CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
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Class Seven: Part Three -
Conflicts of Interest and the Effective Assistance of Counsel

Conflicts of Interest

Many criminal cases involve multiple defendants who may have conflicting interests – *e.g.*, one may be testifying against the others as part of a plea deal or to argue that the others were the one who committed the crime or more culpable. A lawyer owes a duty of loyalty to each client and, therefore, cannot represent defendants who have conflicting interests.

Lawyers are not always disqualified from representing co-defendants. It depends upon whether the clients have conflicting interests. Justice Frankfurter pointed out that "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). However, the potential for conflict is significant in any criminal case involving multiple defendants because what is in the best interest of one may hurt the interests of the others. A conflict may also arise if a lawyer represents a defendant and a witness in the same case, as the lawyer's duty of loyalty to the witness may interfere with his obligation to vigorously cross-examine the witness as part of his duty to the defendant.

In *Glasser v. United States,* the trial judge required Glasser's lawyer to also represent one of his five co-defendants in a joint trial for conspiracy to defraud the United States. The Supreme Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneous representing conflicting interests." The Court found that Glasser's lawyer did not cross-examine some witnesses and did not object to some arguably inadmissible evidence in an effort to protect the interests of the other client.

The Court held that Glasser had been denied the right to counsel and that an assessment of the prejudice resulting from it was unnecessary because "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), a single public defender, Harold Hall, was appointed to represent three co-defendants. Hill moved the court to appoint separate counsel because of the possibility of a conflict of interest. The trial court denied the motion. Hill raised the issue again as the jury was being impaneled, informing the court that "one or two of the defendants may testify and if they do, then I will not be able to cross-examine them because I have received confidential information from them." The court responded, "I don't know why you wouldn't," and again denied the motion. All three defendants were tried together.

After the prosecution rested its case, Hill informed the court that, against his recommendation, all three defendants had decided to testify. He then stated:

> Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for each defendant because of a possible conflict of interest. This

conflict will probably be now coming up since each one of them wants to testify.

THE COURT: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this court each one blames it on the other one.

MR. HALL: I have talked to each one of these defendants, and I have talked to them individually, not collectively.

THE COURT: Now talk to them collectively.

The court then indicated satisfaction that each petitioner understood the nature and consequences of his right to testify on his own behalf, whereupon Hall observed:

I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but have no right to cross-examine them. The prosecuting attorney does that.

MR. HALL: If one [defendant] takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

THE COURT: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright [sic] for them to testify if they want to, or not. It's their business.

Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you.

MR. HALL: Your Honor, I can't even put them on direct examination because if I ask them –

THE COURT: (Interposing) You can just put them on the stand and tell the Court that you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do.

All three defendants testified. When Holloway attempted to object at one point to make an objection:

MR. HOLLOWAY: Your Honor, are we allowed to make an objection?

THE COURT: No, sir. Your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyhow.

The Supreme Court, applying *Glasser v. United States*, reversed, holding:

Here trial counsel, by the pretrial motions * * * and by his accompanying representations, made as an officer of the court, focused explicitly on the probable risk of a conflict of interests. The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of "assistance of counsel."

The Court also held that once a denial of the right to counsel was established, reversal was automatic, relying on *Glasser* and its statement in *Chapman v. California*, 386 U.S. 18, 23 (1967), that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

Justices Powell, Blackmun and Rehnquist

dissented, asserting that while the trial court had a duty to conduct an inquiry about a possible conflict, the failure of the court to conduct such a hearing did not constitute a violation of the Constitution.

Two years later, the Court upheld the conviction of John Sullivan even though his lawyers represented him and his two co-defendants charged with the same murders, in separate trials. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The Court reversed a decision of the Third Circuit holding that the possibility of conflict among the interests represented by the lawyers established a violation of Sullivan's Sixth Amendment right to counsel and prejudice was presumed.

The Supreme Court, observing that Sullivan did not object to the representation by the lawyers who represented his co-defendants, held that unless the trial court knows or reasonably should know that a particular conflict exists, it is not required to initiate an inquiry into the propriety of multiple representation. With regard to presuming prejudice when there is a conflict of interest, the Court held:

> *Glasser* established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See *Holloway*, 435 U.S., at 487-491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

446 U.S. at 349-50. The Court held that a defendant must show not only that counsel "actively represented conflicting interests," but also that "an actual conflict of interest adversely affected his lawyer's performance."

Justices Brennan and Marshall expressed the view in dissent that "whenever two or more defendants are represented by the same attorney the trial judge must make a preliminary determination that the joint representation is the product of the defendants' informed choice." 446 U.S. at 354 (Marshall, J., concurring and dissenting). As explained by Justice Brennan:

> [U]pon the discovery of joint representation, the duty of the trial court is to ensure that the defendants have not unwittingly given up their constitutional right to effective counsel. This is necessary since it is usually the case that defendants will not know what their rights are or how to raise them.

Id. at (Brennan, J., concurring in part). Justice Marshall also expressed the view that in order to prevail, a convicted defendant "need go no further than to show the existence of an actual conflict" because "[a]n actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney." No other members of the Court joined the opinions of Justices Brennan and Marshall.

However, Rule 44(c) of the Federal Rules of Criminal Procedure requires trial judges to investigate cases involving joint representation:

> [T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The Court considered a different kind of conflict in *Wood v. Georgia*, 450 U.S. 261 (1981). There the employer of three defendants convicted of distributing obscene materials paid the fees for the lawyers representing the defendants. The record suggested that the employer's interest was different than the interest of the defendants. Because the Court could not determine on the record before it "whether counsel was influenced in his basic strategic decisions by the interests of

the employer who hired him," it remanded the case to the trial court for it "to determine whether the conflict of interest that this record strongly suggests actually existed." 450 U.S. at 272, 273.

As previously discussed in these materials, the Court did not allow a defendant to waive a conflict on the part of his lawyers in *Wheat v. United States*, 486 U.S. 153 (1988). Wheat wanted to be represented by a lawyer who was representing two of his co-defendants who had plead guilty to being part of a drug distribution conspiracy. Wheat was charged with being part of the same conspiracy. He sought to waive any conflict in the representation and the other two defendants were willing to waive the conflict as well.

The prosecution objected, arguing, *inter alia*, that Wheat might be a witness against one co-defendant if he withdrew his guilty plea and one of the lawyer's other clients might testify against Wheat. The trial court refused to allow the lawyer to represent Wheat. The Supreme Court, over the dissents of four justices, held that the trial court's refusal to accept the waiver and allow Wheat to be represented by the lawyer did not violate Wheat's right to counsel. The Court held that a trial court must be allowed "substantial" or "broad" latitude in refusing waivers of conflicts of interest not only where there is an actual conflict but "where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." 486 U.S. at 163.

Justices Marshall in a dissent joined by Justice Brennan disagreed with Court's holding that trial courts had "broad latitude" to refuse defendants representation by the lawyers of their choosing where there was only a potential conflict. Justice Stevens, joined by Justice Blackmun, agreed that trial judges must be afforded wide latitude in deciding whether to accept the waiver, but found it "abundantly clear" in Wheat's case that the judge "abused his discretion and deprived [Wheat] of a constitutional right of such fundamental character that reversal is required." 486 U.S. at 173.

Christopher A. BURGER, Petitioner
v.
Ralph KEMP, Warden.

United States Supreme Court
483 U.S. 776, 107 S.Ct. 3114 (1987)

Stevens, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, O'Connor, and Scalia, JJ., joined. Blackmun, J., filed a dissenting opinion, in Which Brennan and Marshall, JJ., joined, and in Part II of which Powell, J., joined. Powell, J., filed a dissenting opinion, in which Brennan, J., joined.

Justice STEVENS delivered the opinion of the Court.

A jury in the Superior Court of Wayne County, Georgia, found petitioner Christopher Burger guilty of murder and sentenced him to death on January 25, 1978. In this habeas corpus proceeding, he contends that he was denied his constitutional right to the effective assistance of counsel because his lawyer labored under a conflict of interest and failed to make an adequate investigation of the possibly mitigating circumstances of his offense. * * *

I

[Burger and Thomas Stevens, both privates in the United States Army stationed at Fort Stewart, Georgia, took a cab, driven by Roger Honeycutt, to go the airport to pickup another private, James Botsford. On the way to the airport, Burger and Stevens robbed Honneycut of money and Stevens compelled Honeycutt to commit oral sodomy on him and anally sodomized him. They placed Honeycutt in the trunk of the car and picked up Botsford at the airport. After leaving Botsford at the base, Burger and Stevens drove to a pond where they drove the car into the water, getting out before it went in the pond. Honeycutt drowned.]

A week later Botsford contacted the authorities, and the military police arrested petitioner and Stevens. The two men made complete confessions. * * * Petitioner's confession and Private Botsford's testimony were the primary evidence used at Burger's trial. That

evidence was consistent with the defense thesis that Stevens, rather than petitioner, was primarily responsible for the plan to kidnap the cabdriver, the physical abuse of the victim, and the decision to kill him. Stevens was 20 years old at the time of the killing. Petitioner was 17; a psychologist testified that he had an IQ of 82 and functioned at the level of a 12-year-old child.

II

Alvin Leaphart was appointed to represent petitioner about a week after his arrest. Leaphart had been practicing law in Wayne County for about 14 years, had served as the county's attorney for most of that time, and had served on the Board of Governors of the State Bar Association. About 15 percent of his practice was in criminal law, and he had tried about a dozen capital cases. It is apparent that he was a well-respected lawyer, thoroughly familiar with practice and sentencing juries in the local community. He represented petitioner during the proceedings that resulted in his conviction and sentence, during an appeal to the Georgia Supreme Court which resulted in a vacation of the death penalty, during a second sentencing hearing, and also during a second appeal which resulted in affirmance of petitioner's capital sentence in 1980. Leaphart was paid approximately $9,000 for his services.

[Leaphart's partner in a two-person firm was appointed to represent co-defendant Stevens and "sat in" at Burger's trial and helped Leaphart].

* * *

III

There is certainly much substance to petitioner's argument that the appointment of two partners to represent coindictees in their respective trials creates a possible conflict of interest that could prejudice either or both clients. Moreover, the risk of prejudice is increased when the two lawyers cooperate with one another in the planning and conduct of trial strategy, as Leaphart and his partner did. Assuming without deciding that two law partners are considered as one attorney, it is settled that "[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). We have never held that the possibility of prejudice that "inheres in almost every instance of multiple representation" justifies the adoption of an inflexible rule that would presume prejudice in all such cases. Instead, we presume prejudice "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland [v. Washington]*, 466 U.S., at 692.

* * * [T]he overlap of counsel, if any, did not so infect Leaphart's representation as to constitute an active representation of competing interests. Particularly in smaller communities where the supply of qualified lawyers willing to accept the demanding and unrewarding work of representing capital prisoners is extremely limited, the defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation. In many cases a "'common defense . . . gives strength against a common attack.'" Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and "necessarily rely in large measure upon the good faith and good judgment of defense counsel." In addition, petitioner and Stevens were tried in separate proceedings; the provision of separate murder trials for the three coindictees "significantly reduced the potential for a divergence in their interests."

In an effort to identify an actual conflict of interest, petitioner points out that Leaphart prepared the briefs for both him and Stevens on their second appeal to the Georgia Supreme Court, and that Leaphart did not make a "lesser culpability" argument in his appellate brief on behalf of petitioner, even though he had relied on petitioner's lesser culpability as a trial defense. Given the fact that it was petitioner who actually killed Honeycutt immediately after opening the trunk to ask if he was all right, and the further fact that the Georgia Supreme Court expressed the opinion that petitioner's actions were "outrageously and wantonly vile and inhuman under any reasonable standard of human conduct,"

the decision to forgo this issue had a sound strategic basis. * * *

In addition, determining that there was an actual conflict of interest requires the attribution of Leaphart's motivation for not making the "lesser culpability" argument to the fact that his partner was Stevens' lawyer, or to the further fact that he assisted his partner in that representation. The District Court obviously credited his testimony to the contrary. It would thus be most inappropriate, and factually unsupportable, for this Court to speculate that the drafting of a brief on appeal was tainted by a lawyer's improper motivation. * * *

We also conclude that the asserted actual conflict of interest, even if it had been established, did not harm his lawyer's advocacy. Petitioner argues that the joint representation adversely affected the quality of the counsel he received in two ways: Leaphart did not negotiate a plea agreement resulting in a life sentence, and he failed to take advantage of petitioner's lesser culpability when compared with his coindictee Stevens. We find that neither argument provides a basis for relief.

The notion that the prosecutor would have been receptive to a plea bargain is completely unsupported in the record. * * *

* * *

* * * Because the trials were separate, Leaphart would have had no particular reason for concern about the possible impact of the tactics in petitioner's trial on the outcome of Stevens' trial. Moreover, in the initial habeas corpus proceeding, the District Court credited Leaphart's uncontradicted testimony that "he in no way tailored his strategy toward protecting Stevens." * * *

* * *

IV

[The Court also rejected an argument that Leaphart had been ineffective in his representation of Burger because he did not present any evidence in mitigation.]

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, and, as to Part II, Justice POWELL joins, dissenting.

* * *

I

A

* * *

* * * [P]rejudice is presumed if a defendant demonstrates that his attorney "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"

The presumption * * * is warranted because the duty of loyalty to a client is "perhaps the most basic" responsibility of counsel and "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." This difficulty in assessing prejudice resulting from a conflict of interest is due in part to the fact that the conflict may affect almost any aspect of the lawyer's preparation and presentation of the case. * * *

B

* * *

This active representation of the two coindictees by petitioner's counsel constituted representation of actual conflicting interests. Petitioner's and Stevens' interests were diametrically opposed on the issue that counsel considered to be crucial to the outcome of petitioner's case – the comparative culpability of petitioner and Stevens. . * * *

* * *

* * * Stevens' attempt to argue his lesser culpability was his "sole mitigatory defense" at his second sentencing trial.

* * *

[Counsel's] joint representation of petitioner and Stevens precluded him, as a matter of professional responsibility, from pursuing the lesser culpability argument in petitioner's appellate brief. It would have been inconsistent

with his duty of loyalty to Stevens to argue that the Georgia Supreme Court should reduce petitioner's sentence to life imprisonment because Stevens was the more culpable defendant who deserved the death sentence for this heinous murder.

* * *

Defense counsel's representation of conflicting interests also placed him in an untenable position at an earlier stage of the proceedings – during pretrial plea bargaining. * * * Counsel was not in a position to negotiate with the prosecution to the detriment of Stevens. Although he asserted that he continually attempted to negotiate with the prosecutor on behalf of petitioner for a sentence of life imprisonment, he conceded that he never offered the prosecutor petitioner's testimony against Stevens. Certainly, counsel was not reasonable in expecting a plea bargain if he was not offering the prosecutor the most significant bargaining chip he possessed – petitioner's testimony against Stevens.

C

* * * Juror knowledge that the two cases were being tried by local law partners on inconsistent theories could create a conflict of interest because, in order to preserve the credibility of their argument in either case, the lawyers would have to deny the validity of their contradictory approach in the other. * * *

* * *

D

Finally, I conclude that the trial court in this case erred in failing to inquire into whether petitioner knowingly and voluntarily had waived his constitutional right to conflict-free representation. * * * The court could not properly rely on an assumption that petitioner had given knowing and voluntary consent once the judge became aware of the actual conflict, particularly where he was made aware during the suppression hearing that petitioner was a 17-year-old at the time of the appointment of counsel, had an IQ of 82, functioned at the level of a 12-year-old, and was diagnosed as having psychological problems.

* * *

II.

[Justice Blackmun also expressed the view that Leaphart was ineffective because he failed to investigate mitigating evidence and failed to present any evidence at the sentencing hearing despite the fact that petitioner was an adolescent with psychological problems and apparent diminished mental capabilities.]

[Justice Powell issued a dissenting opinion, joined by Justice Brennan, expressing the view that Leaphart was ineffective in his representation at the penalty phase of the trial.]

Georgia executed Christopher Burger, 17 at the time of his crime, by electrocution on December 7, 1993.

Mickens v. Taylor

Walter Mickens claimed that he was denied effective assistance of counsel because his lead court-appointed attorney had been representing the victim of the murder that Mickens was accused of committing at the time it occurred. The same juvenile court judge who presided over the case involving the victim appointed the lawyer to represent Mickens the day after the murder. The lawyer did not disclose to the court, his co-counsel, or Mickens that he had represented the victim. Nor did the judge advise Mickens that his lawyer had been representing the victim.

The Supreme Court, in an opinion by Justice Scalia, held that, even where a trial court should have inquired into a potential conflict of interest about which it knew or reasonably should have known, a defendant, in order to demonstrate a Sixth Amendment violation, must establish that the conflict adversely affected his counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, (2002). Justice Kennedy, joined by Justice O'Connor, concurred and pointed out that, in his view, Mickens was not adversely affected by the fact that his lawyer had represented the victim.

Justice Stevens dissented, expressing the view that the attorney had a duty to disclose that he was representing the defendant's alleged victim at the time of the murder; that, assuming disclosure of the prior representation, the defendant has a right

to refuse the appointment of the conflicted attorney; and the trial judge, who knew or should have known of the prior representation, had a duty to obtain the defendant's consent before appointing that lawyer to represent him. Finding all of these duties violated, he concluded the "circumstances [were] so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" and therefore prejudice should be presumed.

Justice Souter dissented, expressing the view that because the trial judge knew or should have known of the potential conflict and failed to "enquire into the potential conflict and assess its threat to the fairness of the proceeding" reversal was required.

Justice Breyer, joined by Justice Ginsburg dissented, finding that by appointing to represent Mickens the lawyer who, at the time of the murder, was representing the very person Mickens was accused of killing, the Virginia created a "structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself." In such cases, he opined, a categorical approach is warranted and automatic reversal is required. He stated:

> This kind of breakdown in the criminal justice system creates, at a minimum, the appearance that the proceeding will not "'reliably serve its function as a vehicle for determination of guilt or innocence,'" and the resulting "'criminal punishment'" will not "'be regarded as fundamentally fair.'"

535 U.S. at 211 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

People v. Doolin

The California Supreme Court considered the question of whether a lawyer who agreed to represent a defendant in a death penalty case for a flat fee had a conflict of interest between his responsibility to his client and his personal financial interest. *People v. Doolin*, 198 P.3d 11 (Cal. 2009).

Keith Zon Doolin was charged with the first degree murder of two people and attempted murder of four other people. The Fresno County Superior Court contracted with a single lawyer to represent Doolin for $80,000. Of that, $20,000 was for attorney fees and the remaining $60,000 was for investigation, experts and other necessary costs. The contract allowed the lawyer to keep any funds that were not spent. After trial, counsel submitted a statement that only $8,676.15 was spent on investigation, experts and other costs. He kept the remaining $51,324, thus gaining total compensation for himself of $71,324.

A majority of the Court expressed its skepticism that such an arrangement would present an impermissible conflict of interest. Quoting one of its earlier decisions, the Court observed:

> [A]lmost any fee arrangement between attorney and client may give rise to a "conflict." An attorney who received a flat fee in advance would have a "conflicting interest" to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a "conflicting interest" to drag the case on beyond the point of maximum benefit to the client.
>
> The contingent fee contract so common in civil litigation creates a "conflict" when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of "conflict" are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest.'"

The Court held that Doolin was not entitled to a presumption of prejudice because of the lawyer's financial arrangement, adopting the reasoning of the Fifth Circuit Court of Appeals in a similar case:

> [T]here is little meaningful distinction between a lawyer who inadvertently fails to act and one who for selfish reasons decides not to act. The

"conflict" between the lawyer's self-interest and that of his client is not a real conflict in the eyes of the law. Rather than being immobilized by conflicting ethical duties among clients, a lawyer who represents only one client is obliged to advance the client's best interest despite his own interest or desires.

Relying on *Mickens*, the Court declared that "an 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance," *Mickens*, 535 U.S. at 172, n. 5, but then and analyzed counsel's performance under *Strickland v. Washington*, 466 U.S. 668 (1984) In spending only $8,676 to defend a capital case involving two murders and four attempted murders, the single lawyer who represented Doolin provided a limited defense. He failed to interview the prosecution's penalty phase witnesses; did not contact any of 16 potential mitigating witnesses and present them at trial; failed to retain an expert to perform a blood analysis; obtained a ballistics analysis only four days before trial; did not ask for DNA testing until after the jury returned its guilty verdicts at the guilt phase; and obtained mental health experts who spent very little time with the defendant, one of whom testified that defendant was neither psychotic nor did he have a disordered personality. The Court found that the reason for each decision could have been tactical or at least not motivated by the desire to maximize the amount of money that counsel hoped to take home. It concluded that Doolin had not "demonstrate[d] 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens*, 535 U.S. at 166, quoting *Washington v. Strickland*, 466 U.S. 668,694 (1984).

Justice Kennard issued a dissent, in which Justice Werdegar concurred, stating:

> * * * At a hearing on a defense motion for a continuance, held three days before the penalty phase was scheduled to begin, counsel told the trial court that defendant had given him a list of 16 potential character witnesses but that he had not contacted any of them. None of them testified at the penalty phase of trial, where the only defense witness was a psychologist. * * * [T]o determine whether these potential witnesses would be helpful to the defense, they needed to be interviewed, a task that a reasonably competent attorney would ordinarily have assigned to a hired investigator.

* * *

The nature of the fee agreement was such that the less money counsel spent on the defense, the more money he could pocket for himself, thus creating a strong financial incentive to enrich himself at the expense of the defense. Because it was the government's fee agreement that made this possible, I would apply the standard of presumed prejudice that the high court established in [*Cuyler v.*] *Sullivan*, 446 U.S. 335 (1980). And I would conclude, based on an "informed speculation," supported by the record, that Fresno County's fee agreement with counsel did adversely affect his representation at the penalty phase of trial, thus requiring reversal of the judgment of death.

THE RIGHT TO "EFFECTIVE" COUNSEL

Charles E. STRICKLAND, Superintendent, Florida State Prison, et al., Petitioners
v.
David Leroy WASHINGTON.

Supreme Court of the United States
466 U.S. 668, 104 S.Ct. 2052 (1984)

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I
A

During a ten-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first degree murder and multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by foregoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.

Counsel also excluded from the sentencing

hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby undermined the claim of no significant history of criminal activity, he did not request that one be prepared.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a co-defendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

* * *

* * * [T]he trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. * * * He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. * * *

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted fourteen affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes.

* * *

[W]e granted certiorari 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. * * *

II

In a long line of cases * * *, this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. * * *

* * * [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

* * * The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." * * *

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance . . . In giving meaning to the requirement, however, we must take its purpose – to ensure a fair trial – as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding[.] * * *

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

* * * When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. * * * 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. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. 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. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance."

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

* * *

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.

* * *

Accordingly, . . . [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. * * *

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder

would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. * * *

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

* * *

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

* * *

V

* * *

Application of the governing principles is not difficult in this case. The facts as described above, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. * * * Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more

stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. * * * Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

* * *

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

Justice BRENNAN, concurring in part and dissenting in part.

* * * 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. * * *

*** * ***

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." * * *

Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing," . . . Accordingly, counsel's general duty to investigate, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

* * *

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. * * * Neither of [the majority's] two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney," is to tell them

almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale? The majority offers no clues as to the proper responses to these questions.

* * * I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

* * * By refusing to address the merits of these proposals [for particularized standards], and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. 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.

* * *

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the state does not, in my opinion, constitute due process.

In *Chapman v. California*, 386 U.S. 18 (1967),

we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is "the right to the assistance of counsel at trial." In my view, the right to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter. I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions * * *.

A

* * * The majority * * * suggest[s] that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, and should "apply[ ] a heavy measure of deference to counsel's judgments."

I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I would agree. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

* * *

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." I cannot agree.

* * *

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. * * *

* * *

In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable probability" that he would have been given a life sentence if his lawyer had been competent; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate.

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us. It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, nonviolent man, devoted to his family, and active in the affairs of his church. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

* * * Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life.

* * *

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

* * *

Florida executed David Washington by electrocution on July 13, 1984.

Justice Marshall and the Commentators on *Strickland*

Six years after *Strickland v. Washington*, Justice Marshall observed that "capital defendants frequently suffer the consequences of having trial counsel who are ill equipped to handle capital cases" and pointed out that "[t]he federal reports are filled with stories of counsel who presented no evidence in mitigation of their clients' sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute,' but were nevertheless held to be effective. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-2 (1986). Justice Marshall also criticized the *Strickland* decision in another address to the Judicial Conference of the Second Circuit which were not published.

The *Strickland* decision has also been criticized by commentators. *See*, *e.g.*, Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for some Standards!* 51 WAYNE L. REV. 129 (2005); William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

THE PREJUDICE REQUIREMENT

The Court had previously held that "[t]he right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942). It had also held that the denial of counsel at a critical stage was "structural error" that required reversal without an inquiry into

prejudice.[1]

However, in *Strickland,* the Court makes a determination of prejudice part of whether the right to counsel has been violated. Justice Scalia, writing for the majority in a 5-4 decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where the Court reversed because the defendant was denied the counsel of his choice without an inquiry into prejudice, explained the distinction between reversal without an inquiry into prejudice in cases involving "structural error" and the prejudice requirement in *Strickland*:

> * * * [T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation occurred. A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied. Moreover, if and when counsel's ineffectiveness "pervades" a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel – in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently – or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

1. Denial of counsel has been found to be structural error in other cases. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (trial); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Mempa v. Rhay*, 389 U.S. 128 (1967) (sentencing).

Can Prejudice be Presumed?

UNITED STATES, Petitioner
v.
Harrison P. CRONIC.

Supreme Court of the United States
466 U.S. 648 (1984)

Justice STEVENS delivered the opinion of the [unanimous] Court.

Respondent and two associates were indicted on mail fraud charges * * * during a 4-month period in 1975. Shortly before the scheduled trial date, respondent's retained counsel withdrew. The court appointed a young lawyer with a real estate practice to represent respondent, but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that investigation. The two codefendants agreed to testify for the Government; respondent was convicted on 11 of the 13 counts in the indictment and received a 25-year sentence.

* * *

I

The indictment alleged a "check kiting" scheme. * * * By "kiting" insufficient funds checks between [two] banks * * *, defendants allegedly created false or inflated balances in the accounts. * * *

At trial the Government proved that Skyproof's checks were issued and deposited at the times and places, and in the amounts, described in the indictment * * * [and through the co-defendants] that respondent had conceived and directed the entire scheme, and that he had deliberately concealed his connection with [the company,] Skyproof because of prior financial and tax problems.

* * * Counsel put on no defense. By cross-

examination of Government witnesses, however, he established that Skyproof was not merely a sham, but actually was an operating company with a significant cash flow, though its revenues were not sufficient to justify as large a "float" as the record disclosed. Cross-examination also established the absence of written evidence that respondent had any control over Skyproof, or personally participated in the withdrawals or deposits. * * *

The Court of Appeals reversed the conviction because it inferred that respondent's constitutional right to the effective assistance of counsel had been violated. That inference was based on its use of five criteria: "'(1) [T] he 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 accessibility of witnesses to counsel.'" Under the test employed by the Court of Appeals, reversal is required even if the lawyer's actual performance was flawless. By utilizing this inferential approach, the Court of Appeals erred.

II

* * * The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question."

* * *

* * * The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. * * * [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

III

While the Court of Appeals purported to apply a standard of reasonable competence, it did not indicate that there had been an actual breakdown of the adversarial process during the trial of this case. Instead it concluded that the circumstances surrounding the representation of respondent mandated an inference that counsel was unable to discharge his duties.

In our evaluation of that conclusion, we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "`would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.

* * *

But every refusal to postpone a criminal trial will not give rise to such a presumption. In *Avery*

v. Alabama, 308 U.S. 444 (1940), counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time, the Court refused "to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.

The Court of Appeals did not find that respondent was denied the presence of counsel at a critical stage of the prosecution. Nor did it find, based on the actual conduct of the trial, that there was a breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution. The dispositive question in this case therefore is whether the circumstances surrounding respondent's representation * * * justified such a presumption.

IV

* * *

Respondent places special stress on the disparity between the duration of the Government's investigation and the period the District Court allowed to newly appointed counsel for trial preparation. The lawyer was appointed to represent respondent on June 12, 1980, and on June 19, filed a written motion for a continuance of the trial that was then scheduled to begin on June 30. Although counsel contended that he needed at least 30 days for preparation, the District Court reset the trial for July 14 – thus allowing 25 additional days for preparation.

Neither the period of time that the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation, is necessarily relevant to the question whether a competent lawyer could prepare to defend the case in 25 days. The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge. Of course, in some cases the rebuttal may be equally burdensome and time consuming, but there is no necessary correlation between the two. In this case, the time devoted by the Government to the assembly, organization, and summarization of the thousands of written records evidencing the two streams of checks flowing between the banks in Florida and Oklahoma unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme. When a series of repetitious transactions fit into a single mold, the number of written exhibits that are needed to define the pattern may be unrelated to the time that is needed to understand it.

The significance of counsel's preparation time is further reduced by the nature of the charges against respondent. Most of the Government's case consisted merely of establishing the transactions between the two banks. A competent attorney would have no reason to question the authenticity, accuracy, or relevance of this evidence – there could be no dispute that these transactions actually occurred. As respondent appears to recognize, the only bona fide jury issue open to competent defense counsel on these facts was whether respondent acted with intent to defraud. When there is no reason to dispute the underlying historical facts, the period of 25 days to consider the question whether those facts justify an inference of criminal intent is not so short that it even arguably justifies a presumption that no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution.

That conclusion is not undermined by the fact that respondent's lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. * * *

The three other criteria – the gravity of the charge, the complexity of the case, and the accessibility of witnesses – are all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances,

but none identifies circumstances that in themselves make it unlikely that respondent received the effective assistance of counsel.

V

This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary. Respondent can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel. * * *

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Further Developments in Cronic

Cronic, represented by Yale Law School Professor Steven Duke, prevailed under the *Strickland* standard on remand following the Supreme Court's decision. The Court of Appeals for the Tenth Circuit held that he was denied effective assistance of counsel because his lawyer failed to investigate acceptance of security for overdrafts and present a defense. *United States v. Cronic*, 839 F.2d 1401(10th Cir. 1988).

Cronic was tried a second time and again convicted of mail fraud based the check kiting scheme. However, on appeal, the Court of Appeals held that the evidence was insufficient to establish mail fraud and that a retrial was impermissible under the Fifth Amendment's Double Jeopardy Clause. *United States v. Cronic*, 900 F.2d 1511(10th Cir. 1990).

Thus, Harrison P. Cronic, who was sentenced to 25 years in prison after conviction at his first trial, ultimately was not convicted of anything.

Bell v. Cone and *Florida v. Nixon*

The Court has since made it clear that prejudice is to be presumed only in very limited circumstances. The Court reversed lower courts that presumed prejudice in two capital cases, *Bell v. Cone,* 535 U.S. 685 (2002), where defense counsel presented no evidence or closing argument at the penalty phase, and *Florida v. Nixon*, 543 U.S. 175 (2004), where defense counsel conceded guilt at the guilt phase of the trial without the permission of his client.

In *Bell v. Cone*, the defense lawyer offered no evidence at the penalty phase and, after the junior prosecuting attorney on the case gave a "low-key" closing argument, the defenlawyer waived final argument, preventing the lead prosecutor, who he considered very persuasive, from arguing in rebuttal. The Court of Appeals for the Sixth Circuit held that counsel was ineffective and that a presumption of prejudice was warranted because "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

The Supreme Court, by vote of 8-1, reversed. It noted that counsel had established on cross examination of a records custodian called by the prosecution at the penalty phase that Gary Bradford Cone, the defendant, had been awarded the Bronze Star in Vietnam. He also successfully objected to the State's proffer of photos of the decomposing bodies of the victims. In his opening statement at the penalty phase, the lawyer called the jury's attention to mitigating evidence that had been admitted during the guilt phase, suggested that the defendant was under the influence of extreme mental disturbance or duress, was an addict whose drug and other problems stemmed from the stress of his military service, and felt remorse. He asked for mercy based on the defendant as a "whole man." This, the Court said, was not a case in which prejudice could be presumed:

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Here, respondent's argument is not that his counsel failed to oppose

> the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. * * *

Thus, the Court held, counsel's performance was to be judged under *Strickland v. Washington*, not *Cronic.* The Court upheld the judgement of the Tennessee Supreme Court because it correctly identified *Strickland v. Washington* as the governing law and its denial of the ineffectiveness claim was not "an unreasonable application of clearly established Federal law" which would be required for habeas corpus relief by the Anti-terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (d)(1).

In reaching this conclusion, the Court said that the state courts correctly deferred to counsel's decisions at the penalty phase not to recall medical experts he had presented at the guilt phase, and not to call the defendant's mother, the defendant, and other witnesses, as well as not to give a closing argument, based upon the "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance and the strategic reasons given by the lawyer for the decisions (such as that by not calling witnesses he kept damaging information from coming out in cross-examination, and by failing to give a closing he prevented the prosecutor from giving one).

Justice Stevens, the only justice who dissented, took issue with the majority's "blind reliance" on the presumption of lawyer competence and its "uncritical analysis of a lawyer's proffered explanations for aberrant behavior" saying:

> [The lawyer's] decisions to present no mitigation case in the penalty phase, and to offer no closing argument in the face of the prosecution's request for death, are nothing short of incredible. Moreover, [the lawyer's] explanations for his decisions were not only uncorroborated, but were, in my judgment, patently unsatisfactory. Indeed, his rambling and often incoherent descriptions of his unusual trial strategy lend strong support to the Court of Appeals' evaluation of this case and its decision not to defer to [the lawyer's] lack of meaningful participation in the penalty phase as "strategy."

In *Florida v. Nixon*, the defense lawyer concluded that Joe Elton Nixon's guilt was not subject to dispute based on, *inter alia*, Nixon's confession and depositions of all of the state's witnesses. He engaged in plea negotiations, but was unable to secure an offer for a sentence less than death. He decided to concede Nixon's guilt at the guilt phase in hope of maintaining credibility with the jury at the penalty phase and increase the chances of avoiding a death sentence. He told Nixon he planned to do this, but Nixon was unresponsive, neither approving or disapproving the strategy. At trial, Nixon first engaged in disruptive behavior and then refused to come to the courtroom. Defense counsel acknowledged Nixon's guilt in both his opening statement and closing argument at the guilt phase. Nixon was convicted and also sentenced to death.

The Florida Supreme Court reversed, holding that a defense attorney's concession that his client committed murder, made without the defendant's express consent, automatically ranks as prejudicial ineffective assistance of counsel. The Court found that counsel's action was the equivalent of entering a guilty plea for a defendant without his or her consent.

The U.S. Supreme Court reversed, holding that prejudice must be assessed in accordance with the standard adopted in *Strickland v. Washington*. Justice Ginsburg wrote for a unanimous Court that defense counsel in a capital case may reasonably decide to focus on the penalty phase in an effort to save the defendant's life. The Court noted that counsel was obligated to tell the defendant about his strategy, as Nixon's counsel did. The Court concluded that there was no requirement that counsel obtain the defendant's explicit consent before conceding guilt.

The Michigan Court of Appeals and the U.S. Court of Appeals for the Sixth Circuit held that a lawyer was not ineffective even though she was appointed from the audience and given only 88 minutes before the start of a jury trial on four counts of resisting and obstructing a police officer, criminal sexual conduct, and marijuana possession. The trial judge rejected her motion for a continuance. The state court held the representation was properly evaluated under *Strickland v. Washington* and no presumption of prejudice applied. *People v. Fuller*, 2005 WL 3076931 (Mich.Ct.App. 2005), *leave to appeal denied*, 721

N.W.2d 600 (Mich.2006). The Sixth Circuit held that the state court's holding was a reasonable application of *Strickland*, and cited *Avery v. Alabama*, 308 U.S. 444 (1940), in concluding that the short amount of time that counsel had to prepare did not undermine the presumption of attorney competence. *Fuller v. Sherry*, 2010 WL 5439797 (6th Cir. 2010).

Sleeping Counsel

The Court of Appeals for the Fifth Circuit, sitting *en banc*, overruled a panel decision and held, 9-6, that prejudice could be presumed because Calvin Burdine's one court-appointed attorney, Joe Frank Cannon, slept repeatedly throughout his capital murder trial which lasted only 12 hours and 51 minutes. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001). Judge Benavides, wrote for the majority:

> [T]he absence of counsel at critical stages of a defendant's trial undermines the fairness of the proceeding and therefore requires a presumption that the defendant was prejudiced by such deficiency. Applying this longstanding principle, we conclude that a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is repeatedly unconscious through not insubstantial portions of the defendant's capital murder trial. Under such circumstances, *Cronic* requires that we presume that the Sixth Amendment violation prejudiced the defendant.

262 F.3d at 341. He also pointed out that "[u]nconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client." *Id.* at 349. The fact that an "unconscious attorney does not, indeed cannot, perform at all * * * distinguishes the sleeping lawyer from the drunk or drugged one. Even the intoxicated attorney exercises judgment, though perhaps impaired, on behalf of his client at all times during a trial. Yet, the attorney that is unconscious during critical stages of a trial is simply not capable of exercising judgment." *Id.*

Six members of the Court dissented. Judge Jolly, joined by Judge Jerry E. Smith, wrote a brief dissent, saying he would reject the claim:

> [B]ecause Burdine voluntarily confessed to his crime; * * * because the record fairly establishes that Burdine's counsel actually provided competent representation throughout the course of the trial; because there is no suggestion in the record that Burdine suffered any prejudice on account of counsel's alleged sleeping, that is, there is no suggestion that the outcome in this case would have been any different on account of the allegations now made; because Burdine waited eleven years before he ever raised the "sleeping lawyer" claim; because there is no evidence in the record that shows that counsel's sleeping occurred at a critical stage in the trial, and because the now silent Burdine apparently could have offered testimony on this point but has chosen not to do so; and finally, because I am led to believe by these facts that the "sleeping lawyer" claim is in large part a diverting tactic to create the impression of a miscarriage of justice in a case in which substantial justice has been done * * *.

Id. at 357.

Judge Rhesa Hawkins Barksdale dissented at length, joined by Judges Edith Jones, Jerry E. Smith and Emilio M. Garza, expressing the view that the presumed prejudice standard of *Cronic* was inapplicable and that the Court had created a "new rule" which it could not apply retroactively to Burdine. He also said the rule "will result in uncertainty and undermine accuracy." *Id.* at 363. As he explained:

> For example, how many minutes of sleeping, or how many nods or head bobs will trigger presumed-prejudice? Moreover, allowing presumed-prejudice under these circumstances will encourage defendants not to bring observed sleeping by their counsel to the attention of the court during trial and not to raise the claim on direct appeal, which undermines the strong interest in finality * * * . Finally, the rule imposes a new obligation on the States in our circuit, by requiring trial judges and prosecutors to closely and unceasingly monitor defense counsel throughout trial to ensure defense counsel is awake. If counsel closes his eyes even momentarily, the trial judge or prosecutor had best stop the trial and

inquire, "Are you awake?" * * *

Id. at 363-64.

When Calvin Burdine was returned to Houston for a new trial, the state district court judge refused to appoint Robert McGlasson, the experienced capital litigator who had represented Burdine throughout post-conviction proceedings, and instead appointed a lawyer with no familiarity with the case. Burdine refused to accept the appointment. Post-conviction counsel and another Houston capital defense lawyer continued represented Burdine *pro bono* and the case was eventually resolved with a guilty plea in exchange for the State agreeing not to seek the death penalty. Burdine was sentenced to life imprisonment.

Joe Frank Cannon, the same lawyer who slept during Burdine's trial also slept while representing another man, Carl Johnson, who was also sentenced to death. However, neither the state or federal courts granted any relief. Neither the Texas Court of Criminal Appeals nor the Fifth Circuit published its opinion. Carl Johnson was executed on September 19, 1995. *See* David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691 (1996). Burdine and Johnson were among ten people represented by Cannon who were sentenced to death.

The Texas Court of Criminal Appeals has twice upheld the conviction and death sentence imposed upon George McFarland despite the fact that his trial was described as follows in the *Houston Chronicle*:

> Seated beside his client – a convicted capital murderer – defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.
>
> His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.
>
> Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.
>
> When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.
>
> "It's boring," the 72-year-old longtime Houston lawyer explained.
>
> But is it right for a retained attorney to slumber away beside his embattled client? Benn was asked.
>
> Blinking, he said, "I was just thinking."
>
> Court observers said Benn seems to have slept his way through virtually the entire trial.
>
> * * *
>
> Benn had barely been hired to be McFarland's attorney before Shaver appointed a much younger, more vigorous attorney, Sanford Melamed, as an additional attorney in the case.
>
> Melamed has been questioning witnesses and doing the necessary work to try to save McFarland from a possible death penalty.
>
> Shaver said he realized Benn is "somewhat long of tooth and elderly" and felt Melamed was better able to handle the inevitable stresses that come with capital trials.
>
> "The Constitution says everyone's entitled to the attorney of their choice, and Mr. Benn was their choice," the judge said.
>
> "The Constitution doesn't say the lawyer has to be awake."

John Makeig *Asleep on the job? Slaying trial boring, lawyer says*, HOUSTON CHRONICLE, August 14, 1992.

The Texas Court of Criminal Appeals upheld the conviction on direct appeal over the dissents of Judges Baird and Overstreet. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996).

Judge Baird wrote, "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense." *Id*. at 527.

The Court rejected a challenge made by

McFarland in post-conviction proceedings, distinguishing *Burdine* because of the involvement of the second lawyer in the case. *Ex Parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005).

For further reading regarding issues of defense lawyers sleeping or being impaired by drugs or alcohol *see* Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 Neb. L. Rev. 425, 455-60 (1996).

Plea Bargaining

The Court has held that the Sixth Amendment right to counsel applies to counsel's role in plea bargaining. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) (client advised to reject plea and go to trial based on misunderstanding of the law); *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (failure to notify client of plea before the date for accepting it expired); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (failure to advise client that he was subject to deportation upon entry of a guilty plea); and *Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that the *Strickland* standard applies to claims of ineffective assistance in plea bargaining, but finding Hill did not show that erroneous advice as to eligibility for parole, even if given, affect the outcome because did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial).

However, even when deficient performance is shown, the defendant must show that but for counsel's deficient performance there is a reasonable probability he would have accepted the plea, the prosecution would not have withdrawn it and the judge would have accepted it. Even then, the trial court is to exercise its discretion in determining "whether to vacate the convictions and resentence [the defendant] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the defendant] accordingly, or to leave the convictions and sentence from trial undisturbed.

Application of *Strickland* in other cases

The Supreme Court did not find counsel ineffective in any case until 16 years after *Strickland v. Washington* in the case that follows.

Terry WILLIAMS, Petitioner,
v.
John TAYLOR, Warden.

United States Supreme Court
529 U.S. 362, 120 S.Ct. 1495 (2000)

Stevens, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined, and an opinion with respect to Parts II and V, in which Souter, Ginsburg, and Breyer, JJ., joined.

O'Connor, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which Rehnquist, C.J., and Kennedy and Thomas, JJ., joined, and in which Scalia, J. joined, except as to the footnote, and an opinion concurring in part and concurring in the judgment, in which Kennedy, J., joined. Rehnquist, C.J., filed an opinion concurring in part and dissenting in part, in which Scalia and Thomas, JJ., joined.

[*I.e., Justice Stevens delivered the opinion of the Court with regard to the issue of ineffective assistance of counsel. Justice O'Connor delivered the Court's opinion with regard to application of the deference provision of the habeas corpus statute. Her opinion is included in the materials on "Appellate and Habeas Review."*]

Justice STEVENS announced the judgement of the Court and delivered the opinion of the Court with respect to Parts, I, III, and IV * * *

The questions presented are whether Terry Williams' constitutional right to the effective assistance of counsel * * * was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). We answer both questions affirmatively.

I

On November 3, 1985, Harris Stone was found dead in his residence on Henry Street in Danville, Virginia. Finding no indication of a struggle, local officials determined that the cause of death was blood alcohol poisoning, and the case was considered closed. Six months after Stone's death, Terry Williams, who was then incarcerated in the "I" unit of the city jail for an unrelated offense, wrote a letter to the police stating that he had killed "'that man down on Henry Street'" and also stating that he "'did it'" to that "'lady down on West Green Street'" and was "'very sorry.'" * * * The police readily identified Williams as its author, and, on April 25, 1986, they obtained several statements from him. In one Williams admitted that, after Stone refused to lend him "'a couple of dollars,'" he had killed Stone with a mattock and took the money from his wallet. In September 1986, Williams was convicted of robbery and capital murder.

At Williams' sentencing hearing, the prosecution proved that Williams had been convicted of armed robbery in 1976 and burglary and grand larceny in 1982. The prosecution also introduced the written confessions that Williams had made in April. The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated after the Stone murder. On December 4, 1985, Williams had started a fire outside one victim's residence before attacking and robbing him. On March 5, 1986, Williams had brutally assaulted an elderly woman on West Green Street – an incident he had mentioned in his letter to the police. That confession was particularly damaging because other evidence established that the woman was in a "vegetative state" and not expected to recover. Williams had also been convicted of arson for setting a fire in the jail while awaiting trial in this case. Two expert witnesses employed by the State testified that there was a "high probability" that Williams would pose a serious continuing threat to society.

The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a "nice boy" and not a violent person. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams' counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams' counsel characterized Williams' confessional statements as "dumb," but asked the jury to give weight to the fact that he had "turned himself in, not on one crime but on four . . . that the [police otherwise] would not have solved." The weight of defense counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.

The jury found a probability of future dangerousness and unanimously fixed Williams' punishment at death. * * *

State Habeas Corpus Proceedings

In 1988 Williams filed for state collateral relief in the Danville Circuit Court. The * * * Circuit Court (the same judge who had presided over Williams' trial and sentencing) held an evidentiary hearing on Williams' claim that trial counsel had been ineffective. Based on the evidence adduced after two days of hearings, Judge Ingram found that Williams' conviction was valid, but that his trial attorneys had been ineffective during sentencing. Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he

was "borderline mentally retarded," had suffered repeated head injuries, and might have mental impairments organic in origin. The habeas hearing also revealed that the same experts who had testified on the State's behalf at trial believed that Williams, if kept in a "structured environment," would not pose a future danger to society.

* * *

The Virginia Supreme Court did not accept that recommendation. Although it assumed, without deciding, that trial counsel had been ineffective, it disagreed with the trial judge's conclusion that Williams had suffered sufficient prejudice to warrant relief. * * *. [I]t construed the trial judge's opinion as having "adopted a per se approach" that would establish prejudice whenever any mitigating evidence was omitted.

The court then reviewed the prosecution evidence supporting the "future dangerousness" aggravating circumstance, reciting Williams' criminal history, including the several most recent offenses to which he had confessed. In comparison, it found that the excluded mitigating evidence – which it characterized as merely indicating "that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment," – "barely would have altered the profile of this defendant that was presented to the jury," * * *

Federal Habeas Corpus Proceedings

Having exhausted his state remedies, Williams sought a federal writ of habeas corpus. After reviewing the state habeas hearing transcript and the state courts' findings of fact and conclusions of law, the federal trial judge agreed with the Virginia trial judge: The death sentence was constitutionally infirm.

The Federal Court of Appeals reversed. * * *

We granted certiorari and now reverse.

* * *

IV

* * *

We are * * * persuaded that the Virginia trial judge correctly applied both components of [the *Strickland v. Washington*] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards – a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[19] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates

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19. Juvenile records contained the following description of his home:

> The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

"least likely to act in a violent, dangerous or provocative way." Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system – for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. * * *

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland*. * * *

* * *

* * * [T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation. * * *

But the state court failed even to mention the sole argument in mitigation that trial counsel did advance – Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

* * *

Justice O'CONNOR delivered the opinion of the Court with respect to Part II concurred in part, and concurred in the judgment.

* * *

III

* * * I agree with the Court that the Virginia Supreme Court's adjudication of Williams' claim of ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. * * *

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). Second, I agree that the Virginia Supreme Court's decision was contrary to that clearly established federal law to the extent it held that [another] decision [of the Court] somehow modified or supplanted the rule set forth in *Strickland*. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. * * *

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. * * * Williams' trial counsel failed to conduct investigation that would have uncovered substantial amoun ts of mitigation evidence. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody," * * * In addition, the Circuit Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." * * * The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. * * * For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court 's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

* * *

CHIEF JUSTICE REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring in part and dissenting in part.

* * *

* * * As to the prejudice inquiry, I agree with the Court of Appeals that evidence showing that petitioner presented a future danger to society was overwhelming.

* * *

Here, there was strong evidence that petitioner would continue to be a danger to society, both in and out of prison. It was not, therefore, unreasonable for the Virginia Supreme Court to decide that a jury would not have been swayed by evidence demonstrating that petitioner had a terrible childhood and a low IQ. The potential mitigating evidence that may have countered the finding that petitioner was a future danger was testimony that petitioner was not dangerous while in detention. But, again, it is not unreasonable to assume that the jury would have viewed this mitigation as unconvincing upon hearing that petitioner set fire to his cell while awaiting trial for the murder at hand and has repeated visions of harming other inmates.

Other Decisions on Ineffective Counsel

The Court found ineffectiveness for failure to present mitigating evidence at the penalty phase in two other cases, *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). The Court unanimously reversed per curiam in *Porter v. McCollum*, 558 U.S. 30 (2009), finding that counsel's failure to present Porter's heroic and traumatic experiences during the Korean War was ineffective. The Court summarily found a lawyer deficient for failing to secure a competent ballistics experts based on the attorney's misunderstanding of the law regarding funding for experts. *Hinton v. Alabama*, 134 S.Ct. 1081(2014). But far more often, the Court has reversed – often in per curiam decisions (without briefing and oral argument) – decisions of lower courts finding ineffectiveness.

Review of Ineffectiveness Claims Under AEDPA

Although the Court found that the petitioners in *Williams*, *Wiggins*, *Rompilla* and *Porter* had established an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States as required by 28 U.S.C. § 2254(d)(1), those requirements may prevent a federal court from granting relief even when if would conclude that the representation provided by counsel violated the Sixth Amendment.

For example, the Fifth Circuit concluded in *Neal v. Puckett* that the Mississippi Supreme Court should have granted a petitioner's ineffec-

tive assistance of counsel claim, but because the Mississippi court's erroneous decision to deny the claim was not "unreasonable," the federal courts could not grant relief. *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002) (en banc) (per curium).

The Supreme Court make clear just how hard it is to overcome *Strickland v. Washington*'s presumptions and the deference requirements of the AEDPA in the case that follows, *Harrington v. Richter*. Consider these questions while reading *Harrington*:

How would you describe the barriers to prevailing on a claim of ineffective assistance of counsel in federal habeas review? What must a petitioner prove?

Justice Kennedy purports to be protecting habeas corpus review and the integrity of the adversary system and the case-law tradition (with regard to whether state courts issue written decisions stating their reasons for denying a claim). How well are those objectives served by this decision?

What message does this decision send to the lower federal courts? How are they to reconcile *Harrington v. Richter* with the Court's decision in *Williams v. Taylor* (and the optional readings, *Wiggins v. Smith* and *Rompilla v. Beard*).

Harrington v. Richter

Joshua Richter and Christian Branscombe were convicted of shooting Joshua Johnson, a drug dealer, and Patrick Klein, after the four had smoked marijuana in Johnson's house. Johnson testified he went to sleep but later awoke to find Richter and Branscombe in his bedroom. Branscombe shot him. Johnson heard more gunfire in the living room and the sound of his assailants leaving. He got up, found Klein bleeding on the living room couch, and called 911. A gun safe, a pistol, and $6,000 cash, all of which had been in the bedroom, were missing. Detectives responded to the scene and found, among other things, blood spatter near the living room couch and bloodstains in the bedroom. Pools of blood had collected in the kitchen and the doorway to Johnson's bedroom.

At trial, Richter defense was that Branscombe had fired on Johnson in self-defense and that Klein had been killed not on the living room couch but in a crossfire in the bedroom doorway. Richter and other witnesses gave testimony that supported this version. The prosecution disputed this theory by presenting the testimony of one of the detectives who testified as an expert in blood pattern evidence. He testified that it was unlikely Klein had been shot outside the living room and then moved to the couch, given the patterns of blood on Klein's face, as well as other evidence including "high velocity" blood spatter near the couch consistent with the location of a shooting. The prosecution also presented the testimony of a serologist, who testified the blood sample taken near the pool by the bedroom door could be Johnson's but not Klein's.

Richter sought habeas corpus relief in the California courts, arguing that his counsel was deficient for failing to present expert testimony on serology, pathology, and blood spatter patterns, testimony that, he argued, would disclose the source of the blood pool in the bedroom doorway.

He offed affidavits from three types of forensic experts, two blood serologists who said there was a possibility Klein's blood was intermixed with blood of Johnson's type in the sample taken from near the pool in the bedroom doorway, a pathologist who said the blood pool was too large to have come from Johnson given the nature of his wounds, and an expert in bloodstain analysis who said blood patterns show in a photograph of the scene were inconsistent with the blood pool coming from Johnson as he stood in the doorway. Richter argued this evidence established the possibility that the blood in the bedroom doorway came from Klein, not Johnson, confirming his account, not Johnson's. The California Supreme Court denied Richter's petition in a one-sentence summary order. The Court of Appeals for the Ninth Circuit reversed, finding that Richter had been denied effective assistance of counsel. The United States Supreme Court reversed in the following opinion.

Kelly HARRINGTON,
Warden, Petitioner,
v.
Joshua RICHTER.

Supreme Court of the United States
131 S.Ct. 770 (2011).

Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia, Thomas, Breyer, Alito, and Sotomayor, JJ., joined. Ginsburg, J., filed an opinion concurring in the Judgment. Kagan, J., took no part in the consideration or decision of the case.

Justice KENNEDY delivered the opinion of the Court.

The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance. That judicial disregard is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review. * * *

I
* * *

* * * [The Court of Appeals for the Ninth Circuit, sitting en banc,] held Richter's trial counsel was deficient for failing to consult experts on blood evidence in determining and pursuing a trial strategy and in preparing to rebut expert evidence the prosecution might – and later did – offer. Four judges dissented from the en banc decision.

* * *

II

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As an initial matter, it is necessary to decide whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied.

By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a "decision," which resulted from an "adjudication." * * * And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

There is no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings because applying § 2254(d) in those cases will encourage state courts to withhold explanations for their decisions. Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court. * * * At the same time, requiring a statement of reasons could undercut state practices designed to pre-

serve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed. * * *

* * *

III

* * *

The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004). * * *

* * *

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. * * * It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."

* * *

IV

The conclusion of the Court of Appeals that Richter demonstrated an unreasonable application by the state court of the *Strickland* standard now must be discussed. To have been entitled to relief from the California Supreme Court, Richter had to show both that his counsel provided deficient assistance and that there was prejudice as a result. * * *

* * *

"Surmounting *Strickland*'s high bar is never an easy task." An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for

judging counsel's representation is a most deferential one. * * * The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

A

With respect to defense counsel's performance, the Court of Appeals held that because Richter's attorney had not consulted forensic blood experts or introduced expert evidence, the California Supreme Court could not reasonably have concluded counsel provided adequate representation. This conclusion was erroneous.

1

The Court of Appeals first held that Richter's attorney rendered constitutionally deficient service because he did not consult blood evidence experts in developing the basic strategy for Richter's defense or offer their testimony as part of the principal case for the defense. *Strickland,* however, permits counsel to "make a reasonable decision that makes particular investigations unnecessary." It was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here.

Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. * * *" Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it. Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding the pool in the doorway to Johnson's bedroom.

* * *

Even if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it. The Court of Appeals opinion for the en banc majority rests in large part on a hypothesis that reasonably could have been rejected. The hypothesis is that without jeopardizing Richter's defense, an expert could have testified that the blood in Johnson's doorway could not have come from Johnson and could have come from Klein, thus suggesting that Richter's version of the shooting was correct and Johnson's a fabrication. This theory overlooks the fact that concentrating on the blood pool carried its own serious risks. If serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. Here Richter's attorney had reason to question the truth of his client's account, given, for instance, Richter's initial denial of involvement and the subsequent production of Johnson's missing pistol.

It would have been altogether reasonable to conclude that this concern justified the course Richter's counsel pursued. Indeed, the Court of Appeals recognized this risk insofar as it pertained to the suggestion that counsel should have had the blood evidence tested. But the court failed to recognize that making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on

the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter's case. Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether Johnson was telling the truth, or transform the case into a battle of the experts.

* * *

To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option. If this case presented a *de novo* review of *Strickland,* the foregoing might well suffice to reject the claim of inadequate counsel, but that is an unnecessary step. The Court of Appeals must be reversed if there was a reasonable justification for the state court's decision. In light of the record here there was no basis to rule that the state court's determination was unreasonable.

The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Although courts may not indulge "*post hoc* rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." * * *

2

The Court of Appeals also found that Richter's attorney was constitutionally deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court of Appeals erred in suggesting counsel had to be prepared for "any contingency." *Strickland* does not guarantee perfect representation, only a "'reasonably competent attorney.'" Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

Here, Richter's attorney was mistaken in thinking the prosecution would not present forensic testimony. But the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt.

Even if counsel should have foreseen that the prosecution would offer expert evidence, Richter would still need to show it was indisputable that *Strickland* required his attorney to act upon that knowledge. Attempting to establish this, the Court of Appeals held that defense counsel should have offered expert testimony to rebut the evidence from the prosecution. But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.

In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. And while in some instances "even an isolated error" can support an ineffective-assistance claim if it is "sufficiently egregious and prejudicial," it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here Richter's attorney represented him with vigor and conducted a skillful cross-examination. [D]efense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators had left the crime scene. For all of these reasons, it would have been reasonable to find that Richter had not shown his attorney was deficient under *Strickland*.

B

The Court of Appeals further concluded that Richter had established prejudice under *Strickland* given the expert evidence his attorney could have introduced. It held that the California Supreme Court would have been unreasonable in concluding otherwise. This too was error. In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

It would not have been unreasonable for the California Supreme Court to conclude Richter's evidence of prejudice fell short of this standard. His expert serology evidence established nothing more than a theoretical possibility that, in addition to blood of Johnson's type, Klein's blood may also have been present in a blood sample taken near the bedroom doorway pool. At trial, defense counsel extracted a concession along these lines from the prosecution's expert. The pathology expert's claim about the size of the blood pool could be taken to suggest only that the wounded and hysterical Johnson erred in his assessment of time or that he bled more profusely than estimated. And the analysis of the purported blood pattern expert indicated no more than that Johnson was not standing up when the blood pool formed.

It was also reasonable to find Richter had not established prejudice given that he offered no evidence directly challenging other conclusions reached by the prosecution's experts. For example, there was no dispute that the blood sample taken near the doorway pool matched Johnson's blood type. * * * Nor did Richter provide any direct refutation of the State's expert testimony describing how blood spatter near the couch suggested a shooting in the living room and how the blood patterns on Klein's face were inconsistent with Richter's theory that Klein had been killed in the bedroom doorway and moved to the couch.

There was, furthermore, sufficient conventional circumstantial evidence pointing to Richter's guilt. It included the gun safe and ammunition found at his home; his flight from the crime scene; his disposal of the .32-caliber gun and of Johnson's pistol; his shifting story concerning his involvement; the disappearance prior to the arrival of the law enforcement officers of the .22-caliber weapon that killed Klein; the improbability of Branscombe's not being wounded in the shootout that resulted in a combined four bullet wounds to Johnson and Klein; and the difficulties the intoxicated and twice-shot Johnson would have had in carrying the body of a dying man from bedroom doorway to living room couch, not to mention the lack of any obvious reason for him to do so. There was ample basis for the California Supreme Court to think any real possibility of Richter's being acquitted was eclipsed by the remaining evidence pointing to guilt.

* * *

Justice KAGAN took no part in the consideration or decision of this case.

Justice GINSBURG, concurring in the judgment.

In failing even to consult blood experts in preparation for the murder trial, Richter's counsel, I agree with the Court of Appeals, "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The strong force of the prosecution's case, however, was not significantly reduced by the affidavits offered in support of Richter's habeas petition. I would therefore not rank counsel's lapse "so serious as to deprive [Richter] of a fair trial, a trial whose result is reliable." For that reason, I concur in the Court's judgment.

In the Lower Courts

For an example of similar treatment of an ineffectiveness claim in the United States Court of Appeals for the Eleventh Circuit, *see Holsey v.*

Warden, 694 F.3d 1230 (11th Cir. 2012). The Court, deferring to the Georgia Supreme Court's decision under AEDPA, upheld Holsey's death sentence even though the lead defense lawyer drank a quart of vodka every night of trial while preparing to be sued, criminally prosecuted, and disbarred for stealing client funds, and failed to present evidence that his intellectually limited client had been "subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'" *Id*. at 1275 (Barkett, J., dissenting). *See* Marc Bookman, *This Man Is About to Die Because an Alcoholic Lawyer Botched His Case*, Mother Jones (April 22, 2014), http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial.

For other examples of the poor quality of representation, *see* www.secondclassjustice.com/?page_id=42 and particularly www.secondclassjustice.com/?p=198 about the case of James Fisher (which includes a finding of ineffectiveness by the Tenth Circuit after a determination that the Antiterrorism and Effective Death Penalty Act did not apply) and www.secondclassjustice.com/?p=164 about two cases in Kentucky which were upheld even thought in one the defendant repeatedly tried to fire his alcoholic lawyer and the other in which the lawyer did not even know his client's name and failed to put on evidence of his brain damage.