance of a failing by counsel.<sup>185</sup> In fact, even though the 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 just isolated incidents of counsel's performance."<sup>186</sup> And a New York Court,<sup>187</sup> agreeing that *had* counsel made a timely motion to dismiss the indictment it would have been dismissed, concluded that since at the trial that did occur, counsel performed competently including conducting an adequate cross-examination of prosecution witnesses, "[u]nder the circumstances, counsel's representation, *viewed in its entirety*, was meaningful."<sup>188</sup> The conviction, therefore, remained. The trial on that charge would not have occurred at all had counsel been competent, but the Court most unconvincingly

held that given that counsel did do OK during the trial on the charge that shouldn't have been tried, there was no overall finding of ineffectiveness.

Courts seem to believe that if they do acknowledge and criticize counsel's "isolated" error, then they somehow can proceed to conclude that the overall performance was effective.<sup>189</sup>(183a) That's exactly what was done in People v. Tippins.<sup>190</sup> It was clear that counsel had fallen asleep during the trial, *but* "[a]lthough a defense counsel's sleeping during the course of a trial is reprehensible, 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."<sup>191</sup> The Supreme Court, expectedly, denied certiorari.<sup>192</sup> Similarly, in a case in which the defendant was sentenced to death, the court in McFarland v. State<sup>193</sup> ruled that ineffectiveness could not "be established by isolating one portion of trial counsel's performance",<sup>194</sup> even though the court did find that trial counsel's failure had permitted the prosecutor to impermissibly comment on the client's failure to testify and post arrest silence.<sup>195</sup>

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.<sup>196</sup> After the jury returned its guilty verdict, the punishment phase began for the jury to determine whether or not the defendant was to receive the death penalty. This phase is one which is expected to be time consuming, with defense counsel permitted, in accordance with the Supreme Court decision in Lockett v. Ohio,<sup>197</sup> to call witnesses -- lay and expert -- to present anything and everything that a jury might consider to be mitigating factors calling for a sentence other than death.<sup>198</sup> The *entire* case 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. 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 his hands. You can take it or not. That's all I have to say.<sup>199</sup>

The federal district court vacated the death sentence finding that both prongs of the Strickland requirements<sup>200</sup> were met.<sup>201</sup> 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. The Court mentioned three factors as examples of what could have been developed and argued by counsel: 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.<sup>202</sup>

The Seventh Circuit reversed, concluding that counsel's “representation” at the sentencing phase of the trial was not ineffective.<sup>203</sup> The Court found that although counsel “did not present evidence at the sentencing phase of trial”,<sup>204</sup> the attorney was “an experienced trial lawyer” who had “engaged in substantial preparation for trial.”<sup>205</sup>

The District Court Judge was faulted for not providing counsel the “latitude” necessary for the difficult case.<sup>206</sup> And in rather oblique language that seemed to almost compliment the counsel for his “strategy” at the sentencing phase, the 7<sup>th</sup> Circuit stated 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.<sup>207</sup>

The Court added what could be said about any performance labeled “strategic” regardless of how incompetent, ineffective or absurd the representation was: “Had the jury returned a life sentence the strategy might well have been seen as a brilliant move.”<sup>208</sup> 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 there had been such poor representation) and then the court could have reasoned, as it did in Romero, that had the “strategy” worked, it would have been brilliant so therefore, one cannot consider it to be ineffective.

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.<sup>209</sup> (191a) In any direct appeal of right, a defendant is entitled to the effective assistance of counsel.<sup>210</sup> Standard 4-8.6(a) of the ABA Criminal Justice Standards<sup>211</sup> 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.”<sup>212</sup> Yet the same ineffectiveness that has resulted from excessive caseloads of trial counsel, has impacted upon appellate counsel as well.<sup>213</sup> For example, the matter had become so severe in 1996 in Illinois that the U.S. District Court had to intervene. In Green v. Washington,<sup>214</sup> the Illinois Office of the State Appellate Defender represented a class of indigent defendants challenging delay in the appellate process. The action claimed that the Illinois legislature had known of the crisis situation for years and that the “funding level is plainly insufficient to enable [the Office] to employ enough staff to address the growth in appointments and backlog the district offices have experienced in the last three years.”<sup>215</sup> The caseload problems had also impacted upon the appeals by defendants other than those represented by that Office.<sup>216</sup>

A similar set of problems caused by inadequate funding occur in Florida. The Florida Supreme Court in In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,<sup>217</sup> informed the legislature that if sufficient funds were not appropriated and additional appellate defenders hired within 3 months of the Court's opinion, it would hear habeas corpus petitions from defendants whose appeals were delayed due to the case overload.<sup>218</sup>

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 effectively conduct the investigation and speak to the witnesses required to show how the defendant was prejudiced by his trial counsel not having put forth the necessary case for the defendant.<sup>219</sup> The more time that has passed the harder it will be both to find the witnesses as well as for those witnesses to remember what is 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.<sup>220</sup>

Appellate counsel's task is also made more difficult by courts' adopting Strickland's caveat that "every efforts should be made to eliminate the *distorting effect of hindsight*".<sup>221</sup> Why is it "distorted" to look back and see that counsel should have made motions that were not made,<sup>222</sup> shouldn't have been intoxicated throughout the trial,<sup>223</sup> should have had at least some time to prepare,<sup>224</sup> should have contacted potentially important witnesses,<sup>225</sup> shouldn't be representing a client who was being prosecuted by the same office that was prosecuting counsel,<sup>226</sup> should be receiving at least some compensation for the unsolicited and undesired court appointment,<sup>227</sup> should have presented *some* evidence of mitigation in the punishment phase of death penalty case, or should at least *be awake* during the trial of his client?<sup>228</sup>

The second *but for* prong is often referred to as the prejudice prong and appellate courts frequently, at the Supreme Court's invitation,<sup>229</sup> first examine the strength of the prosecutor's case to determine the likelihood of the defendant's having been found not guilty. If the court determines that the district attorney's case was so strong that the attorney could not have attained a not guilty verdict, then it was not necessary to "grade counsel's performance" to determine if there was any deficiency.<sup>230</sup>

One problem with this prejudice standard is that the record may not reveal weaknesses in the prosecutor's case *because of* counsel's incompetence. The transcript may reveal no indication of reasonable doubt in those instances where there have been the most horrendous failings of counsel.<sup>231</sup>(212a) 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 to adequately prepare for trial, may well have both attacked the prosecutor's claims and presented a case for the defendant that may well have led to a not guilty verdict. The transcript, however, of course will *not* reflect what should have and would have been done by counsel were he to have been competent.<sup>232</sup> As Justice Marshall observed in his strong and often caustic dissent<sup>233</sup> in Strickland: "Seemingly impregnable cases can sometimes be dismantled by good defense counsel."<sup>234</sup>

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,<sup>235</sup>(228a) and

however *unfair* the trial itself may therefore have been, there will be no remedy for the “clearly guilty” defendant; the conviction will stand.<sup>236</sup> Yet it is the defendant who is confronted with the strongest case against him who is *most* in need of a competent, aggressive, and effective defense.<sup>237</sup> Since when is it no longer a cardinal principle of American justice that *all* – the guilty as well as the innocent – have a right to effective counsel?<sup>238</sup> 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?<sup>239</sup> We have long recognized the vital import not only of a trial which is actually fair,<sup>240</sup> but also one which is “perceived to be fair by those affected.”<sup>241</sup>

For the defendant to shoulder the burden of having to demonstrate that were it not for counsel’s ineffectiveness he would have been acquitted, is just another way of saying that the defendant must show that he was innocent.<sup>242</sup> Placing the burden on the defendant flies in the face of many considered decisions from courts at all levels, even those that accepted the relevancy of the concept of prejudice.<sup>243</sup> 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.<sup>244</sup>

The Chief Judge for the D. C. Court of Appeals in United States v. De Coster<sup>245</sup>, held that once a defendant demonstrates that there was a substantial violation of the required duties of counsel, including the need to have conducted an appropriate investigation, then the *state* would have the burden of showing the *lack of prejudice*.<sup>246</sup> 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 governments we all condemn because they assume guilt and require the defendant to prove innocence.<sup>247</sup>

In the death penalty context, the prejudice prong applies not just to the conviction of the defendant but to the penalty phase as well — the defendant must show to a reasonable probability that he would not have been sentenced to death were it not for counsel's ineffectiveness.<sup>248</sup>(240a) Yet any experienced counsel well knows that juries act subjectively and whereas the appellate court might conclude that even if the jurors had heard the mitigating evidence that counsel should have uncovered and presented, the jurors would have been unaffected and would still have determined the death sentence to be appropriate, such might not have been the case. 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 has determined that counsel failed to act competently and effectively in his representation at the penalty phase of a capital case.

In Cronic v. United States,<sup>249</sup> the Tenth Circuit, in holding that there was no need to show prejudice once it had been “established that circumstances hamper a given lawyer’s preparation of defendant’s case”,<sup>250</sup> commented that “[t]his 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 reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.”<sup>251</sup> The Supreme Court reversed. United States v. Cronic<sup>252</sup> was decided the same day as Strickland v. Washington.<sup>253</sup> The Court held that even though the Tenth Circuit had found that counsel had not had adequate time to prepare and investigate the case<sup>254</sup> (232a) which had taken the government four and a half years to prepare and which had led to a thirteen count indictment involving thousand of documents,<sup>255</sup> the only way that the

conviction could be overturned was for the defendant to show, under Strickland, that specific errors were made that prejudiced the defendant, i.e. led to the guilty verdict.<sup>256</sup>

The ramifications of Strickland need not have been as great as has actually been the case. State courts are free to interpret rights provided for in their own state constitutions (as the right to counsel invariably is) in ways that are at variance with Supreme Court interpretations of federal constitutional rights. As Justice Brennan counseled:

[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 policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.<sup>257</sup>

States, however, have almost uniformly adopted the Strickland standard.<sup>258</sup>(249a) The one notable exception is the Supreme Court of Hawaii which, in the 1993 case of Briones v. State,<sup>259</sup> proudly stated: “We have explicitly rejected the federal standard of review in ineffective assistance of counsel cases. . . 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.’”<sup>260</sup> The Hawaii Court specifically refused to adopt the prejudice prong, and in State v. Aplaca,<sup>261</sup> where the defense lawyer failed to contact or call to the stand potentially important witnesses for the defendant, the Court held that “[a]lthough we, as an appellate court, cannot predict the *exact effect* these prospective witnesses would have had on the trial court’s assessment of credibility, we firmly believe that such testimony *could have had* a direct bearing on the outcome of the case.”<sup>262</sup>

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 only 1% or less of the claims of ineffective assistance were granted.<sup>263</sup> Justice Blackmun in McFarland v. Scott,<sup>264</sup> where he explained 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.’”<sup>265</sup> Blackmun is not

alone amongst the judiciary (at least, not completely so). The 7<sup>th</sup> Circuit Court of Appeals in Sullivan v. Fairman<sup>266</sup> observed, critically, that few individuals seeking relief due to ineffectiveness of counsel “will be able to pass through the ‘eye of the needle’ created by Strickland.”<sup>267</sup> 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.”<sup>268</sup>

No justice at all is perhaps when the defendant received by the Seventh Circuit in the 1996 case of Holman v. Page.<sup>269</sup> It was accepted by the Court 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. 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 as a result.”<sup>270</sup> This was to be the rule even when there may be a clear conclusion that

constitutional rights were violated and that an effective lawyer would have managed to suppress the unconstitutionally – obtained statements and thus precluded any conviction. And that is because “fairness to the accused has nothing to do with the purpose of the exclusionary rule.”<sup>271</sup>

One-half justice (or less) is perhaps what the defendant in Foy v. United States<sup>272</sup> received. Unbeknownst to Foy, his attorney was being investigated by the same office that was prosecuting the defendant. 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 Eastern District of New York, the Office prosecuting both Foy and his counsel.<sup>273</sup> The defendant on appeal claimed that his counsel “used Foy as a leverage to make a deal for himself. . . for a lighter sentence.”<sup>274</sup> The Federal District Court applying Strickland, found no prejudice and therefore refused to vacate Fry’s conviction.<sup>275</sup>

The Court in Strickland was fully aware of the import of its decision to the manner in which indigent defense delivery systems would operate in the future. The

Court, however, had the wrong priorities and misplaced concerns. The Court rejected the use of “detailed guidelines”<sup>276</sup> to assess the effectiveness of counsel because such serious assessment of defense counsel performance “would encourage the proliferation of ineffectiveness challenges.”<sup>277</sup> However, careful scrutiny and evaluation of the adequacy of representation is absolutely necessary given the widely acknowledged “crisis” discussed above.<sup>278</sup> The “proliferation” were it to occur, *would* occur precisely because it would become clear 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 with 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 strains credibility in reaching for reasons to avoid a decision which would establish the need for an appellate courts to conduct a careful analysis of defense counsel’s representation. The holding 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.<sup>279</sup>

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 by counties knowing that they need not provide appropriate funding because Strickland requires so little to be done by counsel. 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 60% of the heads of public defender offices stated that the heavy caseloads have led to difficulty in *recruiting new lawyers* to join their offices.<sup>280</sup> Eighty per cent of the defenders surveyed believed that the increase in caseloads has not led to a corresponding increase in defenders.<sup>281</sup> And as for “discouraging the acceptance of assigned cases” by counsel, 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. These caps will often provide reimbursement for serious felony cases of a maximum of 10-15 hours, per case.<sup>282</sup>(258a)

O’Connor’s Strickland opinion had things in reverse -- higher standards would have

required *more* funding so as to provide more money for the additional time assigned counsel would have to devote to each case. The work, therefore, would become *more* attractive. And, 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 allowed (or caused) such routine ineffectiveness that many lawyers most certainly do shun court assignments to represent the indigent defendant.<sup>283</sup>

At least when they can. In parts of New Jersey, they can't. In a recent decision that is once again illustrative of how the message of Strickland is (virtually) "anything goes," the Supreme Court of New Jersey ordered that *all* lawyers licensed to practice in New Jersey and doing so in the Township of Delran<sup>284</sup> accept, with no compensation whatsoever, court appointment to represent indigent defendants. All lawyers -- those who had no criminal experience, those who detested the practice of criminal law (if not detesting defendants themselves), those whose knowledge and practice of law never encompassed the courtroom at all -- were included.<sup>285</sup> The Supreme Court of New Jersey

mandated 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.<sup>286</sup> The Court obviously thought that such non-adequate representation would not be prohibited under Strickland, so why worry if, for example, the National Legal Aid and Defender Association's Guidelines for Criminal Defense Representation,<sup>287</sup> and the ABA Standards for Criminal Justice<sup>288</sup> would be violated.<sup>289</sup>(264a)

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 their client's freedom.<sup>290</sup> The Court was also aware that "financial pressures on unpaid counsel *can* affect their performance."<sup>291</sup> But the Court responded to the expected criticisms by informing that the Sixth Amendment provided only for the "right to counsel" and certainly "not to the *best* counsel."<sup>292</sup> One could rest assured that indigents in that town would *not* be receiving "the best counsel."

## Conclusion

The Supreme Court was confronted, for the first time, in Strickland<sup>293</sup> 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 benefited untold numbers of indigents represented by court-appointed private attorneys or public defenders.<sup>294</sup> The competency of defense counsel had long been of concern<sup>295</sup> and the Court's decision was eagerly awaited by those associations of attorneys most involved with providing and assessing the delivery of defense services.<sup>296</sup> The opinion of the Court, while immediately subjected to harsh analysis and criticism,<sup>297</sup> has an impact that even the strongest critics had not imagined.

The lofty language of previous Court holdings, such as that in Kent v. United States<sup>298</sup> that “the right to representation by counsel is *not* a formality. It is *not* a grudging gesture to a ritualistic requirement. It is the essence of justice”<sup>299</sup> seemed to be ignored. So too the opinion in Fare v. Michael C.<sup>300</sup> 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.”<sup>301</sup> The Court’s holding in Strickland that the conviction of a defendant who had counsel that was incompetent need not be reversed<sup>302</sup> certainly seems to fly in the face of the Court’s forceful language in In re Gault<sup>303</sup>: “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 right of the individual and delimits the power which the state may exercise.”<sup>304</sup>

Our criminal justice system is dependent upon the effective functioning of our adversary system.<sup>305</sup> The Strickland Court’s clear diminution of the import of an effective counsel, especially for the defendant who appears to be guilty,<sup>306</sup> 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.<sup>307</sup> 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 trial and it does in fact fog, then counsel is deemed to be effective.<sup>308</sup> The Court has reduced the Sixth Amendment right to one of form over substance.<sup>309</sup>

Efficiency, rather than justice, may well be most important attribute and goal of our criminal justice system. The rapid processing of cases, the emphasis on pleas, the evaluation of judges based on their rate of disposition have long been the *modus operandi* in the state criminal courts.<sup>310</sup> 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"<sup>311</sup> 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.<sup>312</sup>

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<sup>313</sup> is considered to be one of the Court's most

popular.<sup>314</sup> 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”,<sup>315</sup> the Court has led us down a path which has constitutionalized the *inadequate, incompetent, ineffective* assistance of counsel. And the individual whose counsel has not provided adequate, competent and effective representation may be no better off than the defendant who simply had no lawyer at all.

## FOOTNOTES

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\* Professor of Law, Touro Law School. J.D. Harvard Law School, 1972.

<sup>1</sup> 466 U.S. 668 (1984).

<sup>2</sup> Id. 466 U.S. 683. Whereas several colonies in America, long before the Revolutionary War, had provided for the right of a defendant to have the assistance of counsel, only Connecticut had actually provided for the appointment of counsel for the indigent defendant. W. Beaney, *RIGHT TO COUNSEL IN AMERICAN COURTS* 14-18 (1955). After American achieved independence, 11 of the 13 colonies adopted new constitutions and of the 11, 7 made some provision for the right to the assistance of counsel. Id. At 18. The Sixth Amendment of the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense. For nearly one hundred and fifty years, this right was provided only to that defendant who could afford to hire his own counsel. In 1932,

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the Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932) held that an indigent defendant in a capital case had the right to an appointed attorney. Six years later, *Johnson v. Zerbst*, 304 U.S. 458 (1938) 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.” *Id.* 304 U.S. 462.

<sup>3</sup> 372 U.S. 335 (1963). *Gideon* held that, for felony prosecutions, the right to counsel provision of the Sixth Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Supreme Court recently made clear that this right applies whether or not the defendant, upon convicted, would receive a prison sentence. See *Nichols v. United States*, 114 S.Ct. 1921, 1925 n. 9 (1994)(in contrast to misdemeanors, the Constitution requires that an indigent defendant in all felony cases be offered appointed counsel). The Court extended the right to counsel to juvenile cases in *In re Gault*, 287 U.S. 1 (1967), to a probation revocation hearing in *Mempa v. Rhay*, 389 U.S. 128 (1967), to a preliminary hearing in *Coleman v. Alabama*,

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399 U.S. 1 (1970) and to a parole revocation hearing in *Gagnon v. Scarpelli*, 411 U.S.

778 (1973).

<sup>4</sup> 407 U.S. 25 (1972). *Argersinger*, as clarified by *Scott v. Illinois*, 440 U.S. 367 (1979), requires the appointment of counsel for the indigent in misdemeanor cases only if there is to be imprisonment that would result from a conviction of the offense. Therefore, when a judge determines in advance of trial that the defendant in a misdemeanor charge will not be sentenced to jail if convicted, that defendant has no constitutional right to counsel. *Scott v. Illinois*, 440 U.S. 374. However, the American Bar Association Standards for Criminal Justice, Chapter Five, Providing Defense Services (3d. ed. 1992) call for counsel to be appointed in cases where even though a conviction for the offense would not lead to immediate incarceration, the conviction might serve to subject the defendant to future imprisonment were he to be convicted of a subsequent offense.

Standard 5-5.1. See also National Advisory Commission Standard 13.1 (1973) and the National Legal Aid and Defender Association, National Study Commission Standard 1.1 (1973) calling for appointment of counsel in all misdemeanor cases.

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<sup>5</sup> Supra note 1.

<sup>6</sup> People v. De Pillo, 168 A.D. 2d 899, 1 v. denied 78 N.Y.2d 965, (1990) may illustrate the point. The District Attorney began its prosecution of the defendant after the applicable period set forth by the New York state statute of limitations had expired. Counsel for the defendant, however, failed to move the court to dismiss the indictment on the grounds that it was time-barred. The defendant was convicted and an appeal was based on the claim that the defendant would not have been prosecuted at all were it not for counsel's ineffectiveness. 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. The Court seemed almost to go out of its way to commend the attorney, observing that "trial counsel moved to dismiss. . . posttrial." At that point, the motion was useless since Section 210.20 of the New York State Criminal Procedure Law required such a motion to be made within 45 days of the arraignment, a time which had long passed.

<sup>7</sup> *Supra* note 3.

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<sup>8</sup> Betts v. Brady, 316 U.S. 455, 462 (1942).

<sup>9</sup> (8a) 18 U.S.C. § 3006A.

<sup>10</sup> Certain localities, such as New York City where the Legal Aid Society had been providing counsel for indigent defendants since 1917, and Los Angeles which in 1913 began the country's first public defender office, were isolated examples of the existence of indigent defense systems before the Gideon decision. Indeed, as of 1961, two years before Gideon, only 2.9% of the country's countries had instituted public defender systems. E. Brownell, LEGAL AID: IN THE UNITED STATES 13 (1961).

<sup>11</sup> At the federal level, immediately after the Gideon decision, Congress passed the Criminal Justice Act, 18 U.S.C. §3006 A to provide remuneration in federal cases for the representation of indigent defendants.

<sup>12</sup> In his concurring opinion in Argersinger, supra, Justice Powell predicted that there would be "backlogs", "bottlenecks" and "chaos" resulting at the state court level. 407 U.S. 25, 55-56 (Powell, J. concurring). Justice Burger, on the other hand, voiced

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optimism and confidence in the organized bar: “The holding of the Court today may very well add new burdens to a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.” Id. 407 U.S. 44 (Burger, J. concurring).

<sup>13</sup> President’s Commission Law Enforcement and Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 370 (1968).

<sup>14</sup> Id. at 128.

<sup>15</sup> National Legal Aid and Defender Association, *THE OTHER FACE OF JUSTICE* 70 (1973). One of the authors of the report concluded that the study showed that “representation provided for indigent defendants in many jurisdictions does not meet specific constitutional directives of the Supreme Court.” Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 *Am. Crim.L.Rev.* 667, 684 (1975). That same year, the Director of the National Association of Criminal Defense Lawyers stated that these reports showed that “there has been little awareness in many cities, countries and states of the obligation to the indigent, and even less

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affirmative action to incur the financial cost to rectify the failure of the obligation.”

Friloux, *Equal Justice Under the Law: A Myth, Not a Reality*, 12 *Am. Crim.L.Rev.* 691, 707 (1975).

<sup>16</sup> This study was commenced after the American Bar Association’s House of Delegates voted to approve the following: “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.”

<sup>17</sup> Norman Lefstein, *American Bar Association Standing Committee on Legal Aid and Indigent Defendants. CRIMINAL DEFENSE SERVICES FOR THE POOR* 16 (1982). The Report’s Introduction stated that “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

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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.”

<sup>18</sup> American Bar Association and the National Legal Aid and Defender Association, *GIDEON UNDONE! THE CRISIS IN INDIGENT DEFENSE FUNDING* (1982). 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).

<sup>19</sup> *Id.* at 1-3.

<sup>20</sup> American Bar Association, Special Committee on Funding the Justice System, *CRIMINAL JUSTICE IN CRISIS* (1988).

<sup>21</sup> *Id.* at 9.

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<sup>22</sup> Task Force on Death Penalty Habeas Corpus, American Bar Association,

TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE

DEATH PENALTY CASES, reprinted in 40 Am. U.L. Rev. 1, 69.

<sup>23</sup> Id.

<sup>24</sup> 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 (19 ).

<sup>25</sup> Id. at 1842. Bright, the Director of the Southern Center for Human Rights in Atlanta, Georgia, described the system for providing financing for indigent capital defendants as “a process that lacks fairness and integrity.” Id. at 1837.

<sup>26</sup> 512 U.S. 1256, 114 S.Ct. 2785 (1994) (Blackmun, J. dissenting).

<sup>27</sup> Id. 512 U.S. 1264, 114 S.Ct. 2790. Blackmun added the obvious, yet horrid truth: “The consequences of such poor trial representation for the capital defendant, of course, can be lethal.” Id. 512 U.S. 1259, 114 S.Ct. 2787. *See also* Habeas Corpus Reform:

Hearings on House Resolution 729 Before the Subcomm. On Crime and Criminal Justice

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of the House Judiciary Comm., 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995), testimony of Gerald H.

Goldstein, President, Nat'l Ass'n of Criminal Lawyers (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).

<sup>28</sup> (26a)           The formation of the 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 that burden by terming arraignment day as “meet ‘em and plead ‘em.” One

staff defender who nevertheless picked up 45 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 was not processing the required number of cases, demoted

the staff defender who subsequently resigned. Id.

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<sup>29</sup> Richard Klein, Robert Spangenberg, American Bar Association Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis, *INDIGENT DEFENSE CRISIS* 25 (1993). The study found that the urban centers and poor rural areas of the country were especially hard hit by the inadequate funding for indigent defense representation. *Id.* That same year, two leading criminal law scholars commented that the system for criminal defense appears to be in a “perpetual crisis” and “the results of existing indigent defense methods are often abysmal. . . the need for effective reform is acute.” 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). The President of the American Bar Association added his voice in a speech he called “The Erosion of Individual Rights”, concluding that the lack of adequate funding was causing violations of the constitution rights of indigents accused of crimes. J. Michael McWilliams, *The Erosion of Indigent Rights*, *American Bar Association Journal* (March 1993).

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<sup>30</sup> The special committee was called The Committee to Review the Criminal Justice Act. The Report of the Committee is reprinted in 52 Crim.L.Rep. 2265 (1993).

<sup>31</sup> Charles Ogletree, Jr., An Essay on the New Public Defender for the 21<sup>st</sup> Century, 58 Law and Contemporary Problems 81, 86 (Winter, 1995). An example of the caseload impact can be noted in State v. Peart et al. Judgment on Motion for Constitutionally Mandated Protection and Resources, New Orleans Parish, Louisiana (1992). A staff public defender who had represented 418 clients in just seven months and had 70 cases pending trial, sought and obtained a court ruling that the excessive caseload precluded him from providing effective representation. The defense attorney typically was unable to meet his clients until 60-70 days after they had been arrested. The court ruled that “Not even a lawyer with a ‘S’ on his chest could effectively handle this docket.” The court proceeded to find the underfunded system for providing indigent defense representation to be unconstitutional.

<sup>32</sup> See David J. Carroll, 1997 State Legislative Scorecard: Developments Affecting Indigent Defense, The Spangenberg Report, Vol, IV, Issue 1, Nov. 1997 at 2.

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<sup>33</sup> American Bar Association Special Committee on Funding The Justice System,

FUNDING THE JUSTICE SYSTEM: A CALL TO ACTION ii (1992).

<sup>34</sup> “Orange County Agrees to Settle Lawsuit for \$400 million U.S.,” Associated

Press, June 2, 1998. 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. “No layoffs at S.D. Court, But Offices

Face Cutbacks”, Los Angeles Daily Journal, 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 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 do-able. We couldn’t handle

the caseload. We just couldn’t.” “Less Money Fights More Crime,” Los Angeles Daily

Journal, April 6, 1992.

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<sup>35</sup> John Greenwald, *The California Wipeout: Orange County files for bankruptcy* after losing big on high-risk investments, *Time*, Dec. 19, 1994 at 56.

<sup>36</sup> It had obviously become necessary for the County to reduce expenditures, but those programs that serve the poor were hardest hit -- social services, health care, and indigent defense programs. Sonia Lee, *supra* at 1913. The budget of the Alternate Defense Fund was cut 29%, in sharp contrast to the minimal reductions in the budget of the District Attorney which had received a 31% increase in funding the previous year.

Id.

<sup>37</sup> See Spangenberg Report, Vol. IV, Issue 4, Nov. 1998 at 13. The Alternate Defense Fund, financed by the County's general fund, paid private attorneys on a flat-fee basis for handling conflict of interest cases. Jodi Wilgoren, *Private Lawyers Left Dry as County Work Evaporates*, *L.A. Times (Orange Co. ed.)*, Jan. 9, 1995, at B1, reported in Sonia Y. Lee, *OC's PDs 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, 1912 n. 126 (1996).

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<sup>38</sup> Glasser v. United States, 315 U.S. 60 (1942) is the seminal decision concerned with constitutional problems arising when one lawyer represents codefendants. In Glasser, the Court overturned the conviction of one defendant who had claimed that his counsel was ineffective because of a conflict in the interests of Glasser and his co-defendant who was also represented by Glasser's attorney. In the next major Supreme Court case dealing with conflict of interest, Holloway v. Arkansas, 435 U.S. 475 (1978), one public defender had been assigned to represent three co-defendants. The counsel requested the court to appoint separate counsel for each defendant, specifying how the joint representation would prejudice the defendants. The trial judge refused the lawyer's request, and the Supreme Court, therefore, reversed the convictions. Holloway stands for the proposition that the trial court is required to investigate counsel's timely objection to multiple representation. Two years later, the Court decided the final case of major significance on this topic -- Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, the Court held that a conviction will be overturned only when a defendant can show that there actually were conflicting interests between the clients represented by counsel. When

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such conflict has been shown by a defendant appealing a conviction, the Court held that there is no need to demonstrate prejudice in order to obtain relief. (*Glasser v. United States*, supra 315 U.S. 76, had similarly held that “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”).

<sup>39</sup> The American Bar Association Model Rules of Professional Conduct, Rule 7.1(b) (1998) provides 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. . .” The Comment to the Rule explains that “[L]oyalty is an essential element in the lawyer’s relationship to a client.” Approximately seventy percent of public defender offices maintain a strong policy against multiple representation, with 50% of offices having an outright ban. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L.Rev. 939, 950 (1978). See also American Bar Association Committee on Ethics and Professional Responsibility, *Informal Opinion 1428* (1979) (when a client is represented by an attorney in a legal services office, that office is to be considered the

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firm that is providing the representation). The danger in representation by any one office of co-defendants is that a conflict of interest might not be immediately clear at the outset, but may indeed be revealed as the case progresses.

<sup>40</sup> 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. Sonia Y. Lee, *supra* at 1913-14.

<sup>41</sup> Restrictions on a lawyer representing conflicting interests apply to any lawyer or partner associated with him. American Bar Association Model Code of Professional Responsibility, DR 5-104(D) (1983). Therefore, if the Chief Public Defender were to be the head of the 3 component parts of the Office, then the ethical commands would be violated by having any two lawyers working for him, separated by a wall or not, representing co-defendants with conflicting interests.

<sup>42</sup> Anna Cekola, *Defender's Office Meets Cuts but Seeks Relief*, L.A. Times (Orange County ed.), June 24, 1995 at B8, reported in Sonia Y. Lee, *supra* at 1914. That

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shockingly high number was even surpassed by the average number of cases —650 — assigned to the staff attorneys of the New York City Legal Aid Society in 1997. Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1997 (1998) at 17. In New Jersey, the legislature, in an override of the Governor’s veto, passed a budget sharply cutting funds for the Department of Public Advocate, necessitating a reduction in the number of public defenders in that office. Indigent defendants were being incarcerated without any counsel assigned to represent them; the state’s head public defender resigned in protest. “Was Unique in Nation: New Jersey Shuts Down its Advocate,” National Law Journal, Vol. 14, Number 46, July 20, 1992 at 3.

<sup>43</sup> The National Advisory Committee on Criminal Justice Standards and Goals, Report on Courts (1973), Standard 13.12. The Standard allows for an attorney who is handling exclusively misdemeanor cases to handle 400 cases per year, the counsel working on juvenile matters 200 per year, and the lawyer handling appeals, 25 per year. Id. The misdemeanor caseload cap was greatly exceeded in Albuquerque, New Mexico

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in 1992. Each public defender had a caseload of 1,100 – 1,200 per year, and as a result, counsel would literally meet their clients at the courthouse door and would proceed to try as many as 30 cases per day. “NACDL Spotlight Exposes Chaos Crises in Indigent Defense,” BNA Criminal Practice Manual Trial Practice Series (1992) at 273. The National Association of Criminal Defense Attorneys described the indigent defense delivery system as being in “complete chaos.” Id.

<sup>44</sup> National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Government Contracts for Criminal Defense Services (1984). These guidelines, while endorsing the 150 figure for felony cases per year, recommended a maximum of 300 (as opposed to the National Advisory Committee’s 400 figure) 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. The Supreme Court department in New York which

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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. Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1996 (1997) at 14.

<sup>45</sup> Special Comm. on Criminal Justice in a Free Society, Am. Bar Ass'n.

CRIMINAL JUSTICE IN CRISIS 68, n. 87 (1984) (emphasis added).

<sup>46</sup> Sonia Y. Lee, *supra* at 1917.

<sup>47</sup> American Bar Association Committee on Ethics and Professional Responsibility.

Formal Opinion 347 (1981). See also the American Bar Association Standards for Criminal Justice, Providing Defense Services (3d ed. 1992) warning that defender organizations should not “accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or the breach of professional obligations.” Standard 5-5.3

<sup>48</sup> American Bar Association, Model Code of Professional Responsibility (1983).

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<sup>49</sup> Id., Disciplinary Rule 6-101.

<sup>50</sup> American Bar Association, Model Rules of Professional Conduct (1983, as Amended to February 1998), Rule 1.1.

<sup>51</sup> Id., Rule 1.16. See also Wisconsin Committee on Professional Ethics, Formal Opinion E-84-11, Sept. 1984 (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); American Bar Association Standards for Criminal Justice, The Prosecution Function and Defense Function Standard 4-1.3 (3d ed. 1993) (“defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation”).

<sup>52</sup> (49a) The legislature in New York, for example, has failed to provide any increase in fees paid to court-appointed counsel since 1986. “18B Rate Plan Seen Delaying Pay Increases”, New York Law Journal Jan. 29, 1999 at 1.

<sup>53</sup> David J. Carroll, *supra* at 2.

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<sup>54</sup> (50a) Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1997 (1998) at 5. The Committee was formed at the request of a number of bar associations, and monitors the organizations that represent indigent defendants in the geographic area covered by the Appellate Division, First Department of the New York State Supreme Court. Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1996 (1997). The Court has promulgated standards entitled “General Requirements for All Organized Providers of Defense Services to Indigent Defendants”, *Id.* at 2, and the 1998 Report concluded that these standards of representation were not being complied with by the Legal Aid Society in New York City. Report of the Committee (1998) at 6.

<sup>55</sup> (50b) Report of the Committee (1998) at 5-7.

<sup>56</sup> (50c) New York Law Journal, Feb. 1, 1999 at 1.

<sup>57</sup> Public defender offices in New Jersey, Connecticut, Colorado, Massachusetts and Washington utilize registration fees. See Klein and Spangenberg, *supra* at 14.

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<sup>58</sup> In 1997, two new states – Kansas and Tennessee – passed legislation providing for defendants to pay application fees. Kansas calls its \$35 fee an “administrative fee” and is imposed on any defendant receiving state-paid counsel. See David J. Carroll, supra at 7. In 1998, Arizona imposed a fee of up to \$25 on any individual seeking representation by court appointed counsel. “Revenue Enhancement Mechanisms,” The Spangenberg Report, Vol. IV, Issue 4 (1998) at 10. Kentucky increased its fee from \$40 to \$50. Id. at 11.

<sup>59</sup> See e.g. Cal. Penal Codes 987.8(b)(West. Supp. 1996) which provides that “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender. . . 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.” The California Supreme Court in People v. Amor, 12 Cal. 3d 20, 523 P.2d 1173 (1974) found the statute to be constitutional; the difficult problem of ascertaining an individual’s ability to pay was

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dealt with in Cal. Penal Code S 987.8(c): “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
- 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.”

<sup>60</sup> David J. Carroll, *supra* at 7.

<sup>61</sup> National Association of Criminal Defense Lawyers, *Low-Bid Criminal Defense Contracting: Justice in Retreat*, 1 (Oct. 1997) (emphasis added). The language used in

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the Report's conclusion similarly refers to the "escalating crisis" in indigent defense representation. *Id.* at 6.

<sup>62</sup> National Association of Criminal Defense Lawyers News Release, Adequate Defender Services Funding Needed to Counter Prosecutorial Excesses, April 1, 1998.

<sup>63</sup> (56a) Michael N. Gambrill, District Public Defender, Memorandum of June 22, 1998 to the Circuit Court for Baltimore City, reprinted in Arrie W. Davis, "Gideon: A Generation Later – Is the Trumpet Still Sounding?" University of Maryland School of Law (1999) at Appendix 1. There was, in the year from 1997 to 1998, a 20.8% increase in cases at the Circuit Court level. *Id.*

<sup>64</sup> Janet Reno, Legal Service for the Poor Needs Renewed Vigilance, U.S.A. Today, March, 1998. The Attorney General's concern was echoed in a speech before the American Bar Association's Criminal Justice Section: "To give people confidence in the jury system, we have to have adequate funding, adequate training and adequate resources for indigent defendants." Reported in The Spangenberg Report, Vol. IV, Issue 1 at 14.

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<sup>65</sup> “State Bar Completes Survey on the Status of Indigent Defense in Texas: The Prosecutor’s Perspective”, The Spangenberg Report, Vol. IV, Issue 3, August, 1998 at 10.

<sup>66</sup> Id. at 11.

<sup>67</sup> President’s Commission Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 147 (1967). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) (Canon 8: A lawyer Should Assist in Improving the Legal System).

<sup>68</sup> See supra, notes

<sup>69</sup> Some courts had adopted the “farce and mockery” standard, overturning a conviction on ineffectiveness grounds only when the counsel’s incompetence had made a farce and mockery of the trial. See, e.g. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950) (the lack of effective assistance must shock the conscience of the court and cause the proceedings to be a farce and a mockery of

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justice in order to warrant relief). See *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983) (summarizing cases which have utilized the farce and mockery standard). Courts, however, increasingly adopted the standard of “reasonable competence.” See e.g. *Johnson v. United States*, 506 F.2d 640 (8<sup>th</sup> Cir.), cert. denied, 420 U.S. 978 (1974). The Supreme Court *had held* that when a defendant had *pled guilty* and then appealed on ineffectiveness grounds, he had to show that his attorney’s advice was “outside the range of competence demanded of attorneys in criminal cases.” *Tollet v. Henderson*, 411 U.S. 258, 268 (1973).

<sup>70</sup> American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: CHAPTER FOUR: THE DEFENSE FUNCTION (3<sup>rd</sup> Ed. 1993). The Standards are designed to guide defense counsel with the advice of experts in criminal justice as to how to provide competent representation to any individual charged with crime. The Standards cover counsel’s performance from the initial appointment through trial and culminating in the appeal and other post-conviction remedies. The Standards are respected and valued because they are “the result of careful drafting and meticulous and

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extensive review by representatives of all segments of the criminal justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.”

<sup>71</sup> The Court referred to the Standards as “guides to determining what is reasonable, but they are only guides.” *Strickland v. Washington*, supra 466 US 689. The Court attempted to explain its decision not to give more weight to the ABA Standards: “Indeed the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy for the defendant’s cause.” *Id.* 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 impact *negatively* on his vigorous advocacy?

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<sup>72</sup> Id. at Introduction, p. XIV. For an opinion which does cite and then proceeds to give great weight to the standards, see *United States v. De Coster*, 624 F.2d 196 (1976) (Bazelon, J. dissenting).

<sup>73</sup> 466 U.S. 668 (1984).

<sup>74</sup> The language of Sixth Amendment only provides for the right to have the “assistance of counsel” but in the 1970 case of *McMann v. Richardson*, 397 U.S. 759 (1970), the Supreme Court held that defendants in criminal cases were entitled to the “effective assistance of competent counsel.” In *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) the Court held that the Constitution guarantees the accused “adequate legal assistance.”

<sup>75</sup> The Supreme Court, over 40 years earlier, had warned against exactly that. The Court then was alarmed that inadequate assistance “could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement than an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by *mere formal appointment.*”

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Avery v. Alabama, 308 U.S. 444, 446 (1940) (emphasis added). See also Anders v. California, 386 US 738, 743 (1967) (the defendant has, under the Sixth Amendment, the right to have “counsel acting in the role of advocate”). Despite whatever right the defendant may legally have, the *reality* may become like that described as applying to indigent defense representation 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 ON 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) (emphasis in original). 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 1192 (9<sup>th</sup> Cir. 1977) modified 586

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F.2d 1325 (9<sup>th</sup> Cir. 1978) (en banc), cert. denied 440 U.S. 974 (1979), for instance.

Counsel had had a caseload while working at the Public Defenders Office of approximately 2,000 cases per year and resigned from the office upon reaching the conclusion that she was “actually doing more harm by just presenting a live body than if they [her clients] had no representation at all.” Id. 586 F.2d at 1163 n. 1.

<sup>76</sup> Bruce Shapiro, *Sleeping Lawyer Syndrome; Murder Case in Texas*, *The Nation*, April 7, 1997 at 27.

<sup>77</sup> Id.

<sup>78</sup> Id. reporting the *Houston Chronicle*’s story about the trial.

<sup>79</sup> Id. The lawyer added that he customarily naps in the afternoon. *Id.*

<sup>80</sup> Id.

<sup>81</sup> 428 U.S. 153 (1976).

<sup>82</sup> 408 U.S. 238 (1972).

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83      McFarland v. Scott, 512 U.S. 1256, 1262 (1944) (Blackmun, J. dissenting).

84      570 NYS 2d 581, 173 A.D. 2d 512 (1991), cert. den. 112 S.Ct. 952 (1992).

85      Id. 570 NYS 2d 582, 173 A.D. 2d 514.

86      765 P. 2d 419 (California S. C. In Bank 1989).

87      Id. 765 P.2d 440. The lawyer was also found to have “drank in the morning,  
during court recesses, and throughout the evening.” Id. The bailiff testified that the  
counsel “always smelled of alcohol.” Id.

88      Id.

89      Id. 765 P. 2d 441.

90      Id.

91      750 F.2d 444 (5<sup>TH</sup> Cir. 1985).

92      Id. 750 F.2d 447.

93      Id.

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<sup>94</sup> 595 So. 2d 1149 (1992).

<sup>95</sup> State v. Wille, 559 So. 2d 1321, 1338 (1990). Counsel's conviction was for conspiring to defraud an agency of the United States. 595 So. 2d 1151. Whereas counsel in Bellamy v. Cogdell, 974 F.2d 302 (1992), had not been convicted of a crime, he was, two months after the murder conviction of his client, suspended from the practice of law because of improperly converting a client's funds and negligent handling of another client's case. Id. at 303. Before the defendant's trial on a murder charge began, the counsel had told the Departmental Disciplinary Committee investigating his own alleged wrongdoing, that he was "not mentally capable of preparing for the disciplinary hearing."

Id. The murder trial of the defendant, Bellamy, began two months thereafter, and although the judge in New York State Supreme Court who was presiding over the case was aware of counsel's disciplinary and mental problems, neither the Judge nor counsel felt the need to inform Bellamy. Bellamy's first "inkling" of his counsel's difficulties occurred at his sentencing for murder when the trial judge would not permit counsel to represent him because by then he had been suspended from practice. Although the three

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judge panel of the Second Circuit granted Bellamy's petition for habeas corpus based on the claim of the incapacity of counsel, the Circuit, sitting in banc, disagreed and found that there was no ineffective assistance of counsel.

<sup>96</sup> There is widespread acceptance of the need for lawyers in capital cases to receive special training. For example, when extensive interviews were conducted of lawyers in six states who had provided representation in death penalty cases, there was near unanimity in their advocacy of the need for specialized instruction for capital case representation. "Fatal Defense: Firsthand Accounts of Capital Justice," *National Law Journal*, Vol. 12, No. 40, June 11, 1990 at 40. The law which affects capital cases is unique and effects virtually every portion of the representation — from the procedures of selecting the jury, to the required penalty phase, to the need for proportionality review on appeal. In those states where the standards of appointment for counsel in capital cases are minimal or nonexistent, the entire trial will typically last for only two or three days. Stephanie Saul," *When Death is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, *New York Newsday*, Nov. 25, 1991 at 8. *The American Bar*

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Association has called 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. TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES B-2 (1990).

<sup>97</sup> The Louisiana Supreme Court found that counsel “did not want to accept the appointment, but the judge insisted.” *State v. Wille*, supra 595 So.2d 1152. Counsel appointed by the court to represent defendants in capital cases may express their dismay at the assignment in varying ways. One attorney was particularly frank: “I despise [the appointment], I’d rather take a whipping.” *Coleman v. Kemp*, 778 F.2d 1487, 1522 (11<sup>th</sup> Cir. 1985), cert. denied, 476 U.S. 1164 (1986).

<sup>98</sup> *State v. Wille*, supra 559 So. 2d 1321, 1328 (1990). On appeal, the defendant maintained that his attorney’s failure to disclose deprived the defendant of his right to object to the appointment. *State v. Wille*, 595 So.2d 1152.

<sup>99</sup> *State v. Wille*, supra 595 So. 2d 1151.

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<sup>100</sup> Id. 595 So. 2d.1153-54.

<sup>101</sup> State v. Wille, supra 559 So. 2d 1338-39.

<sup>102</sup> State v. Wille, supra 595 So. 2d, 1152.

<sup>103</sup> Id. (emphasis added).

<sup>104</sup> Id. (emphasis added).

<sup>105</sup> Id. 595 So.2d.1153.

<sup>106</sup> Id. 595 So.2d 1154-55. The Judge was, somehow, objectively and impartially, to decide whether the circumstances that led to his own choosing to appoint the defendant's counsel, was inappropriate.

<sup>107</sup> Id. 595 So.2d 1155.

<sup>108</sup> The Louisiana statute provided that: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve the point." LSA-C.E. Art. 605. Id.

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<sup>109</sup> Id. 595 So.2d 1153.

<sup>110</sup> Id. 595 So.2d 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. 595 So.2d 1156.

<sup>111</sup> Strickland v. Washington, *supra*, 466 U.S. 687.

<sup>112</sup> Id. 466 U.S. 694-95.

<sup>113</sup> Id. 466 U.S. 690-91. In his dissent, Justice Marshall observed that “by ‘strongly presuming’ that [defense counsel’s] behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences on the basis of incompetent conduct by defense counsel.” Id. 466 U.S. 713 (Marshall, J. dissenting)

<sup>114</sup> Id. 466 U.S. 689. For a discussion of how this view of assessing the adequacy of an attorney’s performance differs from that of evaluating the work of other professionals, see Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the*

Quarterly 625, 640-41 (1986).

115 See supra

116 Strickland v. Washington, supra 466 U.S. 688.

117 61 USLW 4155 (1993).

118 754 F.2d 258 (CA8), cert. denied, 474 U.S. 1013 (1985).

119 Id.

120 739 F.Supp. 1334, 1337 (E.D. Ark. 1990).

121 See supra

122 739 F.Supp 1338.

123 946 F.2d 571 (CA8 1991).

124 Lockhart v. Fretwell, supra

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125 754 F.2d 258 (CA8), cert. denied, 474 U.S. 1013 (1985).

126 Lockhart v. Fretwell, supra.

127 871 F.2d 1384 (CA8) cert. denied 493 U.S. 959 (1989).

128 946 F.2d 578.

129 Lockhart v. Fretwell, supra (Stevens J. dissenting).

130 Id. Stevens added 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”. Id.

131 Id.

132 Id. See generally Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103, Yale L.J. 1835, 1864 (it is particularly inappropriate to use the prejudice standard at the penalty phase of a capital case).

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<sup>133</sup> )125a) “Death Row Inmate Spared After Juror Makes Plea,” New York Times, February 6, 1999 at A12. Governor Huckabee is a Republican and former Baptist minister and had not granted Clemency to any other of the individuals who had been scheduled to die since he had become Governor in 1996. *Id.* The Governor stated while announcing the commutation that “I had rather face the anger of the people than the wrath of God.” *Id.*

<sup>134</sup> (125b) *Id.*

<sup>135</sup> (125(c) *Id.* The Governor stated that it was the juror’s comments about defense counsel that led to the commutation. *Id.*

<sup>136</sup> Perhaps that would explain why Irving Kaufman, the former Chief Judge of the Court of Appeals, Second Circuit concluded that court-appointed private counsel who represent indigent defendants are the most incompetent of defense attorneys. Irving Kaufman, “Attorney Incompetence: A Plea for Reform”, 69 A.B.A.J. 308 March 1983. The Judge was speaking from his experience of 21 years on the Second Circuit, as Chief Judge.

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<sup>137</sup> Reported in Crampton and Jesen, The State of Trial Advocacy and Legal

Education: Three New Studies, *Journal of Legal Education* 253, 256 (1979).

<sup>138</sup> 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). The views of state court judges may be similar. See P. Wice, Chaos in the Courthouse: The Inner Workings of the Urban Criminal Courts 88(1985) (judges were generally negative when assessing the competence of criminal defense attorneys).

<sup>139</sup> Burger, The Specialized Skills *supra* at 230. But see Frankel, Curing Lawyers' Incompetence: Primum Non Nocere, 10 *Creighton L.Rev.* 613, 617 (1977) (the main problems with counsel were not their skills or training but rather their laziness and indifference).

<sup>140</sup> 512 U.S. 1256 (1994).

<sup>141</sup> Id. 512 US 1256-57. Justice Blackmun, having sat on the court for \_\_\_\_ years had the opportunity to review an untold number of ineffective assistance of counsel cases.

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<sup>142</sup> Id. 512 U.S. 1257. The Supreme Court itself in 1991 had realized the problems which result from the imposition of inadequate maximum fees and ordered the doubling of the amount paid to represent indigents in capital cases before the Court. In *Re Berger*, 111 S.Ct. 628 (1991). The Court concluded that the maximum permitted under §3006 A(d)(2) of the Criminal Justice Act may “deter otherwise willing and qualified attorneys from offering their services to represent indigent capital defendants.” *Id.* at 629.

<sup>143</sup> Id. 512 U.S. 1258. Stephen Bright, one of the foremost experts in death penalty litigation has written that “No poor person accused of *any* crime should receive the sort of representation that is found acceptable in the criminal courts of the nation today.”

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, 1883.

<sup>144</sup> (133a) “NLADA Board of Directors’ Resolution Calls for End to Death Penalty,” *The Spangenberg Report* Vol. III, Issue 4 (1997) at 5. The Defender Association had, years earlier, enacted Standards for Appointment and Performance of Counsel in Death Penalty Cases.

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<sup>145</sup> Case No. CO57788, Clark County District Court, Nevada (January 16, 1996)

<sup>146</sup> Id. at 2.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id. The District Court Judge granted the defendant’s motion for a new trial. Nine months later, the State informed the Court that it would not seek to retry the case and consented to a dismissal. *Miranda v. Nevada*, Case No. CO57788, Clark County District Court, Nevada, Order Dismissing Case, September 3, 1996.

<sup>150</sup> *Supra*, 466 U.S. 689 (citation omitted).

<sup>151</sup> Id.

<sup>152</sup> (140a The widespread reliance on characterizing as “strategy” that which might be error can be noted by the fact that in the years 1991, 1992, and 1993, Texas courts rejected nearly 40% of the Strickland claims filed by death row inmates. Note, The

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Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials, 107 Harv. L.

Rev. 1923, 1931 (1994).

<sup>153</sup> 84 NY 2d 184 (1994).

<sup>154</sup> Id.

<sup>155</sup> Id. 84 NY 2d 192

<sup>156</sup> Id. The former President of the Louisiana Association of Criminal Defense

Lawyers maintained that the Strickland message to appellate courts is: “We direct you to pretend everything was done for tactical reasons.” Reported in “Fatal Defense: Effective

Assistance: Just A Nominal Right?” National Law Journal, Vol. 12, Number 40, June

11, 1990 at 42.

<sup>157</sup> 64 A.D. 2d 272

<sup>158</sup> Id. 64 A.D. 2d 274.

<sup>159</sup> Id. 64 A.D. 2d 275.

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<sup>160</sup> People v. De Pillo, 168 A.D. 2d 899 (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.

<sup>161</sup> In Re Gay, 19 Cal. 4<sup>th</sup> 771, 779 (1998).

<sup>162</sup> In Re Gay, 19 Cal. 4<sup>th</sup> at 827.

<sup>163</sup> Id. 19 Cal. 4<sup>th</sup> 831 (Mosk, J. concurring). It was found that in the instant case, counsel had engineered his assignment by the court in order to quickly obtain compensation and spent little time or effort on the case. Id. 19 Cal. 4<sup>th</sup> 833 (Werdegar, J. concurring).

<sup>164</sup> People v. Cummings 4 Cal. 4<sup>th</sup> 1233, 1342 (1993) The dissenting judge characterized counsel's failings as pervasive and serious and concluded that the shortcomings had resulted in a breakdown of the adversarial process. Id. (Mosk J. dissenting) at 1343.

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<sup>165</sup> That apparently is what the Court in *People v. Nix*, 173 A.D.2d 285 (1984) required. The Court did not find ineffectiveness: “Nor has the defendant *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.” *Id.* 173 A.D. 2d 286. 104 A.D. 2d 706 (1984)

<sup>166</sup> 104 A.D. 2d. 706 (1984).

<sup>167</sup> Id. 104 A.D. 2d 707. See also *People v. Duvall*, 190 A.D. 988 (in order to show ineffective assistance, defendant “must demonstrate that there was no legitimate explanation for counsel’s failure to make the motion”).

<sup>168</sup> 107 S.Ct. 3248 (1987) The Three Justices were Marshall, Brennan and Blackmun.

<sup>169</sup> Id. 107 S.Ct. 3251 (Marshall, J. dissenting).

<sup>170</sup> *Strickland v. Washington*, *supra* 466 U.S. 690.

<sup>171</sup> Id. 466 U.S. 681

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172 See supra.

173 See supra.

174 See supra.

175 Strickland v. Washington, 466 U.S. 681.

176 And the lower courts took the advice. See e.g. Kimball v. State, 490 A.2d 653, 656 (Me. 1985) where the court acknowledged the need for counsel to conduct an investigation but such obligation must be considered in light of the fact that “[t]rial counsel had a limited budget for investigation.”

177 107 S.Ct. 3248 (1987)

178 Id. 107 S.Ct. 3249

179 Id.

180 Id. The attorney presented his reason for not speaking to the officer: “I personally don’t like the man.”

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Id.

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Id.

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Id. 107 S.Ct. 3251-52.

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963 S.W. 2d 151 (1998)

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Strickland v. Washington *supra* 466 U.S. 695.

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Maestras v. State of Texas, 963 S.W. 2d 161. See also *People v. Noble*, 231 A.D.

2d 800, 801-02 (1966) (failure of counsel to have communicated with his client until the

eve of trial was not ineffectiveness because there were not the cumulative errors

required).

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*People v. De Pillo*, 168 A.D. 2d 899 (1990)

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Id. 168 A.D. 2d 900 (emphasis added).

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For a rare example of a court which did find constitutionally ineffective assistance

based on a single error, see *Mitchell v. State*, 974 S.W.2d 161 (1998). The Court of

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Appeals of Texas held that the failure of counsel to prevent his client from wearing the same T-shirt at trial that the perpetrator in the videotape that recorded the crime had worn, “permeated the entire proceeding.” *Id.* at 167.

<sup>190</sup> 173 A.D. 2d 512 (1991) cert. den. 112 S.Ct. 952 (1992).

<sup>191</sup> Id. 173 A.D. 2d 514.

<sup>192</sup> 112 S.Ct. 952 (1992).

<sup>193</sup> 845 S.W. 2d 824 (1992)

<sup>194</sup> Id. 845 S.W. 2d 843.

<sup>195</sup> Id. 845 S.W. 2d 844.

<sup>196</sup> 884 F.2d 871 (5<sup>th</sup> Cir. 1989).

<sup>197</sup> 438 U.S. 586 (1978).

<sup>198</sup> New York State’s statute, enacted to comply with Lockett, is illustrative of the expansive view of the Lockett Court as to mitigating factors: “[A]ny other circumstance

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concerning the crime, the defendant's state of mind or condition at the time of the crime, the defendant's character, background or record" can be introduced in mitigation. New York State Criminal Procedure Law § 400.27(9)(f).

<sup>199</sup> Romero v. Lynaugh, supra 884 F.2d 875.

<sup>200</sup> See supra.

<sup>201</sup> Romero v. Lynaugh, supra 884 F.2d 876.

<sup>202</sup> Id. 884 F.2d 876-77.

<sup>203</sup> Id. 884 F.2d 879.

<sup>204</sup> Id. 884 F.2d 877.

<sup>205</sup> Id.

<sup>206</sup> Id.

<sup>207</sup> Id.

<sup>208</sup> Id.

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<sup>209</sup> (191a) Not getting paid for one’s lawyering is unlikely to encourage competent representation. Five county commissioners in Georgia, contending that there were no funds available, refused to authorize payment to a counsel who had represented an indigent in a successful appeal of a conviction in a death penalty case. “Commissioners Jailed Over Fees”, American Bar Association Journal, Feb. 1992 at 17. A Superior Court Judge proceeded to incarcerate the commissioners, and after twenty four hours, the commissioners convened a special session in the jail and authorized the appropriation.

Id.

<sup>210</sup> *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). The Court held that the previously established right to counsel on appeal “would be a futile gesture unless it comprehended the right to the effective assistance of counsel.”

<sup>211</sup> See *supra*

<sup>212</sup> The Commentary to the Standard warns 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

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to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose their inadequacy.”

<sup>213</sup> Perhaps that was the reason that appellate counsel in *Jackson v. Leonardo*, 1998 WL 835124 (2<sup>nd</sup> Cir. 1998) was so neglectful and careless as to fail to raise a “well-established, straightforward, and obvious double jeopardy claim.”

<sup>214</sup> 917 F.Supp. 1238 (1996).

<sup>215</sup> Id. 917 F.Supp. 1247. The state appellate defender in Chicago had previously sought to withdraw from ten capital cases because inadequate funding had prevented the office from filing timely briefs. “Funding Cuts Spark Court Crisis,” *National Law Journal*, August 1, 1992 at 3. 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. Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for 1997 (1998) at 54.

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<sup>216</sup> Id. 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. 917 F.Supp. 1263-64.

<sup>217</sup> 561 So. 2d 1130 (Fla. 1990).

<sup>218</sup> Id. 561 So. 2d 1135.

<sup>219</sup> As the 7<sup>th</sup> Circuit commented about information which allegedly should have been known of and used by trial counsel on the defendant’s behalf: “Under usual circumstances, we would expect that. . . information would be presented to the habeas court through the testimony of the potential witnesses.” *United States ex rel Cross v. De Robertis*, 811 F.2d 1008, 1016 (7<sup>th</sup> Cir. 1987).

<sup>220</sup> The task of proving prejudice is clearly a substantial one because “[a] court cannot engage in sheer speculation about what an investigation by counsel might have

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revealed or what witnesses he might have called.” *Wingate v. United States*, 669 A.2d

1275, 1287 (1995) citing *Williams v. United States*, 421 A.2d 19, 25 (1980).

<sup>221</sup> *Strickland v. Washington*, supra 466 U.S. 689.

<sup>222</sup> See e.g. *Lockhart v. Fretwell*, supra note

<sup>223</sup> See e.g. *People v. Garrison*, supra note

<sup>224</sup> See e.g. 750 F.2d 444, supra note

<sup>225</sup> See e.g. *State v. Alpaca*, supra note

<sup>226</sup> See e.g. *Foy v. United States*, infra note

<sup>227</sup> See e.g. *Madden v. Township of Delran*, supra note

<sup>228</sup> See e.g. *People v. Tippins*, supra note

<sup>229</sup> The Court advised that an appeals 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. . . . If it is easier to dispose of an ineffectiveness claim

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on the ground of lack of sufficient prejudice, *which we expect will often be so*, that course should be followed. *Strickland v. Washington*, supra 466 U.S. 697 (emphasis added).

<sup>230</sup> Id. 466 U.S. 697.

<sup>231</sup> (212a) Some failings of counsel can't be remedied in any event. See eg. *Smith v. Murray*, 477 U.S. 527, 539 (1986) (no relief from an unconstitutional sentence due to the counsel's failure to have acted to preserve the issue).

<sup>232</sup> The Supreme Court, itself had clearly recognized this point more than fifty years earlier in the landmark case of *Powell v. Alabama*, 287 U.S. 45 (1932). Powell held that in capital cases, the Fourteenth Amendment's Due Process Clause required the appointment of counsel for an indigent defendant. The Powell Court, in reviewing the effectiveness of the defendant's counsel observed that "it is not enough that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the Court could say what a prompt and thoroughgoing investigation might disclose as to the facts." Id. 287 U.S. 58.

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<sup>233</sup> For example, Marshall characterizes the majority’s two-prong approach as

“unhelpful” and “unacceptable”. *Strickland v. Washington*, supra 466 U.S. 707

(Marshall J. dissenting).

<sup>234</sup> Id. 466 U.S. 710.

<sup>235</sup> In a rare and insightful opinion, the court in *Mitchell v. State*, 974 S.W.2d 161

(1998) recognized that some defendants are especially in need of effective, 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.*

<sup>236</sup> Contrast this to the Court’s earlier holding in *Holloway v. Arkansas*, 435 U.S.

475, 489 (1978): “This 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.” See also *Chapman v. California*, 386 U.S. 18, 22 (1967) (the

constitutional rights basic to a fair trial can never be deemed harmless error).

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<sup>237</sup> Clearly not all agree with this – certainly not the Second Circuit Court of Appeals.

In *United States v. Katz*, 425 F.2d 928 (2d Cir. 1970), the counsel whose representation was being challenged in this ineffectiveness claim had fallen asleep on at least two occasions while a witness was testifying. If sleeping is indicative of lack of enthusiasm, then the sleeping was to be expected. Early in the trial, counsel had told the judge that the “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.” *Id.* 425 F.2d 931. The 2<sup>nd</sup> Circuit, however, did not find ineffective assistance because, in part, “[w]hen as here, the prosecution has an overwhelming case based on documents and testimony of disinterested witnesses, there is not too much the best defense attorney can do.” *Id.* *Id.* 425 F.2d 930. Therefore, one must assume, it really just didn’t matter that counsel had fallen asleep.

<sup>238</sup> See ABA Criminal Justice standards, *supra*, Commentary to Defense Function Standard 4-7.6 (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

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prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed the client").

<sup>239</sup> The prejudice prong does operate for the penalty phase of a capital case which leads to results like that in *Duhamel v. Collins*, 955 F.2d 962 (5<sup>th</sup> Cir. 1992). The court concluded that even though counsel presented no mitigating evidence and failed to conduct the needed investigation, the death sentence would stand because the very strong evidence of guilt and the brutality of the murder would have meant that the jury would have chosen death even if counsel had provided competent representation. *Id.* at 966.

<sup>240</sup> The Supreme Court itself in *Engle v. Isaac*, 456 U.S. 107, 134 (1982) referred to the constitutional guarantee for a criminal defendant to have "a fair trial and a competent attorney."

<sup>241</sup> President's Commission on Law Enforcement and Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* viii (1967). 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.

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<sup>242</sup> In contrast to holdings such as *Holloway v. Arkansas*, *supra* which focus on the need for the trial itself to be a fair one and in the absence of proper, effective counsel a conviction ought be vacated without regard to prejudice.

<sup>243</sup> The Court itself, years earlier, did realize the dangers in attempting to assess prejudice: “The right to have 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.” *Glasser v. United States*, 315 U.S. 60, 76 (1942).

<sup>244</sup> *Chapman v. California*, 386 U.S. 18, 24 (1967). The Supreme Court, however, in *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1720-22 (1993) held that the Chapman standard of harmless error beyond a reasonable doubt is not applicable to habeas petitions.

<sup>245</sup> 487 F.2d 1197 (D.C. Circuit 1973).

<sup>246</sup> Id. 487 F.2d 1204

<sup>247</sup> The Supreme Court had proudly pronounced in *Gideon v. Wainwright*, *supra* 372 U.S. 344 (1963) that: “The right of one charged with crime to counsel may not be deemed

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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.”

<sup>248</sup> See e.g. *In Re Gay*, 19 Cal. 4<sup>th</sup> 771, 830 (1998) (in order to overturn the sentence of death, the court must find that there is a reasonable probability that were it not for counsel’s failings, there would not have been the death sentence).

<sup>249</sup> 675 F.2d 1126 (10<sup>th</sup> Circuit 1982) reversed 466 U.S. 648 (1984).

<sup>250</sup> Id. 675 F.2d 1128.

<sup>251</sup> Id. (citations omitted).

<sup>252</sup> 466 U.S. 648 (1984).

<sup>253</sup> *Supra*

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<sup>254</sup> (232a) 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. The case was a most complex one involving an alleged nine million dollar fraud, yet counsel was allowed only twenty five days to prepare for trial. *Id* at

<sup>255</sup> U.S. v. Cronic, *supra* 466 U.S. 650-51.

<sup>256</sup> 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 10<sup>th</sup> Circuit overturned the conviction holding that Cronic did not have the assistance of counsel guaranteed by the Sixth Amendment. 675 F.2d 1126. The Supreme Court reversed and remanded for a consideration of the ineffectiveness claim “under the standards enunciated in *Strickland v. Washington*.” 466 U.S. 648, 667, n. 41. The District Court upheld the conviction, 839 F.2d 1401 and 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. *Id.* 839 F.2d 1403. A

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new trial was ordered, at which Cronic was again convicted. The 10<sup>th</sup> Circuit again vacated the conviction, finding that the defendant's acts did not come within the scope of the United States mail fraud statute. 900 F.2d 1511 (10<sup>th</sup> Cir. 1990). 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 trial upon these charges impermissible under the Fifth Amendment Double Jeopardy Clause." The defendants' alleged crime had occurred in 1975, this final decision was 15 years thereafter.

<sup>257</sup> Brennan, *State Constitutions and Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

<sup>258</sup> The statement by the Texas Criminal Appeals Court is typical: The test for ineffective assistance of counsel under the state and federal constitutions are the same." *Hernandez v. State*, 726 S.W. 2d 53, 57 (Tex. Crim. App. 1986).

<sup>259</sup> 74 Haw. 442, 848 P.2d 966 (1993).

<sup>260</sup> Id. 74 Haw. 464 n. 12.

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<sup>261</sup> 75 Haw. 54, 837 P.2d 1298 (1992).

<sup>262</sup> Id. 837 P.2d 1308 (emphasis added).

<sup>263</sup> Victor E. Flango, Patricia McKenna, Federal Habeas Corpus Review of State Court Convictions, 31 Cal. W.L. Rev. 237, 259-60 (1995). An earlier analysis restricted to Federal Circuit Courts of Appeal found that only 4% of post-Strickland ineffectiveness claims were upheld. Floyd Feeney and Patrick G. Jackson, Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Matter? 22 Rutgers L.J. 361, 426 (1991).

<sup>264</sup> 512 U.S. 1256, 114 S.Ct. 2785 (1994).

<sup>265</sup> Id. 512 U.S. 1259, 114 S.Ct. 2787 (citing Strickland v. Washington, 466 U.S. at 685). Blackmun went on to discuss the “impotence” of Strickland. Id. Justice Brennan has been somewhat more restrained: “Strickland’s standard, although by no means insurmountable, is highly demanding.” Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

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<sup>266</sup> 819 F.2d 1382 (7<sup>th</sup> Cir. 1987).

<sup>267</sup> Id. 819 F.2d 1391. Few indeed. 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. “Fatal Defense: Effective Assistance: Just a Nominal Right?”, National Law Journal, Vol. 12, Number 40, June 11, 1990 at 42.

<sup>268</sup> As reported in Stephen B. Bright, Glimpses of a Dream Yet to be Realized, The Champion, March 1998.

<sup>269</sup> 95 F.3d 481 (7<sup>th</sup> Cir. 1996) hearing en banc den. 102 F.3d 872.

<sup>270</sup> Id.

<sup>271</sup> Id. The Court further explained that the harm to a defendant because his counsel was ineffective in getting reliable evidence suppressed did not relate to any judgment of his guilt or innocence but rather constituted the absence of a windfall.

<sup>272</sup> 838 F.Supp. 38 (E.E.N.Y. 1993).

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<sup>273</sup> Id. The lawyer was being prosecuted for fraud in the filing of a mortgage application. The lawyer’s cooperation agreement with the U.S. Attorney never led to the anticipated plea because the prosecutors concluded that counsel once again was not being truthful and the Office withdrew from the agreement. Id. 838 F.Supp. 44

<sup>274</sup> Id. The counsel ultimately did plead and received a 12 month sentence. Id. 838 F.Supp. 44.

<sup>275</sup> Id. 838 F.Supp 38.

<sup>276</sup> Strickland v. Washington, supra 466 U.S. 690.

<sup>277</sup> Id.

<sup>278</sup> See supra. The Justices wouldn’t even have had to engage in extensive research to have discovered the problems of indigent defense counsel. One of their own -- former Chief Justice Warren Burger -- wrote that “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

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assigned private counsel or by the public defender office.” Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 *Fordham L.Rev.* 227 (emphasis added). See also Chief Judge of the D.C. Circuit Court of Appeals David Bazelon, *The Defective Assistance of Counsel*, 42 *U. Cin. L. Rev.* 1 (1973); Chief Judge of the Court of Appeals for the Second Circuit Irving Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 *A.B. A.J.* 308 (1983).

<sup>279</sup> *Strickland v. Washington*, supra 466 U.S. 690.

<sup>280</sup> National Institute of Justice, *NATIONAL ASSESSMENT PROGRAM: PRELIMINARY SURVEY RESULTS OF PUBLIC DEFENDERS 1-4* (1990).

<sup>281</sup> Id.

<sup>282</sup> (258a) Although many states do permit counsel to charge for a higher number of hours in a death penalty case, the permissible time does not come anywhere near the 400 to 1,000 hours that experts estimate are required to conduct the investigation and research required for a capital case. Stephanie Saul, “When Death is the Penalty: Attorneys for

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Poor Defendants Often Lack Experience and Skill,” New York Newsday, Nov. 25, 1991

at 8. Counsel appointed in capital cases would in many instances face economic ruin if they did all that was required to provide the appropriate level of representation.

<sup>283</sup> 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, *CRIMINAL JUSTICE IN CRISIS* 7-8 (1988) stated: “[T]he trial bar is not fulfilling its obligation to participate through the representation of indigent defendants, and as a result, the shunning of criminal defense 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.” 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. The proposal is based on an acknowledgment that the indigent have no political power and, therefore, “this proposal is a way to recruit the wealthy into becoming advocates for the improvement of our

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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 Marquette Law Review 47, 78 (1997).

<sup>284</sup> Madden v. Township of Delran, 601 A.2d 211 (1992).

<sup>285</sup> This was in direct violation of Standard 5-2.4 of the ABA Standards for Criminal Justice, Chapter 5 Providing Defense Services, *supra*, which provides that “Assigned counsel should receive prompt compensation at a reasonable hourly rate.” In spite of the ABA Standard, a similar situation to that in New Jersey had 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.

<sup>286</sup> The Court had before it a case which was brought by lawyers who had been appointed, against their will, to represent indigent defendants. Since there was no

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compensation provided the counsel were claiming that the mandated assignment was an unconstitutional taking of property without due process or just compensation. The only lawyers who would be assigned by the court were those counsel who regularly appeared in municipal court. The Supreme Court's decision not only didn't grant the lawyers relief, but expanded the claimed-denial-of-due-process to include all attorneys whose primary office was in the township of Delran.

<sup>287</sup> National Legal Aid and Defender Association, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997), Guideline 1.2(b): "Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation." No training, of course, was called for by the Court.

<sup>288</sup> Standard 5-2.2 rejects the idea that all members of the bar should be required to provide representation to indigent defendants. ABA Standards for Criminal Justice, *supra*, Commentary to Standard 5-2.2.

<sup>289</sup> (264a) 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, *supra* note \_\_\_\_

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, which even in the hardest of times realized the need to continue its extensive and intensive training program. Report of the Indigent Defense Organization Oversight Committee to the Appellate Division, First Department for 1996 (1997) at 11. The cutback in funds, however, did mean that the supervision of these lawyers, once trained, became “dangerously low.” *Id.* at 13.

<sup>290</sup> *Madden v. Township of Delran*, supra 601 A.2d 219. A similar occurrence happened in Tennessee where a caseload crisis led to the drafting of 1200 practicing and non-practicing lawyers in Knoxville to accept assignments without compensation.

“Criminal Crash Course.” 78 A.B.A. J. 14 (April 1992).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* 601 A.2d 215.

<sup>293</sup> *Strickland*, 466 U.S. 668 (1984).

<sup>294</sup> 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

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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.

<sup>295</sup> See supra notes 12-18.

<sup>296</sup> See e.g. the amicus curiae brief of the National Legal Aid and Defender

Association urging Supreme Court affirmance of the Fifth Circuit holding in Strickland v.

Washington 693 F.2d 1243.

<sup>297</sup> See supra note 5.

<sup>298</sup> 383 U.S. 541 (1966).

<sup>299</sup> Id. at 561 (emphasis added).

<sup>300</sup> 442 U.S. 707 (1979).

<sup>301</sup> Id. at 719 (emphasis added).

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<sup>302</sup> 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).

<sup>303</sup> 387 U.S. 1 (1967).

<sup>304</sup> 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*: "Courts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.* at 503.

<sup>305</sup> 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).

<sup>306</sup> 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

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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 on behalf of his client." *Id.* at 744. See also *Wheat v. United States*, 486 U.S. 153 (1988) (the purpose of the Sixth Amendment is to guarantee an effective counsel for every defendant).

<sup>307</sup> See *supra* notes 19-67.

<sup>308</sup> See e.g. Randall Coyne, Capital Punishment and the Judicial Process (Teacher's Manual 148) (1995).

<sup>309</sup> 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).

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<sup>310</sup> See e.g. Richard Klein, The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, 29 Boston College L. Rev. 531 (1988).

<sup>311</sup> Strickland, 466 U.S. at 690.

<sup>312</sup> See supra notes 63-67.

<sup>313</sup> Gideon v. Wainwright, 372 U.S. 335 (1963).

<sup>314</sup> Professor Yale Kamisar, for instance, has observed that Gideon is “one of the most popular decisions ever handed down by the United States Supreme Court.” Yale Kamisar, The Gideon Case 25 Years Later, N.Y. Times, Mar. 10, 1988 at A27.

<sup>315</sup> Judge David Bazelon, former Chief Judge of the D.C. Circuit Court of Appeals and a lifelong advocate of quality representation for the indigent defendant, has written that “if 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 (1976) (Bazelon, J. dissenting) (emphasis added). Instead of

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seeking to condemn ineffective representation, the Court's 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 defending the Society from the sharp criticism regarding the quality of representation provided by Legal Aid which was presented in a report of the Association of the Bar of the City of New York: "*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 (emphasis added). *Of course*, effective lawyering means doing *all that is required*; in recent years, however, courts have systematically accepted far less.