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NEARING THIRTY YEARS: THE BURGER COURT, *STRICKLAND V. WASHINGTON*, AND THE PARAMETERS OF THE RIGHT TO COUNSEL*

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I. INTRODUCTION

The right to a fair criminal trial—including the right to be represented by counsel[1]—is a cornerstone of American democracy. As the Supreme Court held in *Gideon v.*

*This article relies in part on research conducted by the author in the papers of various judges. With the exception of the Bazelon papers, which are housed at the Biddle Law Library at the University of Pennsylvania Law School, all collections cited in this article are available in the Library of Congress's Manuscripts Division. The notations for the collections are as follows: Justice William J. Brennan, Jr. [WJB]; Justice Byron R. White [BRW]; Justice Thurgood Marshall [TM]; Justice Harry A. Blackmun [HAB]; Judge Frank Minis Johnson, Jr., of the United States Courts of Appeals for the Fifth (1979–81) and Eleventh (1981–99) Circuits [FMJ]; Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit [HL]; and Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit [DLB–BLL]; in each case, the judge's initials are followed by the number of the box in which the document is stored. Thus, "[HAB/410]," *infra* n. 6, is a reference to Box 410 of the Blackmun papers.

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1. *See* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

Wainwright,[2] the fourteenth amendment right to counsel applies in all state felony trials, requiring the states to provide counsel to indigent and poor defendants. Although it overturned *Betts v. Brady*,[3] which had held that the fourteenth amendment did not require states to provide defense counsel to indigent defendants in non-capital trials, *Gideon* was not as controversial as other Warren Court decisions.[4] It was, however, to become one of the more influential decisions in modern judicial history. *Gideon* did not address the minimum competency or performance standards required of defense counsel, but the decision would be further expanded to cover all criminal proceedings, which would in turn affect the threshold question of competency and effective representation.

In 1967, the Court applied *Gideon* to juvenile proceedings.[5] In 1970, the Court determined that the right to counsel encompassed the right to effective assistance of counsel in guilty pleas.[6] In 1972, the Court extended *Gideon* to misdemeanor

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2. 372 U.S. 335 (1963). Justice Black, who wrote for the Court in *Gideon*, was also the author of *Johnson v. Zerbst*, 304 U.S. 458 (1938) in which the Court held that

> [t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

Id. at 465. Although the Court did not, by express language, use the term "effective counsel," the *Johnson* analysis would essentially be incorporated into later decisions equating the right to counsel to the right to the effective assistance of counsel.

3. 316 U.S. 455 (1942), *overruled*, *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

4. *See* Lucas A. Powe, Jr., *The Warren Court and American Politics* 379–84 (Belknap Press 2000) (indicating that *Gideon* was non-controversial and could even be characterized as "popular"); *see also e.g.* Bernard Schwartz, *Earl Warren*, in *The Warren Court: A Retrospective* 268–69 (Bernard Schwartz ed., Oxford U. Press 1996) (indicating that *Miranda v. Ariz.*, 384 U.S. 436 (1966), was the Warren Court's "most controversial" decision).

5. *In re Gault*, 387 U.S. 1, 36–37 (1967) ("Just as . . . the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.").

6. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel." (citations omitted)). Interestingly, Justice O'Connor would later state that *Strickland* "elaborates" *McMann*, but this elaboration language is absent from the conference memorandum. *See* Sandra Day O'Connor, J., S. Ct. of the U.S., Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Foster v. Lankford* (May 14, 1984) [HAB/410]; *see also Tollett v. Henderson*, 411 U.S. 258 (1973). In *Tollett*, the issue was whether

trials;[7] although Justice Black and Chief Justice Warren had retired from the Court by then, a majority of Justices appeared to accept the principle that the right to counsel is given a maximum interpretation whenever the deprivation of liberty is involved. As a result, it is clear that all persons, regardless of economic standing, have the right to the assistance of counsel in criminal trials. None of these decisions, however, described the degree of competent representation to which a defendant is entitled.

Twelve years later, in *Strickland v. Washington*,[8] the Court issued a standard for determining when defense counsel's ineffective performance, through no direct fault of the prosecution, law enforcement, public, or judiciary, undermined the fairness of a trial such that a conviction or sentence had to be rendered as a violation of due process. The standard requires a demonstration that counsel's representation "fell below an objective standard of reasonableness," and then a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[9] Federal and state appellate courts have cited *Strickland* over 10,000 times, and there are hundreds of law review articles directly stemming from the decision. However, none presents *Strickland*'s judicial history. Those articles that approach a historical analysis do not utilize primary sources such as the conference memoranda and correspondence of the judges and Justices involved in the decision. This article begins to fill that gap.

Part II provides a historical backdrop to *Strickland*, including an analysis of how judicial standards governing ineffective-assistance assertions evolved in the appellate courts after *Powell v. Alabama*.[10] Importantly, prior to *Strickland*, the

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defense counsel's advice to plead guilty without advising the defendant that a colorable motion for appropriate relief based on the exclusion of minorities from a grand jury pool did not, in and of itself, give rise to an automatic reversal of the conviction and retrial. *Id.* at 266.

7. *Argersinger v. Hamlin*, 704 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

8. 466 U.S. 668 (1984).

9. *See e.g. Padilla v. Ky.*, 559 U.S. 356, 366–67 (2010) (quoting *Strickland*).

10. 287 U.S. 45, 71 (1932) (concluding that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense, . . . it is

Court denied certiorari in several cases involving claims of ineffective counsel.[11]

Part III examines *United States v. DeCoster*,[12] a thrice-reviewed D.C. Circuit decision that several circuits adopted prior to *Strickland*, but which was expressly rejected by a Fifth Circuit panel, the en banc Eleventh Circuit and, in some measure, ultimately the Supreme Court.[13] Notably, *DeCoster* developed an outcome-determinative test for prejudice, which the Court in *Strickland* found problematic.

Part IV summarizes *Strickland*'s appellate traverse from the state trial through the en banc Eleventh Circuit, including an analysis of judicial intent in the majority, concurring, and dissenting judges of the en banc Eleventh Circuit.

Part V analyzes the conference deliberations within the Supreme Court, discerning how the majority, concurring, and dissenting opinions in *Strickland* were initially drafted and then modified through a process of compromises. This section also examines the Court's contemporaneous deliberations in *United States v. Cronic*,[14] a companion decision that arose as a result of a judge's refusal to grant defense counsel a continuance.

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the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law"). This is the famous "Scottsboro Boys" case.

11. *See e.g. Rickenbacker v. Warden*, 550 F.2d 62, 66 (2d Cir. 1976) (declining to depart from farce-and-mockery standard and pointing out that "the courts cannot guarantee errorless counsel or counsel who cannot be made to seem ineffective by hindsight"), *cert. denied*, 434 U.S. 827 (1977); *Matthews v. Wingo*, 474 F.2d 1266, 1268 (6th Cir.) (explaining that "[i]f a criminal defendant is to prevail on an allegation of ineffective assistance of counsel he must demonstrate that what was done or not done by his attorney made his defense a farce and mockery of justice that would be shocking to the conscience of the court"), *cert. denied*, 411 U.S. 985 (1973); *U.S. v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949) (noting, in accordance with then-developing standard, that "[a] lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice"), *cert. denied*, 338 U.S. 950 (1950).

12. 487 F.2d 1197 (D.C. Cir. 1973).

13. *See Douglas v. Wainwright*, 714 F.2d 1532, 1557 (11th Cir. 1983) ("In *Washington v. Strickland* . . . , this court held that a habeas petitioner may prevail on an ineffective assistance claim only if he shows denial of effective assistance and actual prejudice to the course of his defense. In so doing we rejected the allegedly harsher standard of prejudice set forth in *United States v. DeCoster*."), *cert. granted & judgment vacated*, 468 U.S. 1206 & 468 U.S. 1212 (1984); *Washington v. Strickland*, 693 F.2d 1243, 1261 (5th Cir. 1982) ("We reject the outcome-determinative test in *DeCoster* for reasons analogous to those that lead us to reject the *Chapman* standard."), *rev'd*, 466 U.S. 668 (1984). This last reversal came in *Strickland v. Washington* itself.

14. 466 U.S. 648 (1984).

Part VI analyzes likely judicial intent in *Strickland* by considering statements about ineffective assistance made in cases decided prior to Chief Justice Burger's retirement, including not only *Nix v. Whiteside*,[15] but also *Kimmelman v. Morrison*,[16] *Burger v. Kemp*,[17] and *Penson v. Ohio*.[18] This section also analyzes cases held for *Strickland* at the Supreme Court, including those remanded and those in which certiorari was denied. Finally, this section provides an overview of the discussion between Justice Stevens, the author of *Cronic*, and Justice O'Connor on their differences as to which cases required remand.

Section VII, the article's conclusion, presents a model for applying the legal history underlying *Strickland* to ineffective-assistance cases.

Prior to delving into the substance, readers should note that there are several approaches to legal history, this article being a history of the deliberative processes in *Strickland*, beginning with a three-judge panel of the Fifth Circuit, through the en banc Eleventh Circuit, and then the Supreme Court. As such a deliberation-focused history, it presents a new basis for analyzing the judicial intent underlying *Strickland*, but does not express an opinion about whether *Strickland* is either too conservative or too permissive.

Of course, only a final published opinion bears precedential weight in the federal courts.[19] Yet a legal history involving the federal courts has to be more than a final decision standing alone, and a legal history of a continuously cited decision can help both practitioners and courts, providing context for important standards of criminal jurisprudence. To achieve such a context, the Justices and their decisions must be analyzed alongside the political and social environment of the times in which the opinions are issued. Certainly one *Strickland*-related

15. 475 U.S. 157 (1986).

16. 477 U.S. 365 (1986).

17. 483 U.S. 776 (1987). The original name of this case was *Burger v. Zant*; see 718 F.2d 979 (11th Cir. 1983).

18. 488 U.S. 475 (1988).

19. *See e.g. Darr v. Buford*, 339 U.S. 226 (1950) (Frankfurter & Black, JJ., dissenting) (pointing out that the Court "has said again and again and again" that a denial of certiorari "has no legal significance whatever bearing on the merits of the claim"), *overruled in part on other grounds*, *Fay v. Noia*, 372 U.S. 391 (1963).

factor, but by no means the sole factor worthy of consideration here, was an increase in the number of ineffective-assistance claims in the federal courts at the time of *Strickland.*[20]

It has been argued that President Nixon created the Burger Court with the dual intent of responding to a rise in crime and overturning many of the Warren Court's controversial decisions, including such criminal-procedure decisions as *Miranda v. Arizona.*[21] But *Strickland* does not fit into either of these categories. Clearly there was a desire on the Court not to permissively expand on the numbers of ineffective-assistance cases, but there was also the intent to have the legal profession, through the ABA and state bar associations, establish standards of professional responsibility and regulate defense counsel.[22]

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20. *See e.g.* David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev 321, 331 (1973) (indicating that denial and ineffective assistance of counsel were the most frequent reasons for habeas filings in 1970, 1971, and 1972); Robert M. Cover & T. Alexander Alienikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1083 (1977) (predicting that "[t]he adoption by most jurisdictions of the reasonable competence standard will increase the number of ineffective assistance claims," resulting in "intrusive inquiries by federal district courts into state provision and control of counsel").

21. *See e.g.* Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* 113–19 (U. Chi. Press 2004); Earl Maltz, *The Chief Justiceship of Warren Burger* 18–23 (U. S.C. Press 2000) (summarizing conservative credentials of Nixon nominees to the Court).

22. *See Strickland*, 466 U.S. at 688–89. That Chief Justice Burger had served on an ABA defense-counsel-standards committee prior to *Strickland* is surely of some relevance to the decision. *See e.g.* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10 (Winter 2009); *see also* Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 479, 498 (1995) ("The Supreme Court shares a major responsibility for the shameful quality of counsel that is tolerated in the nation's courts. Chief Justice Warren Burger was going around the country talking about how trial lawyers were incompetent at the very same time that the Court he presided over was adopting a standard that amounts to nothing more than 'close enough for government work' in *Strickland vs. Washington.*"); Edward A. Tamm & Paul C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. Rev. 447, 500 (noting that "Burger's expressions of concern about the training of lawyers go back about two decades," and that he had complained in the late 1960s about "cases . . . being inadequately tried by poorly trained lawyers"); Warren E. Burger, *The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974) (introducing a symposium on the Standards); *cf.* David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Speech, *The Realities of* Gideon *and* Argersinger (Los Angeles, Cal. Nov. 19, 1975) (asserting that, while *Gideon* and *Argersinger* were crucial decisions, they resulted in an increase in under-qualified defense counsel, and pointing out that "Judge Edward Tamm, a former trial judge for many years puts the figure as high as 98%," that Chief Justice Burger believed that "the performance of a 'mere' 75% of trial lawyers is deficient," and that "[t]here is virtually universal

It also must be noted from the outset that *Strickland* was a death-penalty case, and several judges and Justices, including Justices Brennan and Marshall, certainly approached it with the idea that the Court had wrongly decided the constitutionality of capital punishment.[23] Despite the fact that the Court had distinguished death-penalty cases from others,[24] it would ultimately create a universal standard of review for ineffective-assistance cases regardless of crime or sentence. That *Strickland* was a capital-murder case contributed to what can fairly be described as passionate judicial debates at all levels, including on the Court. But the overarching debate was over the extent to which the Sixth Amendment governed the competency of counsel.

From the record of available conference notes and other papers, it is clear that Justice O'Connor, along with Justices Stevens, Powell, and Blackmun, intended to find a middle ground between the varying decisions of the federal courts of appeal, several of which had developed disparate tests for ineffective-assistance appeals. However, the Court created that standard with the intention that the test for ineffective assistance would apply only to deficiencies implicating constitutional rights. That is, omissions on the part of counsel such as the failure to object to the admission of unconstitutional evidence, as well as the failure to object to the admission of constitutional evidence such as un-confronted hearsay, or the strategic decisions to pursue certain lines of defense would not constitute a prejudicial abridgement of the Sixth Amendment. Thus, *Strickland* was not part of a conservative judiciary's attempt to diminish the Warren Court's legacy. *Strickland* was, in the end, a pragmatic approach to a critical constitutional issue.

II. EVOLVING STANDARDS PRIOR TO *STRICKLAND*

Although *Gideon* is one guidepost for assessing the relationship between effective assistance and due process, the modern roots of the test for effective assistance predate *Gideon*.

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agreement among judges and lawyers alike that a shockingly large proportion of the criminal bar are at best mediocre trial lawyers") [DLB–BLL/43].

23. *See Gregg v. Ga.*, 428 U.S. 153 (1976).

24. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

In *Powell*, for example, the case that began the line of counsel-competency decisions, the Court held that the trial judge's pushing unprepared defense counsel to trial denied the defendants effective representation.[25]

In *Glasser v. United States*,[26] the Court held that a judge cannot interfere with a defendant's right to conflict-free counsel, because a conflict arising from dual or multiple representation could conceivably impair a trial lawyer's effectiveness.[27] In *Geders v. United States*,[28] the Court determined that when a trial judge sequesters a defendant from conferring with counsel, the interference in the attorney-client relationship constitutes a deprivation of assistance of counsel.[29] In *Cuyler v. Sullivan*,[30] the Court determined that an actual conflict of interest that affected the defense counsel's performance could be enough to require the reversal of a conviction.[31] *Powell* and *Geders* stemmed from influences external to the defense counsel. *Glasser* and *Cuyler* involved defense counsel's departure from clear ethical rules regarding multiple representation. Many claims of ineffective assistance would have no analogue to any of these four decisions.

Prior to *Strickland*, some federal courts of appeals had considered claims of ineffective assistance stemming solely from the performance of counsel. The D.C. Circuit, for example,

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25. *See Powell*, 287 U.S. at 72 (reversing judgments below and recognizing "fundamental nature" of right to counsel in a capital case). Although the Court did not directly rule on the conditions under which the Scottsboro Boys were prosecuted, the Justices acknowledged that an angry white mob acted to intimidate defense counsel as well as potential defense witnesses and thereby subverted due process. *See e.g.* Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 123–25 (Oxford U. Press 2004) (analyzing the Court's establishment of the right to counsel as paramount instead of concentrating on a racist mob's influence on the courtroom proceedings in *Powell*).

26. 315 U.S. 60 (1942).

27. *Id.* at 75–76. Interestingly, Glasser was a former U.S. Attorney and was presumed to know the rules on multiple representation and professional conduct. *Id.* at 88 (Frankfurter, J., dissenting).

28. 425 U.S. 80 (1976).

29. *Id.* at 88–89.

30. 446 U.S. 335 (1980).

31. *Id.* at 350 (holding that "the possibility of conflict is insufficient to impugn a criminal conviction" and explaining that "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance").

established the farce-and-mockery test in *Diggs v. Welch*,[32] requiring proof that counsel's performance was so incompetent or negligent as to make the trial proceedings "a farce and a mockery of justice."[33] Other courts, including the Sixth,[34] Eighth,[35] Ninth,[36] and Tenth[37] Circuits, also adopted this standard for assessing ineffective-assistance claims.[38] The common feature of each court's farce-and-mockery test was difficulty of proof because *Powell* continued to be the basis by which to measure effectiveness of counsel even though few criminal trials would come close to matching the egregious conditions under which the Scottsboro Boys were prosecuted.

The farce-and-mockery standard was gradually abandoned in the fifteen years prior to *Strickland* in favor of assessing counsel's performance against the ABA's standards of diligence and ethics.[39] In 1970, for example, the Fifth Circuit abandoned

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32. 148 F.2d 667 (D.C. Cir. 1945).

33. *Id.* at 670. It bears noting that in 1945, the federal judiciary was much more constrained in granting habeas appeals from state courts than it would become four decades later, and the standards of effective representation at that time were less well defined by ethics rules than at the time of *Strickland*. As a result, few habeas petitions from state trials were granted, both because of a restrictive model of federalism and the difficulty of showing that the proceedings amounted to a "farce and mockery of justice." *See e.g.* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev 2331 (1993); Dallin H. Oaks, *Legal History on the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 451 (1966); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 486–87 (1963).

34. *O'Malley v. U.S.*, 285 F.2d 733, 734 (6th Cir. 1961) (holding that failure to call specific witnesses did not constitute a farce and mockery).

35. *Cardarella v. U.S.*, 375 F.2d 222 (8th Cir. 1967).

36. *Cofield v. U.S.*, 263 F.2d 686 (9th Cir. 1959), *vacated on other grounds*, 360 U.S. 472 (1959) (noting that the circumstances surrounding defendant's original guilty plea justified a remand for entry of a new plea).

37. *Goforth v. U.S.*, 314 F.2d 868, 872 (10th Cir. 1963) (determining that counsel's appointment moments before trial did not render him ineffective because the transcript showed his "active and effective participation in the trial [and] his alertness and timely objections," his conduct of "appropriate cross-examination" and his clear presentation of Goforth's defense).

38. *See generally e.g.* Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 Syr. L. Rev. 1, 12–15 (2009).

39. *See e.g.* Tom Zimpelman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. Rev. 425, 451–52 (2011) (describing move from farce-and-mockery standard to ineffective-assistance standard); *Beasley v. U.S.*, 497 F.2d 687, 696 (6th Cir. 1974) (noting that farce-and-mockery standard is outdated and holding "that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance"); *Moore v. U.S.*, 432 F.2d 730, 736 (3d Cir. 1970) ("[T]he

farce and mockery in *Caraway v. Beto*[40] and instead applied a standard of "reasonably effective assistance."

In 1982, the Second Circuit in *Trapnell v. United States*[41] noted that while it had abandoned "farce and mockery" for "reasonably competent assistance," no court had adequately distinguished the two standards from one another.[42] Moreover, farce and mockery had been applied in much the same manner as the newer standard, rendering the difference more a matter of semantics than a real distinction.[43]

One of the more important decisions predating *Strickland* was *Marzullo v. Maryland*,[44] in which the Fourth Circuit held that "farce and mockery" had outlived its usefulness because it originated in an era before the right to counsel had become an absolute rule.[45] Marzullo was charged with two separate rapes, but the first victim failed to identify him. The appointed public defender, who had only briefly met with Marzullo, did not ask for a new jury when the prosecutor moved to dismiss the first indictment, explaining in the jury's presence that the first victim had originally identified Marzullo. The Fourth Circuit found counsel ineffective for failing to move the trial court to dismiss the jury after its members heard the prosecutor's statement. Only Justices White and Rehnquist voted to grant the state's petition for certiorari,[46] Justice White noting that the standards for

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standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.").

40. 421 F.2d 636 (5th Cir. 1970). *Caraway* is important for understanding the Fifth Circuit's decision in *Strickland*, even though the court did not cite *Caraway* in *Strickland*. Caraway's lawyer met with him for a single fifteen-minute period before trial and then failed both to interview and subpoena witness and to object to irrelevant and prejudicial prosecution evidence. Although other courts of appeals had upheld convictions under similar facts, the Fifth Circuit determined in *Caraway* that defense counsel's performance fell below professional standards of competence, a lower threshold than that posed by the farce-and-mockery standard, and concluded that "[p]etitioner's counsel did not adequately prepare himself for his client's defense, and therefore petitioner did not receive adequate assistance of counsel." *Id.* at 637–38.

41. 725 F.2d 149 (2d Cir. 1983).

42. *Id.* at 153.

43. *Id.* at 154.

44. 561 F.2d 540 (4th Cir. 1977).

45. *Id.* at 543 ("[W]e have usually judged effective representation by determining whether counsel furnished reasonably adequate services instead of inquiring whether the representation was so poor as to make a farce of the trial.").

46. 434 U.S. 1011 (1978) (White & Rehnquist, JJ., dissenting from denial of certiorari).

reviewing claims of ineffective assistance were "in disarray," and that *Marzullo* "present[ed] an appropriate occasion for addressing this issue."[47] Apparently, no other Justices agreed.

III. *DECOSTER* AND THE OUTCOME-DETERMINATIVE TEST

A jury convicted DeCoster of assault with a deadly weapon and aiding an armed robbery[48] after his counsel failed to timely raise motions to the trial court, never obtained a transcript of the preliminary hearing, and, most important, failed to interview a single witness before trial.[49] Like the appellant in *Strickland*, DeCoster did not initially seek relief on the basis of ineffective assistance. However, the D.C. Circuit raised the issue sua sponte, and remanded for a rehearing on the issue of ineffectiveness. Joined by Judge Wright, Judge Bazelon noted that the court could not second-guess defense counsel's "strategic and tactical" decisions unless they were uninformed as a result of inadequate preparation.[50] Judge Bazelon further pointed out that although the D.C. Circuit had previously adopted the farce-and-mockery test, it had been replaced in 1967 with a less rigorous "gross incompetence" formula that stemmed from the ABA standards.[51]

The two most important aspects of *DeCoster I* were, first, that the D.C. Circuit advanced a threshold measurement for establishing defense counsel's effectiveness that was based in the ABA standards.[52] Second, the court followed the Supreme Court's decision in *Chapman v. California* by placing the

47. *Id.* at 1011–12. Note that only Justice White's papers contain information on *Marzullo*. His collection includes a draft and final dissent, but no correspondence with any other Justice. *See* [BRW/I:422].

48. *U.S. v. DeCoster*, 487 F.2d 1197, 1199 (D.C. Cir. 1973) (*DeCoster I*).

49. *U.S. v. DeCoster*, 624 F.2d 196, 199–200 (D.C. Cir. 1976) (en banc) (*DeCoster III*) (noting that the victim was a soldier, that police officers witnessed the robbery, and that both the victim and police identified DeCoster on the night of the attack, but that as a result of a permanent eye injury, the victim could not identify DeCoster at trial).

50. *DeCoster I*, 487 F.2d at 1201.

51. *Id.* (citing *Bruce v. U.S.*, 379 F.2d 113 (D.C. Cir. 1967)). For unexplained reasons, Judge Bazelon indicated there that the D.C. Circuit first used "farce and mockery" in *Jones v. Huff*, 152 F.2d 14 (D.C. Cir. 1945), *see DeCoster I*, 487 F.2d at 1201, but *Diggs* slightly predated *Jones*. *See supra* text accompanying n. 32; *see also* David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev 1, 28 n. 76 (1973).

52. 487 F.2d at 1203.

burden of proving lack of prejudice on the government[53] because ineffective assistance would seldom be obvious on the plain reading of a transcript.[54] Judge MacKinnon agreed with the standard for judging counsel's effectiveness, but could agree with neither the panel's shifting the burden of proof to the government nor its conclusion that counsel's performance had been inadequate under the gross-incompetence standard.[55]

Although the *DeCoster I* court ordered a remand to determine whether effective counsel would have yielded a different result, the trial court found after a three-day hearing that the government had met its burden and denied DeCoster's motion for a new trial. On appeal after remand,[56] the panel, with Judge MacKinnon once more dissenting, determined that trial counsel had failed in a "substantial" way to conduct a proper factual investigation and that the government's burden of proof had not been met, and again remanded.[57]

Judge Bazelon was acutely aware that both *DeCoster I* and *DeCoster II* presented a significant legal development. While the *DeCoster II* decision was pending, he wrote to Judges Wright and MacKinnon:

> I realize that this case has been pending for a long time. It is vital, however, that we not allow its age to color our judgment. Our opinion in *DeCoster (I)* is part of a major development in the law; since it was decided, three additional circuits have adopted the "reasonably competent" standard, making it the majority rule.[58]

But Judge MacKinnon saw things differently:

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53. *Id.* at 1204 n. 34 (citing *Chapman v. Cal.*, 386 U.S. 18 (1967)).

54. *Id.* at 1204 (pointing out that "when counsel fails to conduct an investigation," for example, "the record may not indicate which witnesses he could have called, or defenses he could have raised").

55. *DeCoster I*, 487 F.2d at 1205 (MacKinnon J., dissenting). Judge MacKinnon also wanted to use the term "inadequate," instead of "ineffective." *Id.*

56. *U.S. v. DeCoster*, 624 F.2d 300 (D.C. Cir. 1976) (*DeCoster* II) (appearing as an appendix to *DeCoster III*).

57. *DeCoster II*, 624 F.2d at 309–10 (reasoning that the failure was substantial because a thorough investigation would have helped DeCoster "make a better informed decision whether to go to trial, or whether to seek a plea agreement comparable to his two codefendants'").

58. David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to J. Skelly Wright & George E. MacKinnon, JJ., U.S. Ct. of App. for the D.C. Cir. (Sept. 2, 1975) (footnote omitted) [DLB-BLL/43].

> I would affirm the judgment of the trial court. It represents the opinion of an unusually competent trial judge, with great experience as a lawyer in the defense of defendants in criminal cases and who, I would say, leans to favor such defendants if it is reasonably possible to do so.[59]

He also accused Judges Bazelon and Wright of "disregard[ing] the facts and law applicable" and creating "an unjustified switching of the burden of proof to reverse a conviction of an admittedly guilty defendant."[60]

Judge MacKinnon, who pushed for an en banc decision rather than wait for a possible grant of certiorari, had begun to express his anger with Judge Bazelon prior to *DeCoster II*. In one draft dissent, he placed statistics showing that Judges Bazelon and Wright together led all federal appellate judges in overturning convictions.[61] Judge Wright and Judge Bazelon countered that Judge MacKinnon's statistics were misleading and had no place in a dissent.[62] Judge MacKinnon also took deleted passages from Judge Bazelon's previously circulated drafts and placed them in his proposed dissent.[63] Judge

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59. George E. MacKinnon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to David L. Bazelon & J. Skelly Wright, JJ., U.S. Ct. of App. for the D.C. Cir. (Nov 4, 1975) [DLB-BLL/43].

60. *DeCoster III*, 624 F.2d at 313 (MacKinnon, J., dissenting). For more information on the D.C. Circuit around the time of the *DeCoster* decisions, see Christopher P. Banks, *Judicial Politics in the D.C. Circuit Court* 39 (Johns Hopkins U. Press 1999) (characterizing that era's D.C. Circuit as able "to legislate judicially" because its "core group of unusually gifted judges"—a group in which the author includes both MacKinnon and Bazelon—mastered administrative law so thoroughly) and Matthew Warren, Student Author, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine*, 90 Geo. L.J. 2599, 2618–19 (2002) (describing Judge Bazelon's prickly personality, his ability to alienate even his ideological allies, and his penchant for asking hard questions).

61. David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to George E. MacKinnon, J., U.S. Ct. of App. for the D.C. Cir. (Oct. 7, 1976) (indicating that a copy went to Judge Wright, and characterizing this part of Judge MacKinnon's draft as "misleading and unfair") [DLB-BLL/43].

62. *Id.*

63. David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to J. Skelly Wright, Carl E. McGowan, Edward Allen Tamm, Harold Leventhal, Spottswood W. Robinson, III, George E. MacKinnon, Roger Robb & Malcolm R. Wilkey, JJ., U.S. Ct. of App. for the D.C Cir. (Oct. 27, 1976) [DLB-BLL/43] (discussing the proposed MacKinnon dissent and asserting that "[a] court cannot function if its members refuse to respect the rule of confidentiality shielding conferences, memoranda, and preliminary drafts of opinions from public disclosure"); David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to J. Skelly Wright, Carl E. McGowan, Edward Allen Tamm, Harold Leventhal, Spottswood W.

MacKinnon's actions angered not only Judge Bazelon and Judge Wright, but also several other judges, and he eventually relented by removing the deleted Bazelon paragraphs from his published dissent.

DeCoster II worried several state attorneys general as well as the Justice Department.[64] If it remained as issued, there was an argument that the district courts would be flooded with appeals based on ineffective assistance of counsel, which would lead to multiple trials within appeals.[65] The D.C. Circuit granted en banc review, and its plurality opinion rejected *DeCoster II*'s placement of the burden on the government to establish that the allegedly ineffective assistance did not adversely affect the outcome of the trial.[66]

Judge Leventhal encouraged a unanimous vote for an en banc review, arguing that if *DeCoster II* were followed by other courts, it would "move this country from an adversary to an inquisitorial system."[67] While Judge Leventhal was in the process of lobbying for a unanimous agreement for en banc review, Judge Bazelon kept the court abreast of DeCoster's defense counsel's reputation. "I cannot resist sharing with you a strikingly apposite series of events which, to me, illustrate the heart of the Decoster problem," Judge Bazelon wrote to the court, informing the judges that the attorney was undergoing disbarment proceedings and had been disciplined in the past.[68]

Robinson, III, George E. MacKinnon, Roger Robb & Malcolm R. Wilkey, JJ., U.S. Ct. of App. for the D.C Cir. (Nov. 1, 1976) (delaying publication of opinions in *DeCoster II* until after Judge MacKinnon replied to the Bazelon memo of October 27, or the Judicial Council took action on the matter) [DLB-BLL/43].

64. Harold Leventhal, J., U.S. Ct. of App. for the D.C. Cir., Memo. to All Circuit Judges (Dec. 29, 1976) (suggesting the possibility of inviting "the D.C. Bar," the "Public Defender Service," the "Criminal Justice Section of the ABA," and perhaps other similar organizations to appear as amici) [DLB-BLL/43].

65. *Id.* (citing *U.S. v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970)).

66. *DeCoster III*, 624 F.2d 196.

67. Leventhal, *supra* n. 64.

68. David L. Bazelon, J., U.S. Ct. of App. for the D.C. Cir., Memo. to the Circuit (June 19, 1976) [HL/112 f-1]. Judge Bazelon continued by noting that

> [t]hree months after Decoster's trial, Decoster's lawyer was appointed to represent another indigent defendant, Samuel Saunders. Saunders was accused of purse snatching. He was black, of low intelligence, and half-blind. The police report of the incident described a robber who did not wear eye glasses. Saunders wears very noticeable eye glasses with trifocal lens. Saunders protested his innocence, and asserted that he had been working on the day of the robbery,

Judge Leventhal believed that Judges Bazelon and Wright had ignored the ABA's and the D.C. Bar Association's concerns about *DeCoster I*.[69] Yet this is not to state that Judge Leventhal agreed with Judge MacKinnon either. Indeed, he wrote to Judge McGowan that

> [t]o the extent that he does analyze the "violation of a substantial duty" portion of his approach, Judge MacKinnon's argument pretty much comes down to the proposition that DeCoster was so darned guilty, nothing his counsel could have done would have helped; thus counsel was under no obligation to do anything.[70]

As a result, Judge Leventhal believed that he had to find a middle ground between Judge Bazelon and Judge MacKinnon, and he succeeded in obtaining a plurality to do so.

The plurality recognized that there was little uniformity among the courts of appeal as to whether the government or the appellant had the burden of proving that the ineffective assistance did not materially alter the outcome of the trial to the appellant's detriment.[71] The plurality also emphasized that its decisions made no equating of federal courts reviewing state

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> though he could not exactly remember where. He stated that the US Employment Service would know the details. But Saunders had a prior record, and Decoster's lawyer evidently did not believe his alibi. Decoster's lawyer did no investigation whatever, and his defense consisted of Decoster's denial. Saunders of course was convicted. On appeal, indisputable documentary proof was revealed indicating that Saunders had been working on a Washington Star delivery truck during the entire portion of the crime. The district court granted a Rule 33 motion for a new trial and charges were dropped. In the meantime, Saunders had spent a year and a half in jail. Decoster's lawyer was publiclyreprimanded in an unrelated civil case in Virginia in 1975.

Id.

69. The ABA leadership had concluded that *DeCoster II* would cause prosecutors to inquire into the effectiveness of defense counsel as well as to attempt to learn the thought processes underlying the choices made while pursuing a defense. Leventhal, *supra* n. 64 (expressing concern that the change would lead to an "inquisitorial system" and noting that the court might wish to hear from the ABA and various other lawyers' groups in connection with the case). Clearly, if true, this would create a breach of the attorney-client relationship.

70. Harold Leventhal, J., U.S. Ct. of App. for the D.C. Cir., Memo. to Carl E. McGowan, J., U.S. Ct. of App. for the D.C. Cir. (n.d.) [HLl/112 f-1].

71. *DeCoster III*, 624 F.2d at 202–04.

convictions on collateral attack, because such cases arising from state courts had to first prove an "exceptional circumstance."[72]

In *DeCoster III*, the plurality established a four-part test for determining whether a reversal for ineffective assistance was required: An appellant first had to specify overt acts or omissions, had to prove that the acts or omissions were a substantial and serious deficiency measurably below that of competent counsel, and had to prove that the acts and omissions caused prejudice because they affected the outcome,[73] but then the government could rebut the appellant's assertions by proving that there was no prejudice.

IV. *STRICKLAND*'S ROUTE TO THE BURGER COURT: FACTS AND PROCEDURAL HISTORY

Washington and an accomplice murdered Daniel Pridgen and stole various items from his home. Three days later, Washington murdered Katrina Birk—and attempted to murder three other women—while burglarizing her home. Four days later, Washington and two associates conspired to kidnap Frank Meli for ransom, and then Washington murdered Meli. Learning that his associates had been arrested, Washington surrendered to the police and confessed to the murders and to his other crimes.[74]

After the arrest, but before the confession, Tunkey, Washington's appointed counsel, advised him against speaking with law-enforcement authorities, but Washington confessed

72. *Id.* at 207–08. The Court would in *Strickland* expressly reject the view that it was issuing anything but a universal standard of review, applicable to the state courts as well as the federal courts. *Strickland*, 466 U.S. at 697–98 (holding that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial," and that "no special standards ought to apply to ineffectiveness claims made in habeas proceedings").

73. *DeCoster III*, 624 F.2d at 208 (listing components of test, and stating that "the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial"); *see also U.S. v. Green*, 680 F.2d 183, 188 (D.C. Cir. 1982) (pointing out that "the accused, though ineffectively represented, must further show a likelihood of harm therefrom, and . . . only then does the government face the need to disprove actual injury" (quoting *U.S. v. Wood*, 628 F.2d 554, 561 (D.C. Cir. 1980) (Robinson, J., concurring in part and dissenting in part)).

74. *Washington v. State*, 362 So. 2d 658 (Fla. 1978).

even so.[75] Washington also pled guilty against Tunkey's advice.[76] At trial, Washington waived his right to a jury and Tunkey focused the sentencing case on Washington's guilty plea and his acknowledgement of wrongdoing, but the trial judge sentenced Washington to death nonetheless.[77]

Washington did not challenge Tunkey's effectiveness on his first appeal. After losing at the Florida Supreme Court, he filed a petition for certiorari in the United States Supreme Court, which denied it.[78]

Washington's motion in the trial court for post-conviction relief was denied, but he alleged on appeal to the Florida Supreme Court that Tunkey had been ineffective for failing to seek a continuance after the guilty plea, failing to request a psychiatric report, failing to independently investigate the government's allegations, failing to produce character witnesses for mitigation, failing to request a presentencing report, failing to argue effectively to the judge, and failing to investigate the medical examiner's report or cross-examine the examiner, who testified as to the pain Washington caused Pridgen, Birk, and Meli.[79] Many of Washington's allegations about Tunkey's lack of preparation were true, but the Florida Supreme Court determined that none of Tunkey's alleged failings prejudiced Washington, as the result of the trial would have been the same even had Tunkey been an effective advocate.[80]

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75. *Washington v. Strickland*, 693 F.2d 1243, 1247 (5th Cir. 1982) (en banc) (per curiam), *reversed*, 466 U.S. 668 (1984).

76. *Id.*

77. *Washington v. Strickland*, 673 F.2d 879, 887 (5th Cir. 1982); *see also id.* at 886–89 (summarizing Tunkey's later testimony about his representation of Washington).

78. *Washington v. Fla.*, 441 U.S. 937 (1979) (denying certiorari). Justices Brennan and Marshall dissented on the ground that "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." *Id.*

79. *Washington v. State*, 397 So. 2d 285, 286–87 (Fla. 1981).

80. *Id.* The Court held that

> [a] confession plus numerous aggravating factors limit the alternatives of the most zealous of advocates. Finally, counsel's failure to investigate medical reports and cross-examine the medical examiners could not be prejudicial since the facts of the reports were admitted by defendant in his confession. Under the circumstances cross-examination could have accomplished little. Indeed, cross-examination is a trial tactic choice properly within counsel's discretion.

Id. (citations omitted). Importantly, the Florida Supreme Court relied on *Knight v. State*, 394 So.2d 997 (Fla. 1981), which essentially adopted the four-part test articulated in *DeCoster III*.

Washington next filed a habeas petition in the United States District Court for the Southern District of Florida, arguing that Tunkey's performance at sentencing was so ineffective that it constituted a denial of counsel. But the court denied the petition, measuring Tunkey's performance against the standard articulated in *DeCoster III* and *Knight*.[81]

Washington appealed to the Fifth Circuit, which concluded that the district court had applied the wrong standard for measuring effectiveness,[82] noting that Tunkey testified in the habeas hearing that after Washington confessed to his role in the three murders and determined to plead guilty, he did not feel "that there was anything which [he] could do which was going to save David Washington from his fate."[83] Indeed, "[i]n the weeks preceding the sentencing hearing, Tunkey in fact did very little in the way of investigation or preparation," and later admitted to not pursuing a psychiatric evaluation for Washington, even though he had argued to the trial judge in sentencing that Washington was laboring under mental strain at the time of murders. In essence, Tunkey conceded that since there was little he could do under the circumstances of Washington's confession and the other strengths of the government's case, he did very little on behalf of Washington.[84] It troubled the Fifth Circuit that several people, including church

81. *Strickland*, 673 F.2d at 901 (noting that the trial court had held that Washington had failed to show prejudice and that, "in so concluding, the district court was, apparently, borrowing from the analysis employed in *Knight* and *DeCoster* which require that a petitioner carry the burden of demonstrating 'a likelihood that the deficient conduct affected the outcome of the court proceedings'"). The state trial judge who sentenced Washington to death testified at the habeas hearing that the sentence would not have been affected by the introduction of character evidence or other mitigative evidence. *Id.* at 889. But it bears noting that the Fifth Circuit held that on remand, the district court would have to ignore the trial judge's testimony, because such testimony was customarily inadmissible. *Id.* at 902–06 (reviewing precedents and history).

82. *Id.* at 882, 901–02 (noting that the trial court used "a method of analysis . . . that is different in material respects from that employed in this circuit" and concluding that "although a habeas petitioner seeking relief on the basis of a claim of ineffective assistance of counsel must generally make a showing of prejudice, this prejudice requirement is satisfied by demonstrating that but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him"). The panel consisted of Judges Vance and Randall, both Carter appointees, and Judge Roney, a Nixon appointee, who filed a dissent.

83. 673 F.2d at 886.

84. *Id.*

officials, attested at the habeas hearing to Washington's character for peacefulness, but Tunkey never made any effort to produce these people for trial.[85] Moreover, Tunkey testified that he could not remember whether he had read the state psychiatrist's report of the examination conducted shortly after Washington's arrest.[86]

In 1974, the Fifth Circuit had adopted a standard for assessing the effectiveness of counsel as "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."[87] In rejecting *DeCoster III*'s test, the majority noted that it would leave the reviewing courts in the position of taking the place of the trial court's fact-finding function, and in the panel's opinion, reviewing courts could not, by their nature, accurately accomplish this.[88] Applying the "reasonably effective" standard instead, the Fifth Circuit determined that some showing of prejudice was required, but because there was a clear deficiency in Tunkey's representation, it would be improper and unfair to make Washington prove that a different outcome was likely.[89] Thus, the court applied *Chapman* and held that a remand was required to determine whether Tunkey was ineffective, and if so, whether effective counsel would have altered the trial in any way helpful to Washington, regardless of the outcome.

On rehearing en banc, the Fifth Circuit's Unit B (then soon to become the new Eleventh Circuit) granted the motion and affirmed that, in the Fifth Circuit, an appellant claiming ineffective assistance bore the burden of proving that defense

85. *Id.* at 887–88. In addition to the president of Washington's Baptist church, a police officer provided an affidavit on Washington's behalf. *Id.* at 888 n. 4.

86. *Id.* at 888–89.

87. *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974).

88. *Strickland*, 673 F.2d at 901 (holding that the *DeCoster* test "would inevitably require us, in determining whether the petitioner has made out a prima facie case for habeas relief, to engage in . . . highly speculative re-creations and revisions of trial court proceedings," which "is to be avoided rather than embraced").

89. *Id.* ("To require a petitioner to establish a likelihood that the outcome of criminal proceedings would have been altered in his favor had the error not occurred would require that the court hearing the ineffective assistance claim put itself in the place of the trial-court factfinder in an attempt to predict with some considerable degree of accuracy what that factfinder would have done had it been presented with different evidence.").

counsel had fallen below being "reasonably effective."[90] Moreover, the *en banc* majority recognized that while the ultimate fate of a criminal trial is decided by a trier of fact at trial, defense counsel's failure to investigate could affect the course of the trial to the detriment of the defendant.[91] The en banc majority conceded that it is impossible to create a precise measurement for determining the "reasonableness" of a pretrial investigation, however, because each case possesses a differing level of complexity.[92]

Most importantly, the en banc majority, while it placed a more difficult standard on an appellant than had the original three-judge panel, rejected both *DeCoster III* and any requirement that an appellant prove that the outcome of the trial would have been different had the defense counsel been effective.[93] Indeed, the en banc decision found it troubling that while the court in one decision held that it would not require an appellant to prove that but for the ineffective counsel a different result would have occurred, the *DeCoster III* plurality precisely placed that burden on an appellant.[94] Instead, the *en banc* majority placed the initial burden on the appellant of showing a deficiency in the defense counsel's performance, but then placed an onus on the district court to determine whether the trial's outcome would have been different.

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90. *See e.g. Strickland*, 693 F.2d at 1257 (noting that "[i]n this case numerous factual issues remain to be resolved by the district court before it can be determined with certainty whether counsel was reasonably effective").

91. *Id.* at 1251.

92. *Id.* In an attempt to ease future appellate review, the en banc majority divided ineffective-assistance claims into five categories and discussed each separately. *See id.* at 1252–57.

93. *Id.* at 1251. The following description is helpful to understanding the middle ground between *DeCoster* and the Fifth Circuit's *Strickland* decision:

> The panel majority attempted to steer between the Scylla and Charybdis of *Chapman* and *DeCoster* by imposing upon the petitioner the burden of showing that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." . . . We are now convinced that this standard does not represent a significant improvement upon the *Chapman* standard.

Id. at 1262 (citation omitted).

94. *Id.* at 1261 (citing *Wright v. Estelle*, 571 F.2d 1071 (D.C. Cir. 1978)).

The *en banc* majority incorporated *United States v. Frady*[95] to create a middle-of-the-road burden that did not hold the government to *Chapman*, but also did not require an appellant to prove that the result of the trial would have been different.[96] In incorporating *Frady* into *Strickland*, the court determined that the appellant bore the burden of proving that the "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense,"[97] but acknowledged that this was not the same burden as requiring an appellant to prove that a different result would have occurred.[98] The court then concluded that a remand was necessary so that the district court could apply the new standards.[99]

Judge Tjoflat concurred in the necessity for a remand, but believed that the majority erroneously incorporated *Frady*. Instead he proposed to have each individual state establish a threshold burden for determining prejudice.[100] His chief concern was that the en banc decision would result in federal courts reviewing state decisions more frequently.[101] But he also expected the outcome-determinative test to cause increased federal-court intrusion into matters of state law, and, equally important, to undermine the constitutional right to competent counsel.[102] Thus, while Judge Tjoflat's concurrence could be labeled conservative in the sense of his attempt to minimize

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95. 456 U.S. 152 (1982) (involving jury instructions that ostensibly equated malice with intent).

96. *Id.* at 170 (indicating that defendant "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions" (emphasis in original)).

97. *Strickland*, 693 F.2d at 1262.

98. *Id.* (citing *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974)).

99. *Id.* at 1263–64. The court held that

> [o]n remand, the district court should initially determine whether Washington's right to effective assistance of counsel was violated. If the district court finds a violation, it should then determine whether the petitioner suffered actual and substantial detriment to the conduct of his defense. Finally, if the petitioner meets this twin burden, the district court must determine whether, in the context of the entire case, the detriment suffered was harmless beyond a reasonable doubt. The district court may, in its discretion, conduct further proceedings.

Id. (footnote omitted).

100. *Id.* at 1264–65 (Tjoflat, J., concurring).

101. *Id.* at 1272 (Tjoflat, J., concurring).

102. *Id.* at 1273 (Tjoflat, J., concurring).

federal judicial oversight of state law, he believed that the test established by *DeCoster III* placed too onerous a burden on appellants.

Judges Johnson and Anderson concurred in part, but also dissented in part, because they believed that there was enough evidence to sustain a finding of ineffective assistance without a remand and that Washington had established prejudice.[103] The only purpose for a remand, as they saw it, was to permit Florida to introduce evidence to rebut Washington's showing of prejudice, but the strength of Washington's appeal appeared likely to make that fruitless.[104] Finally, Judges Roney, Fay, and Hill dissented, on the basis that Tunkey had not been ineffective because he had, in their estimation, made tactical decisions that were reasonable at the time.[105]

The internal deliberations in *Strickland* evidence the division among the judges as to where the burden of proving harm should be, but there was also concern that the court not devolve into personal dissension, as had occurred in *DeCoster*. Indeed, Judge Clark expressed these concerns to Judge Godbold, writing that "most or all of the members of the court are disturbed by our splintered resolutions of *Ford* and *Washington*."[106] He urged Judge Godbold to lobby Judges Vance, Tjoflat, and Johnson to join with the majority, even if there were differences on the final remedy proposed.[107] And as a show of good faith, Judge Clark withdrew a draft concurrence and instead joined Judge Tjoflat's opinion, even though he believed that Judge Tjoflat's proposed remedy favored Washington more than Judge Clark had originally thought

103. *Id.* at 1281 (Johnson & Anderson, JJ., concurring and dissenting).

104. *Id.* at 1281–85.

105. *See e.g. id.* at 1285 (Roney, Fay & Hill, JJ., dissenting) (referring to Tunkey's reaching "a reasoned, tactical decision as to the only course of action which he thought could result in a sentence of life imprisonment rather than a death sentence"). Although Judge Hill joined in this dissent, he also dissented separately. *See* 693 F.2d at 1288 (Hill, J., dissenting) (stressing that the propriety of the district court's taking of Judge Fuller's testimony was a matter for a different proceeding because it had no bearing on the effectiveness of Tunkey's performance as Washington's trial counsel).

106. Thomas A. Clark, J., U.S. Ct. of App. for the 11th Cir., Memo. to John C. Godbold, C.J., U.S. Ct. of App. for the 11th Cir. (Nov. 29, 1982) [FMJ/263].

107. *Id.*

appropriate.[108] Nonetheless, the *Strickland* split was as pronounced as the *DeCoster* split: Across the ideological spectrum, there was a significant gulf among the judges as to what constituted ineffective assistance and where the burden of proving its effect should fall.[109] (There were, to be sure, differences of opinion regarding capital punishment as well, but the root issue of where the line between effective and ineffective fell permeated the discussions.)

The judges understood that the Supreme Court was likely to grant certiorari in *Strickland*, and after this occurred, Judge Vance predicted that the Court would adopt either *DeCoster III* or their en banc decision, and was not confident that the Eleventh Circuit's approach would win.[110] Judge Godbold, on the other hand, noted that the Court might even adopt the original panel decision, which he considered "more favorable" to convicted appellants than the en banc decision.[111]

V: *STRICKLAND* AND *CRONIC*: DELIBERATIONS, DEBATES, AND DECISIONS

On May 29, 1983, Justice Blackmun hand-wrote on the last page of a preliminary memorandum prepared by one of Justice

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108. Thomas A. Clark, J., U.S. Ct. of App. for the 11th Cir., Memo. to Robert S. Vance, J., U.S. Ct. of App. for the 11th Cir. (Nov. 29, 1982) (pointing out that "[t]here are too many opinions in this case") [FMJ/263].

109. Judge Roney, for example, circulated the transcript of Tunkey's testimony in the habeas hearing to support his conclusion that Tunkey was not ineffective. Paul H. Roney, J., U.S. Ct. of App. for the 11th Cir., Memo. to All Active Judges (except Judge Hatchett), *Re:* Washington v. Strickland (Nov. 5, 1982) (indicating Judge Roney's belief that "a decision that [Tunkey] did not make a strategy decision, or a judgment call in which his client was involved on how he would proceed in the case would be clearly erroneous" and also noting that Tunkey stood by the decision years later "as the correct approach") [FMJ/263]. That memo prompted Judge Johnson to note that he found it "amazing" that he and Judge Roney had come to "diametrically opposite conclusions regarding . . . Tunkey's decision(s)," and also to tell Judge Roney that he believed both that Tunkey's failure to investigate had "absolutely nothing to do with trial strategy" and that "Tunkey was ineffective in failing to prepare for the sentence hearing." Frank M. Johnson, Jr., J., U.S. Ct. of App. for the 11th Cir., Ltr. to Paul H. Roney, J., U.S. Ct. of App. for the 11th Cir. (Nov. 8, 1982) [FMJ/263]. Judge Johnson sent copies of this letter to the rest of the judges. *Id.*

110. Robert S. Vance, J., U.S. Ct. of App. for the 11th Cir., Memo. to All Active and Senior Judges (June 21, 1983) [FMJ/263].

111. John C. Godbold, C.J., U.S. Ct. of App. for the 11th Cir., Ltr. to Robert S. Vance, J., U.S. Ct. of App. for the 11th Cir. (July 7, 1983) [FMJ/263].

White's clerks:

> A grant seems unavoidable, given the clear conflict & the importance of the issues. I am unhappy about this, because I doubt that the Court will be able to find 5 votes for any 1 standard, & the decision may create more of a muddle than is present now. Still, it is about time the Court gave some guidance about effective assistance claims, & the conflict here provides the foundation for doing so. . . . I would GRANT; if the timing can be worked out, I would schedule the case with *Cronic*.[112]

Justice Blackmun's pessimism about the Court's being fractured was a realistic assessment that reflected an increase of plurality decisions.[113] However, in this instance, it was misplaced: The Court would find a solid majority through a series of compromises leading to the creation of a middle standard of review.

A. Strickland v. Washington

The Court held its conference discussions in *Strickland* on the same day as its conference discussions on *Cronic*, and three days after hearing argument in *Strickland*. Justice Blackmun's conference notes indicate diverging views in *Strickland* that are not evident in the published opinion, or even in response to the first circulated draft.[114]

Justice Stevens believed that *United States v. Agurs*[115] presented a usable model for ineffective-assistance appeals of the type raised in *Strickland*, which arise through no fault of the trial court or government, more so than for the type raised in *Cronic*, which result from a judge pushing defense counsel to

112. Harry A. Blackmun, J., S. Ct. of the U.S., Ann. Memo. to Byron R. White, J., S. Ct. of the U.S. (May 29, 1983) [HAB/401]. Stuart H. Singer, who clerked for Justice White, drafted that memo for the cert pool. *Id.*

113. On the increase of plurality decisions see Student Author, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1135–43 (1981) (discussing potential causes for increasing use of plurality decisions).

114. *See* Sandra Day O'Connor, J., S. Ct. of the U.S., 1st Draft—*Strickland v. Washington* (Mar. 13, 1984) [HAB/401]. Chief Justice Burger assigned Justice O'Connor to write in *Strickland* and Justice Stevens to write in *Cronic*.

115. 427 U.S. 97 (1976).

trial.[116] *Agurs* arose from a murder trial in which the prosecution possessed potentially exculpatory evidence—the murder victim's criminal record and violent past—that was unknown to the defendant.[117] The Court recognized that a prosecutor has a constitutional duty to provide known exculpatory evidence to the defendant prior to trial, but did not conclude that a prosecutor's failure to provide exculpatory evidence required a reversal and retrial in all instances.[118] The Court instead created a sliding scale in which, if a reviewing court determined that the evidence in question was unable to overcome reasonable doubt of guilt, that is, the evidence would not change the verdict, then no new trial was necessary.

In the *Strickland* conference, according to notes made by Justice Blackmun and Justice Brennan, Chief Justice Burger initially disfavored creating a uniform standard, preferring that the lower courts review each claim of ineffectiveness based on reversible error.[119] In other words, Chief Justice Burger would apply a variety of tests to assess defense counsel's omission when, for example, the failure to object to the admissibility of a confession would be governed by the evidentiary standards for confessions, but the failure to discover exculpatory evidence would be governed by the newly discovered evidence rule. Under this proposed test, the failure to investigate for all exculpatory or mitigating witnesses would not automatically constitute reversible error. Instead, such a failure would place a heightened burden on an appellant to prove how an exculpatory witness would create reasonable doubt as to an element of an offense. But as Justice O'Connor would point out, the Burger method did not acknowledge that defense counsel's failure to investigate the conditions under which a confession was taken

116. Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes—*Strickland v. Washington* (Jan. 13, 1984) [HAB/401].

117. *Agurs*, 427 U.S. at 99–101.

118. *Id.* at 112–13 ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

119. Blackmun, *supra* n. 116.

could be symptomatic of other deficiencies in the defense counsel's performance.[120]

Justice Brennan also disagreed with Chief Justice Burger, urging instead that a universal test was the correct solution.[121] Justice White concurred with Justice Brennan and called Chief Justice Burger's approach "too lax," explaining that it would create more problems than it solved. Justice White also pointed out his dislike of the outcome-determinative test, noting that it lent itself to the judge and jury having their mental processes come under scrutiny in violation of *Fayerweather v. Ritch.*[122] He also indicated, somewhat surprisingly, that *DeCoster* was "too tough," and instead approved of Judge Tjoflat's *Strickland* concurrence.[123]

Justice Powell initially urged the Court to adopt *DeCoster III*'s outcome-determinative text, and Justice Rehnquist added that "Decoster makes sense."[124] However, Justice Rehnquist also later agreed with Justice Stevens that *Agurs* presented a better standard than *DeCoster III.*[125] Justice Marshall was the sole vote to sustain the Fifth Circuit's decision, taking the position that even the rule of the *en banc* decision was too onerous, particularly in a death-penalty case.[126]

Following the conference, Justice O'Connor circulated her first draft, which addressed using Tunkey's performance as an example for how the test might be applied, a discussion apparently missing from the conference deliberations.[127] Justice

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120. Blackmun, *supra* n. 116; William J. Brennan, Jr., J., S. Ct. of the U.S., Conf. Notes (n.d.) [WJB I:647 f-2].

121. Both Justice Brennan's and Justice Blackmun's notes following the conference indicate that the majority of justices agreed that counsel's performance could be measured by creating a guidepost combining *McMann* and the ABA's duties of counsel. Blackmun, *supra* n. 116; Brennan, *supra* n. 120 (citing *McMann* and suggesting that the Court "explain in general terms what reasonably competent counsel is—perhaps in terms of the ABA's duties of skill, knowledge, loyalty, and diligence").

122. 195 U.S. 276, 306–08 (1904) (immunizing decisional processes from review).

123. Brennan, *supra* n. 120. On Justice White generally, see Henry J. Reske, *Pragmatic White Retires*, ABA J. 16–18 (May 1993); Daniel C. Kramer, *Justice Byron R. White: Good Friend to Polity and Solon* in *The Burger Court: Political and Judicial Profiles* 407 (Charles M. Lamb & Stephen C. Halpern, eds., U. Ill. Press 1991).

124. Blackmun, *supra* n. 116.

125. *Id.*

126. *Id.*

127. *See supra* n. 114 (indicating that first O'Connor draft circulated on March 13, 1984). Three further drafts circulated around the Court, on March 29, May 5, and May 10,

Marshall circulated the first draft of his dissent on May 3.[128] Justice Brennan circulated a first draft of an opinion concurring in part and dissenting in part on March 28.[129]

After reviewing Justice O'Connor's first circulated draft, Justice Brennan informed her that he agreed with "most of the legal analysis in [her] careful and scholarly opinion," but remained convinced that vacating the decision below and remanding was preferable to reversing outright.[130] Justice Brennan's difficulty with the majority's decision was not in creating a new middle-ground standard, but the majority's application of the test in *Strickland* itself. He acknowledged to Justice O'Connor that it "*might* have been the case" that Tunkey's decision "not to investigate potentially mitigating circumstances" had been "a strategic choice," but he believed that the record did not favor such an interpretation:

> As I read this passage, it suggests at least a strong possibility that Tunkey's decision was not the product of a strategy, but rather of a sense of hopelessness. I do not consider it "reasonable" for counsel in a death case to make decisions based on a feeling of hopelessness and frustration. Indeed, it seems to me that the worse a client's plight, the more important it is that his lawyer acts professionally and not on the basis of emotion.[131]

Justice Brennan also pointed out that because the district court did not "employ the *Agurs* standard" to analyze prejudice, a remand was the only appropriate decision, particularly as a majority of Justices favored the creation of an entirely new standard. Finally, because the sentencing judge had only Washington's apology to consider, and "had virtually no information concerning Washington the man," there was, to

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though the differences between the first and fourth draft were largely stylistic. *See e.g.* William J. Brennan, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (May 9, 1984) (suggesting possible clarification); Sandra J. O'Connor, J., S. Ct. of the U.S., Memo. to William J. Brennan, Jr., J., S. Ct. of the U.S. ((May 9, 1984) (agreeing to add requested clarification) [WJB/I:647 f-1].

128. Thurgood Marshall, J., S. Ct. of the U.S., 1st Draft–*Strickland v. Washington* (May 3, 1984) [HAB/401].

129. William J. Brennan, Jr., J., S. Ct. of the U.S., 1st Draft–*Strickland v. Washington* (March 28, 1984) [HAB/401].

130. William J. Brennan, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 13, 1984) [HAB/401 & WJB/I:647 f-1].

131. *Id.*

Justice Brennan, more than a reasonable doubt that the outcome would have been different had Tunkey been reasonably effective as demanded by the new standards.[132]

Justice O'Connor clearly wanted Justice Brennan to join the majority opinion, but not at the expense of applying the new standard to the facts of the initial case. But, she noted, "[i]t is helpful because it gives a concrete illustration of how the otherwise abstract principles articulated in the opinion apply to one particular set of facts." As to Justice Brennan's contention that Tunkey's "hopelessness" rendered his performance incompetent, Justice O'Connor responded that "if it did, any counsel who felt hopeless about a case would have to be disqualified."[133] On the other hand, she concluded that if she could not muster five justices to vote for reversal, she would revise the opinion to order a remand.[134]

Justice O'Connor did not, in reality, have to wonder whether five justices would side with her first draft opinion. Justice Rehnquist noted his agreement, adding: "I think without Section V, in which you apply the standards developed in the earlier part of the opinion to the facts of this case, the opinion is somewhat abstract and might mean a number of things to a number of people."[135] Chief Justice Burger also joined her draft, stating that he saw "no need to remand"[136] Justices White, Powell, and Blackmun eventually joined Justice O'Connor's draft as well.[137] Moreover, Justice Powell agreed with Justice Rehnquist, stating, "I think we should decide *Strickland*. It would be helpful for the lower courts to have us apply the new

132. *Id.*

133. Sandra Day O'Connor, J., S. Ct. of the U.S., Memo. to William J. Brennan, Jr., J., S. Ct. of the U.S. (Mar. 13, 1984) [HAB/401 & WJB/I:647 f-1].

134. *Id.*

135. William H. Rehnquist, J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 14, 1984) [HAB/401 & WJB/I:647 f-1].

136. Warren E. Burger, C.J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 14, 1984) [HAB/401].

137. Byron R. White, J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 22, 1984) [HAB/401]; Lewis F. Powell, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 23, 1984) [HAB/401]; Harry A. Blackmun, J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 26, 1984) [HAB/401].

standards."[138] Justice Powell also differentiated *Cronic* from *Strickland* with the caveat that he favored a remand in *Cronic*. This left only Justice Stevens and Justice Marshall not in favor of Justice O'Connor's circulated draft.

On March 22, Justice Stevens informed Justice O'Connor that he favored a remand even though she had "written an excellent opinion."[139] Had Justice Stevens maintained his posture on the issue of a remand, he would have joined with Justice Brennan. But on March 28, Justice Stevens switched his position on both the remand and the application of the new standard, and decided to join the majority.[140]

Although Justice Brennan intended to concur, his influence over the majority did not end after Justice O'Connor's third draft. Following Justice Marshall's circulated dissent, Justice Brennan noted to Justice O'Connor that the draft majority opinion could be interpreted as directing state and federal appellate courts to "indulge a *strong* presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[141] This caused Justice O'Connor to add language regarding the influence of the ABA standards.[142]

The final opinion first provided an overview of Washington's trial and appeals history, noting that the sole reason for granting certiorari was to "consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[143] Then the Court reaffirmed the principle that the right to counsel is an essential component of the right to a fair trial.[144]

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138. Lewis F. Powell, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 23, 1984) [HAB/401, WJB/I:647 f-1].

139. John Paul Stevens, J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 22, 1984) [HAB/401, WJB/I:647 f-1].

140. John Paul Stevens, J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S. (Mar. 28, 1984) [HAB/401].

141. William J. Brennan, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor, J., S. Ct. of the U.S., *Re:* Strickland v. Washington (May 9, 1984) (emphasis in original) [WJB/I:647f-2].

142. Sandra Day O'Connor, J., S. Ct. of the U.S., Memo. to William J. Brennan, Jr., J., S. Ct. of the U.S., *Re:* Strickland v. Washington (May 9, 1984) [WJB/I:647f-2].

143. *Strickland*, 466 U.S. at 684 (citing *Strickland v. Washington*, 462 U.S. 1105 (1983) (granting certiorari)).

144. *Id.* (citing both *Powell* and *Gideon*).

In the opinion's third section, the Court held that it was not in the interests of a fair trial to create specific guidelines for measuring the effectiveness of counsel,[145] and declined to adopt the ABA guidelines as the sole determinant of effectiveness:

> Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.[146]

Essentially an adoption of *DeCoster III*, this part of the opinion indicated the plurality's belief that defined rules would hinder the performance of defense counsel by creating restrictions on "the wide latitude counsel must have for making tactical decisions."[147] The Court also recognized that strict adherence to ABA-issued rules would also enable the ABA to shape appellate practice at the expense of judicial discretion.[148] Nonetheless, the Court did not seek to diminish the ABA's role in regulating the practice of law by defense counsel.

The Court also recognized that with the absence of specific guidelines to measure effectiveness, courts had to judge whether counsel was ineffective on a case-by-case basis[149] because even unreasonable errors require reversal only if they are prejudicial. Distinguishing *Cronic*, the Court then held that it would be improper to require the government to prove prejudice when neither its actions nor those of the court created the error.[150]

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145. *Id.* at 688 (pointing out that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms" and noting in addition that "[m]ore specific guidelines are not appropriate").

146. *Id.* at 688–89.

147. *Id.* at 689 (citing *DeCoster III*).

148. *Id.* at 689 (noting that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges," and pointing out that "[j]udicial scrutiny of counsel's performance must be highly deferential" because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable").

149. *Id.* at 690 (referring to "the facts of the particular case, viewed as of the time of counsel's conduct").

150. *Id.* at 692–93.

Although the Court recognized that *DeCoster III*'s outcome-determinative test possessed several strengths, it found the test to be unreasonable.[151] The Court then concluded that a single standard of review was the only means for assuring uniform fairness.[152] In doing so, it rejected Judge Tjoflat's position that states should be permitted to create their own standards.

With the exception of Justice Marshall, who dissented from any departure from the en banc Eleventh Circuit, the last section of the majority decision generated the most disagreement among the justices. Justice Brennan ultimately concurred in the standards for reviewing appeals,[153] but believed that Tunkey was ineffective under the new standards and that the resulting prejudice required reversal of the death sentence.[154] The remaining seven Justices were split as to whether the Court could apply the new standards or should remand Washington's case for application of the new standards in the district court. Justice O'Connor considered that both sides on this issue had merit.[155] However, a majority of the remaining Justices—including Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell—wanted to evaluate Washington's claims of ineffective assistance by the new standards.[156]

Finally, the Court concluded that Tunkey had made a strategic choice to focus on Washington's emotional distress at the time of his offenses and also assumed that by pleading guilty Washington would receive leniency.[157] The majority then

151. *Id.* at 694 (noting that "the standard is not quite appropriate").

152. *Id.* at 695 (acknowledging that "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors").

153. *Id.* at 702 (Brennan, J., concurring & dissenting) ("I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law.").

154. *Id.* at 701 (Brennan J., concurring & dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, . . . I would vacate respondent's death sentence and remand the case for further proceedings.") (citation omitted); *see also* Blackmun, *supra* n. 116 (indicating both that Justice Brennan believed Tunkey's errors to have affected the outcome in Washington's case and that he would reverse the death sentence).

155. Blackmun, *supra* n. 116.

156. *Id.*

157. *Strickland*, 466 U.S. at 698–99.

determined that Tunkey's strategic choices were reasonable and in the alternative Washington was not prejudiced by any deficiency. Had Tunkey provided psychiatric testimony, the majority noted, the prosecution would have been able to present evidence of Washington's prior criminal record.[158] As a result, the Court concluded that Washington's sentencing proceeding had not been inherently unfair. The majority may have been correct in finding that Washington did not suffer any prejudice by Tunkey's decisions: Following the reinstatement of the death penalty, Florida sentenced several people to death, and Washington's conduct was egregious.[159] On the other hand, Tunkey's pre-sentencing investigation did not appear to be thorough, even by his own admission. The question of whether Tunkey's pre-sentencing investigation was adequate would be a contested issue in the conference.

Like Judges Johnson, Anderson, Vance, and Randall, Justice Brennan believed that Tunkey had been ineffective, and that the ineffectiveness had prejudiced Washington. However, he urged a remand on the ground that because of the severe nature of death-penalty proceedings, a trial court would be in a better position to determine whether there was prejudice.[160]

Justice Marshall dissented in part because he believed that the Fifth Circuit's standard was appropriate, but also because he disagreed with the Court's refusal to articulate guidelines, instead offering courts and lawyers relatively general advice.[161] Justice Marshall conceded that the decision would bring uniformity to the review of ineffective-assistance claims, but at too high a bar for convicted appellants to clear.[162]

B. United States v. Cronic

Unlike *Strickland*, which originated in a state capital-

158. *Id.* at 699–70.

159. *Id.* at 699 (calling the aggravating circumstances here "utterly overwhelming").

160. *Id.* at 706.

161. *Id.* at 706–09 (Marshall, J., dissenting).

162. *Id.* at 710 ("In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.") (Marshall, J., dissenting).

murder trial, *United States v. Cronic* arose from a federal fraud trial[163] in which Cronic and two co-defendants were prosecuted for conspiring to commit mail fraud and for the use of a fictitious name, both in a large-scale check-kiting scheme. His two co-defendants pled guilty, but Cronic litigated his case. He was defended by a court-appointed attorney who specialized in real-estate law and had only once defended a person charged with a crime. The defense counsel's strategy, when confronted with thousands of bank documents, was to try to undermine the government's ability to meet its burden of proof, and urge the jury to consider that overdrafts were a commonplace part of banking practices. Prior to trial, Cronic's defense counsel asked for a thirty-day continuance, but the trial court granted him twenty-five days to prepare for trial.[164] A prior defense counsel who had been a United States Attorney had recommended thirty days, and Cronic had, to no avail, sought a second, more experienced counsel.[165]

In *Dyer v. Crisp*,[166] the Tenth Circuit rejected the farce-and-mockery standard for one based on reasonably competent counsel. In order to prevail under this standard, the convicted appellant had to show prejudice. However, shortly after *Dyer*, the Tenth Circuit created an exception to this requirement: In both *United States v. King*[167] and *United States v. Golub*,[168] the

163. 675 F.2d 1126 (10th Cir. 1982), *rev'd*, 466 U.S. 648 (1984).

164. *Id.* at 1129 n. 1.

165. *Id.* It is unclear why Cronic's prior counsel did not remain on the case, but in any event, Cronic was found guilty at trial and sentenced to twenty-five years. *See Cronic*, 466 U.S. at 650.

166. 613 F.2d 275, 278 (10th Cir. 1980) (holding that "[t]he Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney").

167. 664 F.2d 1171 (10th Cir. 1981). *King* arose from a judge's refusal to grant a continuance to replacement counsel in a complicated tax-fraud trial. The Tenth Circuit considered the insufficient preparation time a "court-induced lack of preparation." *Id.* at 1173.

168. 638 F.2d 185 (10th Cir. 1980). *Golub* arose from a lawyer's having five days to prepare to defend against a complex mail-fraud case. Golub's attorney was a retired lawyer who had not defended a client in a criminal trial in over twenty years, had unsuccessfully sought more time to prepare, and was unable to interview the government's out-of-state witnesses prior to trial. *Id.* at 187. In *Golub*, the court created the following ineffective-assistance test: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the

court determined that in instances in which the prosecution or judge created circumstances that hampered the performance of defense counsel, an appellant need not prove prejudice. And the *Cronic* court itself noted that "Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on," and vacated the conviction.[169] The government sought certiorari.

The Court issued *Cronic* on the same day as *Strickland*, but remanded *Cronic*, which appears to have been an almost unanimous decision other than Justice Marshall's concurrence. The Justices' papers, though, reveal several disagreements in conference, similar to the disagreements in *Strickland*. The Court ultimately determined that even where the ineffectiveness was alleged to have been caused by the trial judge, a reviewing court must still find prejudice because not every refusal to grant a continuance would give rise to the presumption of prejudice.[170]

The Court was also unwilling to create a rule that twenty-five days to prepare for trial was too short to ensure for effective trial representation.[171] But the Court did not criticize the Tenth Circuit's test for ineffectiveness; instead it criticized the Tenth Circuit's coupling of *Powell* to Cronic's appeal insofar as Cronic did not have to show prejudice. The Court did not object to a test that presumed prejudice, but in such instances, the Justices wanted petitioners to point to counsel's specific omissions or deficiencies.[172]

In conference, Chief Justice Burger called Cronic's "a phony claim," by which Cronic could not demonstrate any

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accessibility of witnesses to counsel. *Id.* at 189. This test would be used by the Tenth Circuit in *Cronic*.

169. *Cronic*, 675 F.2d at 1129.

170. *Cronic*, 466 U.S. at 661–62.

171. *Id.* at 664–65.

172. *Id.* at 666. The Court held that the case was "not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel," noting that "[t]he criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary," and concluding that Cronic could have made out a claim of ineffective assistance "only by pointing to specific errors made by trial counsel." *Id.* Acknowledging that Cronic's counsel in the Supreme Court took the position "that the record would support such an attack," the Court nonetheless decided to "leave that claim—as well as the other alleged trial errors raised by respondent which were not passed upon by the Court of Appeals—for the consideration of the Court of Appeals on remand." *Id.* at 666–67.

prejudice, because there simply was none.[173] Justice Brennan countered that the trial court had itself placed conditions on the defense counsel, which, given the counsel's lack of experience, created a situation in which Cronic "had no counsel at all."[174] Justice White urged that as a result of the trial judge's action, *Powell* provided a better basis for decision than *Strickland*.[175] Justice Powell sided somewhat with Justice White but wanted to insure that whatever standard the Court created, it did not encompass a presumption that new lawyers were incompetent, commenting that "new lawyers do well."[176] He also informed Justices O'Connor and Stevens that, while he did not believe that a remand in *Strickland* was necessary, he thought one necessary in *Cronic*.[177] Justice Rehnquist and Justice Stevens agreed with Justice Powell on this point, trying to ensure that the opinion recognized that defense counsel had "broad discretion."[178] In principle Justice O'Connor accepted all but Chief Justice Burger's position, and ultimately even he joined the majority. Only Justice Marshall, who had dissented in *Strickland*, opted to concur in the judgment.[179]

Justice Brennan differentiated *Cronic* from *Strickland* because in *Cronic* the trial court had a role in pressing defense counsel to trial when he claimed that he was not ready, and in *Strickland*, the trial court had no such role.[180] Nonetheless, to Justice Brennan, and the unanimous court, what had occurred in *Cronic* did not necessitate overturning a conviction without any showing of prejudice.[181] Unlike Chief Justice Burger and Justice O'Connor, though, Justice Brennan believed that there were two categories of ineffective-assistance claims that required no

173. William J. Brennan, Jr., J., S. Ct. of the U.S., Conf. Notes (n.d.) [WJB/I:638].

174. *Id.*

175. *Id.*

176. *Id.*

177. Lewis F. Powell, Jr., J., S. Ct. of the U.S., Memo. to Sandra Day O'Connor & John Paul Stevens, JJ., S. Ct. of the U.S. (Mar. 23, 1984) [WJB/I:638].

178. *Id.*

179. Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes—*U.S. v. Cronic* (June 13, 1984) [HAB/394]; Thurgood Marshall, J., S. Ct. of the U.S., Memo. to John Paul Stevens, J., S. Ct. of the U.S. (May 11, 1984) [WJB/I:638].

180. William J. Brennan, Jr., J., S. Ct. of the U.S., Bench Memo.–*Strickland v. Wash.* (n.d.) [WJB/I:638].

181. *Id.*

showing of prejudice: those stemming from egregious judicial or government conduct or from truly incompetent counsel.[182]

VI: THE IMMEDIATE AFTERMATH OF *STRICKLAND*

A. Strickland*'s Progeny: 1984–1986*

Between *Strickland* and the end of Chief Justice Burger's tenure, several ineffective-assistance cases came to the Court.[183]

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182. William J. Brennan, Jr., J., S. Ct. of the U.S., Bench Memo.–*U.S. v Cronic* (n.d.). Justice Brennan expanded on this point:

> In my view, there are only two circumstances in which a court addressing a claim of ineffective assistance of counsel can dispense with any inquiry into prejudice: (1) The first circumstance is when a state authority—either the prosecutor or the judge—fundamentally impairs counsel's ability to do his job. This type of claim includes cases ranging from outright denial of counsel (*Gideon*) to prohibiting counsel-client consultations (*Geders*, 1976) to barring a summation (*Brooks*, 1972) to appointing counsel a few minutes before trial (*Powell v. Alabama*). In none of our cases of this type have we required a showing of prejudice. (2) The second type of claim in which no prejudice need be shown is when counsel's own conduct is so ineffective that the defendant constructively has no counsel at all, such as, for instance, when counsel sits on his hands and does absolutely nothing.

Id.

183. Justice O'Connor circulated several memoranda during this period in which she recommended action on cases to be remanded for consideration in light of *Strickland* and those on which the Court should simply pass. *See* Sandra J. O'Connor, J., S. Ct. of the U.S., Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stanley v. Zant* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Wainwright v. Douglas* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Douglas v. Wainwright* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Foster v. Lankford, supra* n. 6; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Solem v. Lufkins* (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Johnson v. McKaskle* (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stafford v. Oklahoma* (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Strickland v. King* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Berryhill v. Francis* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stafford v. Oklahoma* (capital case) (May 14, 1984) (involving second unrelated murder conviction) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Burger v. Zant* (capital case) (May 14, 1984) [HAB/401]; Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Strickland v. King* (capital case) (May 21, 1984) [HAB/401]. Justice Stevens circulated a responsive memorandum highlighting points on which he disagreed with Justice O'Connor. *See* John Paul Stevens, J., S. Ct. of the U.S., Memo. to the Conf. Re: Cases Held for *United States v. Cronic* and Cases Held for *Strickland v. Washington* (May 18, 1984) [HAB/401]. And then

Those in which the Court granted certiorari are divisible into three categories: claims originating from counsel's errors in trial; questions about the extent to which *Strickland* applied to appellate counsel; and the extent to which *Strickland* applied to the rule of procedural default.[184]

1. Ineffectiveness Claims Stemming from Trials

Two years after *Strickland*, in *Nix v. Whiteside*,[185] the Court determined that when defense counsel refuses to cooperate with a defendant during the commission of perjury, counsel is not ineffective. While *Nix* reaffirmed defense counsel's duty of loyalty, that duty was limited to lawful conduct, and both the ABA's Model Code of Professional Responsibility and the relevant state rules prohibited counsel from participating in a

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Justice O'Connor circulated a second series of memoranda explaining her position in each case about which they differed. *See* Sandra J. O'Connor, J., S. Ct. of the U.S., Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Wainwright v. Douglas* (capital case) (May 21, 1984) [HAB/401]; Sandra J. O'Connor, J., S. Ct. of the U.S., Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stanley v. Zant* (capital case) (May 21, 1984) [HAB/401]. Because several state attorneys general and the Justice Department were concerned about whether the Court would create a standard in *Strickland* that would apply only prospectively, these discussions of remands and denials of certiorari were particularly important. *See e.g. Amicus Curiae Br. of the States of Ala., Ariz., Ark., Cal., Colo., et al., in Support of Petrs., Strickland v. Washington*, 1983 U.S. S. Ct. Briefs LEXIS 532 at LEXIS p. 2 ("[T]he analysis provided by this Court will bear on cases in which state courts have already reviewed and rejected claims of ineffective assistance of counsel . . . [and] much time will have elapsed since the convictions. Because these claims are tardy and speculative, they threaten the integrity of our entire criminal justice system, raising the possibility that such claims will materialize in every case in which a conviction has occurred.").

184. In order to obtain review for procedural default, a petitioner must show that the omission by defense counsel would result in a fundamental miscarriage of justice, and that the petition is not an abuse of habeas. *See e.g. McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991) (holding that "petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard," but also holding that "[i]f petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim"). At the time of *Strickland*, the law on procedural default was defined by *Engle v. Isaac*, 456 U.S 107 (1982), in which the Court essentially held that a defendant is entitled to competent, rather than perfect, defense counsel and to a fair trial. *Id.* at 134 (acknowledging that competence will "not insure that defense counsel will recognize and raise every conceivable constitutional claim"). The extent to which *Strickland* modified *Engle* was an open question in the aftermath of *Strickland*.

185. 475 U.S. 157 (1986).

client's perjury or presentation of false evidence.[186] The Eighth Circuit had held that even though the defendant had committed perjury, counsel's efforts to persuade the defendant against committing perjury were improper, because the threat to inform the trial court of the intended perjury and the threat to withdraw from representation made the defendant choose not to testify.[187] But as the right to testify does not encompass the right to testify falsely, the Court found that counsel was not ineffective.[188]

In conference, Chief Justice Burger asserted that the ABA standards were, by implication, at issue in *Nix*, and that it was important for the Court to give these standards maximum deference.[189] Justices Brennan, Blackmun, and Stevens urged that the Court simply rule on the basis that because defense counsel's advice to a client not to commit perjury and refusal to participate in perjury is consistent with acting in the client's best interest, there simply could be no prejudice.[190] Justice Brennan later added in a memorandum circulated to Justice Stevens and Justice Blackmun that, while recognizing "there is, of course, no right to perjure oneself," he did not think that the Court "should constitutionalize legal ethics."[191] Justice White disagreed and urged Chief Justice Burger to approach the appeal by excepting ethical obligations of counsel from the *Strickland* test altogether.[192] Justices O'Connor, Powell, and Rehnquist agreed with Chief Justice Burger's approach as well.[193]

Justice Blackmun's concurrence reflected the view he expressed at the conference discussions by agreeing that

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186. *Id.* at 168 (quoting rule and citing *Comm. on Prof. Ethics & Conduct of Iowa St. Bar Assn. v. Crary*, 245 N.W.2d 298 (Iowa 1976)).

187. *Whiteside v. Scurr*, 744 F.2d 1323, 1329 (8th Cir. 1984) (noting that "[c]ounsel's actions, in particular the threat to testify against appellant, indicate that a conflict of interest had developed between counsel and appellant," and that "counsel had become a potential adversary and ceased to serve as a zealous advocate of appellant's interests"), *rev'd sub nom. Nix v. Whiteside*, 475 U.S. 157 (1986).

188. *Nix*, 475 U.S. at 173.

189. Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes—*Nix v. Whiteside* (Nov. 8, 1985) [HAB/441].

190. *Id.*

191. William J. Brennan, Jr., J., S. Ct. of the U.S., Bench Memo.–*Nix v. Whiteside* (argued Nov. 5, 1985) [WJB/I:704].

192. Byron R. White, J., S. Ct. of the U.S., Memo. to Warren E. Burger, C.J., S. Ct. of the U.S. (Jan. 31, 1986) [HAB/441].

193. Blackmun, *supra* n. 189.

Whiteside suffered no prejudice, but along with Justice Brennan and Justice Stevens, he departed from the Court's use of the ABA standards, albeit for a reason absent from the conference discussion. Justice Blackmun urged that the Court's ruling could evolve into usurpation of the state bars' duties of establishing professional standards within each state.[194] Justice Brennan joined Justice Blackmun, but also concurred separately on the basis that the Court did not possess the authority to create rules of professional responsibility that applied in state courts.[195] Justice Stevens concurred as well, to make the point that a client's recalling events differently over time does not automatically give rise to perjury, and that he believed the Court's decision could be read to imply that changes in a defendant's memory should be treated as perjury.[196]

While *Nix* appears as a fractured decision, the Court unanimously agreed to deny certiorari in a contemporaneously considered case. Chief Justice Burger noted that *Curtis v. United States*[197] had been held for *Nix*, and the facts underlying *Curtis* were fairly similar: The defendant had admitted to his counsel that he committed an armed bank robbery but wanted to testify and be questioned on an alibi defense. The attorney refused to offer the testimony, and informed the defendant that he would withdraw if the defendant testified.[198] The Seventh Circuit

194. *Nix*, 475 U.S. at 189–90 (Blackmun, Brennan, Marshall & Stevens JJ., concurring) (indicating that Justice Blackmun was "troubled by the Court's implicit adoption of standards of professional responsibility for attorneys in state criminal proceedings," and noting that although states "have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal," the ABA's "implicit suggestion . . . that the Court find that the . . . Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience," and that "[i]t is for the States to decide how attorneys should conduct themselves in state criminal proceedings," the Supreme Court's role being "only" to ensure "that the restrictions a State enacts do not infringe a defendant's federal constitutional rights").

195. *Id.* at 177–78 (Brennan, J., concurring in the judgment).

196. *Id.* at 190–91 (Stevens, J., concurring in the judgment).

197. 742 F.2d 1070 (7th Cir. 1984), *cert denied*, 475 U.S. 1064 (1986). Justice Brennan took no part in the denial of certiorari, but his conference notes indicate no intention of voting for a grant. *See* Warren E. Burger, C.J., S. Ct. of the U.S., Memo. to the Conf. (Feb. 27, 1986) [WJB:/I:704].

198. *Curtis*, 742 F.2d at 1072–73.

determined that because there was no right to testify falsely, the sixth amendment was not implicated by counsel's actions.[199]

In *Kimmelman v. Morrison*,[200] the Court concluded that counsel's failure to timely file a motion to suppress a confession or evidence under either the fifth or fourth amendments could support a finding of ineffective assistance requiring the reversal of a conviction. The Court also concluded that the traditional habeas test governing review of state convictions—that so long as the state appellate courts reviewed the petitioner's claim fully and fairly, the federal judiciary must defer to that review—did not apply to review of petitions rooted in the sixth amendment's right to counsel.[201] The question was whether the then-new restrictions on federal habeas review of unlawful-search-and-seizure claims

> should be extended to . . . claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.[202]

According to the state, the case was just an "attempt to litigate [a] defaulted Fourth Amendment claim."[203] But the Court accepted the initial habeas court's conclusion that "counsel failed to conduct any meaningful pretrial investigation."[204] *Kimmelman* is important for the principle that the paramount consideration for assessing ineffective-assistance claims is not the nature of the underlying omission (such as a failure to investigate a fourth amendment violation), but rather an assessment of whether counsel truly failed to investigate and pursue a claim. It may be that the admission of reliable, but illegally seized, evidence did not rise to the level of prejudice in *Kimmelman*, as Justice Powell pointed out.[205] However, the Court did not address this issue, and no Justice expressed a

199. *Id.* at 1076 (pointing out that "a defendant has no constitutional right to testify perjuriously in his own behalf").

200. 477 U.S. 365 (1986).

201. *Id.* at 373–75.

202. *Id.* at 368.

203. *Id.* at 373.

204. *Id.* at 372.

205. *Id.* at 394 (Powell J., concurring).

belief in conference that the defense counsel's wholesale failure to investigate could survive the first *Strickland* prong.[206]

In *Burger v. Kemp*,[207] the Court determined that the appointment of two attorneys from the same firm to represent co-defendants at a capital-murder trial, without more evidence of a conflict, did not support a claim of ineffective assistance based on the right to conflict-free counsel.[208] The relevant facts in *Burger* were that the co-defendants murdered a taxi driver,[209] that one lawyer had prepared both appellate briefs, and that appellate counsel did not argue on appeal that one defendant—Burger—had a lesser degree of culpability, so the death penalty was excessive.[210] Burger also claimed that his attorney did not offer a plea deal to the prosecution, which would have included his testifying against his co-defendant.[211] But the Court accepted the finding below that a plea deal was unlikely to be accepted because of the gravity of the crime, and concluded that even if the omissions of counsel occurred, they did not fall outside "the wide range of professionally competent assistance."[212]

During conference discussions, Justice O'Connor stressed that a vote for remand was meritorious because the lower court did not satisfactorily articulate its reasons for concluding that an adequate investigation had occurred.[213] "Whether counsel's decisions were reasonable depends on what counsel planned to do, as evidenced by what he actually did, at the sentencing," Justice O'Connor commented.[214] Ultimately, though, Justice O'Connor, along with the majority, determined on appeal that there was no ineffective assistance prejudicial to Burger.

Justice Blackmun, with Justices Brennan, Marshall, and Powell joining, dissented, arguing that both allegations of

206. Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes (Mar. 7, 1986) [HAB/445].

207. 483 U.S. 776 (1987). The case was originally *Burger v. Zant*, 718 F.2d 979 (11th Cir. 1983).

208. *Id.* at 783–84.

209. *Id.* at 778–79.

210. *Id.* at 784.

211. *Id.* at 785 (asserting that "[t]he notion that the prosecutor would have been receptive to a plea bargain is completely unsupported in the record").

212. *Id.* at 795.

213. Sandra Day O'Connor, J., S. Ct. of the U.S., Memo. to the Conf.—*Burger v. Zant*, (May 15, 1984) [HAB/401].

214. *Id.*

ineffectiveness were of constitutional dimension and at least established the first part of *Strickland.* Petitioner Burger pointed out that at trial, a third party who had been in the cab with the co-defendants shortly before the murder testified that Burger had initially opposed murdering the driver, but that his co-defendant demanded it.[215] In conference, the issue of counsel's decision not to pursue the defense of lesser culpability became a matter of contention between Justice Blackmun and Justice Stevens. Justice Blackmun believed that *Strickland* coupled with *Glasser* mandated reversal on a showing of a potential conflict of interest, but Justice Stevens countered that in no drafts or discussions did any Justice pursue such an analysis in the *Strickland* deliberations.[216]

2. Strickland *and the Right to Counsel on Appeal*

In *Penson v. Ohio*, the Court held that the right to effective assistance of counsel applied to the first post-conviction appeal.[217] *Penson* was indigent and the state appointed appellate counsel, who concluded that there were no errors at trial and any appeals would be frivolous.[218] The Ohio Court of Appeals permitted counsel to withdraw, and did not appoint new counsel. But during its later review of the record, that court concluded that, contrary to counsel's assertions, Penson had several meritorious claims that could be advanced on appeal. Indeed, the appellate court found that the trial judge had issued erroneous

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215. *Burger*, 483 U.S. at 800 (Blackmun, Brennan, Marshall, & Powell, JJ., dissenting). Justice Blackmun pointed to the actual testimony, which read:

> Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean.

Id.

216. Harry A. Blackmun, J., S. Ct. of the U.S., *Burger v. Kemp* Conf. Notes (Apr. 1, 1987) [HAB/485].

217. *See* 488 U.S. 75 (1988). This was not a shocking decision. In *Anders v. Cal.*, 386 U.S. 738, 744 (1967), the Court had held that the right to appellate counsel meant that counsel had to conduct at least a "conscientious examination" of the case.

218. *Penson*, 488 U.S. at 78.

jury instructions in one instance, and consequently reversed one of the petitioner's convictions.[219]

The Court recognized that appellate counsel had a duty not to advance frivolous appeals, but also noted its holdings that the right to counsel extended to the first appeal from a conviction.[220] The Court also held that a no-merit assertion made before investigating the record constituted a denial of counsel,[221] and then found prejudicial error in the state court's permitting counsel to withdraw without appointing new counsel.[222] The state argued that because the appellate court itself found errors in the petitioner's trial, the petitioner suffered no prejudice. The Court found this argument misplaced because the appellate court could not both conduct its function in reviewing appeals and adopt a secondary function embracing a convicted defendant's right to advocacy on appeal.[223]

In conference, none of the justices urged that *Strickland* did not apply to appellate counsel. To the contrary, all of the Justices agreed that *Strickland* governed appellate counsel. However, appellate counsel will often be measured on their thorough review of trial records, as well as their adherence to the time standards set by the appellate courts, and there was no consensus as to whether defense counsel in *Penson* was ineffective. Chief Justice Rehnquist indicated that counsel was not per se ineffective simply because he exercised his judgment and determined that there was no basis for appeal. Justice Brennan disagreed and urged that counsel's ineffectiveness was shown by the action of the state appellate courts, which found on their own that Penson could raise meritorious claims on appeal. Justice Stevens believed that three clear errors existed, but conceded that it would be difficult to prove prejudice. Justice

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219. *Id.* at 79–80.

220. *Id.* at 79 (citing *Douglas v. Cal.*, 372 U.S. 353 (1963)).

221. *Id.* (citing *Anders*).

222. *Id.* at 80 ("[I]f the court disagrees with counsel—as the Ohio Court of Appeals did in this case—and concludes that there are nonfrivolous issues for appeal, 'it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.'" (quoting *Anders*)).

223. *Id.* at 88 (pointing out that "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, . . . the presumption of prejudice must extend as well to the denial of counsel on appeal") (citation omitted).

O'Connor noted that she was "no fan of *Anders*," but would favor a remand. Justice Scalia urged that the Court could not reasonably apply *Strickland* to *Anders*, and that the central issue in *Penson* was whether appellate counsel had a duty to write something on his client's behalf.[224]

3. Strickland *and Procedural Default*

In *Murray v. Carrier*[225] the Court determined that because many procedural defaults could not be classified under *Strickland*, the avenues of redress for procedural default had to be separate from those based on ineffective assistance.[226] Since then, *Strickland* has been considered inapplicable where otherwise competent defense counsel made a single mistake.[227] In the absence of a viable ineffective-assistance claim, the Court held that the petitioner bears the liability for procedural default, but if the default was the result of ineffective assistance, responsibility for the default is imputed to the state.[228]

Although Justice Blackmun recorded in conference that Justice Brennan wanted to do away with *Engle* and the procedural default tests, and liberalize *Strickland*, Justice Brennan's conference memorandum indicates otherwise.[229] Justice Brennan did not believe that *Strickland* should expand to cover procedural default cases:

> The performance prong of the *Strickland* test explains at length that counsel's overall performance must have been

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224. Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes (Oct. 14, 1988) [HAB/530].

225. 477 U.S. 478 (1986).

226. *Id.* at 487–88.

227. *See e.g. Harrington v. Richter*, ___ U.S. ___, ___, 131 S. Ct. 770, 791 (2011); *Holland v. Fla.*, ___ U.S. ___, ___, 130 S. Ct 2549, 2571 (2010) (noting that "[w]here a State is constitutionally obliged to provide an attorney but fails to provide an effective one, the attorney's failures that fall below the standard set forth in *Strickland* . . . are chargeable to the State, not to the prisoner," and citing *Carrier*).

228. *Carrier*, 477 U.S. at 488 (explaining that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default," but also that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State").

229. William J. Brennan, Jr., J., S. Ct. of the U.S., Conf. Memo.–*Murray v. Carrier* (n.d.) [WJB/I:706]; Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes,–*Murray v. Carrier* (Jan. 24, 1986) [HAB/443].

> inadequate to prove ineffective assistance. It was intended to, and does, make proof of a single mistake by counsel insufficient to make out a Sixth Amendment claim, even if counsel's mistake creates a "reasonable probability" that the outcome would have been different.[230]

By keeping procedural default separate from *Strickland*-style consideration of ineffective assistance, the Court narrowed *Strickland*'s range.

a. Cases Not Remanded

Typical of the cases held for *Strickland* that were not remanded was *Berryhill v. Francis*,[231] in which Berryhill asserted that his counsel failed to investigate the government's case and present mitigating evidence of possible drug-induced psychosis. In conference, Justice O'Connor concluded that the state court was correct in concluding that defense counsel had conducted ample investigation and made the reasonable decision not to present this evidence as mitigation.[232]

Several cases not remanded were detrimental to the appellant, but not all were so. For instance, in *Foster v. Lankford*,[233] the Fourth Circuit affirmed the district court's holding that counsel's decision not to call character witnesses, failure to seek a recording of a state preliminary hearing and to request modifications to the jury instructions, and decision not to voir dire a jury together constituted ineffective assistance.[234] Justice O'Connor noted that the district court "did not apply any rigid rules," adding that "the one possible ground for faulting the

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230. Brennan, *supra* n. 229; *see also* Harry A. Blackmun, J., S. Ct. of the U.S., Conf. Notes (Mar. 2, 1986) [HAB/457]. The Court reached a similar result in *Smith v. Murray*, 477 U.S. 527, 530–32, 535 (1986) (applying procedural-default rule to sustain decision of state supreme court, and noting that *Strickland*'s ineffectiveness standard required more than a single error or omission by defense counsel unless that error is "sufficiently egregious and prejudicial" (quoting *Carrier*)).

231. For the facts of *Berryhill*, see *Berryhill v. State*, 291 S.E.2d 685 (Ga. 1982), *abrogated on other grounds*, *Jones v. State*, 409 S.E.2d 642 (Ga. 1991).

232. O'Connor, Memo. to the Conf.—*Berryhill v. Francis*, *supra* n. 183.

233. 716 F.2d 896 (4th Cir. 1983) (affirming 546 F. Supp. 241 (W.D. Va. 1982) without opinion).

234. *Lankford*, 546 F. Supp. at 245–49, 253 (describing facts and pointing out that "the adoption of a trial strategy does not excuse defense counsel's obliviousness to certain weaknesses in the Commonwealth's evidence").

court is that its opinion does not emphasize the deference due to tactical decisions that *Strickland* emphasizes."[235] But she believed that a remand was unnecessary because the Fourth Circuit had properly applied *Strickland*.[236]

In *Stanley v. Zant*,[237] another capital case from the Eleventh Circuit, Justice O'Connor concluded that neither remand nor a grant of certiorari was necessary because defense counsel's determination that multiple general statements of Stanley's good character during childhood would be cumulative was within the range of reasonable discretion.[238] Justice Brennan and Justice Marshall dissented from the denial of certiorari, but only on the issue of the death penalty's constitutionality, not effectiveness of counsel.[239]

In *Johnson v. McKaskle*,[240] the Court found that *Strickland* did not apply to counsel's performance on appeal. Justice O'Connor noted in a conference memorandum that counsel's assistance on appeal

> raises quite different questions from those raised by assistance at trial: there is no constitutional right to an appeal, and the only cases in which this Court has considered claims concerning counsel on appeal are equal protection/due process cases, not Sixth Amendment cases.[241]

b. Cases Remanded

Clearly the Court intended an end to the application of standards stricter than that established in *Strickland*. Determining that the Oklahoma Court of Criminal Appeals had

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235. O'Connor, Memo. to the Conf.—*Foster v. Lankford*, *supra* n. 183.

236. *Id.*

237. 697 F.2d 955 (5th Cir. 1983).

238. O'Connor, Memo. to the Conf.—*Stanley v. Zant*, *supra* n. 183. Justice O'Connor further noted that the ineffectiveness claim was "the one substantial claim," and that the Eleventh Circuit "applied standards at least as favorable to petitioner as those articulated in *Strickland*," and "gave the record a thorough examination." *Id.*

239. *Stanley v. Kemp*, 467 U.S. 1219 (1984).

240. 465 U.S. 1009 (1984); *see also Johnson v. State*, 627 S.W.2d 186 (Tex. Crim. App. 1981). *McCaskle* would seem to be somewhat at odds with *Penson*. *See* text accompanying nn. 217–24, *supra*.

241. O'Connor, Memo. to the Conf.—*Johnson v. McKaskle*, *supra* n. 183.

wrongly applied "farce and mockery" in *Stafford v. State*,[242] Justice O'Connor lobbied the Conference for a remand:

> Since *Strickland* adopts a standard significantly different in form from the "mockery of justice" test, a GVR in light of *Strickland* seems in order, even though application of the Strickland standards on remand will almost certainly result in reentry of judgment against petitioner.[243]

Because a majority of the Court did not believe that *Strickland* was clearly a prospective-application-only decision, it prompted state attorneys general to appeal cases decided under standards more favorable to appellants than those the Court ultimately created. In *Strickland v. King*,[244] for example, the Eleventh Circuit found defense counsel to have been ineffective during the sentencing phase of the trial, which had resulted in a sentence of death.[245] In voting for a remand, Justice O'Connor noted that while the Eleventh Circuit followed its more permissive standard, she thought it "reasonably possible that reconsideration in light of *Strickland*" would lead to a change in the result.[246] Although initially the Eleventh Circuit had not required King to prove prejudice, it determined on remand that he had proved ineffective representation resulting in prejudice

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242. 665 P.2d 1205, 1210 (Okla. Crim. App. 1983) (holding that "appellant must show that counsel's performance was so ineffective that the trial was reduced to a farce or mockery of justice, or was shocking to the conscience of this Court, or that counsel's services were only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation," and also noting that "[t]he burden is a heavy one, and is not satisfied by simply pointing out possible errors in counsel's judgment, or lack of success in the defense"), *vacated sub nom Stafford v. Okla.*, 467 U.S. 1212 (1984). The Court of Criminal Appeals replaced the farce-and-mockery standard with a standard requiring "reasonably competent assistance of counsel" after Stafford's trial but before his appeal, and held in *Stafford* that the new standard had no retroactive application. *Id.*

243. O'Connor, Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stafford v. Okla.* (No. 83-5636), *supra* n. 183 (recommending by reference to "GVR" that the Court grant certiorari, vacate the decision below, and remand the case for reconsideration in light of *Strickland*). Stafford also had a second trial—in which he was represented by different counsel—that resulted in a second death sentence. *Stafford v. State*, 669 P.2d 285 (Okla. 1983), *vacated sub nom Stafford v. Okla.*, 467 U.S. 1212 (1984). Again, Justice O'Connor was persuaded that Stafford's petition for certiorari "would not be worthy of review but for one fact": The Court of Criminal Appeals had applied the farce-and-mockery test. O'Connor, Memo. to the Conf. Re: Case Held for *Strickland v. Washington—Stafford v. Okla.* (No. 83-6125), *supra* n. 183.

244. 714 F.2d 1481 (11th Cir. 1983), *vacated*, 467 U.S. 1211 (1984).

245. *Id.* at 1491.

246. O'Connor, Memo. to the Conf.—*Strickland v. King*, *supra* n. 183.

likely to have led to an outcome that would otherwise have been different.[247]

c. The Stevens–O'Connor Dialogue

Illinois v. Williams[248] and *Illinois v. Rainge*[249] together presented an issue not directly considered in either *Strickland* or *Cronic*. Williams was sentenced to death for two counts of murder, and to concurrent extended sentences of sixty years for two counts of aggravated kidnapping and a single count of rape.[250] Rainge, his co-defendant, likewise was found guilty but was sentenced to two concurrent terms of life imprisonment for the murders, two terms of sixty years for the kidnappings, and one sixty-year term for the rape.[251] Williams appealed, arguing that his counsel had been ineffective, in part for failing to file a motion to suppress some evidence, but the court found the remaining evidence of guilt so overwhelming that no prejudice resulted.[252]

Williams petitioned for rehearing, and while that petition was pending, his counsel was disbarred for matters unrelated to his trial.[253] On rehearing, Williams argued that this disbarment was further proof of his counsel's ineffectiveness.[254] The Illinois

247. *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984) (concluding that "King has satisfied both the performance and the prejudice prongs" of the *Strickland* standard).

248. *See People v. Williams*, 444 N.E.2d 136 (Ill. 1982), *cert. denied sub nom. Ill. v. Williams*, 467 U.S. 1218 (1984).

249. *People v. Rainge*, 445 N.E. 535 (Ill. App. 1st Dist. 1983), *cert. denied sub nom. Ill. v. Rainge*, 467 U.S. 1219 (1984).

250. *Williams*, 444 N.E.2d at 137.

251. *Rainge*, 445 N.E.2d at 537.

252. *Williams*, 444 N.E.2d at 142 ("[T]he evidence, if believed by the jury as it apparently was, was sufficient to prove defendant guilty beyond a reasonable doubt.").

253. *Williams*, 444 N.E.2d at 312 (citing *In re Weston*, 442 N.E.2d 236 (Ill. 1982)); *see also Rainge*, 445 N.E.2d at 544–45 (same). Weston apparently mishandled the estate of a deceased client and refused to communicate with the decedent's heirs, and ignored inquiries from the state disciplinary agency. *See Weston*, 442 N.E.2d at 435–37; *see also* John Paul Stevens, J., S. Ct. of the U.S., Memo. to the Conf.—Cases Held for *U.S. v. Cronic* & *Strickland v. Washington* (May 18, 1984) (describing the "Illinois Supreme Court's careful consideration of the relationship between the serious disciplinary proceedings brought against the lawyer in the capital case and the record before it") [HAB/401].

254. *Williams*, 444 N.E.2d at 137 (referring to the court's consideration of the "possible relevance of the disciplinary matters to the capital case").

Supreme Court conceded that there was ample evidence to prove Williams's guilt, but then concluded that defense counsel's behavior was dispositive: The distraction evident in his performance because he was laboring under disciplinary charges while representing Williams and Rainge could be considered a denial of competent counsel.[255]

Although Justice Stevens urged remands in both cases, Justice O'Connor disagreed. She pointed out that the Illinois courts "followed neither the presumed-prejudice analysis discussed in *Cronic*, nor the prejudicial-deficient-performance analysis set forth in *Strickland*."[256] Instead, she rightly noted that the state supreme court adopted an "irrebuttable presumption, not simply of prejudice, but of unprofessional judgment as well as prejudice." What concerned Justice O'Connor was that under the unique circumstances of an attorney facing disciplinary proceedings before a state bar or court, the Court was adopting a third basis for finding ineffective counsel in violation of the sixth amendment, and this third standard was impossible for the state to overcome. In particular, the Illinois Supreme Court did not acknowledge any actual errors resulting in prejudice committed by Weston. Most troubling to Justice O'Connor was that while Williams had standing to move the trial court to suppress evidence seized from his property but used in both trials, Rainge did not have standing because the property belonged to Williams and was found in his vehicle. This made Rainge's case "a good bit weaker than Williams."[257] In essence, Justice O'Connor argued that because the Illinois Supreme Court did not apply any test for acts or omissions to be weighed against prejudice to the petitioners, a remand in the hope that the Illinois Supreme Court would apply *Strickland* was worthwhile.

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255. Stevens, *supra* n. 253 (revealing Justice Stevens's belief that the Illinois Supreme Court "had become convinced that counsel was such a thoroughly disreputable person, and had been so obsessed by the disbarment proceedings, that he simply could not be trusted to provide competent representation"). Both Williams and Rainge eventually received new trials. *Williams*, 444 N.E.2d at 143 (concluding that Williams was entitled to a new trial); *Rainge*, 445 N.E.2d at 547 ("We are of the opinion that the similar interests of Williams and Rainge and the similar issue raised on the same record require that defendant Rainge be granted a new trial.").

256. Sandra Day O'Connor, J., S. Ct. of the U.S., Memo. to the Conf.–*Ill. v. Williams & Ill. v. Rainge* (May 17, 1984) [HAB/394].

257. *Id.*

No justice voted to grant Illinois's application for certiorari, so the case was not remanded.[258] The Court's action, if it could stand for a jurisprudential principle, is that the *Strickland* test may not be necessary when counsel is later disciplined and disbarred. In that situation, counsel's demonstrated failure to adhere to standards of professional conduct indicates that he or she cannot be trusted to have provided competent representation in cases decided while the disciplinary and disbarment proceedings were pending. This aspect of the Court's denial of certiorari in *Williams* and *Rainge* makes good sense. A lawyer who continues to defend his or her reputation and professional licensure when the state has legitimate evidence of misconduct is likely to be untrustworthy on other matters and must at a minimum be distracted by the disciplinary proceedings.

VI. CONCLUSION

In *Padilla*, the Court recently reaffirmed that while the ABA standards for defense counsel are not binding on courts, they are valuable measures of the prevailing professional norms.[259] *Padilla* is thus a continuation of the judicial intent underlying *Strickland*. While this article does not seek to analyze any of the thousands of federal and state appellate decisions citing to *Strickland*, the use of a historic model may help courts return to the original intent of the decision: that it should not serve as the most difficult barrier to relief for claims of ineffective assistance, and should be regarded instead as articulating a middle ground between the permissive and conservative ends of the spectrum.

Likewise, states are free to adopt more permissive standards than *Strickland*'s formulation of representation that "fell below an objective standard of reasonableness,"[260] but the judiciary should be wary of interpreting any such standard as being more stringent than the Court intended. The Court did not

258. *Ill. v. Rainge*, 467 U.S. 1219 (1984) (denying certiorari without dissent, but including the notation that "Justice White took no part in the consideration or decision of this motion and this petition").

259. 559 U.S. at 366–67 (citing both *Strickland* and *Bobby v. Van Hook*, 558 U.S. 4 (2010)).

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

intend to permit this objective standard to evolve into the old farce-and-mockery standard, or indeed into any other more difficult standard, or to include an outcome-determinative approach. Instead, the Court expected that *Strickland*'s plain language would govern, and the plain language simply requires proof that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[261] It does not require proof of a specific different outcome.

Strickland should be applied with deference to—and acknowledgement of—its historic origin and judicial intent. The decision may be considered a compromise, but it was nonetheless largely independent of the political and social forces that brought the case to the Court in the first place. It avoided the tough-on-crime politics behind the appointment of several of the Justices then on the Court and maintained a space in which the bar associations could regulate the criminal defense function. And perhaps most important, *Strickland*'s was a reasonable middle-ground solution that evolved from a pragmatic compromise into the means of resolving a constitutional defect.

261. *Id.* at 694.