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Casenotes: Constitutional Law — Sixth Amendment Guarantees Assistance of Counsel That Is Reasonably Effective and Does Not Prejudice the Fairness of the Proceeding. *Strickland v. Washington*, 104 S. Ct. 2052 (1984)

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# CASENOTES

CONSTITUTIONAL LAW — SIXTH AMENDMENT GUARANTEES ASSISTANCE OF COUNSEL THAT IS REASONABLY EFFECTIVE AND DOES NOT PREJUDICE THE FAIRNESS OF THE PROCEEDING. *Strickland v. Washington*, 104 S. Ct. 2052 (1984).

A Florida prisoner pleaded guilty to an indictment that included three capital murder charges.<sup>1</sup> Acting against counsel's advice, the prisoner waived his right to an advisory jury at his capital sentencing hearing. Defense counsel, in preparation for the hearing, failed to request a psychiatric examination or attempt to find any character witnesses. In addition, at the hearing counsel did not present any evidence regarding the prisoner's character and emotional state.<sup>2</sup> The trial judge sentenced the prisoner to death on all three murder counts.<sup>3</sup> The prisoner subsequently filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, contending that counsel had rendered ineffective assistance at the sentencing hearing.<sup>4</sup> The district court denied the petition, and the prisoner appealed to the United States Court of Appeals for the Fifth Circuit,<sup>5</sup> which held that the sixth amendment imposes upon counsel the duty to make a reasonably substantial investigation, and that an accused must show that ineffective assistance of counsel caused actual and substantial prejudice to the accused's defense.<sup>6</sup> The Fifth Circuit remanded the case for application of the above standard.<sup>7</sup> The Supreme Court granted certiorari and

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1. *Strickland v. Washington*, 104 S. Ct. 2052, 2057 (1984).
  2. *Id.* at 2057-58. Counsel admitted to experiencing a sense of hopelessness over the case after the prisoner had confessed to the first two murders. Thus, counsel's strategy was largely premised upon the trial judge's reputation for being sympathetic, at sentencing hearings, to those who admitted their guilt. Counsel's decision also reflected his wish to prevent any further evidence of the prisoner's character and emotional state, as well as past criminal activities, from being introduced at the hearing. *Id.* at 2056-57.
  3. *Id.* at 2058. On direct appeal, the Supreme Court of Florida affirmed. *Washington v. State*, 362 So. 2d 658, 665-67 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). The prisoner sought collateral relief in state court, contending that counsel had rendered ineffective assistance at the sentencing hearing. The trial court denied relief and held that the prisoner did not demonstrate that counsel's assistance was so deficient as to affect the outcome of the sentencing proceeding. *Strickland v. Washington*, 104 S. Ct. 2052, 2058-59 (1984). The Supreme Court of Florida affirmed. *Washington v. State*, 397 So. 2d 285 (Fla. 1981).
  4. *Strickland v. Washington*, 104 S. Ct. 2052, 2060 (1984).
  5. *Washington v. Strickland*, 673 F.2d 879 (5th Cir.), *rev'd*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984). The Court of Appeals for the Fifth Circuit remanded the case with instructions to apply the standards for ineffective assistance claims as developed in its opinion. The decision of the circuit court, however, was vacated when Unit B of the Fifth Circuit decided to rehear the case en banc. 679 F.2d 23 (5th Cir. Unit B 1982). The former Fifth Circuit Unit B became the current Eleventh Circuit, of which Florida is now a part.
  6. 693 F.2d 1243, 1257-58 (5th Cir. Unit B 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984).
  7. *Id.*

reversed the Fifth Circuit, thus denying the prisoner's petition for writ of habeas corpus.<sup>8</sup> The Court held that in order to support a claim of ineffective assistance of counsel, an accused must show that counsel's performance was less than reasonable under the circumstances, and further, that counsel's deficient representation sufficiently prejudiced the defense so as to deprive the accused of a fair trial.<sup>9</sup>

The sixth amendment to the Constitution,<sup>10</sup> made applicable to the states through the fourteenth amendment,<sup>11</sup> guarantees an accused the right to counsel in all criminal prosecutions.<sup>12</sup> The right to counsel clause of the sixth amendment was originally perceived to entitle a criminal defendant only to the right to retain counsel without any interference from the government.<sup>13</sup> The 1932 Supreme Court decision of *Powell v. Alabama*<sup>14</sup> marked the first indication that the constitutional right to counsel should be broadly interpreted. The *Powell* Court construed the sixth amendment guarantee in a capital case to include not only the right of the defendant to be assisted by counsel, but also the right to have counsel appointed if the defendant is indigent.<sup>15</sup> Since *Powell*, the Court has progressively broadened the scope of the sixth amendment's right to counsel to include the appointment of an attorney to an indigent federal felony defendant,<sup>16</sup> an indigent state felony defendant,<sup>17</sup> and most recently, to any indigent defendant who might be imprisoned.<sup>18</sup> Furthermore, the Court has recognized that the mere appointment of counsel does not satisfy the constitutional guarantee of assistance of counsel.<sup>19</sup> The Court has held that the sixth amendment entitles a criminal defend-

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

9. *Id.* at 2064-69.

10. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

11. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

12. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

13. *Andersen v. Treat*, 172 U.S. 24, 29 (1898).

14. 287 U.S. 45 (1932).

15. *Id.* at 71. The *Powell* Court determined that an indigent defendant in a capital case not only has the right to appointment of counsel, but that counsel must have sufficient opportunity to confer with defendant and to prepare a defense. *Id.* For a detailed discussion of the expansion of the sixth amendment's right to counsel, see W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27-76 (1972).

16. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (sixth amendment requires appointment of counsel for any indigent federal defendant threatened with loss of life or liberty).

17. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (defendant's trial and conviction, without the assistance of counsel, violates his fundamental right to a fair trial).

18. *Scott v. Illinois*, 400 U.S. 367, 373-74 (1979) (actual imprisonment is different from fines or threat of imprisonment and thus justifies the right to appointment of counsel); *accord*, *Argersinger v. Hamlin*, 407 U.S. 25, 30-37 (1972) (sixth and fourteenth amendments guarantee the appointment of counsel to a defendant, whether accused of a felony or misdemeanor, who is actually imprisoned).

19. *See Avery v. Alabama*, 308 U.S. 444, 446 (1940) (denial of opportunity for appointed counsel to confer with defendant and prepare a defense turns the constitutional guarantee into a "sham").

ant to the timely appointment of counsel,<sup>20</sup> as well as appointment of counsel whose representation is not burdened with conflicting interests<sup>21</sup> or state interference.<sup>22</sup> Although the Court had provided defendants with the right to effective appointment of counsel,<sup>23</sup> it had not yet discussed whether the sixth amendment required the appointed counsel to be competent or to provide the defendant with effective assistance.

In 1970, the Supreme Court for the first time acknowledged that defendants have a constitutional right to competent counsel.<sup>24</sup> In *McMann v. Richardson*,<sup>25</sup> the Court stated, in dictum: "the right to counsel is the right to the effective assistance of counsel."<sup>26</sup> Although the *McMann* Court equated effective assistance of counsel with the effective assistance of competent counsel,<sup>27</sup> the Court left the standard for measuring effective, competent assistance to the discretion of the trial courts.<sup>28</sup> Thus, the Supreme Court did not establish any uniform standard for effective assistance of counsel under the sixth amendment.

Without guidance from the Supreme Court, federal and state courts created a variety of diverse standards for measuring effective attorney assistance in criminal cases.<sup>29</sup> Most state courts have adhered to a test requiring proof that counsel's incompetence deprived the defendant of a fair trial.<sup>30</sup> A few state courts guarantee the right to a fair trial by exam-

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20. *Id.*; cf. *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970) (no showing of substantial prejudice to defendant even when counsel did not confer with defendant until a few minutes before the trial began).
  21. *Glasser v. United States*, 315 U.S. 60, 69-76 (1942) (where counsel represented a co-defendant over the objection of defendant, such representation amounted to denial of the right to counsel under the sixth amendment); see also *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (ineffective assistance where defendant can show an actual conflict of interest that adversely affected counsel's performance); *Holloway v. Arkansas*, 435 U.S. 475, 481-84 (1978) (ineffective assistance where trial judge failed to appoint separate counsel to co-defendants with conflicting interests).
  22. See, e.g., *Geders v. United States*, 425 U.S. 80, 91 (1976) (preventing petitioner from consulting with counsel during a 17-hour recess "impinged" upon sixth amendment right to counsel); *Herring v. New York*, 422 U.S. 853, 858, 865 (1975) (ineffective assistance when state statute barred final summation by defense counsel).
  23. See *supra* notes 14-18 and accompanying text.
  24. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).
  25. 397 U.S. 759 (1970).
  26. *Id.* at 771 n.14. *McMann* required that counsel's performance be competent in order to be effective. *Id.*
  27. *Id.* at 771. Reasonably competent advice is based on "whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.*; see also *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (ineffective assistance found where counsel provides inadequate advice). This situation, which encompasses the standards of attorney performance that establish effective assistance of counsel, is the focus of this casenote.
  28. *McMann*, 397 U.S. at 771.
  29. See *Maryland v. Marzullo*, 435 U.S. 1011, 1011 (1978) (White, J., dissenting from denial of certiorari) ("the Federal Courts of Appeals are in disarray" regarding the standard of ineffective assistance); Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 30 (1983). See generally *infra* notes 39-48 and accompanying text.
  30. See, e.g., *State v. Jones*, 110 Ariz. 546, 521 P.2d 978, cert. denied, 419 U.S. 1004

ining whether counsel's mistakes had a reasonable probability of affecting the outcome of the trial.<sup>31</sup> Until recently, the federal courts followed the "farce and mockery" test, which focused on whether counsel's procedural mistakes denied the defendant a fair trial.<sup>32</sup> The "farce and mockery" test was based on the fifth amendment's due process clause and required proof that counsel's errors deprived the defendant of a fair trial.<sup>33</sup> All of the federal courts of appeals have now rejected the "farce and mockery" standard.<sup>34</sup> The courts rejected this standard because of disillusionment with the harsh results produced by the standard's heavy burden on the defendant. This burden required proof that counsel's rep-

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(1974) (assistance of counsel that is neither a "farce" nor a "sham" is adequate assistance); *State v. Hester*, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976) (in determining whether accused had effective counsel, test is whether defendant received a fair trial); *Zimmer v. Langlois*, 95 R.I. 446, 188 A.2d 89 (prisoner not denied constitutional right to effective representation where he received a fair trial), *cert. denied*, 374 U.S. 851 (1963); *State v. Myers*, 86 Wash. 2d 419, 545 P.2d 538 (1976) (test for effective assistance of counsel is whether accused was afforded a fair and impartial trial). For a discussion of states that apply this fair trial standard, see Annot., 2 A.L.R.4TH 27, 107-08 (1980).

31. *See, e.g., People v. Dudley*, 46 Ill. 2d 305, 308, 263 N.E.2d 1, 3 (1970) (to establish incompetent representation defendant must show actual prejudice resulting in an adverse verdict), *cert. denied*, 402 U.S. 910 (1971); *Winter v. State*, 210 Kan. 597, 604, 502 P.2d 733, 739 (1972) (burden on accused to demonstrate that counsel's representation was wholly inadequate, the effect of which was a complete absence of counsel); *Schoonover v. State*, 2 Kan. App. 2d 481, 493, 582 P.2d 292, 298 (1972) (where counsel's incompetence or dishonesty causes defendant's conviction, defendant is deprived of effective counsel). To establish ineffective assistance under this test, the defendant must show actual incompetence of the attorney and that substantial prejudice resulted. *See Comment, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1409 (1983) (labeling this approach as the "fair trial guarantee").
32. *See, e.g., William v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965) (relief from conviction on ground of ineffective assistance granted only when attorney has inadequate opportunity to prepare for trial); *Root v. Cunningham*, 344 F.2d 1, 3 (4th Cir. 1965) (one is deprived of effective assistance in extreme instances where representation is wholly inadequate); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976, 980 (7th Cir. 1948) (ineffective assistance where attorney's mistakes amount to a travesty of justice); *Andrews v. Robertson*, 145 F.2d 101, 102 (5th Cir. 1944) (representation by counsel which is poor and incapable, but does not amount to a nullity, is constitutionally adequate representation), *cert. denied*, 324 U.S. 874 (1945). *See also Comment, supra* note 31, at 1408 (test labeled the "outcome-determinative" approach).
33. *See Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). In this test, the defendant must show that the trial was "a farce and a mockery of justice," as well as showing that counsel's representation was ineffective. If counsel's procedural mistakes denied the defendant a fair trial, a new trial is granted. *Id.* at 669-70.
34. *See, e.g., Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977) (rejecting "farce and mockery" standard), *cert. denied*, 435 U.S. 1011 (1978); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) ("farce and mockery" standard does not ensure that defendant receives effective assistance of counsel); *United States ex rel. Green v. Rundel*, 434 F.2d 1112, 1113 (3d Cir. 1970) (court substitutes "competency" test that determines whether assistance of counsel is "reasonably competent" for "farce and mockery" standard); *see also Bazelon, The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973) (" 'mockery' test . . . is itself a mockery of the Sixth Amendment").

resentation had been wholly ineffective.<sup>35</sup> Furthermore, the federal courts preferred a sixth amendment analysis that focuses on counsel's effective performance rather than the "farce and mockery" test, which did not focus on counsel's assistance to the defendant, but on whether the defendant had received a fair trial.<sup>36</sup> The abandonment of the "farce and mockery" test plus the *McMann* court's recognition of defendants' right to competent counsel<sup>37</sup> thus led the federal courts to adopt diversified forms of a "reasonable competence" test.<sup>38</sup>

The majority of federal courts apply a standard for effective assistance of counsel under the sixth amendment that requires a showing of prejudice resulting from counsel's incompetence.<sup>39</sup> Although the courts vary in their applications of this approach,<sup>40</sup> they generally implement a

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35. See *United States v. Katz*, 425 F.2d 928, 931 (2d Cir. 1970). In *Katz*, counsel fell asleep during the trial. The court, strangely enough, held this to be an error that did not constitute a "farce and mockery" of justice. *Id.* The heavy burden of the standard is considered unjustified because counsel's role is to protect the defendant's rights at trial. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (Supreme Court recognizes counsel's important role of protecting defendant's right to fair trial). Thus, the defendant's burden of proving ineffective assistance of counsel should be comparable to the burden required to prove other transgressions at trial. See Note, *supra* note 29, at 35 (discussing harshness of the "farce and mockery" standard); Comment, *supra* note 31, at 1409 (courts have "moved away from the harshness of the 'farce and mockery' test").
36. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978) (standard rejected as "outmoded"); *Beasley v. United States*, 491 F.2d 687, 692 (6th Cir. 1974) (Sixth Circuit recognizes the subjective nature of fifth amendment analysis compared to objective nature of sixth amendment analysis). For a general discussion of the rejection of the "farce and mockery" standard, see Note, *supra* note 29, at 33-36.
37. 397 U.S. 759, 771 (1970) (discussing "effective assistance of competent counsel"); see *supra* notes 24-26 and accompanying text.
38. *E.g.*, *Trapnell v. United States*, 725 F.2d 149, 151-52 (2nd Cir. 1983) ("reasonably competent assistance" standard is proper test for assessing competence of counsel); *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978) (adopting "reasonably competent assistance" standard); *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir.) (test for attorney competence is whether it meets "minimum standard of professional representation"), *cert. denied*, 423 U.S. 876 (1975); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (adopting standard of "reasonably effective assistance"); *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) (effective assistance is provided when counsel performs with "normal competency").
39. See *Washington v. Strickland*, 673 F.2d 879, 896-900 & nn.11-20 (5th Cir.), *vacated*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984) (surveying law in federal circuits); see also *Decoster v. United States*, 624 F.2d 196, 208 & n.74 (D.C. Cir.) (en banc) (accused must show that prejudice resulted to prove a constitutional violation), *cert. denied*, 444 U.S. 944 (1979); *Cooper v. Fitzharris*, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc) (relief granted only if it appears that defendant was prejudiced by counsel's conduct), *cert. denied*, 440 U.S. 974 (1979); *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974) (ineffective assistance claim requires demonstration that failure of attorney properly to investigate murder case prejudiced the defense); *United States ex rel. Green v. Rundel*, 434 F.2d 1112, 1115 (3d Cir. 1970) (counsel's failure to call alibi witness must prejudice the defendant's case to prove ineffective representation claim). For a survey of the law in state courts see Annot., *supra* note 30, at 109-41.
40. See *Washington v. Strickland*, 673 F.2d 879, 896 (5th Cir.), *rev'd*, 693 F.2d 1243

two-step inquiry. First, the defendant must demonstrate, under a reasonableness standard, that counsel was incompetent.<sup>41</sup> The federal courts have developed several approaches to this reasonableness standard, including the "ordinary fallible lawyer,"<sup>42</sup> the "reasonably competent and effective" test,<sup>43</sup> and the "customary skills and diligence" standard.<sup>44</sup> Second, the defendant must show that counsel's incompetence actually prejudiced the defendant's case.<sup>45</sup> A minority of federal courts has adopted an approach that does not require a showing of prejudice in an ineffective counsel claim.<sup>46</sup> This minority holds that the sixth amendment guarantees a right to competent counsel, and that a showing of incompetence alone will be sufficient to warrant a new trial.<sup>47</sup> The minority approach requires an examination of whether counsel has competently performed certain duties enumerated by the courts, including the duty to investigate the case, to interview witnesses, to confer with the defendant, to conduct pretrial discovery, and to conduct a vigorous defense.<sup>48</sup> Without a consensus on the standard to be applied in an effective

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(5th Cir. Unit B 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984) ("no substantial consensus among the circuits"); Comment, *supra* note 31, at 1387 (discussing courts' variations in the degree of prejudice required to support ineffective counsel claims).

41. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1329-30 (9th Cir. 1979) (en banc), *cert. denied*, 440 U.S. 974 (1979).
42. *United States v. Decoster*, 624 F.2d 196, 206 (D.C. Cir. 1979) (en banc).
43. *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).
44. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976).
45. See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325, 1329-30 (9th Cir. 1978) (en banc) (applying the two-pronged test), *cert. denied*, 440 U.S. 974 (1979); *McQueen v. Swenson*, 498 F.2d 207, 218-20 (8th Cir. 1974) (same); *United States ex rel. Green v. Rundel*, 434 F.2d 1112, 1115 (3d Cir. 1970) (same). For a description and detailed analysis of this approach, see Comment, *supra* note 31, at 1386-99 (this approach labeled the "prejudicial incompetence" approach); Note, *Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752, 757 (1980) (discussing the two-step inquiry).
46. See, e.g., *United States v. Yelardy*, 567 F.2d 863, 865 n.1 (6th Cir.) (court must find that counsel's performance is constitutionally ineffective by evaluating soundness of counsel's legal judgment), *cert. denied*, 439 U.S. 842 (1978); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (reversal upon finding that counsel is ineffective); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (failure of counsel properly to investigate the case and to interview defendant and witnesses constitutes denial of effective representation), *cert. denied*, 393 U.S. 849 (1968).
47. See *United States v. Decoster*, 624 F.2d 196, 275-76 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting); *Coles v. Peyton*, 389 F.2d 224, 227 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).
48. *United States v. Decoster*, 624 F.2d 196, 276 & n.63 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting); see also *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (effective counsel constitutes prompt appointment, reasonable opportunity to prepare defense, regular communication with defendant, and appropriate investigation), *cert. denied*, 393 U.S. 849 (1968); 1 AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION STANDARDS, STANDARDS FOR CRIMINAL JUSTICE Chap. 4 (2d ed. 1980) (defining counsel's duties in criminal cases) [hereinafter cited as ABA STANDARDS]. For a discussion and analysis of the minority view, see Comment,

assistance of counsel claim, the federal and state courts were in need of clarification on the issue when *Strickland v. Washington*<sup>49</sup> came before the Supreme Court.

In *Strickland v. Washington*,<sup>50</sup> the Supreme Court for the first time discussed the appropriate standards to be followed in determining what constitutes effective, competent assistance of counsel. The Court held that in an ineffective counsel claim the appropriate standard to be applied, to reverse a conviction or a death sentence, consists of a two-step inquiry.<sup>51</sup> First, the defendant must show that counsel's performance "fell below an objective standard of reasonableness";<sup>52</sup> that is, counsel's deficiencies offend the sixth amendment's right to reasonably effective assistance.<sup>53</sup> Second, the defendant must show that counsel's deficient assistance prejudiced the defense to the point that the defendant was deprived of a fair trial.<sup>54</sup>

Noting that the protection of the right to a fair trial<sup>55</sup> is the foundation on which the right to counsel was created,<sup>56</sup> the Court held that effective assistance of counsel is necessary to preserve the reliability of the adversarial nature of a trial.<sup>57</sup> Although the Court declined to implement specific guidelines for determining the effectiveness of counsel for fear of interfering with counsel's independence, it did determine that reasonably effective assistance impels that defense counsel owes certain fundamental duties to the defendant.<sup>58</sup> Thus, counsel's representation of a

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*supra* note 31, at 1399-1408 (labeling the minority view "The Abstract Competence Approach").

49. 104 S. Ct. 2052 (1984).

50. *Id.*

51. *Id.* at 2064.

52. *Id.* at 2065 (citing *McMann v. Richardson*, 397 U.S. 759, 770, 771 (1970) ("reasonably competent advice" and "advice . . . within the range of competence demanded of attorneys in criminal cases")).

53. 104 S. Ct. at 2065. Reasonable attorney performance is prescribed by "prevailing professional norms." Although the sixth amendment's right to counsel includes certain basic duties on the part of the attorney, the Court declined to "form a checklist for judicial evaluation of attorney performance." *Id.*

54. *Id.* at 2064.

55. While the due process clauses of the fifth and fourteenth amendments guarantee a right to a fair trial, the sixth amendment defines the elements of a fair trial. *Id.* at 2063.

56. *Id.* at 2063-64. The Court first established that a fair trial requires an "adversarial testing" before an "impartial tribunal," and the right to counsel plays an essential role in defending the accused. The sixth amendment recognizes that counsel's role is to protect the defendant's right to a fair trial; right to counsel includes the right to effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

57. *Strickland v. Washington*, 104 S. Ct. 2052, 2064 (1984). The Court equated a capital sentencing proceeding to the adversarial proceedings of a trial. *Id.* (citing *Barclay v. Florida*, 463 U.S. 939 (1983) (paralleling a trial and capital sentencing hearing)).

58. *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984). The Court stated that specific rules would also inhibit both counsel's strategic decisions and his advocacy of the client's cause. *Id.*; see *supra* note 53 and accompanying text.

criminal defendant necessitates an obligation of loyalty free of conflicts of interest,<sup>59</sup> timely communication with the defendant, and a certain degree of adeptness in counsel's use of his skill and knowledge.<sup>60</sup> In addition to not requiring formal guidelines, the Court refused to enforce a strict scrutiny standard of counsel's performance in post-trial ineffective assistance inquiries. The Court reasoned that too critical an examination of counsel's assistance would erode counsel's independence, deter counsel's acceptance of cases, and negatively affect the attorney-client relationship.<sup>61</sup>

In formulating the second prong of the ineffective assistance test, requiring a showing of prejudice, the *Strickland* Court recognized that the sixth amendment's right to counsel ensures confidence in the outcome of the proceeding by guaranteeing that the defendant is able to confront the prosecution's case with competent counsel.<sup>62</sup> The Court therefore concluded that a prejudice requirement, which would necessitate proof of the harmful effect of counsel's errors on the verdict, was warranted. Such a showing of prejudice was warranted because it demonstrates that, but for counsel's errors, the result of the trial would have been different, thus showing the verdict reached to be unreliable.<sup>63</sup>

Justice Marshall, in a strong dissent, described the majority's opinion as "unhelpful."<sup>64</sup> The dissent characterized the reasonableness standard as meaningless because it is so flexible that interpretations will vary from court to court.<sup>65</sup> Justice Marshall believed that the majority's holding failed to provide a uniform standard for the circuits. Furthermore, Justice Marshall argued that specific guidelines for attorney performance are preferable to the majority's prejudice requirement because the prejudice standard will allow a defendant to be convicted when his counsel is not reasonably effective, consequently violating the defendant's due process rights.<sup>66</sup> Justice Marshall also criticized the prejudice requirement

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59. 104 S. Ct. at 2065 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)); see *supra* note 26 and accompanying text.

60. 104 S. Ct. at 2065.

61. *Id.* at 2065-66.

62. *Id.* at 2067. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.*

63. *Id.* The Court pointed out that in some cases, prejudice is automatically presumed: for example, prejudice is presumed where no counsel is appointed, where the state interferes with counsel's performance, see *United States v. Cronin*, 104 S. Ct. 2039, 2046-47 (1984), and where counsel is burdened with a conflict of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980).

64. *Strickland v. Washington*, 104 S. Ct. 2052, 2075 (1984) (Marshall, J., dissenting).

65. *Id.* at 2075-76 (Marshall, J., dissenting).

66. *Id.* at 2077 (Marshall, J., dissenting). Justice Marshall equates the sixth amendment's right to counsel with the constitutional right to effective counsel. Thus, ineffective assistance would deny a defendant his fundamental right to a fair trial. *Id.* (Marshall, J., dissenting). In addition, Justice Marshall points out that the majority fails to adhere to the stricter standards that should be implemented in a capital sentence case. *Id.* at 2079-80 (Marshall, J., dissenting).

because he believed that a court, when reviewing an ineffectiveness claim, will have problems analyzing whether the outcome of the trial would have differed had counsel been competent, because of the difficulty in collecting evidence of injury to the defendant.<sup>67</sup>

While *Strickland* provides some clarification of the guidelines for judging an ineffective assistance of counsel claim, the Court's two-step examination creates a potential anomaly. Although the reasonableness test<sup>68</sup> provides for a desirable case by case inquiry into each ineffectiveness claim, the Court has failed to provide a uniform standard to the federal circuits for determining what is reasonably effective assistance. To present meaningful and workable guidelines, the definition of what is reasonable will remain dependent upon the articulate and consistent development of the "reasonable" definition by the lower courts.<sup>69</sup> Although the *Strickland* opinion leaves lower courts with the responsibility to develop their own standards for deciding whether assistance of counsel has been reasonably effective, it also, by requiring a showing of prejudice, allows those same lower courts to escape that responsibility.<sup>70</sup> As a result of the Court's ruling in *Strickland*, a trial court may analyze an ineffective counsel claim in any order in which the claim may be most easily disposed,<sup>71</sup> and thus courts, by deciding the prejudice issue first, may defeat the entire claim without ever reaching the question of whether counsel's assistance was reasonably effective.<sup>72</sup>

While *Strickland* did not develop a specific standard for what consti-

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67. 104 S. Ct. at 2076-77 (Marshall, J., dissenting). Justice Marshall cites *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) ("inquiry into a claim of harmless error . . . would require . . . unguided speculation").

68. The Court adopted the majority approach of implementing a reasonableness standard to determine whether counsel's assistance was ineffective. See *supra* notes 39-45 and accompanying text. Likewise, Justice Marshall's dissent follows the minority view. See *supra* notes 46-48 and accompanying text.

69. For a discussion of the anomaly of the reasonableness standard, see Note, *supra* note 29, at 36-40 (no incentive to perform more adequately than is necessary under the reasonableness test; thus, there is low duty of performance); see also Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1572 (1983). The adoption of the reasonableness standard may thus be seen as consistent with the Court's analysis in *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (discretion of lower courts in measuring standard of attorney's competence).

70. The *Strickland* Court states that the purpose of the ineffectiveness claim is "not to grade counsel's performance." The Court therefore allows lower courts to dismiss ineffectiveness claims on the prejudice issue without examining whether the attorney's representation was competent. *Strickland v. Washington*, 104 S. Ct. 2052, 2070 (1984); see Comment, *supra* note 69, at 1573 (prejudice requirement introduces unpredictability and unreliability into the sentencing process).

71. 104 S. Ct. at 2069-70.

72. See *United States v. Ingram*, 477 F.2d 236, 240 (7th Cir.) (court declines to analyze whether attorney was reasonably competent because the ineffectiveness claim fails because of lack of prejudice), *cert. denied*, 414 U.S. 840 (1973). This may result in the dispensing with the reasonableness standard's primary function of serving as a guide for defining effective assistance. See *supra* note 69 and accompanying text.

tutes reasonably effective assistance,<sup>73</sup> the Fourth Circuit<sup>74</sup> and the American Bar Association<sup>75</sup> have constructed checklists setting out the basic duties of defense counsel in a criminal case.<sup>76</sup> Generally, a counsel who fails properly to investigate the available defenses of his client, who fails actively to prepare the defendant's case, or who delays in conferring with the defendant will be regarded as ineffective,<sup>77</sup> and will thus satisfy the first prong of the *Strickland* test in an ineffective assistance claim.

The holding in *Strickland* is result-oriented because the Court is preoccupied with preserving convictions rather than with protecting the right to a fair trial. In addition to providing for the convenient dispensing of ineffectiveness claims by allowing defeat of the claim by a showing of a lack of prejudice to the defendant,<sup>78</sup> the *Strickland* Court expressed an interest in ensuring that the criminal justice system is not burdened with an excessive number of such claims.<sup>79</sup> Legitimate ineffective counsel claims, however, benefit the criminal justice system by ensuring that the adversarial nature of the trial is preserved. Another problem with the *Strickland* holding is that the Court grants substantial deference to the trial counsel's performance by giving the defendant "an unusually weighty burden of persuasion."<sup>80</sup> The heavy burden of proof on the defendant to establish prejudice will tend to finalize convictions that are obtained when the defendant was assisted by incompetent counsel.<sup>81</sup> Furthermore, the prejudice requirement applied to a capital sentencing hearing seems unusually harsh in light of recent Supreme Court decisions holding that the uniqueness of the death penalty requires a greater measure of certainty that the sentence was properly imposed.<sup>82</sup>

In *Strickland*, the Court's analysis of ineffective counsel claims is self-defeating. While the reasonableness standard may provide guidance through case law development, the prejudice requirement may preclude a

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73. See *supra* note 58 and accompanying text.

74. See *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968).

75. See ABA STANDARDS, *supra* note 48.

76. See *supra* note 48 and accompanying text.

77. See *supra* notes 74-75 and accompanying text. The Fourth Circuit, in *Coles*, adopted the specific guidelines for determining when the assistance of counsel is ineffective. *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968). Although *Strickland* did not adopt specific duties that counsel must perform in order to be effective, the Court's adoption of "basic duties" of counsel suggests that reasonably effective assistance will entail certain required functions. *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984).

78. See *supra* note 72 and accompanying text.

79. 104 S. Ct. at 2070.

80. *Id.* at 2078 (Marshall, J., dissenting). The Court, in the majority opinion, refers to a "heavy measure of deference to counsel's judgments," *id.* at 2066, and a "strong presumption that counsel's conduct . . . [is] reasonable" under the circumstances. *Id.* at 2065-66.

81. See *id.* at 2078 (Marshall, J., dissenting).

82. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (higher standard of review in death penalty case); *Furman v. Georgia*, 408 U.S. 238 (1972) (special constraints on administration of capital punishment); see also Comment, *supra* note 65, at 1573 (allocation of the risk of sentencing error in capital cases).

court from reaching the first step of analyzing what is reasonable.<sup>83</sup> The Court should follow the rule established by the Fifth Circuit, which attempts to avoid this anomaly by requiring an examination of the effective assistance inquiry before the actual prejudice issue, even though the claim will clearly be defeated on the prejudice question.<sup>84</sup> Although the Court relies heavily on the preservation of the right to a fair trial as the underlying fundamental right requiring it to structure an effective assistance of counsel standard, the *Strickland* Court seems to have been more interested in preserving the finality of the verdict than in preserving the defendant's sixth amendment guarantees. The result of *Strickland* very well may be the expeditious disposal, if not the outright discouragement, of ineffective assistance allegations, rather than the protection of the fundamental fairness of the proceedings in such claims.

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83. See *supra* notes 70-72 and accompanying text.

84. See *Washington v. Strickland*, 693 F.2d 1243, 1258, 1263-64 (5th Cir. Unit B 1982) (en banc), *rev'd*, 104 S. Ct. 2052 (1984).