Journal of Criminal Law and Criminology

Volume 75
Issue 3 *Fall*

Article 11

Fall 1984

Sixth Amendment--Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel

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0091-4169/84/7503-755
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 75, No. 3

Printed in U.S.A.

SIXTH AMENDMENT—DEFENDANT'S DUAL BURDEN IN CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Strickland v. Washington, 104 S. Ct. 2052 (1984).

I. INTRODUCTION

In *Strickland v. Washington*,[1] the Supreme Court, for the first time, established standards for determining whether a defense attorney's performance denied a defendant the constitutional right to effective assistance of counsel.[2] The Court held that a defendant must overcome two separate burdens to establish a claim of ineffective assistance.[3] First, a defendant must show that counsel acted "unreasonably" as measured by the prevailing norms of the profession.[4] Second, a defendant must show that counsel's incompetent assistance prejudiced the defense by rendering the proceeding fundamentally unfair.[5] The Court stated that the defendant need not prove that counsel's unreasonable conduct likely affected the outcome of the case; the defendant need prove only that the incompetent assistance created a reasonable probability that, but for

1 104 S. Ct. 2052 (1984).

2 The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Recognizing the "fundamental fairness" notion in the sixth amendment, the Supreme Court has held that, in capital cases, the due process clause of the fourteenth amendment requires the effective appointment of counsel. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932). More recently, the Court has noted that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (citing Reece v. Georgia, 350 U.S. 85, 90 (1955)). The *McMann* Court further stated that counsel must not commit "serious derelictions," but rather, must perform "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771. This requirement of competence, however, was not accompanied by a clear articulation of the level of effectiveness that is guaranteed by the Constitution. Before *Strickland v. Washington*, the Court had not applied the *McMann* language to a claim of ineffective assistance based on the defense counsel's failure to investigate the case adequately. *See* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752, 755 (1980); *see also infra* note 48.

3 104 S. Ct. at 2064.

4 *Id.* at 2066.

5 *Id.* at 2068.

counsel's errors, the outcome would have been different.[6] The Court held that this standard is applicable to ineffective assistance claims emanating from all proceedings—capital or otherwise.[7] Because the defendant, Washington, could not meet either of the two burdens established by the Court, the Supreme Court upheld his sentence of death.[8]

This Note will argue that the Supreme Court erred in establishing its two-tiered test to determine whether counsel adequately assisted the defendant. Imposing the burden upon the defendant of proving both incompetence and prejudice is unnecessary and unfair. The Court offered no convincing justification for why the defendant, rather than the state, should be required to prove prejudice. Furthermore, the Court could have directed trial court judges to use the pretrial conference to discover an attorney's unreasonable behavior before the trial or sentencing hearing begins and thereby prevent unnecessary, repetitive litigation due to defendants' charges of ineffective assistance of counsel.

The Court aggravated its error by applying an unfair and unnecessarily vague standard to defendants accused of capital crimes. The Court did not need to create such a vague standard of "reasonableness" for attorney conduct at a capital sentencing hearing. The Court easily could have established concrete minimum guidelines that attorneys must follow when representing a capital defendant. Such guidelines would not greatly hinder counsel's independence or imagination, but would increase the likelihood that defendants receive adequate representation when facing the prospect of execution.

II. FACTS

In September 1976, David Leroy Washington planned and committed three stabbing murders during a ten-day period.[9] Washington later surrendered and confessed to the third murder.[10] The State of Florida appointed an experienced criminal lawyer to represent him.[11] Counsel actively pursued pretrial matters and discovery but experienced a sense of hopelessness after Washington

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6 *Id.*

7 *Id.* at 2064.

8 *Id.* at 2071.

9 *Id.* at 2056. The "brutal" murders were accompanied by "torture, kidnapping, severe assaults, attempted murder, attempted extortion and theft." *Id.*

10 *Id.* Washington was indicted for kidnapping and murder. *Id.*

11 *Id.*

confessed to the first two murders.[12] Acting against counsel's advice, Washington pleaded guilty to all the charges, including the three capital murder charges.[13] In the plea colloquy, Washington admitted his crimes and told the judge he had no significant criminal history. The trial judge told Washington that he respected Washington's admission of responsibility but did not comment on the upcoming sentencing.[14]

In preparing for the sentencing hearing, the defense counsel talked to Washington about his background and spoke on the telephone with his wife and his mother, but did not meet with them.[15] He did not request a psychiatric examination,[16] nor did he attempt to locate character witnesses for his client.[17] Counsel purposely declined to present any character evidence in order to prevent the state from cross-examining Washington about his background or putting forth psychiatric testimony.[18] Counsel also used other strategies to prevent the introduction of evidence of Washington's criminal history.[19]

At the sentencing hearing, counsel asserted that Washington's "remorse and acceptance of responsibility justified sparing him from the death penalty."[20] He also argued that Washington had no criminal history and committed the crimes under mitigating circumstances.[21] He further stressed that Washington should be spared the death penalty because he had surrendered, confessed, offered to testify against his accomplices, and "was fundamentally a good person who had briefly gone badly wrong in extremely stressful

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12 *Id.* Washington's confession was against the specific advice of appointed counsel. *Id.*

13 *Id.* at 2057. Washington was indicted for "three counts of first degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder and conspiracy to commit robbery." *Id.* at 2056-57.

14 *Id.* at 2057.

15 *Id.*

16 *Id.* Counsel's interaction with Washington gave "no indication that respondent had psychological problems." *Id.*

17 *Id.* The decision not to investigate and present character evidence resulted from counsel's "sense of hopelessness" about overcoming the effect of Washington's confessions. *Id.*

18 *Id.*

19 *Id.* Counsel successfully moved to exclude Washington's "rap-sheet" from evidence at the sentencing hearing. He did not request a presentence report because it also would include Washington's criminal record. *Id.*

20 *Id.* Counsel's "strategy" was founded on the trial judge's remarks at the hearing as well as the judge's reputation for believing it essential that defendants accept responsibility for their conduct. *Id.*

21 *Id.* The mitigating circumstances were extreme mental or emotional disturbance caused by Washington's inability to support his family. *Id.*

circumstances."[22] Defense counsel did not cross-examine the state's medical experts, who testified about the manner of death of respondent's victims.[23]

The trial judge found several aggravating factors[24] with regard to each of the three murders.[25] He did not find any significant mitigating circumstances that outweighed the aggravating factors.[26] He sentenced Washington to death on each of the three counts, and the Florida Supreme Court upheld the sentences on direct appeal.[27]

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[22] *Id.*

[23] *Id.*

[24] In Florida, the sentencer is directed to balance the aggravating and mitigating factors in determining whether to impose the death sentence. FLA. STAT. ANN. § 921.141(2) (West Supp. 1985). For a brief description of such a balancing process, see *infra* note 140. Florida's statute lists nine possible aggravating factors:

> (a) The capital felony was committed by a person under sentence of imprisonment. (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (c) The defendant knowingly created a great risk of death to many persons. (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (f) The capital felony was committed for pecuniary gain. (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (h) The capital felony was especially heinous, atrocious, or cruel. (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Id. at § 921.141(5). The state's capital sentencing scheme also identifies seven suggested mitigating circumstances:

> (a) The defendant has no significant history of prior criminal activity. (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's conduct or consented to the act. (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (e) The defendant acted under extreme duress or under the substantial domination of another person. (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (g) The age of the defendant at the time of the crime.

Id. at § 921.145(6).

[25] 104 S. Ct. at 2057-58. The judge found that all three murders were especially heinous, atrocious, and cruel, were committed in the course of at least one other dangerous and violent felony, for pecuniary gain, to avoid arrest for accompanying crimes, and to hinder law enforcement. *Id.* at 2058.

[26] *Id.* at 2058. Washington's alleged lack of criminal history was offset by the fact that he admitted he had "engaged in a course of stealing" during the murder spree. The judge found that Washington could appreciate the criminality of his acts. He also held that Washington's relative youth (26 years) was not a mitigating factor because he had planned the crimes and had disposed of the proceeds from the thefts. *Id.*

[27] Washington v. State, 362 So. 2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). David Leroy Washington was executed on July 13, 1984. Henderson, *Executioner Stays Busy in Florida*, Dallas Times-Herald, Nov. 4, 1984, § A, at 1, col. 1.

III. Disposition of Appeal

Washington sought collateral relief in state court, asserting that his defense counsel had rendered ineffective assistance at the sentencing proceeding.[28] The trial court denied relief, finding that the evidence conclusively showed that the claim of ineffective assistance was without merit.[29] The trial court concluded that Washington "had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding."[30] The Florida Supreme Court affirmed the trial court's denial of relief.[31] That court concluded that Washington had not made out a prima facie case of substantial deficiency or possible prejudice.[32]

After exhausting his appeals in the state courts, Washington filed a petition for a writ of habeas corpus in federal court.[33] The

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[28] 104 S. Ct. at 2058. Washington asserted that counsel was ineffective because he failed to (1) move for a continuance to prepare for sentencing; (2) request a psychiatric report; (3) investigate and present character witnesses; (4) seek a presentence investigation report; (5) present meaningful arguments to the sentencing judge; and (6) investigate the medical examiner's reports or cross-examine the medical experts. *Id.*

[29] *Id.* The trial court held that the ineffective assistance claim was meritless because there was no ground for counsel to request a continuance, the admission of a presentence report would have undermined Washington's assertion of no criminal history, counsel's argument at sentencing hearing was "admirable," counsel's failure to cross-examine the medical witnesses was not error, counsel's failure to order a psychiatric examination was not prejudicial error because there was no indication of major mental illness at the time of the crimes, and counsel's failure to develop and present character witnesses was not prejudicial error. *Id.* at 2058-59.

[30] *Id.* at 2059. The trial court applied the standard for ineffective assistance claims articulated by the Florida Supreme Court in Knight v. State, 394 So. 2d 997 (Fla. 1981). 104 S. Ct. at 2059. In *Knight*, the Florida Supreme Court considered an ineffective assistance claim of a defendant facing the death penalty. The Florida Supreme Court embraced the four-step analysis adopted in United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) [*Decoster III*]. *Knight*, 394 So. 2d at 1000. The defendant must show: (1) a specific omission or overt act by counsel upon which the claim is based; (2) that the act was a "substantial and serious deficiency measurably below that of competent counsel"; and (3) that the deficiency was "substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." *Id.* at 1000-01. Finally, if defendant meets this burden, (4) the state can rebut the presumption of ineffective assistance by showing "beyond a reasonable doubt that there was no prejudice in fact." *Id.* at 1001.

Interestingly, the *Knight* court recognized that in applying the standard of reasonableness, "death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." *Id.* The United States Supreme Court made no such comment in *Washington*. *See infra* note 147 and accompanying text.

[31] Washington v. State, 397 So. 2d 285 (Fla. 1981).

[32] *Id.* at 287.

[33] 104 S. Ct. at 2060. Washington filed the writ in the United States District Court for the Southern District of Florida. *Id.*

federal district court concluded that, although trial counsel had erred by failing to further investigate mitigating evidence, Washington's defense was not prejudiced as a result of this error.[34] The court reiterated that there was not a significant possibility that any of counsel's errors affected the outcome of the sentencing proceeding.[35] Thus, the court denied the petition.[36]

The Court of Appeals for the Eleventh Circuit reversed the district court and remanded the case for new factfinding.[37] The Eleventh Circuit, en banc, developed its own standards for considering ineffective assistance claims.[38] The court of appeals stated that the sixth amendment requires reasonably effective assistance under the circumstances.[39] This standard imposes on counsel a duty to investigate.[40] Although it need not be exhaustive, the investigation must include an independent examination of the relevant facts, circumstances, pleadings, and laws.[41] If many defenses are available, the court of appeals usually will respect counsel's objective strategic decision to forego some investigation in favor of another.[42] This deference to strategic choices is related to the reasonableness of counsel's judgments on which the choices are based.[43] When counsel's strategy represents a reasonable choice of defense, based upon reasonable assumptions, counsel need not investigate defenses that he or she will not employ at trial.[44]

The court of appeals further noted that where the prosecution is not directly responsible for the deficient performance by counsel,[45] the defendant must show that counsel's errors "resulted in

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34 *Id.*

35 *Id.*

36 *Id.*

37 Washington v. Strickland, 693 F.2d 1243, 1263-64 (11th Cir. 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984). The Eleventh Circuit, then Unit B of the Fifth Circuit, decided to rehear the case en banc after a Fifth Circuit panel, in Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), had affirmed in part, vacated in part, and remanded with instructions to apply the standards for analyzing ineffective assistance claims that the Fifth Circuit panel had developed in its opinion. Washington v. Strickland, 679 F.2d 23 (11th Cir. 1982) (granting rehearing en banc).

38 *Washington*, 693 F.2d at 1250-62.

39 *Id.* at 1250. The Supreme Court noted that the court of appeals had "remarked in passing that no special standard applies in capital cases." *Washington*, 104 S. Ct. at 2060.

40 *Washington*, 693 F.2d at 1251.

41 *Id.*

42 *See id.* at 1254. The court of appeals stated that because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decision, strategic choices must be respected in these circumstances if they are based on professional judgment. *Id.* at 1254.

43 *See id.*

44 *Id.* at 1255.

45 *Id.* at 1262. In cases of "outright denial of counsel, of affirmative government

actual and substantial disadvantage to the course of his defense."[46] A majority of the en banc court of appeals agreed to remand the case to apply the newly announced standards.[47]

The Supreme Court granted certiorari to determine the standards by which to judge a claim that defense counsel's specific errors undermined defendant's constitutional right to effective assistance of counsel.[48]

IV. THE SUPREME COURT DECISION

In *Strickland v. Washington*, the Supreme Court[49] ruled that a successful claim of ineffective assistance of counsel must show that counsel's performance was deficient and that this deficient representation prejudiced the defense.[50] Thus, the defendant must prove that counsel's representation was unreasonable under professional norms and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[51] The Court rejected the notion that the defendant's burden should be less in cases involving the death penalty.[52] Furthermore, the Court established a strong presumption in ineffective assistance claims that counsel's performance falls within the realm of reasonable professional assistance.[53] The Court maintained that its holding did not establish mechanical rules, but rather

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interference in the representation process, or of inherently prejudicial conflict of interest," the Supreme Court has held that a special showing of prejudice is unnecessary to reverse a judgment because of ineffective assistance of counsel. *Washington*, 104 S. Ct. at 2061 (citing *Washington*, 693 F.2d at 1258-59). *See also infra* note 161.

46 693 F.2d at 1262. The court of appeals reasoned that this standard would discourage insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. *Id.* at 1260-62. Though the appellate court did not require the defendant to prove that the errors *actually affected* the outcome of the proceeding, "even if the defense suffered actual and substantial disadvantage, the state may show in the context of *all* the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." *Id.* at 1262 (citation omitted) (emphasis in original).

47 *Id.* at 1263.

48 Strickland v. Washington, 103 S. Ct. 2451 (1983) (grant of certiorari). The petition for certiorari presented a new issue before the Court. Justice O'Connor stated that the Supreme Court "has never directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial." 104 S. Ct. at 2062.

49 Justice O'Connor's majority opinion was joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens. Justice Brennan concurred in part and dissented in part. Justice Marshall dissented in full.

50 104 S. Ct. at 2064.

51 *Id.* at 2068. *Cf. Washington*, 693 F.2d at 1262 (defendant must show that counsel's error worked an actual and substantial disadvantage to defense).

52 104 S. Ct. at 2069.

53 *Id.* at 2065-66.

operated as a guide for the decision process.[54] It stressed that a court's ultimate focus must be on the fundamental fairness of the challenged proceeding.[55] Applying its new standard, the Court reversed the Eleventh Circuit and held that Washington's defense was the result of reasonable professional judgment and that there was no reasonable probability that any errors could have affected the outcome of the sentencing hearing.[56]

The Court noted that no prior Supreme Court decision had directly addressed a claim of counsel's actual ineffective assistance in a case at trial.[57] Because the Court had not squarely decided the proper standard for ineffective assistance, lower courts have adopted varying tests with respect to the standard of prejudice that a defendant must show in an ineffective assistance claim.[58] The Court granted certiorari to clarify the proper standard.[59]

The Court held that the defendant must overcome two distinct burdens to succeed with an ineffective assistance claim. The first prong of the *Strickland v. Washington* test requires that the defendant show that counsel's performance was inadequate.[60] In short, the defendant must show that counsel's representation "fell below an objective standard of reasonableness."[61]

A court deciding an ineffective assistance claim must determine

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54 *Id.* at 2069.

55 *Id.*

56 *Id.* at 2071.

57 *Id.* at 2062. *See supra* note 2 and accompanying text.

58 104 S. Ct. at 2063. The first standard established by the lower courts was the "farce and mockery" standard. *See* Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). The standard provided that defendant's sixth amendment right to counsel was violated only when the lawyer's incompetence was so gross that the criminal proceedings became "a farce and mockery of justice." *Id.* at 669. This standard fell into disrepute when it became clear that the standard was so minimal that it was a mockery of the sixth amendment itself. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973). Over the past 20 years, most jurisdictions have substituted the "farce and mockery" standard with a "community standards" or "reasonable lawyer" rule under which the attorney must perform. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 239 (1979). These courts followed the teaching of *McMann*, which demanded that attorneys provide "advice within the range of competence demanded by attorneys in criminal cases." *McMann*, 397 U.S. 759, 771 (1969). All federal circuit courts and most state courts have adopted some formulation of the "reasonably effective assistance" standard in assessing attorney performance. *Washington*, 104 S. Ct. at 2062 (citing Trapnell v. United States, 725 F.2d 149, 151-52 (2d Cir. 1983); Brief for United States at 3a-6a, United States v. Cronic, 104 S. Ct. 2039 (1984); Annot., 2 A.L.R. 4TH 27, 99-157 (1980)).

59 Strickland v. Washington, 103 S. Ct. 2451 (1983) (grant of certiorari).

60 104 S. Ct. at 2064.

61 *Id.* at 2065. The Court considered more specific guidelines to be "not appropriate." *Id.* The sixth amendment implicitly relies on the "legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in

the reasonableness of counsel's conduct by looking at the facts of the case,[62] viewed at the time of counsel's conduct.[63] The defendant must identify counsel's acts or omissions that constitute an unreasonable professional judgment.[64] In light of all the circumstances, the court must determine whether the identified acts or omissions fell beyond the broad range of professionally competent assistance.[65]

In making this determination, a court's scrutiny of counsel's performance must be highly deferential.[66] Because of the difficulties of fairly evaluating counsel's performance with hindsight, the court must strongly presume that counsel's conduct was within the range of reasonable professional assistance."[67]

Proof of an unreasonable error under professional norms will not, in itself, require reversal of a conviction.[68] The second prong of the *Strickland v. Washington* test requires that any deficiencies in counsel's performance must prejudice the defense.[69] The defendant has the burden of proving prejudice in most claims of ineffective assistance.[70] The Court reasoned that attorney errors come in many forms and are as likely to be harmless as prejudicial in any particular case.[71] Because legal representation is not an exact science and the

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its adversary process that the Amendment envisions." *Id.* (citing Michel v. New York, 350 U.S. 91, 100-01 (1955)).

62 *Id.* at 2065. The Court noted that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* The Court refused to prescribe a set of rigid rules that would define counsel duties in all cases. Though the Court recognized several duties that counsel always owes the defendant, it elected not to stultify the independence of counsel, but rather, to grant counsel "wide latitude . . . in making tactical decisions." *Id.*

63 *Id.* at 2066. The Court stressed that a court should be reluctant to second guess counsel's strategic decisions with its benefit of hindsight. Justice O'Connor wrote that "every effort [must] be made to eliminate the distorting effects of hindsight, . . . and to evaluate the conduct from counsel's perspective at the time." *Id.* at 2065.

64 *Id.* at 2066.

65 *Id.*

66 *Id.* at 2065.

67 *Id.* at 2066.

68 *Id.* at 2067.

69 *Id.*

70 *Id.* In some cases prejudice is presumed. These include the "actual or constructive denial of assistance altogether . . . and various kinds of state interference with counsel's assistance." *Id.* (citing United States v. Cronic, 104 S. Ct. 2039, 2046-47 & n.25 (1984)). Prejudice also is presumed "when counsel is burdened by an actual conflict of interest." *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980)). The *Cuyler* language, however, does not rise to the level of a per se presumption because defendant must demonstrate that counsel " 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* (quoting *Cuyler*, 446 U.S. at 348, 350 (footnote omitted)).

71 *Id.*

same act or omission can have different consequences depending on the circumstances, the defendant must show that the alleged errors actually had an adverse effect on the defense.[72]

The Court chose a stricter standard for prejudice than that offered by the respondent Washington, but less burdensome than that requested by the United States as amicus curiae.[73] The defendant "must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[74] The Court defined reasonable probability as a probability sufficient to undermine confidence in the judgment.[75] Applying this standard to cases challenging a death sentence, the Court stated that the "question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[76] A court hearing the ineffective assistance claim must consider all the evidence in front of the sentencer.[77] The Court noted that a verdict weakly supported by the evidence is more likely affected by counsel's errors than a verdict

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72 *Id.*

73 *Id.* at 2068. Respondent argued that prejudice should be found when the errors "impaired the presentation of the defense." *Id.* (citing Brief for Respondent at 58, *Washington*). The Court stated that this standard "provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.* The Court also rejected the proposal by the United States that "counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* The Court stated that this standard, which is applied to newly discovered evidence, was too high for claims alleging ineffective assistance. The Court reasoned that an "ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker" than in a claim that presupposes that all the essential elements of a fair proceeding are present. *Id.* The Court concluded that the "result of a proceeding can be rendered unreliable . . . even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* The Court, thus, implicitly rejected the standard of prejudice espoused in *Decoster III*. *See* United States v. Decoster, 624 F.2d 196, 206 (D.C. Cir. 1979); *see also supra* note 30. That court held that defendant must prove that an adequate counsel would likely have changed the outcome of the proceeding. *Decoster III*, 624 F.2d at 206. *Decoster III* has been criticized for placing too great a burden upon defendants. *See* Washington v. Strickland, 693 F.2d 1243, 1261 (1982) (en banc), *rev'd on other grounds*, 104 S. Ct. 2052 (1984).

74 104 S. Ct. at 2068 (emphasis supplied). This test for prejudice "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, [427 U.S. 97, 104, 112-13 (1976)] . . . , and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, [458 U.S. 858, 872-74 (1981)]." 104 S. Ct. at 2068.

75 104 S. Ct. at 2068.

76 *Id.* at 2069. *See supra* note 24 (setting out Florida's statutory mitigating and aggravating factors).

77 104 S. Ct. at 2069.

with overwhelming record support.[78]

The Court provided lower tribunals with practical considerations for the overall application of the two-tiered test.[79] First, the test does not establish mechanical rules; courts must focus on the fundamental fairness of the challenged proceeding.[80] Second, a court must determine whether a breakdown in the adversarial process produced unreliable results in the challenged proceeding.[81] Finally, an ineffectiveness claim is essentially a challenge to the fundamental fairness of the proceeding.[82]

The Court explained how the ineffective assistance claim should affect the criminal justice system as a whole. The standards should not be applied so as to encourage ineffective assistance claims.[83] Counsel's willingness to serve must not be adversely affected.[84] The independence of counsel should not be impaired, and the trust between attorney and client should be preserved.[85]

Applying its new test to Washington's claim,[86] the Court found that counsel's conduct was reasonable.[87] Furthermore, even if the conduct were unreasonable, Washington suffered insufficient prejudice to warrant reversing his death sentence.[88] With respect to the performance component of the *Strickland v. Washington* test, "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable."[89] With respect to the prejudice component, the Court found even less merit in defendant's claim.[90] The Court

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78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* at 2070.
83 *Id.* at 2066.
84 *Id.*
85 *Id.*
86 *Id.* at 2070-71.
87 *Id.* at 2070.
88 *Id.*
89 *Id.* at 2071. The Court elaborated:

> The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. . . . Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in.

Id. Thus, counsel's defense, "though unsuccessful, was the result of reasonable professional judgment." *Id.*
90 *Id.*

reasoned that "[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances . . . ."[91] Thus, defendant failed twice by showing neither deficient performance nor sufficient prejudice.[92] In the broad analysis, the Court found no showing that counsel's alleged deficient assistance caused a breakdown in the adversarial process, thus rendering the sentence unreliable.[93] The Court concluded that Washington's sentencing proceeding was fundamentally fair.[94]

Justice Brennan concurred with the Court's opinion but dissented from its judgment because, in his view, the death penalty is in all instances cruel and unusual punishment prohibited by the eighth and fourteenth amendments.[95] Justice Brennan would have vacated Washington's sentence of death and remanded the case to the trial court for further proceedings.[96]

Justice Brennan agreed with the majority that defendants claiming ineffective assistance must show that counsel's performance was inadequate and that the defense was prejudiced thereby.[97] He disagreed, however, in the application of the standards in a capital sentencing hearing.[98] Justice Brennan noted that, because the consequences of error are so great in capital cases, the Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding."[99] Justice Brennan believed it essential that the factfinder, upon sentencing in a capital case, consider all possi-

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91 *Id.* The Court explained that the evidence counsel chose not to offer "would barely have altered the sentencing profile . . . ." *Id.* Numerous people would have testified that respondent was "generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance." *Id.* The Court further asserted that the admission of evidence defendant wanted to offer may even have harmed rather than helped his case. *Id.*

92 *Id.*

93 *Id.* The Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 2064.

94 *Id.* at 2071. The Court stated that the purpose of the effective assistance guarantee of the sixth amendment is "simply to ensure that criminal defendants receive a fair trial." *Id.* at 2065.

95 *Id.* at 2071-72 (Brennan, J., concurring in part and dissenting in part).

96 *Id.* at 2072 (Brennan, J., concurring in part and dissenting in part).

97 *Id.* at 2072-73 (Brennan, J., concurring in part and dissenting in part).

98 *Id.* at 2073 (Brennan, J., concurring in part and dissenting in part).

99 *Id.*

ble relevant information about the defendant.[100] He noted that the right to have all mitigating evidence considered loses its meaning if defense counsel does not search for mitigating evidence.[101] Justice Brennan asserted that defense counsel's general duty to investigate takes on supreme importance when developing mitigating evidence before a judge or jury considering a death sentence.[102] He concluded that claims of ineffective assistance in the context of a capital crime, therefore, should be considered with utmost care.[103]

Justice Marshall dissented from both the opinion and the judgment of the Court.[104] Justice Marshall argued that the Court erred in establishing a performance standard of "simple" reasonableness.[105] Furthermore, he asserted that the majority erred in establishing its standard for prejudice.[106]

Justice Marshall claimed that the majority's performance standard of reasonableness is so "malleable" and ambiguous that it provides no guidance to lawyers and lower court judges.[107] The dissent asserted that many aspects of the criminal defense attorney's duties could be made the subject of uniform standards.[108] He contended that the Court should have developed particularized standards to ensure that defense counsel renders effective legal assistance.[109]

The dissent also objected to the Court's prejudice standard. Justice Marshall argued that estimating prejudice caused by incompetent counsel is too difficult.[110] Not only is it difficult to imagine how competent counsel would have handled the case, but any evidence of prejudice to the defendant may not be reflected in the record *because* of the unreasonable actions of defense counsel.[111]

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100 *Id.* at 2074 (Brennan, J., concurring in part and dissenting in part) (citing Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

101 *Id.* at 2074 (Brennan, J., concurring in part and dissenting in part) (citing Comment, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1549 (1983)).

102 *Id.*

103 *Id.*

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

105 *Id.*

106 *Id.* at 2076 (Marshall, J., dissenting).

107 *Id.* at 2075 (Marshall, J., dissenting). Justice Marshall believed that the majority standard tells judges nothing beyond requiring them to "advert to their own intuitions regarding what constitutes 'professional' representation." *Id.*

108 *Id.* at 2076 (Marshall, J., dissenting). Activities amenable to judicial oversight are, according to Justice Marshall, "preparing for a trial, applying for bail, conferring with one's client, making timely objections to signficant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefore . . . ." *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

Furthermore, Justice Marshall asserted that, though seemingly guilty, a defendant who does not receive adequate legal assistance does not receive due process.[112] Thus, Justice Marshall would hold that constitutionally inadequate performance by defense counsel requires a new trial whether or not the defendant suffered prejudice.[113]

Despite his objections to the prejudice requirement, Justice Marshall assumed that a showing of prejudice would be required and suggested an appropriate standard for prejudice. If a defendant burdened with incompetent counsel can "establish a significant chance that the outcome would have been different"—rather than reasonable probability—the defendant should be entitled to a new sentencing hearing.[114]

The dissent also attacked the majority's suggestion that lower courts should strongly presume that defense counsel's conduct was constitutionally acceptable.[115] Though Justice Marshall believed that defendants have the burden of proof in claims of ineffective assistance, he argued that a strong presumption imposes an unusually heavy burden on defendants.[116] He asserted that holding counsel to prevailing professional norms grants counsel sufficient flexibility to respond to problems at trial.[117] Justice Marshall disagreed with the majority's speculation that a lesser presumption would encourage frivolous suits and clog the courts.[118] He argued that courts are capable of disposing of meritless claims without presuming that the defendant's claim is insubstantial.[119]

Finally, Justice Marshall attacked the majority's notion that counsel's duties at a capital sentencing hearing do not differ from those at an ordinary trial.[120] Like Justice Brennan, the dissent wrote that "the standards for determining what constitutes 'effective assistance' [must] be applied especially stringently in capital sentence proceedings."[121]

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112 *Id.* at 2077 (Marshall, J. dissenting). Justice Marshall asserted that inadequate legal assistance effectively denies defendants the sixth amendment right to assistance of counsel. Such a denial by the state constitutes a denial of due process under the fourteenth amendment. *Id.*

113 *Id.*

114 *Id.* at 2080 n.16 (Marshall, J., dissenting).

115 *Id.* at 2077-78 (Marshall, J., dissenting).

116 *Id.* at 2078 (Marshall, J., dissenting).

117 *Id.* Thus, it seems that Justice Marshall would hold the defendant to the burden of proving that defense counsel failed to meet prevailing professional norms.

118 *Id.*

119 *Id.*

120 *Id.* at 2079 (Marshall, J., dissenting).

121 *Id.* (Marshall, J., dissenting). Justice Marshall noted that "[t]he Court has repeat-

In applying these alternative standards to the facts, Justice Marshall concluded that Washington received constitutionally inadequate representation, and thus, was entitled to a new sentencing proceeding.[122] Justice Marshall contended that counsel made "virtually no investigation of the possibility of obtaining testimony . . . to counteract the impression conveyed by the trial that [Washington] was little more than a cold-blooded killer."[123] He argued that evidence of defendant's family and social connections is crucial in a sentencing hearing, and defense counsel's failure to make a significant effort to determine what evidence might be gained from Washington's relatives and acquaintances cannot be considered "reasonable."[124] Because juries often show mercy when exposed to facets of defendant's personality and life, Justice Marshall concluded that counsel's failure to investigate and present such evidence foreclosed a "significant chance" that Washington would have received a life sentence.[125] Counsel's unreasonable failure to investigate, combined with the significant chance of a different outcome at the sentencing hearing, established a violation of Washington's sixth amendment right to effective assistance of counsel.[126]

V. ANALYSIS

In *Strickland v. Washington*, the Supreme Court continued its effort to restrict the effectiveness of collateral attacks upon verdicts, particularly in claims of ineffective assistance of counsel.[127]

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edly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases." *Id.* He pointed for support to the Court's language in *Woodson v. North Carolina*:

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

104 S. Ct. at 2079 (Marshall, J., dissenting) (footnote omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted)).

122 *Id.* at 2080-81 (Marshall, J., dissenting).

123 *Id.* at 2080 (Marshall, J., dissenting). The "humanizing" evidence available to counsel was testimony from Washington's friends, relatives, and former employers that he was a "responsible, nonviolent man, devoted to his family, and active in the affairs of his church." *Id.*

124 *Id.* at 2080-81 (Marshall, J., dissenting).

125 *Id.* at 2081 (Marshall, J., dissenting).

126 *Id.*

127 *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308 (1983) (appointed counsel has no constitutional duty to assert all nonfrivolous claims requested by defendant on appeal); Morris v. Slappy, 103 S. Ct. 1610 (1983) (reversing Ninth Circuit's holding that the sixth amendment required a "meaningful attorney-client relationship"); Cuyler v. Sullivan, 446 U.S 335 (1980) (where attorney represents multiple defendants and defendant has

Although it did not embrace the standard most burdensome to the defendant,[128] the Court imposed requirements that will make it unlikely that a defendant claiming ineffective assistance will succeed.[129] The Court's imposition of dual burdens upon defendants facing the death penalty is disturbing. The Court has expressed its preference for limiting appeals and preserving verdicts at the expense of protecting the constitutional rights of criminal defendants.[130]

A. THE REASONABLENESS COMPONENT

The Supreme Court in *Strickland v. Washington* adopted the reasonableness standard after balancing its strengths and weaknesses. Though a reasonableness standard may be appropriate in certain criminal cases, the Court could have strengthened the effectiveness of such a standard by requiring judges to review the adequacy of counsel's performance before the trial or sentencing hearing. The reasonableness standard, however, is not appropriate in capital sentencing hearings. By recognizing the differences between trials and capital sentencing hearings, the Court could have avoided applying the reasonableness standard to sentencing hearings. The Court instead could have developed concrete standards to guide and evaluate attorney conduct during capital sentencing hearings.

Persons claiming ineffective assistance of counsel must show that counsel acted "unreasonably" as measured by the prevailing standards of the profession.[131] This open-ended standard has its strengths and weaknesses. On the one hand, it provides attorneys with flexibility to try cases with regard to the relevant facts at hand. Because cases are so varied in nature, forcing lawyers to take specific steps in every case might be wasteful and debilitating. Furthermore, judges may have difficulty in applying rules to such a vast array of circumstances. It might be a mistake to deny judges discretion to determine when attorneys need not go through certain standardized procedures.

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not argued conflict of interest below, defendant must show counsel's conflict of interest *actually* affected adequacy of representation); *see generally* Note, *Sixth and Fourteenth Amendments—Appointed Counsel Has No Constitutional Duty to Argue All Nonfrivolous Issues on Appeal*, 74 J. CRIM. L. & CRIMINOLOGY 1353 (1983) (discussing *Jones v. Barnes* and the Court's desire to shorten lengthy appellate process).

128 *See* 104 S. Ct. at 2068. For an example of a case imposing the standard most burdensome to the defendant, see *Decoster* III, 624 F.2d at 208 (defendant must show serious incompetency in counsel's performance and likelihood that counsel's inadequacy affected outcome of trial). *See also supra* notes 30 & 73.

129 *See infra* notes 152-62 and accompanying text.

130 *See infra* notes 138-49 & 152-62.

131 104 S. Ct. at 2065.

On the other hand, the vague standard of "reasonableness" provides very little guidance to attorneys and judges. Counsel will behave under their own notions of what is reasonable, and judges will apply *their* own personal conceptions about attorneys' duties to defendants. Thus, the Court is really setting no standard at all beyond the notion that counsel must provide competent legal assistance to the client.

The Court balanced these pros and cons of the "reasonableness" standard and opted for providing counsel with wide latitude in making strategic decisions about the case.[132] It may be right to provide attorneys with flexibility in making decisions about how to present the defense. But the Court could have strengthened its position if it had required some type of pretrial or pre-hearing supervision by the trial judge.[133] A judge easily could review the pretrial conduct of counsel at a pretrial conference and determine whether counsel has performed the necessary investigations.[134] Before the trial or sentencing hearing begins, the judge can determine whether counsel acted "reasonably."[135] This procedure would alleviate the Court's fear of repeated litigation and overcrowded court dockets caused by post-trial ineffective assistance claims. The judge would review and remedy counsel's conduct before trial and would eliminate the possibility that the verdict would be reversed and a new trial required because of counsel's inadequate investigations.[136]

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132 *Id.*

133 *See* Note, *supra* note 2, at 773-75. This supervision would be appropriate to ensure that counsel made reasonable investigations before a trial or sentencing hearing to uncover any information that would benefit the defense. The pretrial conference need not be limited to capital cases, although that is where it is most urgently needed. The trial court can use a pretrial conference in any criminal case to review the evidence and determine whether defense counsel made reasonable investigations. Such a procedure would be well worth the expenditure of resources. Claims of ineffective assistance are rapidly becoming popular among jailhouse lawyers. *See* Tybor, *Trial and Error: The Issue of Incompetent Legal Counsel*, Chicago Tribune, Sept. 25, 1983, §4, at 1, col. 1.

134 The lawyer could give the judge a report on all the investigations that were made and whether the attorney followed all the leads that could uncover beneficial evidence. During the conference the trial judge can review the state's evidence to help determine whether defense counsel invested the necessary resources to provide competent representation.

135 Of course this procedure will only determine whether counsel made any errors before trial begins. The judge will be on hand to evaluate any errors made during trial. The judge at the pretrial conference can look at counsel's investigations of all the issues, including character evidence, and determine if the investigation was adequate under the circumstances.

136 If the judge determined that the attorney's report, *see supra* note 134, was unsatisfactory, he or she could grant a continuance and order investigations or further preparations for trial to be made. The trial judge could even discharge the defense counsel if the attorney is not willing to make the necessary preparations.

The Court failed to advocate a procedure whereby judges could detect and remedy attorney incompetence with the minimum amount of interference with attorney independence and jury verdicts.

Although the Court may have been correct in providing counsel wide latitude in preparing the defense in ordinary criminal cases, it was wrong in applying this same vague "reasonableness" standard in capital cases. The Court missed an opportunity to impose concrete standards for attorney competence in capital sentencing hearings. Because capital punishment sentencing proceedings are fundamentally different from any other type of criminal proceeding,[137] the Court could have carved out some basic standards to aid attorneys and judges in determining whether counsel's performance was reasonable.[138]

Despite the majority's contrary conclusion,[139] a capital sentencing hearing is different from an ordinary trial.[140] The situations in a capital sentencing hearing are not so varied and complex that the establishment of rules would be counterproductive.[141] A defense attorney must persuade the sentencing authority that a sentence of life is preferable and more appropriate than a sentence of death.[142] This is done by exposing the "human" qualities of the defendant that mitigate the monstrous acts that the defendant committed.[143] For example, by presenting evidence that the defendant was abused as a child or that the defendant was acting under extraordinarily stressful circumstances, an attorney may persuade a sentencing authority that mercy is the appropriate response.[144] This mitigating "human" evidence can be obtained only by a thorough investigation

137 *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983) ("Trials about life differ radically in form and in issues addressed from those about the commission of a crime, and the cases must be tried differently.").

138 *Id.* at 317-34.

139 *See infra* note 147.

140 A sentencing hearing is essentially a trial with regard to punishment after a determination of guilt. At the hearing the state and the defense present aggravating and mitigating factors respectively, and each side argues for the appropriate punishment. The sentencer weighs these factors and determines if death is the appropriate sentence. *See* Comment, *supra* note 101, at 1547-48 & n.16.

141 Thirty-six states allow for a death penalty, and thirty-five of the states have sentencing hearing procedures similar to each other. For a description of the basic provisions of these statutes, see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-19 (1980). New Jersey's death penalty statute, which differs from the other thirty-five, is set out in N.J. STAT. ANN. § 2C:11-3 (West 1982). *See* Comment, *supra* note 101, at 1547 n.15.

142 *See* Goodpaster, *supra* note 137, at 334-39.

143 *Id.*

144 *Id.* at 323-25.

into the defendant's life history.[145]

Because sentencing hearings typically involve similar elements, the Court could have adopted standards for effective assistance of counsel without impairing attorney independence. The standards for effective assistance in a capital sentencing hearing include: (1) thorough crime and life-history investigations in preparation for the sentencing hearing; and (2) presentation of all reasonably available mitigating evidence that would be helpful to the defendant.[146]

Although the Court easily could have established these standards, it ignored the differences between a capital sentencing hearing and other types of criminal proceedings.[147] Perhaps the Court did not want to carve out an exception for capital cases and create precedent for defendants in other types of cases to seek exceptions to its two-tiered rule. The Court expressed its fear of encouraging other defendants to bring ineffective assistance claims.[148] But, as argued above, the Court could have embraced pretrial procedures for determining counsel's reasonableness without prolonging the appellate process.[149] By failing even to address the notion of concrete standards for attorney conduct at a capital sentencing hearing, the Court unnecessarily limited the rights of criminal defendants.

B. THE PREJUDICE COMPONENT

The Supreme Court placed upon defendants the burden of proving that counsel's incompetence prejudiced the defense.[150]

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145 *Id.*

146 *Id.* at 362.

147 104 S. Ct. at 2064. The Court stated:

> A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Id. (citing Barclay v. Florida, 103 S. Ct. 3418, 3425 (1983); Bullington v. Missouri, 451 U.S. 430, 438 (1981)). This sentence is the extent of the Court's discussion on the differences between a capital sentencing hearing and other criminal proceedings. The Court looked only at the sterile procedures of the sentencing hearing to determine its similarity to a regular criminal proceeding. It thus ignored the fundamental distinction between the types of punishment involved in the two proceedings. Justice Stewart has stated the distinction most clearly:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique finally, in its absolute renunciation of all that is embodied in the concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

148 104 S. Ct. at 2066. *See generally* Note, *supra* note 127.

149 *See supra* notes 133-36 and accompanying text.

150 104 S. Ct. at 2068.

Rather than require the defendant to prove prejudiced, the Court could have required the state to prove that defense counsel's incompetence was harmless error. Requiring the state to prove harmless error at least in capital cases would have been consistent with previous Supreme Court decisions imposing special safeguards upon the administration of capital punishment.[151]

The Court was harsh in its demand that defendants prove that counsel's incompetence prejudiced the defense. Once defendants prove that counsel rendered ineffective assistance, they must show that counsel's incompetence created a reasonable probability that the results of the proceedings would have been different.[152] This two-tiered test is an unnecessary burden upon criminal defendants—capital or otherwise. The Court's decision is reasonable in seeking to preserve a verdict in which counsel's representation could not have affected the result. But the Court gave no persuasive justification as to why the defendant should have to prove prejudice. Once the defendant proves that counsel acted unreasonably, the defendant should not bear an additional burden. The Court did not address a more reasonable alternative that would place the burden of proving no prejudice on the state. Once the defendant conclusively shows that counsel rendered inadequate representation, the judge would order a new trial unless the state could show harmless error.[153]

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151 *See infra* notes 159-162 and accompanying text.

152 104 S. Ct. at 2068.

153 *See* United States v. Decoster [*Decoster III*], 624 F.2d 196, 290-95 (D.C. Cir. 1979) (Bazelon, J., dissenting) (although counsel's incompetent representation constitutes a sixth amendment violation, government may prove harmless error to avoid needless retrial); Goodpaster, *supra* note 137, at 352-56 (automatic reversal when attorney incompetence prejudices defense in pervasive but undeterminable manner; government required to prove harmless error in other cases); Note, *supra* note 2, at 768-70 (government must prove beyond reasonable doubt that lawyer's substantial violations did not affect verdict). Some circuits have adopted the harmless error view. *See* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.) (prosecution must prove beyond reasonable doubt that ineffective assistance did not adversely affect defense), *cert. denied*, 393 U.S. 849 (1968). Compare other cases, however, holding that defendant has the burden of showing prejudice. *See* Cooper v. Campbell, 597 F.2d 628 (8th Cir. 1979); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); United States v. Williams, 575 F.2d 388 (2d Cir.), *cert. denied*, 430 U.S. 987 (1977), 439 U.S. 842 (1978). Sixteen states also have indicated agreement. *See* State v. Anonymous, 34 Conn. Supp. 656, 384 A.2d 386 (Super. Ct. 1978); State v. Kenner, 336 So. 2d 824 (La. 1976); David v. State, 40 Md. App. 467, 391 A.2d 872 (1978), *modified and remanded on procedural grounds*, 285 Md. 19, 400 A.2d 406 (1979); Commonwealth v. Bolduc, 375 Mass. 530, 378 N.E.2d 661 (1978); People v. Garcia, 398 Mich. 250, 247 N.W.2d 547 (1976); Estes v. State, 326 So. 2d 786 (Miss. 1976); Cox v. State, 572 S.W.2d 631 (Mo. Ct. App. 1978); State v. Mays, 203 Neb. 487, 279 N.W.2d 146 (1979); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State v. Kroeplin, 266 N.W.2d 537 (N.D. 1978); Commonwealth v. Garcia, 478 Pa. 406, 387 A.2d 46 (1978); State v. Ambrosino, 114 R.I. 99, 329 A.2d 398

If the state must prove harmless error, both parties assume burdens when counsel for the defendant is found incompetent. Under the *Strickland v. Washington* test, it will be extremely difficult for a defendant to show that the case was prejudiced by counsel's incompetence. Evidence of prejudice may be unavailable precisely because counsel failed to make a reasonable investigation.[154] Requiring defendants to show what evidence would have been produced, however, is reasonable because they are in the best position to know what evidence was available to the defense. But defendants are not in any better position than the state to demonstrate the effect that new evidence would have had on the outcome.[155] Thus, there is no reason to give the defendant the dual burden of providing the new evidence and proving prejudice.[156]

The harmless error rule advocated here does not require a per se reversal once attorney incompetence is established. The state, however, would have to rebut the presumption that such incompetence rendered the process unfair by proving that the incompetence was only harmless error.[157] Considering the importance of competent counsel to an effective defense, such a presumption is reasonable. The Court's presumption that attorney incompetence is harmless unless proved otherwise is counterintuitive.[158]

Requiring the state to prove harmless error in *capital* cases is both an appropriate safeguard and a procedural protection consistent with previous decisions of the Court. In capital cases, the consequences of an erroneous judgment, for society and the de-

(1974); State v. Pieschke, 262 N.W.2d 40 (S.D. 1978); Peyton v. Fields, 207 Va. 40, 147 S.E.2d 762 (1966); State v. Cobb, 22 Wash. App. 221, 589 P.2d 297 (1978); State v. Thomas, 203 S.E.2d 445 (W. Va. 1974).

154 104 S. Ct. at 2076 (Marshall, J., dissenting). At the very least, inquiry into the claim of prejudice would require unguided speculation. *See* Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978) (inquiry into whether conflict of interest of defense counsel actually prejudiced defense not susceptible of intelligent, even-handed application); Goodpaster, *supra* note 137, at 348 (no reliable way to determine impact of attorney's deficient performance).

155 *See* Washington v. Strickland, 693 F.2d 1243, 1262 (11th Cir. 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984).

156 *Cf.* McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974) (defendant alleging denial of effective assistance of counsel has "initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation" that counsel failed to produce; where defendant unable to make showing due to changed circumstances, state must show harmless error beyond reasonable doubt); *see also* Goodpaster, *supra* note 137, at 347.

157 *See supra* note 153. The state would have to show beyond a reasonable doubt that the attorney's errors were harmless. A lesser burden of proof standard would not adequately protect the defendant. *See Peyton*, 389 F.2d at 226.

158 *See supra* note 153.

fendant, are unparalleled.[159] A prisoner, later found to be innocent, cannot be released once the prisoner has been executed.[160] The state, therefore, should take all precautions to make certain that those defendants put to death are guilty beyond even a shadow of a reasonable doubt. Judges or juries also must reach the right sentencing decision because their sentence cannot be undone. By placing an onerous burden upon capital defendants, the Supreme Court created the potential for intolerable situations; defendants could be put to death because they did not have the resources to prove that counsel's incompetence prejudiced their defense. Thus, it is entirely reasonable and consistent with Supreme Court precedent to make an exception to the proposed harmless error rule in capital cases and make proof of attorney incompetence a per se reversible error.[161] If the Court did not wish to go this far, it at least should

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159 *Washington*, 104 S. Ct. 2073 (Brennan, J., concurring in part and dissenting in part).

160 Furthermore, the rule of law is undermined when an innocent man is put to death because the injustice can never be fully corrected.

161 *See* Goodpaster, *supra* note 137, at 350-52 (overwhelming importance of presenting mitigating evidence in capital case justifies per se reversal upon finding of defense attorney incompetence). The Constitution imposes special safeguards on the administration of capital punishment. *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (juries cannot have unfettered discretion in determining whether to impose death penalty). Capital punishment must be imposed with a greater degree of reliability than a noncapital sentence. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (sentencers can not be prevented from considering mitigating evidence); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (mandatory death sentences for first degree murder are unconstitutional). Thus, it is entirely reasonable for the Court to provide a capital defendant with a greater guarantee of effective assistance to make certain that a death sentence is not imposed "in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See generally* Comment, *supra* note 101, at 1545-49.

In Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), the Court struck down a death penalty statute that prevented the sentencer from considering mitigating evidence on behalf of the defendant. When an attorney fails to present mitigating evidence to the sentencer, counsel is, in effect, preventing the sentencer from deliberating upon that evidence. Furthermore, the failure by a sentencer to consider mitigating evidence, in this situation because of attorney incompetence, can lead to a sentence that is arbitrary and capricious. *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion). Defendants of similar culpability may not be treated similarly if defense attorneys fail to present necessary mitigating evidence in every case. Finally, the Court has stated that the death penalty can be imposed only if it is proportionate to the defendant's culpability. *See* Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977). When a defense attorney fails to represent the client adequately, the sentencer may be unaware of mitigating factors that may limit the defendant's culpability. Thus, an incompetent attorney may preclude a constitutional death sentence.

Other cases where the Court has found per se reversible error in ineffective assistance claims are not helpful here. Those cases support a finding of per se reversible error when the state has interfered with the defendant's sixth amendment right to counsel. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (absence of counsel at trial); Hamil-

have required the state to prove harmless error in capital cases.[162] The greater protection for capital defendants is a logical extension of other procedural protections afforded to defendants facing the prospect of execution.

Although the Supreme Court made several errors in developing the standard for claims of ineffective assistance of counsel, the Court may have reached the right conclusion in this particular case. It is not clear whether counsel's actions in this case were unreasonable. He undoubtedly could and should have investigated the defendant's background. He had an obligation to overcome his "sense of helplessness" and search for any possible mitigating evidence. Counsel's failure even to meet with Washington's wife or mother[163] demonstrates a lack of thoroughness in his investigation.

Counsel's lack of thoroughness in investigating, however, does not necessarily indicate incompetence or apathy on his part. Counsel realized that any character testimony would be rebutted by the state's presentation of evidence about Washington's criminal background. Thus, Washington may not have been better off having the character testimony introduced. The standards of reasonable

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ton v. Alabama, 368 U.S. 52 (1961) (absence of counsel at arraignment); *see also* Geders v. United States, 425 U.S. 80 (1976) (conviction reversed because defense counsel not allowed to meet with client during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (conviction reversed because statute prevented final summation by defense counsel). Per se reversible error is also established when defense counsel represents defendants with actual conflicting interests. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). These cases are distinguishable and have been forcefully distinguished by the courts. *See, e.g.*, Washington v. Strickland, 693 F.2d at 1258-59. In *Washington*, the defendant was not totally deprived of counsel as was the defendant in *Gideon*. He did not claim that the state interfered with his relationship with his attorney as was the case in *Geders*. Finally, there is no evidence that the attorney was burdened by an actual conflict of interest as in *Cuyler*. *Id.*

162 The Court has often held that the need for procedural safeguards is particularly great when a life is at stake. The Court has prohibited procedures in capital cases that may have been accepted under ordinary circumstances. *See, e.g.* Bullington v. Missouri, 451 U.S. 430 (1981) (capital sentencing proceeding sufficiently similar to trial on guilt or innocence such that Double Jeopardy clause prevents state from seeking greater penalty on retrial); Beck v. Alabama, 447 U.S. 625 (1980) (may not impose death sentence where jury not permitted to consider verdict of guilt of lesser included non-capital offense); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (may not preclude sentencer from considering mitigating evidence in capital cases); Gardner v. Florida, 430 U.S. 349 (1977) (may not impose death sentence based, in part, on information that defendant had no opportunity to deny or explain); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (mandatory death sentence for first degree murder impermissible). Justice O'Connor has stated that the Court has taken great care to minimize the chance that a sentence of death is "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). *See also Washington*, 104 S. Ct. at 2073-74 (Brennan, J., concurring in part and dissenting in part).

163 *Washington*, 104 S. Ct. at 2057.

representation cited in this Note do not require presentation of "mitigating" evidence if such evidence is not helpful to the defendant.[164] In this case, counsel's decision to forego the opportunity to present character testimony may have been reasonable because the testimony ultimately may have damaged the case.

Of course, any analysis as to the probable effect of evidence that was never introduced is highly speculative.[165] One would feel much more comfortable with the verdict if counsel had made an exhaustive investigation and then decided to introduce no character evidence. Because counsel made such a cursory investigation, and because the consequences of an erroneous verdict are so great, the Court should have reversed and remanded the judgment for further proceedings. By doing so, the Court would have sent a signal to lawyers assisting capital defendants that the Constitution will not tolerate any cutting of corners in capital cases.

VI. Conclusion

In *Strickland v. Washington*, the Supreme Court held that claimants asserting ineffective assistance of trial counsel must meet two burdens. First, the defendant must show that counsel's representation was unreasonable; second, the defendant must show that counsel's errors prejudiced the defense. The Court asserted that this test applied even when the defendant is facing a sentence of death. The two-tiered standard is unnecessary and unfair to the defendant. Once the defendant shows that the defense counsel was incompetent, the state should be required to prove that counsel's errors did not prejudice the defense. The Court's harsh ruling is aggravated by the fact that defendants facing a death sentence must also meet the dual burden. The Court could have developed concrete guidelines that counsel must follow in a capital sentencing hearing. It also could have embraced a pretrial hearing as a method of discovering and remedying attorney errors that occur before trial. The Court did not choose to take any innovative steps to ensure that defendant's receive adequate counsel at trial. Its failure to do so results in the further erosion of the rights of criminal defendants.

David J. Gross

164 *See* Goodpaster, *supra* note 137, at 351 (failure to present mitigating evidence in capital sentencing hearing not inherently prejudicial where prosecution would present more aggravating case in rebuttal to particular mitigating evidence).

165 *See supra* note 154 and accompanying text.