

SPEAKING TRUTH TO POWER: THE OBLIGATION OF THE COURTS TO ENFORCE THE RIGHT TO COUNSEL AT TRIAL

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ABSTRACT

Professor Metze takes a critical look at the historical and contemporary law on the right to counsel and the evolution of what measure the courts must use to review trial counsel's performance. By the use of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the courts have settled on the proper measure of counsel's representation. Struggling with the new rights extended to former servants and slaves, the courts following the Civil War fought a slow but steady battle to implement the constitutional guarantees of the Bill of Rights to all citizens. After a century, the Supreme Court finally guaranteed the right to counsel to all facing the loss of life or liberty. During the twentieth century, it was determined that more than counsel's mere presence was needed. This Article addresses the constitutional right to counsel, what standard of effectiveness a defendant may expect his counsel to perform, and the history of these concepts. Finally, it analyzes the practical applications of the right to counsel and the court's application of its attorney competence standards, leading to the conclusion that those in power may think they do no harm resisting the temptations of change, but by their deeds, if only for their own political survival, the least among us survive, and the smell of systemic disease lingers.

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*They that have power to hurt and will do none,
That do not do the thing they most do show,
Who, moving others, are themselves as stone,
Unmoved, cold, and to temptation slow;
They rightly do inherit heaven's graces,
And husband nature's riches from expence;
They are the lords and owners of their faces,
Others but stewards of their excellence.
The summer's flower is to the summer sweet,
Though to itself it only live and die;
But if that flower with base infection meet,
The basest weed outbraves his dignity:
For sweetest things turn sourest by their deeds;
Lilies that fester smell far worse than weeds.¹*

1. WILLIAM SHAKESPEARE, SHAKESPEARE'S SONNETS 100, no. 94 (Boston, Ticknor & Fields 1865).

I. INTRODUCTION

Appellate courts have long been for me an anathema. I remember how proud I was of the Supreme Court when I was young—ensuring the rights and liberties of the poor and disenfranchised, seeing that they had the right to vote, the right to access in accommodations and public services, the right to education, the right to remain silent, the right to a lawyer, the right to a fair trial, and the right to equal treatment under the law. I remember, though, how angry my father would get in reaction to these courageous stands and how he believed they threatened his very existence. Then I went to law school, living every day expecting to be drafted into the service for my time in Vietnam. I struggled with my father's disdain for my generation and virtually all those I called friends.

This April, I celebrate thirty-eight years practicing law. My father has long since left this world, but my draw to the causes of the 1960s did not die with him. My passion was not just an adolescent rebellion—my guiding philosophies became like a magnet drawing me into a fight with the system—a system that so emulates my late father. To me, adolescence has been a lifetime struggle—authority, my enemy.

As I practiced law, I saw firsthand the struggles of the poor. With usually only enough money to pay rent or have transportation—not both—I saw their daily struggles. My law practice made me see the appellate courts, and to a greater extent the trial courts, as products of their own political struggles to survive. The poor I represented have lived their lives with the same self-interest as the judges I have known. So, what began as a reverence for authority and an admiration for the good work of the appellate courts—and some trial courts—during my formative years, turned into amusement and shame during my practice years for the way the courts allowed the rights entrusted to their protection to be eroded. Where are the brave jurists?

It is with this background that my friend and mentor, Professor Arnold Loewy, charged me to take this critical look at one of the rights set out by the founding fathers and later enumerated as a fundamental right of our freedom—the right to counsel. In preparation for my participation in a panel discussion on the right to counsel at trial, given at the annual Criminal Law Symposium presented by Professor Loewy and the *Texas Tech Law Review*, I was struck with how Professor Loewy had placed me on a panel with distinguished professors from Washington & Lee University, the University of Virginia, the University of California at Davis, and the University of North Carolina. I have only recently come to academia from my life as a practitioner, and the thought of trying to add some valuable insight into a discussion on the right to counsel in the company of such legal experts gave me great pause. To approach this topic, however, from any viewpoint other than that of a practitioner is to forsake all my brethren toiling in the well. With this in mind, I press on.

I have often thought that *Strickland v. Washington* was a tool of the judiciary used to protect verdicts with no concern for the rights of the convicted.² So, I decided to take a historical look at the right to counsel at trial—that is, the right to effective assistance of counsel. The following Parts take a look at the history of the right to counsel, Due Process and the Fourteenth Amendment, and how the Supreme Court and the lower courts developed these concepts.

The standards that were developed by the courts shed light on their struggle to ensure the right to counsel and highlight the importance of the courts' role in maintaining this right. The modern standard of “normal competency” or “reasonably competent assistance of counsel” developed during my formative years.³ This standard appears to be a reaction to the political upheaval of my generation and the well-intended thought that counsel needed to be more than just present at trial—that the performance level of defense counsel should test the system and, by confrontation, create a just result.

During the years surrounding and immediately following World War II, the judiciary gave lip service to the role of defense counsel being more than pro forma.⁴ During this time, the courts and prosecutors were charged with the responsibility—as officers of the court—to address apparent deprivations of the Sixth Amendment.⁵ But the trial courts and prosecutors—as creatures of politics—demanded and received from the appellate courts decisions that had the effect of maintaining verdicts and sustaining the elected officials' political power.⁶ There is a reason you seldom see a sitting district judge or district attorney suffer loss of his job in this area of Texas. Their continued employment rests largely on placating the fears of the electorate and protecting the decisions of the courts and juries of a community.⁷ This is especially true in

2. See *Strickland v. Washington*, 466 U.S. 668 (1984). “To establish ineffective assistance of counsel ‘a defendant must show both deficient performance by counsel and prejudice.’” *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009)).

“To establish deficient performance, a person challenging a conviction must show that ‘counsel’s representation fell below an objective standard of reasonableness.’ A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” With respect to prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Id. (citations omitted) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011)).

3. See *infra* notes 240-70 and accompanying text.

4. See *infra* notes 121-42 and accompanying text.

5. See *infra* notes 140-62 and accompanying text.

6. See *infra* notes 103-23 and accompanying text.

7. See *infra* note 445 and accompanying text.

an area such as Texas, which during my lifetime, has bought hook-line-and-sinker into the Southern Strategy of the Republican Party of the 1960s.⁸

By the early 1980s, the courts felt overwhelmed by the litigation that was meant to test the effectiveness of defense counsel. The new reasonably competent assistance of counsel standard created collateral problems, which the judiciary was forced to face.⁹ Just as in the hallowed fabrication of the harmless error rule and how it solved so many appellate problems, the courts turned to “prejudice” to cure the effective counsel problem.¹⁰ After all, prejudice is in the eye of the beholder—and predicting what *could have been* gave the courts the ammunition they needed to just say “no” to the convicted unless the facts of the case were so offensive that they could not be ignored. This seldom happened.

This Article tracks the evolution of a defendant’s right to counsel through the progressive realization that standards had to define the proper role of defense counsel as pro forma measures fell short of meeting constitutional expectations. I discuss the application of the various standards used by the courts in defining what is required of defense counsel, ending with *Strickland v. Washington* as the current, proper measure of counsel.¹¹ Sadly, the struggle between the states, local authorities, and the federal government in setting and meeting constitutional expectations is ongoing and *Strickland* only provides a convenient method to dispose of most claims of ineffective assistance of counsel.¹² The idealistic dream of the right to counsel and the reality of the application of those ideals often fail to find common ground.

As an homage to my practice experience, I end this article with two examples of the application of these principles. The first example is the effort of the Texas Tech University School of Law to bring this basic right to counsel to an underserved rural area of Texas. Texas Tech has formed a rural Public Defenders Office for a large, rural region of West Texas. By contracting with the local authorities of the region, we are fighting for the fundamental right of counsel for the rural poor. It will probably shock some to know that the basic right to counsel has yet to be firmly established in some places.

The second example of the application of the right to counsel is a practical lesson from the teachings of *Strickland v. Washington*, illustrated by examining the decisions of the state appeals court, which covers much of the region served by our new Public Defenders Office.¹³ This last example is not meant to embarrass my friends on the court—I consider every one of them to be

8. See, e.g., James Boyd, *Nixon’s Southern Strategy ‘It’s All in the Charts,’* N.Y. TIMES (May 17, 1970), www.nytimes.com/packages/html/books/phillips-southern.pdf.

9. See *infra* notes 240-70 and accompanying text.

10. See *infra* notes 270-91 and accompanying text.

11. See *infra* Parts VII-XVI.

12. See *infra* Parts XXII-XXIV.

13. See *infra* Part XXIV.

hardworking and knowledgeable, and I know and respect them all. This criticism is a broad brush applicable to virtually all the judiciary—at the trial and appellate level. The appellate courts have allowed themselves the luxury of harmless and waived error and of standards of review that protect judicial discretion and prosecutorial misconduct. Even though they may not intend anything sinister, the courts produce an effect that is concerning to those who work with the poor every day. In the end, it is the judiciary that must give voice to *Gideon's* trumpet.

II. HISTORY OF THE RIGHT TO COUNSEL

One must understand how the right to counsel evolved throughout our history before one can properly evaluate the role of counsel, whether effective or not, in the protection of accused citizens. In the English Common Law, except for a very limited purpose, the accused was denied the assistance of counsel for the crime of treason or for felonies.¹⁴ Interestingly, however, at the time of the writing of the Constitution, those charged with petty crimes and misdemeanors, even in England, had the right to counsel.¹⁵ “[T]he Sixth Amendment was intended as a rejection of the limitations which had existed in England and as an extension of the right to counsel to those classes of offenses from which it had been withheld at common law.”¹⁶ The Framers of the Constitution intended to confirm the right to counsel in misdemeanor cases—as had been the custom at common law—but also wanted to add the additional guarantee of counsel to all charged with a crime.¹⁷

To add strength to this argument, those who founded this country held the right to counsel in the highest of reverence. The Maryland Constitution of

14. *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (explaining that counsel was provided in these serious crimes only for help with legal questions raised by the accused himself). The rule as to felonies persisted until 1836. See *Argersinger v. Hamlin*, 407 U.S. 25, 29-33 (1972).

15. *James v. Headley*, 410 F.2d 325, 331-32 n.9 (5th Cir. 1969); see also *Argersinger*, 407 U.S. at 30-31 (“The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided. We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.” (citations omitted)). In an often-cited article, Justice (then Professor) Frankfurter and Thomas G. Corcoran show that at the time the Constitution and Bill of Rights were framed, petty offenses were tried without a jury in England, the colonies, and the newly constituted states; the absence of debate on this in the Federal Convention and the First Congress indicate that the Founding Fathers did not intend to abolish the prior summary practice. *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 960-70 (1926).

16. *James*, 410 F.2d at 332 n.9 (citing *Powell*, 287 U.S. at 60). “[T]he Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense” *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275 (1942) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-66 (1938)).

17. *James*, 410 F.2d at 331-32. This right was eventually extended to all crimes in which the accused’s liberty was at stake. See *Argersinger*, 407 U.S. at 40.

1776, Article 19, provided that “in all criminal prosecutions, every man hath a right . . . to be allowed counsel.”¹⁸ The Massachusetts Constitution adopted the right in 1780, as did New Hampshire in its 1784 Constitution, New York in its Constitution of 1777, and Pennsylvania in Article 9 of its Declaration of Rights in 1776. In fact, “as early as 1701, the Penn Charter (article 5) [said] ‘all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors.’”¹⁹ The common law of England was adopted by article 25 of the Delaware Constitution of 1776 with the added language, “that in all Prosecutions for criminal Offences, every Man hath a Right . . . to be allowed Counsel.”²⁰ Article 16 of the New Jersey Constitution of 1776 had language similar to the Penn Charter.²¹ Using language borrowed closely from the Sixth Amendment, the Connecticut Constitution said “that in all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel.”²²

Most of the other original thirteen states provided for the right to counsel by statute or later by constitution. Although the North Carolina Constitution of 1776 did not so provide the right, its statutes provided, “That every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defence, as well to the facts as to law.”²³ Georgia’s Constitution of 1798 said that “no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both.”²⁴ In the Constitution of 1842, Rhode Island provided “the usual guaranty in respect of the assistance of counsel in criminal prosecutions.”²⁵ As early as 1798, however, Rhode Island provided by statute, “[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.”²⁶ Only South Carolina (1731) and Virginia (1734) limited the right to counsel by statute for the more serious felony crimes including treason, murder, or capital offenses.²⁷

18. MD. CONST. art. XIX.

19. *Powell*, 287 U.S. at 61 (quoting PENN CHARTER of 1701, art. V). As early as 1718 in the DALLAS, LAWS OF PENNSYLVANIA, 1700-1781, vol. 1, p. 134, Pennsylvania said that “in capital cases learned counsel should be assigned to the prisoners.” *Id.*

20. *Id.* at 62 (second alteration in original) (quoting DEL. CONST. of 1776, art. XXV). Penn’s Charter was also applicable to Delaware. *Id.*

21. *Id.* (quoting CONN. CONST. of 1818, art. 1, § 9).

22. *Id.* (alteration in original) (quoting 1777 N.C. Sess. Laws ch. 115, § 85).

23. *Id.*

24. *Id.* at 63 (quoting GA. CONST. of 1798, art. 3, § 8). In *Ferguson v. Georgia*, in interpreting a Georgia statute that an accused, being incompetent to testify under oath on his own behalf at his trial since 1868, could make an unsworn statement to the court and jury in his defense, the Supreme Court held that although the accused could not be compelled to answer any questions on cross-examination, it was consistent with the Fourteenth Amendment for the accused to have “the right to have his counsel question him to elicit his statement.” *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961).

25. *Powell*, 287 U.S. at 63 (quoting R.I. CONST. of 1842).

26. *Id.* at 63-64 (alteration in original) (quoting 1798 R.I. Pub. Laws § 6).

27. *Id.* at 62.

Of the thirteen original states, all but two had rejected the common law rule and recognized the right to counsel in criminal prosecutions in all manner of cases.²⁸ Those who settled in the English Colonies in North America sought ways to mitigate the “severity of the common law” in criminal matters.²⁹ The Supreme Court of the United States, in interpreting the various laws of the states and applying the rights guaranteed by the Constitution and incorporated to the states by the Fourteenth Amendment, labeled the process a “progressive science.”³⁰ Later, in the interpretation of another right guaranteed by the Bill of Rights, the Supreme Court acknowledged that the concept of what many call the “living Constitution” was sensitive to the “evolving standards of decency that mark the progress of a maturing society.”³¹ To quote Chief Justice Warren, “[T]he words of the Amendment are not precise, and . . . their scope is not static.”³² The words of all Amendments defining and protecting fundamental rights—such as the right to counsel or the right against cruel and unusual punishment—see their scope and effect defined by the times and the philosophies of the jurists who sit on the Court.³³ So, the progressive interpretations of the right to counsel arising out of the Sixth Amendment—and to what extent the Constitution is satisfied with the performance of said counsel—have been defined over time. Many of the abuses of the common law—such as depriving the accused of the “assistance of counsel and compulsory process for the attendance of his witnesses”—though not changed in England, have not found a home in the United States.³⁴ As Justice Brown wrote in *Holden v. Hardy*, “[T]o the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.”³⁵

28. *Id.* at 64-65.

29. *Holden v. Hardy*, 169 U.S. 366, 386 (1898).

30. *Id.* at 385.

31. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

32. *Id.* (footnote omitted).

33. *Id.*; see *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

34. *Powell v. Alabama*, 287 U.S. 45, 65 (1932); see *United States v. Ash*, 413 U.S. 300, 308 (1973) (“[E]arly in the eighteenth century the American system of judicial administration adopted an institution which was (and to some extent still is) unknown in England: while rejecting the fundamental juristic concepts upon which continental Europe’s inquisitorial system of criminal procedure is predicated, the colonies borrowed one of its institutions, the public prosecutor, and grafted it upon the body of English (accusatorial) procedure embodied in the common law.” (alteration in original) (quoting F. HELLER, *THE SIXTH AMENDMENT* 20-21 (1951))). Another example of the Colonies’ rejection of the inquisitorial system is a reference in a case discussing the Fifth Amendment privilege and a comment by the prosecution on the defendant’s failure to testify. See *Griffin v. California*, 380 U.S. 609, 614 (1965). The Court said, “For [a prosecutor to] comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which [comment] the Fifth Amendment [now] outlaws.” *Id.* (citations omitted) (quoting *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

35. *Holden*, 169 U.S. at 386.

III. HISTORY OF DUE PROCESS

Prior to this period, Western law began to develop the concept of due process, as set out in the United States Constitution and in particular the Fourteenth Amendment.³⁶ The concept of due process “was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.”³⁷ Addressing the Magna Charta and its concepts incorporated into our definitions of due process, the Supreme Court wrote, “[T]he good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”³⁸ Years later, the nation’s highest court said, “The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice.”³⁹

Even though process within the states may change from time to time, landmarks, such as the concept of due process established for the protection of the citizen, are always the foundation and legitimization of such change.⁴⁰

In the fourteenth amendment, . . . [due process] refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.⁴¹

But not all constitutional protections carry with them the dictates of the Federal Constitution. For example, even though the Seventh Amendment to the United State Constitution provides the following:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law,⁴²

and the Sixth Amendment to the United States Constitution says,

36. *See* *Westervelt v. Gregg*, 12 N.Y. 202, 212 (1894).

37. *Id.*

38. *Bank of Columbia v. Okely*, 17 U.S. 235, 234-44 (1819).

39. *Hurtado v. California*, 110 U.S. 516, 527-28 (1884) (quoting Chancellor Kent (2 Comm. 13), adopting the language of Magna Charta and referring to Lord Coke’s comment.).

40. *See id.*

41. *Id.* at 535.

42. U.S. CONST. amend. VII.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense,⁴³

the states may regulate their own trials. Trial by jury is not a privilege or immunity of national citizenship that the Fourteenth Amendment prevents the states from limiting.⁴⁴ On the question of the deprivation of life, liberty, property, and the role of due process, a state may place a tax or other assessment upon a citizen's property for public use as long as the state laws provide due process in setting and contesting the imposed charge.⁴⁵ Also, upon the request to set aside state legislation—under the authority of the state constitution—creating a state agency to “conduct and manage . . . certain utilities, industries, enterprises, and business projects,” the Supreme Court held it was not within its judicial authority to use the Fourteenth Amendment for this purpose.⁴⁶ And as to crime, the courts have long recognized that the states have the power to address crime within their borders as long as due process is given.⁴⁷ The Supreme Court refused to interpret a New York state criminal statute setting a minimum price on milk, citing claims of violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.⁴⁸ The Court said,

[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory⁴⁹

[L]aw in its regular course of administration through courts of justice is due process, and when secured by the law of the state the [federal] constitutional

43. U.S. CONST. amend. VI.

44. *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875).

45. *Davidson v. New Orleans*, 96 U.S. 97, 104-05 (1877).

46. *Green v. Frazier*, 253 U.S. 233, 234 (1920).

47. *Ughbanks v. Armstrong*, 208 U.S. 481, 487 (1908). The Supreme Court rejected Ughbanks's contention that the Michigan punishment enhancement statute violated due process under the Fourteenth Amendment and denied him the equal protection of the laws. *Id.* The Fourteenth Amendment “was not intended to, and does not, limit the powers of a state in dealing with crime committed within its own borders or with the punishment thereof, although no state can deprive particular persons or classes of persons of equal and impartial justice under the law.” *Id.*

48. *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

49. *Id.*

requirement is satisfied; . . . operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.⁵⁰

By the end of the first quarter of the twentieth century, the Supreme Court continued to confirm the proper role of the Due Process Clause of the Fourteenth Amendment. Construction of state statutes remained a state question, and the authority of the Supreme Court to revise them remained uninvolved so long as the fundamental principles of liberty and justice were similarly applicable in all the states.⁵¹

IV. THE FOURTEENTH AMENDMENT

During this developmental period, the violation of a constitutionally guaranteed right—such as the right to counsel—often resulted in the courts finding that a resulting judgment that was in violation of constitutional guarantees rendered the judgment void for lack of jurisdiction.⁵² Quite often, this remedy was only through the vehicle of a writ of habeas corpus,⁵³ which became the preferred method for checking state government abuses of constitutional rights.⁵⁴ The United States moved away from the complicated English model of writs in this regard with one major exception—the writ of habeas corpus—which has remained the cornerstone of protecting the American citizens’ rights and privileges.⁵⁵ As early as 1879, the Supreme

50. *Leeper v. Texas*, 139 U.S. 462, 468 (1891).

51. *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926). The Due Process Clause requires “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” *Id.* at 316.

52. *Ex parte Nielsen*, 131 U.S. 176, 182 (1889). A person who is imprisoned “by virtue of [a void judgment] may be discharged from custody on habeas corpus.” *Id.* (emphasis omitted); *cf.* *Scott v. McNeal*, 154 U.S. 34, 34 (1894) (due process violation); *Ex parte Siebold*, 100 U.S. 371, 373-74 (1879) (habeas corpus); *Ex parte Lange*, 85 U.S. 163, 200-01 (1873) (double jeopardy). In a suit involving probate administration and contested ownership of land, the Supreme Court held, “No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.” *Scott*, 154 U.S. at 46.

53. *Ex parte Siebold*, 100 U.S. at 375. Upon the proper role of habeas, the Supreme Court said, “The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.”

Id.

54. *Cf.* *Frank v. Mangum*, 237 U.S. 309, 326-27 (1915). The Supreme Court would not review irregularities or erroneous rulings of the trial court, however serious, and limited the writ of habeas corpus only in a case in which the judgment detaining the convicted is absolutely void for want of jurisdiction—“because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings.” *Id.* at 327.

55. *United States v. Mayer*, 235 U.S. 55, 67-68 (1914). *Mayer* contains a discussion of the complicated English system of writs of equity (writs of prohibition, *coram nobis*, etc.) available in common law courts, in

Court ruled, “If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.”⁵⁶

For the first half century following the Civil War and the ratification of the Fourteenth Amendment, most judicial interpretations of the guarantees under the Bill of Rights primarily involved due process and the systemic exclusion of African-Americans from juries—both grand juries and petit juries—while addressing the right to counsel only in passing. The Supreme Court was often asked to judge the fairness of the treatment of the freed slaves and their descendants in the criminal courts.⁵⁷ Through the new power of the Fourteenth Amendment, a person whose “right, privilege, or immunity . . . secured or guaranteed by the [C]onstitution or laws of the United States had been denied” by state judicial action, “found through the revisory power of the highest court of the state, and ultimately through that of [the Supreme Court]” a remedy.⁵⁸

It is through the use of the Fourteenth Amendment we see how our federal courts have arrived at our present state of enforcing equal protection, due process, and the fundamental freedoms of the United States Constitution on the state level.⁵⁹ After the Civil War, much was written on the proper role of the federal courts in supervising the states and their courts as they slowly adjusted to the new societal acceptance of a formerly servant population into the full favor of American citizenship.⁶⁰ Not wishing to participate in the business of revising state law, the Supreme Court limited the application of the Fourteenth Amendment’s Due Process Clause to matters other than the interpretation of state constitutions and statutes.⁶¹ It said, “The due process clause does not take

criminal matters of the King’s bench, and writs of error all designed for the common purpose of correcting mistakes of law in judgments. *Id.*

56. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

57. *See Gibson v. Mississippi*, 162 U.S. 565, 583 (1896); *Bush v. Kentucky*, 107 U.S. 110, 116 (1883); *Neal v. Delaware*, 103 U.S. 370, 397 (1880); *Ex parte Virginia*, 100 U.S. 339, 341 (1879); *Virginia v. Rives*, 100 U.S. 313, 321 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

58. *Gibson*, 162 U.S. at 583 (citing *Neal*, 103 U.S. at 386; *Rives*, 100 U.S. at 322-23). The quote can also be found in *Bush*, 107 U.S. at 116.

59. *See Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (“We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” (citations omitted)).

60. *Cf. Del Castillo v. McConnico*, 168 U.S. 674, 682, 683-84 (1898). This is a case about the role of the state in transferring title in a tax suit when looked at through the prism of the Due Process Clause of the Fourteenth Amendment. *Id.* The proper role of the federal courts is to determine constitutional issues, and the role of the state courts is to interpret their own statutes. *Id.*

61. *Patterson v. Colorado*, 205 U.S. 454, 459 (1907); *cf. Pullman Co. v. Knott*, 235 U.S. 23, 27 (1914) (“But as we are dealing with the validity of the law under the state Constitution, a matter that must be decided finally by the state court, and as the state court has held other gross earning taxes to be license taxes, we are of opinion that if this act is to be overthrown, it should not be overthrown by us.” (citation omitted)).

up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.”⁶² But the Supreme Court did place limits on the states by requiring, through the power of the Fourteenth Amendment, that state trials occur within a settled course of judicial procedure.⁶³ This would ensure that the state laws “operate on all persons alike and [would] not subject the individual to the arbitrary exercise of the powers of government[.]” with the Supreme Court often refusing to “interfere with the administration of justice in [a] state.”⁶⁴

A common source of conflict during this period came from the state laws that limited the participation of African-Americans in the judicial process. These laws found themselves being reviewed by the Supreme Court—not for constitutionality under state law or constitutions—but by application of the Bill of Rights through the Fourteenth Amendment to test their constitutionality when viewed through the federal lens of due process, equal protection, and fairness.⁶⁵ The federal government, through Congress and the Supreme Court, upheld its power over state and local governmental authorities by making illegal the acts of state actors, which were deemed to violate federal constitutional principles.⁶⁶

62. *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1917).

63. *Minder v. Georgia*, 183 U.S. 559, 562 (1902).

64. *Id.*

65. *Carter v. Texas*, 177 U.S. 442, 447 (1900) (“Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.”); see *Strauder v. West Virginia*, 100 U.S. 303, 305-11 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975). On the issue of qualifications of jurors and the power of the states in this regard, interestingly, the Supreme Court found the discrimination against some citizens still clearly constitutional. *Strauder*, 100 U.S. at 305-11.

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color.

Id. at 310.

66. *Ex parte Virginia*, 100 U.S. 339, 344 (1879). A judge was arrested and held in custody for violation of an act of Congress, holding that

no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000.

Id. (quoting Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (repealed 1948)) (internal quotation marks omitted). The Supreme Court found, “It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.” *Id.* at 348-49.

So it became the actions of officers of a state or the refusal of state courts to “redress the wrong by them committed [which] was [the] denial of a right secured . . . by the Constitution and laws of the United States” that the Supreme Court addressed.⁶⁷ In defining the effect of a constitutional prohibition, the Supreme Court placed back upon the state actors the responsibility to always act within a constitutional framework.⁶⁸

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.⁶⁹

Therefore, it is into this mix the right to counsel guaranteed by the Sixth Amendment is thrown. For many years the states continued to find ways in which to honor their commitment to the right of counsel—set out in their own state statutes or constitutions—without effectively providing many criminal defendants an actual right to the assistance of counsel. Interestingly, although those who continued to deny counsel to all defendants, often by dedicating only the barest effort to the right to counsel, often referred to that right as being “sacred”—coming from the long tradition of English law and being courageously modified in the North American Colonies of the new United States so to provide almost universally, at least in theory, the right to counsel.⁷⁰ In fact, the Sixth Amendment rights of confrontation and “to be heard by himself or counsel” were considered by the Supreme Court to be “upon the ground of the peculiar sacredness of this high constitutional right.”⁷¹

67. *Neal v. Delaware*, 103 U.S. 370, 397 (1880).

68. *Ex parte Virginia*, 100 U.S. at 347.

69. *Id.*

70. *Dyson v. Mississippi*, 26 Miss. 362, 383 (1853), *overruled on other grounds by Illinois v. Allen*, 397 U.S. 337 (1970) (quoted by the Supreme Court in *Lewis v. United States*, 146 U.S. 370, 374-75 (1892)). *Dyson* is not a case about the right to an attorney, but about the right of confrontation—the right to be present in trial—under the Sixth Amendment. *Dyson*, 26 Miss. at 383. In passing, *Lewis* references another guarantee within the Sixth Amendment the right “to be heard by himself or counsel”—which is the right to an attorney—and categorizes these two constitutional rights as sacred. *Lewis*, 146 U.S. at 374-75.

71. *Lewis*, 146 U.S. at 374-75.

V. SUPREME COURT

Between the major wars of the twentieth century, the Supreme Court finally began to apply constitutional concepts, other than the unfairness of exclusion from jury service by race, to the basic mechanics of a trial and started defining the proper role of trial counsel in a criminal case.⁷² When a federal right was alleged to be violated in a state court, the Supreme Court began to expand its previous limited reach to express violations of that right and examined whether rights were denied in substance and effect, looking at the facts developed at trial at the state level.⁷³

In the trial of African-Americans following a race riot that resulted in the death of a white person, even though the trial court provided counsel, the Supreme Court held that appointing a lawyer at the beginning of a trial that lasted for forty-five minutes was sufficient to show the resulting conviction and death sentence was a deprivation of the protected right of due process of law—even though the conviction was affirmed by the highest court of the state.⁷⁴

In a state case in which the trial occurred six days after indictment and indictment came six days after the date of the crime, the Supreme Court found that the defendants did not have the aid of counsel in any real sense from arraignment to trial although they were entitled to the aid of counsel during pretrial as much as during trial.⁷⁵ The designation of counsel was found to be “so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.”⁷⁶ This would be the first time the Supreme Court would use the word “effective” as a limiting descriptor of the performance level an attorney must achieve in representing a criminal client.⁷⁷ The Supreme Court also placed a duty upon the court to assign counsel “as a necessary requisite of due process of law,” and failure to do so “if carried into execution, would be little short of judicial murder.”⁷⁸ The refusal to hear a party by counsel “would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”⁷⁹

72. See *Powell v. Alabama*, 287 U.S. 45, 56-58, 71-73 (1932).

73. Cf. *Norris v. Alabama*, 294 U.S. 587, 590 (1935) (“If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.”).

74. *Moore v. Dempsey*, 261 U.S. 86, 88-92 (1923).

75. *Powell*, 287 U.S. at 49, 53, 57. “[They] were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them. . . . No attempt was made to investigate. No opportunity to do so was given.” *Id.* at 58.

76. *Id.* at 53.

77. *Id.*

78. *Id.* at 71-72.

79. *Id.* at 69.

In the federal case of *Johnson v. Zerbst*, the defendants were notified of the indictment, arraigned, tried, convicted, and sentenced all on the same day—two days after indictment.⁸⁰ The defendants pled not guilty, acknowledged they had no lawyer, and announced they were ready for trial.⁸¹ The defendants made a request for a lawyer—not to the court but to the district attorney—but were told they were only entitled to a court-appointed lawyer for a capital crime, which this was not.⁸² As a safeguard of the Sixth Amendment, the Supreme Court found the right to assistance of counsel was fundamental to life and liberty.⁸³ The Court recognized the “humane policy of the modern criminal law,” which guarantees assigned counsel for the indigent.⁸⁴ Quoting *Patton*, the Court said the accused now is provided the means to “effectively” make a defense to such an extent that in a former era the law tried to prevent the right to counsel.⁸⁵ The argument was made that in *Zerbst*, the defendants waived the right to counsel.⁸⁶ The Court cited a series of its holdings showing “every reasonable presumption against waiver” of fundamental constitutional rights.⁸⁷

80. *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938). The assistance of counsel “is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’” *Id.* at 462 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)).

81. *Id.* at 460.

82. *Id.*

83. *Id.* at 462-69.

84. *Id.* at 463 (quoting *Patton v. United States*, 281 U.S. 276, 308 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78 (1970)).

85. *Id.* at 464.

86. *Id.* at 465.

87. *Id.* at 464; *see also* *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (waiver of jury trial); *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 307 (1937) (due process in a rate setting case); *Foust v. Munson S.S. Lines*, 299 U.S. 77, 84 (1936) (discussing a jury trial for wrongful death and assumption of the risk defense); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (right to jury trial in personal injury case); *Patton*, 281 U.S. at 312 (discussing the use of eleven in a jury to finish a trial when twelve were sworn); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 385 (1913) (jury trial in an insurance case); *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (jury trial in civil conversion case). The Court’s presumption against waiver can be seen in the use of the extraordinary writ of *coram nobis* (used for the “[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review”) in *United States v. Morgan* for “errors ‘of the most fundamental character’” when the probability of a different result existed. *United States v. Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)). In *Morgan*, the Court referenced the rule of *Johnson v. Zerbst*, that a

federal trial without competent and intelligent waiver of counsel bars a conviction of the accused. Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court.

Id.; *see* *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963) (“Where inadequacy of counsel is alleged, moreover, independently stringent requirements have become well established. Thus we have held that relief may be obtained only when representation has been so woefully inadequate ‘as to make the trial a farce and a mockery of justice.’” (quoting *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949))). *Garguilo* was complaining of alleged tactical errors or mistakes in strategy, which will not justify relief. *Garguilo*, 324 F.2d at 797.

Whenever waiver was considered, the Supreme Court called on the trial court to determine if an intentional and knowing, intelligent and competent waiver was made by the accused.⁸⁸ As the trial court in *Zerbst* did not furnish counsel to an indigent defendant, the conviction was void for a failure of jurisdiction.⁸⁹

As late as 1939, as in the cases in the late nineteenth century, the Supreme Court was still dealing with the systematic exclusion of African-Americans from juries.⁹⁰ The Court found that “the indictment returned by a Grand Jury, selected from the same general venire [that excluded minorities from the trial venire], should also have been quashed.”⁹¹ This expansion to the procedures of trial was due to the Court seeing its “solemn duty to make independent inquiry and determination of . . . disputed facts” if the revisory power of the state appellate courts had failed to properly review the alleged denial of equal protection because of race.⁹²

The proper role of due process in criminal matters was, therefore, fine-tuned and extended from giving the defendant the right to a judge free from “direct, personal, substantial pecuniary interest” in the outcome of the trial,⁹³ to forbidding the State from obtaining a conviction by the use of perjured testimony,⁹⁴ to stating a defendant who was “duped and inveigled” into a plea of guilty was imprisoned under an invalid judgment under the due process clause,⁹⁵ to finding that if a defendant was “deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of [his] constitutional right [to counsel].”⁹⁶

88. *Zerbst*, 304 U.S. at 465.

89. *See id.* at 468-69. The court may lose its jurisdiction at trial “due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.” *Id.* at 468.

90. *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939).

91. *Id.*

92. *Id.* (“Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service.”).

93. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). A defendant has a right to an impartial judge. *See id.* The judge in *Tumey* was disqualified because the financial needs of the village for which he worked encouraged the court to convict and raise the resulting fine, thereby creating in the judge a direct pecuniary interest in the outcome of the trial. *Id.* at 535.

94. *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935).

[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured . . . [T]he action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, “whether through its legislature, through its courts, or through its executive or administrative officers.”

Id. (quoting *Carter v. Texas*, 177 U.S. 442 (1900)).

95. *Smith v. O’Grady*, 312 U.S. 329, 333 (1941).

96. *Walker v. Johnston*, 312 U.S. 275, 286 (1941). The deprivation of the right to counsel would also apply if the defendant did not voluntarily waive the right. *See Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

“[W]hatever is . . . ‘essential to the substance of a hearing’ is within the procedural protection afforded by the constitutional guaranty of due process.”⁹⁷ Through the process of “absorption,” the Supreme Court recognized that the rights theretofore protected from only federal government intrusion were now enlarged to include “liberty of the mind as well as liberty of action”—protecting the individual from oppressive and arbitrary restraints of substantive rights and duties placed upon the citizens by their state legislatures and other state action.⁹⁸ To that end, “the benefit of counsel was [held to be] essential to the substance of a hearing.”⁹⁹

During this period, the Supreme Court continued to interpret the Constitution to guarantee counsel and to correct constitutional violations in state criminal actions, pushing even further into the workings of the states.¹⁰⁰ As discussed below, in 1940 in *Avery v. Alabama*, the Supreme Court continued the line of cases establishing the right to counsel as fundamental under the Sixth Amendment to the United States Constitution, while in the same year in *Chambers v. Florida*, it addressed a serious issue of violation of the Due Process Clause in a trial in which coerced confessions were used to obtain convictions and death sentences of four African-American men in the State of Florida.¹⁰¹

The abuse of minorities based on race has remained a continuing theme throughout our constitutional history.¹⁰² The *Chambers* Court confirmed in strong language that history has shown that the Due Process Clauses, of both the Fifth and Fourteenth Amendments,

[were] intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.¹⁰³

97. *Betts v. Brady*, 316 U.S. 455, 475 (1942) (Black, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

98. *Palko*, 302 U.S. at 326-27.

99. *Id.*

100. *See* *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

101. *Id.*; *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.”).

102. *See* *Chambers*, 309 U.S. at 235 n.8.

103. *Id.* at 236 (footnote omitted).

So, we “evolved the fundamental idea that no man’s life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power,” obeying strictly the “procedural safeguards of due process.”¹⁰⁴

VI. LOWER COURTS

During this period, the lower courts also began to look critically at the role of counsel. As early as 1883, the Supreme Court of New York found that the Constitution of the State of New York guaranteed, in any trial, that an accused had the right to appear and defend in person and with an attorney “at every step and stage of the proceeding.”¹⁰⁵ In *Batchelor v. State*, the defendant was indicted, arraigned, and pled guilty to murder the same day, and the following day was sentenced to death, all without an attorney.¹⁰⁶ The Supreme Court of Indiana ruled, “Where it appears . . . that the defendant has been denied a right guaranteed by the Constitution, such showing requires a reversal unless the record clearly shows that the right was waived or that no injury could have resulted to the accused by reason of such denial.”¹⁰⁷ The constitutional right to be heard by counsel contemplates the right to consult “at every stage of the proceedings,” not just at the trial.¹⁰⁸

These lower courts began to discuss concepts later used in the rationale of *Strickland*—for example, the standards of materiality for newly discovered evidence and its effect in a motion for new trial¹⁰⁹ and the difficulties a

104. *Id.* at 236-37.

105. *People v. Risley*, 13 Abb. N. Cas. 186, 188 (N.Y. Sup. 1883).

106. *Batchelor v. State*, 125 N.E. 773, 775 (Ind. 1920).

107. *Id.* at 776.

108. *Id.*

109. *Sanchez v. State*, 157 N.E. 1, 3 (Ind. 1927). In *Sanchez*, materiality and diligence in finding the newly discovered evidence is key to having a motion for new trial granted along with five tests. *Id.* In order to warrant a new trial on newly discovered evidence grounds, the Indiana Supreme Court, in interpreting state law, said that (1) it must appear that the new evidence would have “probably” changed the result of the trial—the probability that the original trial would be different being one of the lynchpins in *Strickland* to determine prejudice, *Strickland v. Washington*, 466 U.S. 668, 694 (1984); (2) the new evidence has been discovered since trial—quite often the effectiveness of trial counsel is discussed on direct appeal or, more preferably, in a post-conviction collateral attack:

While defendants in criminal cases in Texas are not absolutely prohibited by law from challenging the effectiveness of their trial counsel on direct appeal, such claims typically call for extensive factual development beyond what is disclosed in the appellate record, and thus, as a practical matter, post-conviction habeas corpus is the first opportunity to raise them.

Ex parte Adams, No. WR-68066-03, 2012 WL 476538, at *2 n.6 (Tex. Crim. App. Feb. 15, 2012) (citing *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999)); (3) it could not have been discovered before trial, but the lack of diligence in discovering the new evidence before trial becomes unimportant if the new evidence will probably change the result—once again placing the reviewing court in the business of divining what would have happened in the original trial; (4) the new evidence is material, in that the new evidence is likely to produce a different result upon re-trial—materiality became the issue in *Strickland*, 466 U.S. at 694; and (5) it

reviewing court would have in trying to determine if a verdict would have changed had trial counsel been more familiar with the rules of evidence and trial procedure.¹¹⁰ The lower courts stressed trial counsel's obligation to be a diligent advocate for the client and developed how that advocacy relates to the Sixth Amendment guarantee of the right to counsel.¹¹¹

The development of the concept of "trial strategy" to excuse a claimed incompetence on the part of trial counsel—discussed in *Strickland* as a catch-all excuse for trial counsel's unexplained, apparent mistakes or omissions—was seen in the early case of *Bostic v. Rives*.¹¹² In *Bostic*, a twenty-three-year-old lawyer, appointed by the court to defend an accused, was attacked as incompetent by a former client because of the lawyer's perceived youth and inexperience.¹¹³ The court found that no evidence was offered by Bostic in support of his petition that his attorney was not competent.¹¹⁴ They said, "The record in the criminal case shows no dispute as to the place of death. Appellant's counsel may well, in the exercise of good judgment, have decided not to attempt to take advantage of such a defect where, even if successful, he would gain nothing but delay."¹¹⁵

In a case involving the distribution of pro-communist literature on the streets of Washington, D.C., and the charge of littering, the trial court forbade the defense from putting on witnesses and arguing the case and thereby forbade the "effective assistance of counsel."¹¹⁶ Citing *Powell v. Alabama*, the Court found that "the Sixth Amendment, guaranteeing the accused in a criminal

is not merely cumulative or impeaching—the concept of impeachment lost at trial because of lack of due diligence is certainly analogous to the courts assuming so often that trial counsel must have had a strategy by his inaction or omission. *Strickland*, 446 U.S. at 699; see *Sanchez*, 157 N.E. at 3. *Sanchez* also talked of the defendant being poorly defended not justifying a reversal of a judgment otherwise supported by the evidence. See *Sanchez*, 157 N.E. at 5.

110. *People v. Schulman*, 132 N.E. 530, 531 (1921). The Supreme Court of Illinois said, "[I]t cannot reasonably be said no other verdict would have been justified than one of guilty under the evidence as it appears in the record." *Id.* A court reviewing the trial cannot say the trial counsel's unfamiliarity with the rules of evidence and impeachment would not have produced a different result. *Id.* at 532. The ability of a reviewing court in trying to determine what would have happened finds its way again into this line of cases. *Id.*

111. See *Castro v. State*, 147 N.E. 321, 323 (Ind. 1925) ("And mere perfunctory action by an attorney assuming to represent one accused of crime, which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent or the imposition of a penalty more severe than is deserved, should not be tolerated.").

112. See *Bostic v. Rives*, 107 F.2d 649, 651 (D.C. Cir. 1939).

113. See *id.* at 650.

114. See *id.* at 652. The attorney had tried a "substantial number of criminal cases, and . . . was at the time of the trial a member of the bar in good standing." *Id.* at 650.

115. *Id.* at 652. Also preceding *Strickland* was *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). In *Michel*, the Court could not infer lack of effective counsel for failing to file a motion to quash the constitutionality of the grand jury as the delay might be considered sound trial strategy. See *Michel*, 350 U.S. at 101. In *United States v. Duhart*, the court held that trial strategy, even if unsuccessful, is not an adequate basis for an attack on the competence of counsel. See *United States v. Duhart*, 269 F.2d 113, 115 (2d Cir. 1959).

116. See *Thomas v. District of Columbia*, 90 F.2d 424, 428 (D.C. Cir. 1937).

prosecution the assistance of counsel for his defense, means effective assistance.”¹¹⁷ So by the late 1930s, the lower courts were beginning to use the term “effective” in applying the Due Process Clause to the defendants’ Sixth Amendment right to counsel—the word “effective” becoming a key to the findings in *Strickland*.¹¹⁸

In *Johnson v. United States*, the Federal Court of Appeals for the District of Columbia reviewed the performance of appointed counsel for “a colored boy without funds or other means to employ counsel of his own selection. . . .”¹¹⁹ New counsel was appointed for the appeal to address the trial attorneys’ “failure . . . to produce all available evidence.”¹²⁰ The Court found that the trial attorneys’ performance—counsel apparently working without compensation—“should not be held against” the accused.¹²¹ In effect, the Court called for the creation of a system to provide for the defense of the poor, finding, “[t]he right to counsel is not formal, but substantial.”¹²²

VII. RIGHT TO COUNSEL

The Supreme Court, in its analysis of the right to counsel, on the other hand, was not always quick to find a constitutional violation. It would seem at times that the Court would look to the Federal Constitution for an excuse to deny relief.¹²³ In *Avery v. Alabama*, two lawyers were appointed at arraignment to a defendant who was tried and convicted beginning on the third day following appointment.¹²⁴ The Court found that “the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel.”¹²⁵

117. *Id.* at 428 (citing *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932)).

118. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

119. *Johnson v. United States*, 110 F.2d 562, 563 (D.C. Cir. 1940).

120. *Id.*

121. *Id.* (“It would be a strange system of law which first assigned inexperienced or negligent counsel in a capital case and then made counsel’s neglect a ground for refusing a new trial.”).

122. *Id.*

123. *See infra* notes 124, 131 and accompanying text (analyzing two cases in which the Court found that the right to counsel had not been infringed upon).

124. *See Avery v. Alabama*, 308 U.S. 444, 446 (1940).

125. *Id.*

In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial. Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States’ determination of local social policy. But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record.

At the same time, the *Avery* Court hinted that the lack of opportunity to confer and to prepare a defense after appointment “could covert the appointment of counsel into a sham [by] nothing more than a formal compliance” with the Sixth Amendment, which “cannot be satisfied by mere formal appointment.”¹²⁶ Consequently, *Avery* was later used in the landmark case of *Gideon v. Wainwright* in 1963 as precedent for the protection of the fundamental safeguards of the Bill of Rights by the use of the Fourteenth Amendment—in particular, to protect the Sixth Amendment right to counsel.¹²⁷ And in 1984 in *United States v. Cronin*—decided the same day as *Strickland*—*Avery* was cited as authority on the much more narrow issue that “[t]he Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”¹²⁸ But the Supreme Court soon stumbled in its efforts to protect the right to counsel and due process.

Disturbingly, the Supreme Court in June 1942, in *Betts v. Brady*, ignored *Powell v. Alabama*¹²⁹ and *Avery v. Alabama*¹³⁰ when it said, “[I]n the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”¹³¹ This halted the progressive move toward the acceptance of the right to counsel as being fundamental to all citizens in all criminal prosecutions in which liberty was at risk. Justices Black,

Id. at 446-47 (footnotes omitted).

126. *Id.* at 446.

127. See *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . [L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344. In *Gideon*, the Court quoted *Powell v. Alabama* on the issue of the fundamental character of the right to counsel, correcting previous misstatements and once and for all determined the true fundamental nature of the right. See *id.* “[T]he right to the aid of counsel is of this fundamental character.” *Id.* at 342-43 (quoting *Powell*, 287 U.S. at 68).

128. *United States v. Cronin*, 466 U.S. 648, 654-55 (1984) (quoting *Avery*, 308 U.S. at 446).

129. *Powell*, 287 U.S. at 49.

130. *Avery*, 308 U.S. at 446; see *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936). In a First and Fourteenth Amendments due process case involving a gross receipts tax, the Court said, “[C]ertain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.” *Grosjean*, 279 U.S. at 243-44.

131. *Betts v. Brady*, 316 U.S. 455, 471 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963). Interestingly, in *Betts*, the Court found that the Due Process Clause “prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right.” *Id.* at 473. Apparently, in *Betts* the Court found that the State not appointing counsel did not make *Betts*’s trial “offensive to the common and fundamental ideas of fairness and right.” *Id.*

Douglas, and Murphy dissented to the majority opinion.¹³² Believing that the Fourteenth Amendment made the Sixth Amendment applicable to the states,¹³³ the dissenting Justices discussed the purpose of the Fourteenth Amendment as defined by the sponsors of the Amendment in the House and Senate.¹³⁴ Those in Congress thought the purpose of the Fourteenth Amendment was “to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights.”¹³⁵

But in virtually the same breath, less than five months earlier, the Court had continued to enforce the right to counsel in federal prosecutions in *Glasser v. United States*, following *Johnson v. Zerbst*, speaking out of both sides of its constitutional mouth.¹³⁶ *Glasser* was a conflict of counsel case in which the Court called the Bill of Rights “the protecting bulwarks against the reach of arbitrary power.”¹³⁷ Could the Court not foresee that in just a few months the states too might arbitrarily exercise their power? Incredibly, the Court quoted *Powell*—a state court case—when it found in *Glasser* that the “right to the assistance of counsel is so fundamental” that its denial by a state court, because of that court’s “failure . . . to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment.”¹³⁸ *Glasser* is an early discussion of how “difficult and unnecessary” it was to try and “determine the precise degree of prejudice sustained by *Glasser*.”¹³⁹ By 1984, however, in *Strickland v. Washington*, the precise degree of prejudice sustained by one claiming a violation of his right to counsel became one of only two prongs in the test of the constitutional effectiveness of counsel.¹⁴⁰ *Glasser* was the first Supreme Court case to use the phrase “effective assistance” in defining the proper role of counsel in the context of the requirements of the Sixth Amendment.¹⁴¹

VIII. RIGHT TO EFFECTIVE COUNSEL

During the next five years, the lower federal courts began to discuss not just the constitutional requirements of appointment of counsel, but the

132. *Id.* at 474 (Black, J., dissenting).

133. *Id.*

134. *Id.* at 474 n.1.

135. *Id.* “Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the ‘universal sense of justice’ throughout this country.” *Id.* at 476.

136. *Glasser v. United States*, 315 U.S. 60, 69-70 (1942), *superseded by statute*, FED. R. EVID. 104(a); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938).

137. *Glasser*, 315 U.S. at 69.

138. *Id.* at 70.

139. *Id.* at 75-76. “The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” *Id.* at 76.

140. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see discussion infra* note 272.

141. *Glasser*, 315 U.S. at 76.

constitutional requirements of how well that counsel must perform. At the beginning of this discussion, the Supreme Court suggested for one whose liberty is at stake, “[t]he guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed.”¹⁴² In 1945, the Court of Appeals for the District of Columbia addressed three cases in this regard.¹⁴³

In affirming the denial of a habeas petition claiming appointed counsel was not effective or competent because he gave “bad advice through negligence or ignorance,” the court of appeals ruled that once appointed, counsel’s mere negligence will not be sufficient to “deprive the accused of any right under the Sixth Amendment. All [the Sixth Amendment] requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel’s mistakes subsequent to a proper appointment.”¹⁴⁴ To justify habeas based on violation of the Due Process Clause of the Constitution, a petitioner must show that the “proceedings were a farce and a mockery of justice.”¹⁴⁵ Carelessness of counsel is but only one factor to be proven to justify relief in that situation.¹⁴⁶ In addition, the trial court, by neglecting its duty to protect the accused, may be to blame in such a case.¹⁴⁷ Also, in such a case, the prosecuting attorney may be blamed for violating his duty as an officer of the court “in obtaining a conviction by proceeding in defiance of the orderly administration of justice.”¹⁴⁸ The “assistance by counsel is not satisfied by the mere formality of an appointment of an attorney by the court. There must also be ‘effective’ [assistance of counsel].”¹⁴⁹ In strictly construing what is effective representation, the court of appeals said, “It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution

142. *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945).

143. *See Strong v. Huff*, 148 F.2d 692, 692-93 (D.C. Cir. 1945); *Diggs v. Welch*, 148 F.2d 667, 668 (D.C. Cir. 1945); *Jones v. Huff*, 152 F.2d 14, 15 (D.C. Cir. 1945).

144. *Diggs*, 148 F.2d at 668 (footnote omitted).

145. *Id.* at 669. Even though the court cited five Supreme Court cases following the phrase “farce and a mockery of justice,” those being *Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Brown v. Mississippi*, 297 U.S. 278 (1936), none of the cases reference a “mockery of justice.” Only *Brown* contains the word “farce” in describing how a confession was given to a Sheriff after the accused had been beaten. *See Brown*, 297 U.S. at 463. None of these cases reference the trial as a “farce” or a “mockery of justice.” The first Supreme Court case to use the phrase “farce or a mockery of justice” was in *Maryland v. Marzullo*, 435 U.S. 1011, 1011 (1978), and only twice before were the words “farce” and “sham” used together to describe the quality of representation, *see Faretta v. California*, 422 U.S. 806, 813 (1975); *Whitney v. Florida*, 389 U.S. 138, 139 (1967).

146. *See Diggs*, 148 F.2d at 669.

147. *Id.*

148. *Id.*

149. *Id.* (citing *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell*, 287 U.S. at 70; *Glasser v. United States*, 315 U.S. 60, 69-70 (1942)).

to observe it and to correct it.”¹⁵⁰ Even “serious mistakes” on counsel’s part are insufficient to grant habeas relief alone.¹⁵¹ Once again, the court held that in order to obtain relief, the trial had to be a “farce and a mockery of justice” and added that the case must shock the conscience of the reviewing court.¹⁵² Finally, the court confirmed that there could be no test to determine how many errors make counsel ineffective.¹⁵³ “The only practical standard for habeas corpus is the presence or absence of judicial character in the proceedings as a whole.”¹⁵⁴

In this same vein, two months later in *Strong v. Huff*, the same court said, “in the absence of exceptional circumstances surrounding the trial,” the reviewing court will presume the regularity of both the judicial proceedings and the performance of accused’s counsel during trial unless the record of the trial reflects otherwise.¹⁵⁵ This time the court used the magic language “exceptional circumstances” as a qualifier to the normal presumption of regularity.¹⁵⁶

Finally, in *Jones v. Huff*, the court confirmed the rulings in *Strong v. Huff* and *Diggs v. Welch* that in habeas review there is a strong presumption in favor of the regularity of judicial proceedings and that mere mistakes of counsel would not be reviewed and that there must be an “extreme case” to justify relief.¹⁵⁷ “It must be shown that the proceedings were a farce and a mockery of justice,” but at the same time, the representation of counsel must be “effective.”¹⁵⁸

IX. FARCE AND A MOCKERY OF JUSTICE

In using the “farce and a mockery of justice” standard in these cases, the Court of Appeals for the District of Columbia said that effective representation by the accused’s trial counsel is not affected by mere mistakes, bad advice, or even serious mistakes made through negligence, ignorance, or carelessness, but is just one factor the reviewing court should examine.¹⁵⁹ The court required an extreme case, one shocking to the conscience, with exceptional circumstances showing the proceedings were a farce and a mockery of justice.¹⁶⁰ The court of

150. *Diggs*, 148 F.2d at 670.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Strong v. Huff*, 148 F.2d 692, 692 (D.C. Cir. 1945).

156. *Id.* at 692-93.

157. *See Jones v. Huff*, 152 F.2d 14, 15 (D.C. Cir. 1945).

158. *Id.* As late as *United States v. Garguilo*, 324 F.2d 795 (2d Cir. 1963), and *Sims v. Lane*, 411 F.2d 661, 665 (7th Cir. 1969), *overruled in part by Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982), the circuit courts continued to deny habeas relief for alleged ineffective assistance of counsel where complaints were of alleged tactical errors or mistakes in strategy, without a showing that the trial was a “sham or a mockery.”

159. *Diggs*, 148 F.2d at 668-70.

160. *See id.* at 670; *Jones*, 152 F.2d at 16; *Strong*, 148 F.2d at 692-93.

appeals, though, would also blame the trial court in neglecting its duty to protect the accused and blame the prosecutor for violating his duty as an officer of the court.¹⁶¹ The representation, with all these considerations, must shock the conscience to such a degree that it affects the judicial character of the proceedings as a whole, invoking the duty of the court and the prosecutor to observe and correct the representation.¹⁶²

Three years later in *United States ex rel. Feeley v. Ragen*, Feeley brought a habeas action in federal court challenging his state court conviction and sentence with the competence of trial counsel as the complaint.¹⁶³ The Seventh Circuit stated that a reviewing court in a habeas proceeding should presume that a member of the bar is in good standing and is competent when appointed in a criminal case.¹⁶⁴ This appointment meets the right to counsel constitutional requirement.¹⁶⁵ If counsel's performance "reduces the trial to a travesty on justice," his conduct is just one factor to be considered on the issue of denial of due process.¹⁶⁶ Trial counsel is but "one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama."¹⁶⁷ Trial counsel's mistakes may show lack of skill or incompetence, but unless, on the whole, the representation amounts to no representation at all and the trial is reduced to a farce, relief will not be granted in habeas.¹⁶⁸ Citing *Diggs v. Welch*, the court adopted the words "farce," "sham," and "mockery" in establishing the "degree of incompetency of defense counsel" to amount to "no defense" to justify relief and confirmed the trial court never lost jurisdiction by counsel's mistakes.¹⁶⁹

By the end of the decade, the Second Circuit adopted *Feeley, Jones, Strong*, and *Diggs* in finding that "time consumed in oral discussion and legal research is not the crucial test of the effectiveness of the assistance of counsel."¹⁷⁰ The reviewing court should look to the "character of the resultant proceedings, and unless the . . . representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice" for the court to grant relief in habeas.¹⁷¹ The court thereby adopted the test that counsel's work had to have

161. *Diggs*, 148 F.2d at 669.

162. *Id.*

163. *U.S. ex rel. Feeley v. Ragen*, 166 F.2d 976, 979 (7th Cir. 1948).

164. *Id.* at 980.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 980-81.

169. *Id.*

170. *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949). The same circuit court, in *United States v. Garguilo*, said relief for claims of ineffectiveness of counsel may only be obtained when the representation was so woefully inadequate "as to make the trial a farce and a mockery of justice." *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963) (quoting *Wight*, 176 F.2d at 379).

171. *Wight*, 176 F.2d at 379.

“shock[ed] the conscience of the Court” and made the “proceedings a farce and mockery of justice.”¹⁷²

By 1960, the Fifth Circuit defined the “right to counsel” as the “right to effective counsel . . . not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.”¹⁷³ The court found the “undivided loyalty of appointed counsel to client [to be] essential to due process.”¹⁷⁴ “A genuflection in the direction of justice by the pro forma appointment of counsel” is insufficient and less than the effective assistance of counsel.¹⁷⁵ Shortly thereafter, the Ninth Circuit confirmed “errorless counsel” is not required, but added, before a conviction can be vacated, there must be a “total failure to present the cause of the accused in any fundamental respect,” saying, “inevitably” it would be a question of “judgment and degree.”¹⁷⁶

X. RIGHT OF EFFECTIVE ASSISTANCE AND DUE PROCESS

In 1955, the Supreme Court began to link due process to the right of effective assistance of counsel.¹⁷⁷ *Reece v. Georgia* involved the systematic exclusion of African-Americans from the grand jury and the trial court by the timing of appointed counsel, which prevented a challenge to this grand jury procedure.¹⁷⁸ Citing *Powell v. Alabama*, the Supreme Court reaffirmed that

the assignment of counsel . . . at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial . . . is a denial of due process of law. The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard.¹⁷⁹

And the Supreme Court continued to boldly use the Due Process Clause to revise state judgments in which a fundamental federal constitutional right was

172. *Id.*

173. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) (emphasis omitted). In the landmark case of *Strickland v. Washington*, discussed below, the Supreme Court said, “[T]o eliminate the distorting effects of hindsight” there is “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.’” *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see, e.g., Michel*, 350 U.S. at 101 (holding that appointed counsel’s failure to file a timely motion to quash did not overcome the presumption of effectiveness).

174. *MacKenna*, 280 F.2d at 599.

175. *Id.* at 601.

176. *Brubaker v. Dickson*, 310 F.2d 30, 37, 39 (9th Cir. 1962).

177. *See Reece v. Georgia*, 350 U.S. 85, 91 (1955).

178. *Id.* at 86.

179. *Id.* at 90.

violated.¹⁸⁰ In *Payne v. Arkansas*, the Court refused to use a balancing test of the effect of a coerced confession on Payne's conviction versus the other evidence before the jury.¹⁸¹ "[N]o one can say what credit and weight the jury gave to the [coerced] confession."¹⁸² "[T]he admission in evidence, over objection, of the coerced confession vitiates the judgment [of conviction] because it violates the Due Process Clause of the Fourteenth Amendment," even if the other evidence would support a conviction.¹⁸³ After all, the Court had previously ruled that "[t]he requirement of the Fourteenth Amendment is for a fair trial."¹⁸⁴

The Supreme Court also used violations of federal constitutional rights to continue to modify the way in which the states operated their criminal courts.¹⁸⁵ Addressing a requirement in state law that a criminal defendant had to pay court costs in advance, the Court said, "Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."¹⁸⁶ "[A] State can no more discriminate on account of poverty than on account of religion, race, or color."¹⁸⁷ The Court found "no rational relationship" between one's ability to pay court costs and one's guilt or innocence.¹⁸⁸

Two years later, in further confirming the extent of the right of appellate review for the poor, the Supreme Court in *Eskridge* found that "a State denies a constitutional right guaranteed by the Fourteenth Amendment [by allowing] all those convicted to have appellate review except those who cannot afford to pay" the costs.¹⁸⁹ "[D]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."¹⁹⁰

In 1963, the Supreme Court continued its analysis of the fairness of appellate review for the poor, deciding two cases on the same day.¹⁹¹ Following the reasoning in *Eskridge*, the Court in *Draper* found a ruling by a

180. See *Payne v. Arkansas*, 356 U.S. 560, 568-69 (1958) (holding that Arkansas statutes denying an African-American a hearing in front of a magistrate deprived the defendant of due process).

181. *Id.* at 568.

182. *Id.*

183. *Id.* (footnote omitted).

184. *Massey v. Moore*, 348 U.S. 105, 108 (1954).

185. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that the Illinois Supreme Court's dismissal of defendant's petition under the state's statute violated the defendant's constitutional rights).

186. *Id.* at 17.

187. *Id.*

188. *Id.*

189. *Eskridge v. Wash. State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 216 (1958) (citing *Griffin*, 351 U.S. at 19).

190. *Id.* (quoting *Griffin*, 351 U.S. at 19) ("The conclusion of the trial judge that there was no reversible error in the trial [in denying the convicted a stenographic transcript at public expense,] cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript.").

191. See *Draper v. Washington*, 372 U.S. 487, 499 (1963); *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

trial judge that an appeal was frivolous to be an inadequate substitute for a full appellate review for those who could not afford court costs “when the effect of that finding is to prevent an appellate examination based upon a sufficiently complete record of the trial proceedings themselves.”¹⁹² In *Douglas*, the Court said, “[D]enial of counsel on appeal [to an indigent person] would . . . be . . . as invidious” as the denial of a free transcript (*Griffin*)¹⁹³ or the denial of a full appellate review (*Draper*).¹⁹⁴ “For there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’”¹⁹⁵

XI. FUNDAMENTAL RIGHT TO COUNSEL

On the same day as its opinions in *Draper* and *Douglas*, the Supreme Court decided the landmark case of *Gideon v. Wainwright*.¹⁹⁶ The question decided by the Court in *Gideon* was whether *Betts v. Brady* should be reconsidered.¹⁹⁷ In overruling *Betts*, the Court found that the denial of appointed counsel for an indigent defendant violated the Due Process Clause of the Fourteenth Amendment.¹⁹⁸ “[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”¹⁹⁹

And so it has been settled that the poor are entitled to the same protection as those who can afford to pay for their own counsel. The inevitable fine-tuning continued a few months after *Gideon* as the Court addressed at what point in the criminal process the right to an attorney attaches.²⁰⁰ In a state court proceeding, a defendant pled guilty at a preliminary hearing without an attorney.²⁰¹ This plea of guilty was later introduced into evidence at his trial—

192. *Draper*, 372 U.S. at 499-500.

193. *Douglas*, 372 U.S. at 355 (second alteration in original) (quoting *People v. Brown*, 9 Cal. Rptr. 816, 821 (Cal. Ct. App. 1960) (Traynor, J., concurring)); see also *Griffin*, 351 U.S. at 12.

194. *Draper*, 372 U.S. at 495-96.

195. *Douglas*, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19).

196. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

197. *Id.* at 339 (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). In *Betts*, the indigent defendant, charged with robbery, was denied a lawyer because he was not charged with a murder or rape. *Betts*, 316 U.S. at 473. *Betts* found this did not necessarily violate the Due Process Clause of the Fourteenth Amendment. *Id.* However, in *Crooker v. California*, the Court said, “What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness.” *Crooker v. California*, 357 U.S. 433, 441 n.6 (1958). At least the Court saw that the “least change” in circumstances could result in unfairness. *Id.*

198. *Gideon*, 372 U.S. at 345. In *Gideon*, much like in *Betts*, the defendant was denied a court-appointed lawyer, even though requested, because he was not charged with a capital offense. *Id.*

199. *Id.* at 344. “[T]he right to the aid of counsel is of this fundamental character.” *Id.* at 342-43 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

200. See *White v. Maryland*, 373 U.S. 59 (1963).

201. *Id.*

with counsel.²⁰² Under *Hamilton v. Alabama*, the Court found the right of counsel attaches at a “critical stage in a criminal proceeding” where rights are preserved or lost.²⁰³ Even though the state law did not have a requirement for appointment of counsel at a preliminary hearing, the Court found it was “critical,” without regard to prejudice.²⁰⁴ As an aside, following this same reasoning, the Court in *Arsenault v. Massachusetts* noted the retroactivity of “[t]he right to counsel at the trial [(*Gideon*)], on appeal [(*Douglas*)], and at the other ‘critical stages’ of the criminal proceedings [(*Hamilton*)], . . . since the ‘denial of the right must almost invariably deny a fair trial.’”²⁰⁵

And soon, upon the opportunity to rule on a habeas petition following a plea of guilty with no attorney to the rape of a child, the Court, in a two sentence opinion, reversed the denial of the writ, merely citing *Carnley v. Cochran* and *Gideon v. Wainwright*.²⁰⁶ “[T]he assistance of counsel, unless intelligently and understandingly waived . . . , was a right guaranteed . . . by the Fourteenth Amendment,” not requiring a request from the defendant.²⁰⁷

Protecting its handiwork, the Court found the right to assistance of counsel is one of the “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.”²⁰⁸ In discussing the harmless error rule, the Supreme Court quoted its decision in *Fahy v. Connecticut*, saying the error is not harmless if “there is a reasonable possibility that the evidence complained of might have contributed to the conviction” and “‘affect[ed the] substantial rights’ of a party.”²⁰⁹

The Supreme Court continued to refine the limitations of effective representation when it found a defendant should not be “left to the mercies of incompetent counsel” as an attorney’s advice must be “within the range of competence demanded of attorneys in criminal cases.”²¹⁰ The Court placed the burden on the judges to “strive to maintain proper standards of performance” of the attorneys in their courts and held that the attorneys should maintain

202. *Id.* at 60.

203. *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961).

204. *White*, 373 U.S. at 60 (quoting *Hamilton*, 368 U.S. at 53, 55). “What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.” *Hamilton*, 368 U.S. at 54.

205. *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (first quote quoting *Hamilton*, 368 U.S. at 82) (second quote quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967), *abrogated by Harper v. Va. Dep’t of Taxation*, 509 U.S. 86 (1993)).

206. *See Doughty v. Maxwell*, 376 U.S. 202, 202 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Carnley v. Cochran*, 369 U.S. 506 (1962). *Gideon* establishes the right to counsel as a fundamental right enforced through the Fourteenth Amendment on the states. *Gideon*, 372 U.S. at 344.

207. *Carnley*, 369 U.S. at 512-13.

208. *Chapman v. California*, 386 U.S. 18, 23 (1967). The *Chapman* Court confirmed other “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Id.*; *see, e.g., Payne v. Arkansas*, 356 U.S. 560, 561 (1958) (coerced confession); *Gideon*, 372 U.S. at 344 (right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (impartial judge).

209. *Chapman*, 386 U.S. at 23-24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

210. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

reasonable competence.²¹¹ The Court did attempt to maintain proper standards of performance by protecting counsel when it found, in *Brooks v. Tennessee*, that court procedures that restrict a lawyer's tactical decisions in trial unconstitutionally abridge the right to counsel.²¹²

XII. EXPANSION OF THE RIGHT TO COUNSEL

The requisites of a fair trial were expanded to include petty and misdemeanor crimes in *Argersinger v. Hamlin* in 1972, when the Supreme Court said, “[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”²¹³ In those cases that result “in the actual deprivation of a person’s liberty, the accused will receive the benefit of ‘the guiding hand of counsel’ so necessary when one’s liberty is in jeopardy.”²¹⁴

Keying off the language of *McMann*, the Court in *Tollett v. Henderson* acknowledged that the “range of competence demanded of attorneys in criminal cases” sometimes depends not on the lawyer’s failure to evaluate facts or to provide good advice or his ability to spot possible defenses or to “amass a large quantum of factual data and inform the defendant of it,” but on the “faithful representation of the interest of his client” often involving “highly practical considerations as well as specialized knowledge of the law.”²¹⁵

The following year the Court looked at the historical context of the assistance of counsel at trial.²¹⁶ The “core purpose” of the right to counsel was to ensure “assistance” at trial when the accused was confronted with the intricacies of the law and the advocacy of the public prosecutor.²¹⁷ This assistance means more than just “at trial” as the defendant is confronted earlier than trial by the intricate procedures and his expert adversary.²¹⁸ At the time of the formation of our country, neither modern, organized police forces nor professional prosecutors were the norm.²¹⁹ The accused—without counsel—was often confronted by law enforcement, the prosecutor, and the witnesses

211. *Id.*

212. *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (holding that a limitation depriving the defendant of the assistance of counsel in his unsworn statement to the Court “deprived the accused of ‘the guiding hand of counsel at every step in the proceedings against him, within the requirement of due process in that regard as imposed upon the States by the Fourteenth Amendment’” (citation omitted) (quoting *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961)) (internal quotation marks omitted)).

213. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

214. *Id.* at 40.

215. *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973) (discussing *McMann*, 397 U.S. at 771).

216. *United States v. Ash*, 413 U.S. 300, 309 (1973).

217. *Id.* at 308-10.

218. *Id.* at 309.

219. *Id.* at 310.

against him, while the evidence was usually developed at the trial itself.²²⁰ By contrast, today there are “critical confrontations” with law enforcement and the prosecution pretrial, where events often affect the ultimate outcome.²²¹ The Court recognized the imbalance in our adversary system that resulted from the creation of professional prosecutors.²²² The accused “does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”²²³ Hence, the reason the courts interpret the Sixth Amendment to apply to all “‘critical’ stages” of the proceedings.²²⁴ The accused’s right to the assistance of counsel means the right to have counsel acting as the accused’s assistant.²²⁵

XIII. FINE-TUNING INEFFECTIVENESS

The question of the effectiveness of defense counsel was collaterally raised in *United States v. Agurs* in 1976.²²⁶ Although primarily a case raising *Brady v. Maryland* issues, the Court ruled trial counsel’s failure to obtain the victim’s criminal history, believing it to be inadmissible, was not ineffective as the record was not requested by defense counsel.²²⁷

The representation of multiple defendants is not necessarily a violation of the right to counsel under the Sixth Amendment unless the interests of the defendants conflict.²²⁸ Upon the existence of a conflict of interest, adequate legal assistance required by the Sixth Amendment is not possible, ruled the Supreme Court in *Holloway v. Arkansas*.²²⁹ Although *Holloway* was a capital offense case, it was not material to the Court’s ruling that a reversal of a conviction is automatic when the “defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage” of his case.²³⁰

Another multiple representation case held, inter alia, that ineffective assistance from a privately retained attorney can provide a basis for federal habeas corpus relief.²³¹ This case confirmed once again that the right to counsel

220. *Id.*

221. *Id.* (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

222. *Id.* at 309.

223. *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)).

224. *Id.* at 310-11 (quoting *Wade*, 388 U.S. at 224).

225. *Id.* at 312.

226. *United States v. Agurs*, 427 U.S. 97, 98-99 (1976).

227. *Id.* at 114 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

228. *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978).

229. *Id.* at 481-82.

230. *Id.* at 489 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961)).

231. *Cuyler v. Sullivan*, 446 U.S. 335, 335 (1980).

is a fundamental right guaranteed by the Sixth Amendment.²³² The court saw no “distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.”²³³ The Sixth Amendment “prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.”²³⁴

XIV. ROLE OF STATE ACTORS

Several of the Court’s rulings during this period seem to place the burden on the state actors—the court and the prosecutor—to also ensure a fair trial. Justice Marshall, in his dissent in *Cuyler v. Sullivan*, went further to say it is the trial judge’s duty to “make a preliminary determination that the joint representation is the product” of a defendant’s informed choice.²³⁵ After *Ex parte Virginia* (1879),²³⁶ *Powell v. Alabama* (1932),²³⁷ *Chambers v. Florida* (1940),²³⁸ *Diggs v. Welch* (1945),²³⁹ *Gideon v. Wainwright* (1963),²⁴⁰ and *McMann v. Richardson* (1970),²⁴¹ in 1980, the Supreme Court in *Cuyler v. Sullivan* confirmed a long established duty upon the trial court—a duty to the Constitution and a duty to the defendant—to protect the defendant and his right to a fair trial by enforcing this fundamental right of freedom: the right to effective, adequate assistance at all critical stages of the prosecution—adding the word “adequate” to the mix.²⁴²

232. *Id.* at 343.

233. *Id.* at 344-45. “The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection.” *Id.* at 344.

234. *Id.*

235. *Id.* at 354 (Marshall, J., dissenting).

236. *Ex parte Virginia*, 100 U.S. 339, 344 (1879) (holding that any officer or other person charged with any duty in the selection or summoning of jurors may be subject to prosecution for discrimination).

237. *Powell v. Alabama*, 287 U.S. 45 (1932). The Supreme Court placed a duty upon the trial court to assign counsel “as a necessary requisite of due process of law” and stated that failure to do so, “if carried into execution, would be little short of judicial murder.” *Id.* at 71-72. The refusal to hear a party by counsel “would be a denial of a hearing, and, therefore, of due process in the constitutional sense.” *Id.* at 69.

238. *Chambers v. Florida*, 309 U.S. 227 (1940). “No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.” *Id.* at 241.

239. *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1945). In the only federal case in this list, trial counsel was careless and incompetent; the trial court was assigned blame by the District of Columbia Court of Appeals by neglecting its duty to protect the accused. *Id.* at 670.

240. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court in *Gideon* found that the denial of appointed counsel for an indigent defendant violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 348-49.

241. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Supreme Court placed the burden on the judges to “strive to maintain proper standards of performance” of the attorneys in their courts, so that the attorneys could maintain reasonable competence. *Id.*

242. *Cuyler v. Sullivan*, 446 U.S. 335, 344-47 (1980).

XV. NORMAL COMPETENCY STANDARD OR REASONABLY COMPETENT ASSISTANCE OF COUNSEL

The standard to measure counsel's performance for effectiveness was first formulated by the circuits in *Diggs* in 1945, adopted by the Second Circuit in *United States v. Wight* in 1949, and used in all eleven federal circuit courts of appeal beginning in 1970.²⁴³ For over thirty years, counsel's performance had to "shock the conscience of the Court and make the proceedings a farce and mockery of justice," in order for such performance to be deemed a violation of the right of counsel of the Sixth Amendment.²⁴⁴

And just as the circuits began to all use the same standard, in 1970, the Third Circuit adopted a new "normal competency" standard.²⁴⁵ The court noted that other professions looked to the "exercise of the customary skill and knowledge which normally prevails at the time and place."²⁴⁶ Discouraging the retrospective examination of counsel's representation, as perfection is impossible, the Third Circuit said, "The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record."²⁴⁷ The court acknowledged the movement toward the increased recognition of the constitutional right to the assistance of counsel.²⁴⁸ After *Gideon v. Wainwright*, the Third Circuit believed this constitutional guarantee and the new standard of normal competency should apply equally to all.²⁴⁹ The "ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency. That the client was prejudiced by a failure in performance is of course evidentiary on the issue."²⁵⁰ The same year, the Court of Appeals for the District of Columbia used the words "*reasonably competent assistance of an attorney acting as his diligent conscientious advocate*," suggesting that a lawyer should be guided by the American Bar Association Standards for Defense Function.²⁵¹

243. See *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949); *Diggs*, 148 F.2d at 670. The Fifth Circuit in 1970 said, "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970) (quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960)).

244. *Wight*, 176 F.2d at 379.

245. *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970).

246. *Id.* at 736.

247. *Id.* at 736-37.

248. *Id.* at 737.

249. *Id.*

250. *Id.*

251. *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). As to the ABA Standards, in a another case, the Court said, "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." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The Seventh Circuit in 1975 found counsel ineffective for not seeking a delay to investigate the role of the codefendant.²⁵² This failure was “sufficiently short of the expected professional standard of competent counsel” to be a violation of the Due Process Clause of the Fourteenth Amendment and the right to assistance of counsel under the Sixth Amendment.²⁵³ Although the court paid homage to the “sham or mockery” standard, the court said its decision went beyond that standard.²⁵⁴ The Sixth Amendment is satisfied with a “true adversarial criminal trial.”²⁵⁵ The poor should not be left to a representation “shockingly inferior” to the prosecution, whether at “pretrial, investigatory, trial, or otherwise.”²⁵⁶ “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.”²⁵⁷

Since 1970, with the exception of the Second Circuit, every circuit moved to adopt the new “reasonably competent assistance” standard.²⁵⁸ Although the exact words change, sometimes called reasonably competent assistance, normal competency, reasonably effective assistance, minimum standard of professional representation, customary skills and diligence of a reasonably competent attorney, reasonably competent and effective assistance, the “reasonably competent assistance” label best describes what developed as the test.²⁵⁹ In 1978, Justice White argued in dissent that the Supreme Court “should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants.”²⁶⁰ In 1982, it was suggested that the Second Circuit “join the rest of the federal judiciary, as well as the leading state courts of last resort, in abandoning the contentless, out-moded ‘farce and mockery’ rule.”²⁶¹

So, in 1983, the Second Circuit in *Trapnell v. United States* also adopted the reasonably competent assistance standard for effective assistance of counsel.²⁶² “[E]ffective’ assistance means ‘reasonably competent assistance,’ which [is] shorthand for [saying] the standard that the quality of a defense counsel’s representation should be [is] within the range of competence

252. U.S. *ex rel.* Williams v. Twomey, 510 F.2d 634, 643 (7th Cir. 1975).

253. *Id.* at 640.

254. *Id.* at 638, 640 (citing Sims v. Lane, 411 F.2d 661, 665 (7th Cir. 1969), *overruled in part by* Alicea v. Gagnon, 675 F.2d 913, 922 (7th Cir. 1982)). “We are aware that this decision goes beyond an inquiry as to whether the state court trial was a sham or a mockery.” Twomey, 510 F.2d at 638.

255. See United States v. Cronin, 466 U.S. 648, 656 (1984).

256. Twomey, 510 F.2d at 640 (“The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard.”).

257. *Id.*

258. Trapnell v. United States, 725 F.2d 149, 152 (2d Cir. 1983).

259. *Id.* at 151.

260. Maryland v. Marzullo, 435 U.S. 1011, 1012-13 (1978) (White, J., dissenting).

261. Langone v. Smith, 682 F.2d 287, 289 (2d Cir. 1982) (Oakes, J., dissenting).

262. Trapnell, 725 F.2d at 151.

reasonably expected of attorneys in criminal cases.”²⁶³ The court found that the new standard of “reasonable competence” was “consistent with the Sixth Amendment jurisprudence developed by the Supreme Court in the wake of *Gideon v. Wainwright*.”²⁶⁴ The court felt that the Sixth Amendment defined not only the right to counsel but also the “standard to be used in determining whether the assistance of counsel is effective.”²⁶⁵ After *Gideon*, the courts gradually moved away from judging counsel’s performance on the Due Process Clause, which guarantees a fair trial and away from satisfying the Sixth Amendment by the mere presence of counsel, leaving behind the farce and a mockery standard.²⁶⁶ After *Gideon* held the Sixth Amendment right to counsel was a fundamental right binding on the States under the Due Process Clause of the Fourteenth Amendment, the Supreme Court “repeatedly referred to some minimal quality of representation in articulating the level of assistance necessary to assure the constitutional validity of criminal convictions.”²⁶⁷

The *Trapnell* court painted this “reasonably competent assistance” standard as a “stricter constraint than farce and mockery” and confirmed “trial strategy” as insufficient to sustain a claim of ineffective assistance.²⁶⁸ This new standard, though, is not a stricter standard in fact but a broadening of the scope of inquiry into trial counsel’s performance. If the test was truly stricter, then its application would be more difficult. By expanding the scope of the inquiry into an examination of the level of competence based on some purported objective standard of what is effective assistance, it soon would have been possible to reverse half of all convictions because, statistically, half of all attorneys perform at less than the average standard of what defense counsel’s representation is expected of attorneys in criminal cases. The lower courts had sculpted a test that could not stand the political realities.

XVI. *STRICKLAND V. WASHINGTON*

So, the following year, the Supreme Court tried to put to rest this evolution of effectiveness by taking the best of the language of the lower courts and adding such a nebulous condition to defining effectiveness that now, almost thirty years later, recognizing ineffectiveness has become sport.²⁶⁹ In the landmark case of *Strickland v. Washington*, the Supreme Court considered 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

263. *Id.* at 153.

264. *Id.* at 154.

265. *Id.* (discussing *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973)).

266. *Id.*

267. *Id.*

268. *Id.* at 155 (internal quotation marks omitted).

269. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

counsel.”²⁷⁰ The Court first acknowledged the line of cases confirming the constitutional right to counsel being fundamental to preserving the right to a fair trial, guaranteed through the Due Process Clauses and the several provisions of the Sixth Amendment.²⁷¹ “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.”²⁷² But this right to counsel means “effective assistance of counsel.”²⁷³ The Court established as the “benchmark” for claims of ineffectiveness, “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.”²⁷⁴ This is no more clear a standard than the sham-farce-and-mockery-of-justice standard abandoned. Without a crystal ball, how does a reviewing court know if the result was just? Having confidence in the result of a trial is subjective analysis at its best.²⁷⁵

A. Performance Standard

Strickland did provide a supposed bright-line, two-prong rule for determining defective assistance of counsel. First, the defendant must show that “counsel’s performance was deficient. . . , [with] errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”²⁷⁶ It must be shown that “the deficient performance prejudiced the defense . . . [with] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”²⁷⁷ All this must indicate “a breakdown in the adversary process that renders the result unreliable,” showing that “counsel’s representation fell below an objective standard of reasonableness.”²⁷⁸ “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”²⁷⁹ Linking to history, the Court said counsel’s “acts or omissions” had to be “outside the wide range of professionally competent assistance.”²⁸⁰

270. *Id.* at 684.

271. *Id.* at 684-85 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932)).

272. *Id.* at 685 (“[R]ight 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.” (quoting *Adams v. U.S.* *ex rel. McCann*, 317 U.S. 269, 275 (1942))); see *Powell*, 287 U.S. at 68-69.

273. *McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970).

274. *Strickland*, 466 U.S. at 686.

275. After all, few contested litigations do not end without one side or the other having no confidence in the result.

276. *Strickland*, 466 U.S. at 687.

277. *Id.*

278. *Id.* at 687-88.

279. *Id.* at 688.

280. *Id.* at 690.

So the Court constructed a rule that only the appellate courts can define or recognize. And to give the courts the additional option of making fact-determinative decisions, the Court said that trial counsel's judgments should be given a "heavy measure of deference."²⁸¹ But a "professionally unreasonable [error is not sufficient to set aside a judgment] if the error had no effect on the judgment."²⁸² How does an appellate court divine such answers?

B. Prejudice Standard

The Court reasoned that counsel's performance alone could not reach the measure of prejudice to undermine "reliance on the outcome of the proceeding," and the burden fell on the defendant to affirmatively prove prejudice.²⁸³ The Court said that the test for materiality of exculpatory evidence to be disclosed to the defendant has the same genesis as the test for prejudice in this context.²⁸⁴ In the case of *United States v. Valenzuela-Bernal*, the government deported a witness and the defendant complained about the violation of his right to compulsory process as guaranteed by the Sixth Amendment or the Due Process Clause of the Fifth Amendment.²⁸⁵ In this situation, the lost evidence would have to be both material and favorable to the defense to be a violation of the Constitution.²⁸⁶

Applied to the ineffective assistance of counsel (IAC) claim, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁸⁷ The Court defined a "reasonable probability" as a probability that would "undermine confidence in the outcome."²⁸⁸ The reviewing court must look to the "fundamental fairness of the proceeding whose result is being challenged," deciding "whether . . . 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."²⁸⁹

281. *Id.* at 691.

282. *Id.*

283. *Id.* at 691-93.

284. *Id.* at 694 (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

285. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982).

286. *Id.* at 872-73.

287. *Strickland*, 466 U.S. at 694.

288. *Id.* When a defendant challenges a conviction, the proper inquiry is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt [or whether the sentencer] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

289. *Id.* at 696.

C. Justice Marshall's Dissent

In Justice Marshall's dissent, he voiced objection to both supposed prongs of the *Strickland* test.²⁹⁰ Justice Marshall saw the "performance standard" as "malleable."²⁹¹ He warned that this standard would either have no effect at all or would allow "excessive variation in the manner in which the Sixth Amendment is interpreted and applied."²⁹² Justice Marshall warned of the judges "advert[ing] to their own intuitions regarding what constitutes 'professional' representation," seeing the "objective standard of reasonableness" as suffering from "debilitating ambiguity."²⁹³

As to the prejudice standard, he said it would be difficult to judge if a defendant would have "fared better if his lawyer had been competent."²⁹⁴ Justice Marshall disagreed that the only purpose of this constitutional guarantee was to "reduce the chance that innocent persons will be convicted."²⁹⁵ He said any proceeding in which the defendant's interests were not "vigorously and conscientiously advocated by an able lawyer . . . in meeting the forces of the State . . . d[id] not . . . constitute due process."²⁹⁶ Justice Marshall believed in these circumstances a new trial was required, regardless of a showing of prejudice.²⁹⁷

The previous year—likewise in a dissent—Justice Brennan spoke of the need for counsel to be an "advocate for the defendant, as opposed to a friend of the court."²⁹⁸ As the Constitution does not define "assistance of counsel," in addition to being qualified to practice law, counsel must achieve "minimum standards of effectiveness" in meeting his obligations as an advocate.²⁹⁹ The Court had previously stressed that the role of counsel "is to serve the undivided interest of his client [because] an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."³⁰⁰ "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."³⁰¹

290. *Id.* at 706-07 (Marshall, J., dissenting).

291. *Id.* at 707.

292. *Id.*

293. *Id.* at 708.

294. *Id.* at 710.

295. *Id.* at 711.

296. *Id.*

297. *Id.* at 712.

298. *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting).

299. *Id.* at 757.

300. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

301. *United States v. Cronin*, 466 U.S. 648, 656 (1984).

XVII. MODERN INTERPRETATIONS OF *STRICKLAND*

It has now been almost thirty years since the Supreme Court conjured up the two-prong test for effectiveness of trial counsel.³⁰² One would expect in this time the Supreme Court would have abandoned or modified its original holdings many times. Interestingly, looking at the most recent cases citing *Strickland*—mostly habeas corpus cases—the *Strickland* rules have remained intact.³⁰³ During the 2010 session of the Supreme Court, in interpreting the one-year statute of limitations on petitions for writs of habeas corpus in federal court, the Court found the petitions were now, for the first time, subject to equitable tolling and remanded the case for the lower court to determine if habeas counsel’s failures rose to the level of being an “extraordinary circumstance” that would allow such tolling.³⁰⁴ The Court confirmed the Great Writ was the only writ explicitly protected by the Constitution.³⁰⁵

Justice Scalia, in his dissent, characterized the *Strickland* standard as inuring to the benefit of the defendant.³⁰⁶ He saw the *Strickland* rule of effectiveness as relaxed where the “client has a constitutional right to effective assistance of counsel.”³⁰⁷ In these circumstances, if the state fails to provide counsel when required, “the attorney’s failures that fall below the standard set forth in *Strickland v. Washington* . . . are chargeable to the State, not to the prisoner.”³⁰⁸ Justice Scalia warned the Court not to intervene when counsel makes mistakes.³⁰⁹ “[T]he temptation to tinker with technical rules to achieve what appears a just result is often strong, especially when the client faces a capital sentence. But the Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made.”³¹⁰

302. See WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 13-14 (2005) (stating that *Strickland* remains the principle test for ineffective assistance of counsel).

303. See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (addressing how to apply the *Strickland* test when ineffective assistance results in a rejection of a plea offer and the defendant is later convicted at trial).

304. *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010).

305. *Id.* at 2562 (citing U.S. CONST. art. I, § 9, cl. 2).

306. *Id.* at 2571 (Scalia, J., dissenting).

307. *Id.*

308. *Id.* (citation omitted) (discussing *Strickland v. Washington*, 466 U.S. 668 (1984)). Justice Scalia here cited *Murray v. Carrier*, 477 U.S. 478, 488 (1986). *Holland*, 130 S. Ct. at 2571 (Scalia, J., dissenting). The Justice then went on to say, “But where the client has no right to counsel—which in habeas proceedings he does not—the rule holding him responsible for his attorney’s acts applies with full force.” *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

309. *Holland*, 130 S. Ct. at 2576.

310. *Id.* (“Endowing unelected judges with that power is irreconcilable with our system, for it ‘would literally place the whole rights and property of the community under the arbitrary will of the judge,’ arming him with ‘a despotic and sovereign authority.’” (citations omitted) (quoting 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19, at 19 (14th ed. 1918))).

During the same month, the Court decided *Sears v. Upton*.³¹¹ In review of a state post-conviction proceeding, the Court looked at the application of the *Strickland* two-prong standard.³¹² The state court properly applied the deficient performance prong under *Strickland* but could not decide prejudice, stating the proper prejudice standard but failing to conceptualize it to the circumstances of the case.³¹³ Although counsel did present some mitigation, “[t]he [lower] court explained that ‘it is impossible to know what effect [a different mitigation theory] would have had on [the jury].’”³¹⁴

Once again, Justice Scalia, joined again by Justice Thomas, dissented.³¹⁵ Calling some of the majority’s description of the mitigation presented in habeas as “silly,” and ridiculing Sears’s childhood injuries and upbringing, Scalia described the crime itself in all its horrible detail and Sears’s bad behavior in prison.³¹⁶ “I do not know how anyone could disagree with the habeas court’s conclusion that it is impossible to say that substituting the ‘deprived-childhood-cum-brain-damage’ defense for the ‘good-middle-class-kid-who-made-a-mistake’ defense would probably have produced a different verdict. I respectfully dissent.”³¹⁷

In *Williams v. Hobbs*, the Court denied a petition for certiorari in another habeas appeal.³¹⁸ In dissent, Justice Sotomayor, joined by Justice Ginsburg, disagreed with the circuit court, reversing a grant of a writ by the district court on both the performance and prejudice prongs under *Strickland*.³¹⁹ The circuit court reversed the district court’s finding that Williams should not have been granted a federal evidentiary hearing based on a procedural issue “entirely disregarding the evidence introduced at the hearing as a result, [holding] that Williams had failed to prove prejudice ‘on the factual record he developed in state court.’”³²⁰

311. *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010).

312. *Id.*

313. *Id.* at 3261 (“explaining that first inquiry when evaluating a Sixth Amendment ineffectiveness claim is whether counsel’s representation ‘fell below an objective standard of reasonableness’” (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984))).

314. *Id.* at 3264 (third and fourth alterations in original) (quoting Appendix to Petition for Writ of Certiorari at 30B, *Sears*, 130 S. Ct. 3259 (No. 09-8854)).

315. *Id.* at 3267 (Scalia, J., dissenting) (“THE CHIEF JUSTICE and Justice ALITO would deny the petition for a writ of certiorari.”).

316. *Id.* at 3271.

317. *Id.* The majority felt a

proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears’ ‘significant’ mental and psychological impairments, along with the mitigation evidence introduced during Sears’ penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. It is for the state court—and not for either this Court or even Justice SCALIA—to undertake this reweighing in the first instance.

Id. at 3267 (majority opinion) (citations omitted).

318. *Williams v. Hobbs*, 131 S. Ct. 558, 558 (2010).

319. *Id.* at 560-61 (Sotomayor, J., dissenting).

320. *Id.* at 559 (quoting *Williams v. Norris*, 576 F.3d 850, 863 (8th Cir. 2009)).

Another writ of certiorari was denied in *Allen v. Lawhorn*.³²¹ Justice Scalia, again, this time with Justice Thomas and Justice Alito joining, dissented from the denial of certiorari.³²² Lawhorn contended in post-conviction that his trial counsel's failure to give a closing argument in the sentencing phase of his trial was ineffective assistance of counsel under *Strickland*.³²³ The state habeas court denied the petition under the "reasonable strategic decision" grounds exception, which was affirmed by the Alabama Court of Criminal Appeals—the state's highest court denied certiorari.³²⁴ In the federal habeas proceeding, the district court set aside the conviction and the sentence, and the Eleventh Circuit affirmed only with regard to the sentence, reversing the grant of a new trial on guilt-innocence.³²⁵ The circuit court agreed with the district court that "counsel's failure to give a closing argument was not a reasonable strategic decision, [and] sustained the District Court's conclusion that Lawhorn had been prejudiced by counsel's failure."³²⁶

The dissent cited the *Strickland* standard as a general standard, giving the state court "more latitude to reasonably determine that a defendant has not satisfied that standard."³²⁷ "[T]he more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations."³²⁸ Calling the circuit court's decision "lawless speculation," Justice Scalia railed at the possibility that one convicted of a capital crime might receive another punishment hearing rather than be executed:

With distressing frequency, especially in capital cases such as this, federal judges refuse to be governed by Congress's command that state criminal judgments must not be revised by federal courts unless they are 'contrary to, or involv[e] an unreasonable application of, *clearly established Federal law*,

In my opinion, the interests of justice are poorly served by a rule that allows a State to object to an evidentiary hearing only after the hearing has been completed and the State has lost. *Cf.* *Puckett v. United States*, 556 U.S. 129, 129 (2009) ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.").

Id.

321. *Allen v. Lawhorn*, 131 S. Ct. 562, 562 (2010) (Scalia, J., dissenting).

322. *Id.*

323. *Id.*

324. *Lawhorn v. State*, 756 So. 2d 971, 994 (Ala. 1999), *cert. denied*, *Lawhorn v. Alabama*, 531 U.S. 835 (2000).

325. *Lawhorn v. Haley*, 323 F. Supp. 2d 1158, 1211-14 (N.D. Ala. 2004), *aff'd in part, rev'd in part sub nom.* *Lawhorn v. Allen*, 519 F.3d 1272, 1297 (11th Cir. 2008).

326. *Allen*, 131 S. Ct. at 563 (discussing *Allen*, 519 F.3d at 1295-97). "Deficient performance is demonstrated by an attorney's failure to use the closing argument to focus the jury's attention on his client's character or any mitigating factors of the offender's circumstances, and by his failure to ask the jury to spare his client's life." *Allen*, 519 F.3d at 1295.

327. *Allen*, 131 S. Ct. at 564 (alteration in original) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 114 (2009)).

328. *Id.* (quoting *Renico v. Lett*, 130 S. Ct. 1855, 1859 (2010)).

as determined by the Supreme Court of the United States.’ We invite continued lawlessness when we permit a patently improper interference with state justice such as that which occurred in this case to stand.³²⁹

The following month, in *Harrington v. Richter*, the Court quoted itself from the year before when it wrote, “Surmounting *Strickland*’s high bar is never an easy task.”³³⁰ Out of concern for “the integrity of the very adversary process the right to counsel is meant to serve,” the Court warned *Strickland* must always be used with “scrupulous care,” because it can be used to “escape rules of waiver and forfeiture and raise issues not presented at trial.”³³¹ Adding to the lexicon of *Strickland* language, Justice Kennedy writing for the majority said that “prevailing professional norms” were not “best practices or most common custom.”³³² This language is new to the argument. Never before has the Court tried to define “prevailing professional norms” in such a way. In habeas, the *Strickland* and statutory standards are “highly deferential,” creating a “doubly” deferential review.³³³ The Court drew the distinction between unreasonableness under *Strickland* and unreasonableness in habeas, saying the “*Strickland* standard is a general one, so the range of reasonable applications is substantial.”³³⁴ In habeas review, “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,” reminding that *Strickland* “calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.”³³⁵ “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,” so long as counsel’s performance does not “so undermine[] the proper functioning of the adversarial process that the defendant [is] denied a fair trial.”³³⁶

The Court, in defining the *Strickland* prejudice prong, said that “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

329. *Id.* at 565 (alteration in original) (citation omitted) (quoting 28 U.S.C. § 2254(d)(1) (2006)).

330. *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)). Decided the same day was *Premo v. Moore*, 131 S. Ct. 733 (2011). *Premo* cites *Harrington* and virtually tracks its language and reasoning. *Premo*, 131 S. Ct. at 733. *Premo* provides nothing new not covered in *Harrington v. Richter* other than to use the best practices or most common custom comparison again, repeating the language first used in *Harrington*. See *id.* at 740.

331. *Harrington*, 131 S. Ct. at 788. (God, forbid).

332. *Id.*

333. *Id.* (using language from *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

334. *Id.* (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

335. *Id.* at 792 (citing *Strickland*, 466 U.S. at 688).

336. *Id.* at 791 (quoting *Strickland*, 466 U.S. at 686).

been established if counsel acted differently.”³³⁷ The Court said, “*Strickland* asks whether it is ‘reasonably likely’ the result would have been different.”³³⁸ Somehow this is not that counsel’s performance “more likely than not altered the outcome,” and the difference between “reasonably likely” and “more-probable-than-not” is slight and matters “only in the rarest case.”³³⁹ “The likelihood of a different result must be substantial, not just conceivable.”³⁴⁰ So to be granted habeas relief on a claim of ineffectiveness based on the prejudice prong, it must be shown that counsel’s performance was substantially likely to be more probable than not to alter the outcome, which is somehow different than the *Strickland* prejudice prong—that but for counsel’s performance, it is reasonably likely the result would have been different.³⁴¹ This is a distinction without a difference—an incomprehensible word salad.

Next, the Court confirmed in *Walker v. Martin* that a court could bypass the determination of “whether counsel’s performance was deficient . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.”³⁴²

In *Connick v. Thompson*, the Court provided a discussion of the proper role of the prosecution in a § 1983 suit involving alleged violations of *Brady v. Maryland* by the prosecution.³⁴³ For the purposes of argument below, this case provides instruction. The Court reminded us that “attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession’s standards.”³⁴⁴ Also, the Court said, “Trial lawyers have a ‘duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process,’” suggesting that this duty falls upon all lawyers in a trial.³⁴⁵ Prosecutors, the Court reminded us, have a special “duty to seek justice, not merely to convict,” and “to see that justice is done.”³⁴⁶ “It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a

337. *Id.* (citing *Wong v. Belmontes*, 130 S. Ct. 383, 390 (2009) (per curiam), and *Strickland*, 466 U.S. at 693).

338. *Id.* at 792 (quoting *Strickland*, 466 U.S. at 696).

339. *Id.* (citing *Strickland*, 466 U.S. at 693, 696-97).

340. *Id.* (citing *Strickland*, 466 U.S. at 693).

341. *See id.*

342. *Walker v. Martin*, 131 S. Ct. 1120, 1129 (2011) (alterations in original) (quoting *Strickland*, 466 U.S. at 697). It is interesting to note the Court’s language. Almost instructive in its tone, if the Court follows *Walker*, “it is easier to dispose of an ineffectiveness claim” on the prejudice prong. *Id.* (quoting *Strickland*, 466 U.S. at 697). This says volumes about the Supreme Court’s true feelings about these claims.

343. *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011).

344. *Id.* This is a Louisiana case. *Id.* (citing, e.g., LA. STATE BAR ASS’N, ARTICLES OF INCORPORATION art. 14, § 7 (1985)). *See generally* LA. STATE BAR ASS’N, *supra*, art. 16 (1971) (Code of Professional Responsibility).

345. *Connick*, 131 S. Ct. at 1362 (quoting *Strickland*, 466 U.S. at 688).

346. *Id.* at 1362, 1365 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935); LA. STATE BAR ASS’N, *supra* note 344, art. 16, EC 7–13; ABA STANDARDS FOR CRIMINAL JUSTICE 3–1.1(c) (2d ed. 1980)).

wrongful conviction as it is to use every legitimate means to bring about a just one.”³⁴⁷

Less than a week later, the Court issued *Cullen v. Pinholster*, addressing the usual two-prong test outlined in *Strickland*.³⁴⁸ The Court also included interesting language about the purpose of *Strickland*, which will aid the discussion below. The Court said, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.”³⁴⁹ So, it is 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.”³⁵⁰ This is the benchmark for reviewing claims of ineffectiveness.³⁵¹

The final *Strickland* case from last year reviewed here is *Maples v. Thomas*.³⁵² The most interesting language comes from Justice Scalia’s dissent once again joined by Justice Thomas.³⁵³ Scalia says, when an accused has a constitutional right to effective assistance of counsel (such as at trial), it is the state’s failure in its duty to provide an effective attorney when counsel makes an error judged ineffective as measured by *Strickland*.³⁵⁴ This makes the error “external to the defense.”³⁵⁵ In distinguishing between post-conviction procedural default as opposed to before conviction, it is not the kind of error that is of import.³⁵⁶ So long as counsel is not ineffective under *Strickland*, the defendant does not bear the risk of procedural default if “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.”³⁵⁷ For example, “showing that the factual or legal basis for a claim was not reasonably available to counsel” at trial, or showing that “some interference by officials” made compliance impracticable, would constitute

347. *Id.* (alteration in original) (quoting *Berger*, 295 U.S. at 88).

348. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (“To overcome that presumption, a defendant must show that counsel failed to act ‘reasonabl[y] considering all the circumstances.’ The Court cautioned that ‘[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.’ The Court also required that defendants prove prejudice. ‘The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ That requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” (citations omitted) (quoting *Strickland*, 466 U.S. at 688, 690-92, 694)).

349. *Id.* (alterations in original) (quoting *Strickland*, 466 U.S. at 689).

350. *Id.* (quoting *Strickland*, 466 U.S. at 686).

351. *Id.* (citing *Strickland*, 466 U.S. at 686-89) (acknowledging the “countless ways” different attorneys can defend a client).

352. *Maples v. Thomas*, 132 S. Ct. 912 (2012).

353. *Id.* at 929-30 (Scalia, J., dissenting).

354. *Id.* (citing *Strickland*, 466 U.S. at 668).

355. *Id.* at 930 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

356. *Murray*, 477 U.S. at 488.

357. *Id.*

cause under this standard.³⁵⁸ Justice Scalia and I agree.³⁵⁹ An effective denial of counsel is external to the defense and charged to the state. As argued below, it is the state, through the officers of the court, that bears the responsibility for ineffective trial counsel, and relief should always be granted.³⁶⁰

XVIII. *UNITED STATES V. CRONIC*

On the same day as *Strickland*, the Supreme Court also decided *United States v. Cronic*.³⁶¹ In *Cronic*, the term “actual ineffectiveness” worked itself into the lexicon.³⁶² The facts—showing a young, inexperienced defense lawyer, given only twenty-five days to prepare a complex case with grave charges and witnesses not easily accessible—were not sufficient to establish ineffective assistance of counsel without a showing of “actual ineffectiveness.”³⁶³ These facts, surrounding the trial, were insufficient to justify a claim of ineffectiveness without looking to specific errors made by counsel at trial.³⁶⁴ And to meet the Constitution’s guarantee of a “fair trial and a competent attorney,”³⁶⁵ *Cronic* emphasized the adversarial process and the need for a “counsel acting in the role of an advocate.”³⁶⁶

To evaluate the satisfaction of the constitutional standards, the majority reasoned that courts should not look at the defendant’s relationship with his counsel—or the defendant’s assessment of counsel’s performance—but at whether counsel was a reasonably effective advocate throughout the adversarial process.³⁶⁷ This is why the courts pay no attention to a defendant’s expressions of dissatisfaction.³⁶⁸

So, the Court returns again to looking for an “actual breakdown of the adversarial process during the trial,” which would have an effect on whether the defendant received a fair trial.³⁶⁹ “[A] trial is unfair if the accused is denied

358. *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)).

359. Tongue firmly placed in cheek.

360. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984).

361. *United States v. Cronic*, 466 U.S. 648 (1984).

362. *Id.* at 667.

363. *Id.* at 648 n.42.

364. *See id.* at 666. The Court found *Cronic* did not present facts such that ineffectiveness could be presumed, unlike *Powell v. Alabama*, 287 U.S. 45, 53 (1932), in which “the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial.” *Cronic*, 466 U.S. at 661.

365. *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

366. *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client” *Anders*, 386 U.S. at 744.

367. *See Cronic*, 466 U.S. at 656-58.

368. *See id.* at 656.

369. *Id.* at 657-58.

counsel at a critical stage of his trial.”³⁷⁰ “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.”³⁷¹

While it places no weight on the defendant’s complaints of dissatisfaction, the Court nevertheless places the burden on the defendant to show a constitutional violation even though the Court will presume counsel is “competent to provide the guiding hand that the defendant needs,” requiring any specified errors allegedly made by counsel to be evaluated under the rules of *Strickland v. Washington*.³⁷²

XIX. MODERN INTERPRETATIONS OF *CRONIC*

As *Cronic* is a narrow exception to *Strickland*, references to it as precedent are infrequent.³⁷³ In fact, no cases issued during the current term of the Supreme Court have referenced *Cronic*, only one case referenced it during the October 2010 term, and the October 2008 term yielded only three cases using *Cronic* as a reference.³⁷⁴ Three fairly recent cases using *Cronic* as precedent have been chosen to illustrate how, after almost thirty years, *Cronic* still remains good law with its language intact.³⁷⁵

In *Florida v. Nixon*, defense counsel conceded guilt without obtaining the defendant’s express consent, which was held to not automatically render his performance ineffective.³⁷⁶ *Cronic* allowed for a presumption of prejudice, showing a denial of Sixth Amendment rights only if “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing . . . mak[ing] the adversary process itself presumptively unreliable.”³⁷⁷ The Court permits counsel to make strategic choices if the defendant is unresponsive.³⁷⁸ “[I]f counsel’s strategy, given the evidence bearing on the defendant’s guilt, satisfies

370. *Id.* at 659. “The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” *Id.* at 659 n.25.

371. *Id.* at 659 (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (showing constitutional error and no showing of prejudice necessary when the defendant was denied right of effective cross-examination).

372. *Id.* at 658 (citing *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955)); see *Strickland v. Washington*, 466 U.S. 668, 699-700 (1984).

373. See *Strickland*, 466 U.S. at 668. A check of Westlaw shows *Strickland v. Washington* has been cited as authority for various points in 134 cases since 1984, while *United States v. Cronic* has been cited thirty-seven times.

374. See *Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011) (decided during the October 2010 term); *Kansas v. Ventris*, 556 U.S. 586, 591 (2009); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 353 (2009) (decided during the October 2008 term); *Hedgpeth v. Pulido*, 555 U.S. 57, 67 (2008).

375. See *Florida v. Nixon*, 543 U.S. 175, 176 (2004); *Bell v. Quintero*, 125 S. Ct. 2240, 2240 (2005); *Wright v. Van Patten*, 552 U.S. 120, 124 (2008).

376. *Florida*, 543 U.S. at 190.

377. *Id.* (quoting *Cronic*, 466 U.S. at 659).

378. See *id.*

the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.”³⁷⁹

In *Bell v. Quintero*, the Court reaffirmed that *Cronic* established certain per se presumptions of ineffectiveness.³⁸⁰ Finally, in *Wright v. Van Patten*, *Cronic*, not *Strickland*, applied “when . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance [was] so small that a presumption of prejudice [was] appropriate without inquiry into the actual conduct of the trial.”³⁸¹ *Cronic* contemplates the complete denial of counsel by absence or being prevented from assisting the accused during a critical stage of the proceeding.³⁸² The Court looks for a “breakdown in the adversarial process” such that the attorney’s failure to test the prosecutor’s case is complete.³⁸³

XX. THE EVOLUTION OF EFFECTIVE COUNSEL

Not until 1932 in *Powell v. Alabama* did the Supreme Court first use the word “effective” as an adjective to describe a counsel’s ability to be “substantial aid” to the defendant.³⁸⁴ *Powell* was a death penalty case, and in the strongest terms, the Supreme Court criticized any trial court for failing to appoint an attorney in this situation as a “requisite of due process.”³⁸⁵ The Court in *Powell* placed a duty upon the court to assign counsel and labeled the failure to do so as “little short of judicial murder.”³⁸⁶ Soon, in *Johnson v. Zerbst*, the Court found that “the humane policy of modern criminal law” gave the poor this “safeguard” of the Sixth Amendment, finding the right to counsel as “fundamental human rights of life and liberty.”³⁸⁷

The Supreme Court found that the right to counsel was “essential to the substance of a hearing,” and by 1940 the Court made procedural standards in the trial courts subject to the Supreme Court’s authority in order to protect the accused from the “power and authority” of the government, including state government.³⁸⁸ The Court confirmed the “fundamental idea that no man’s life, liberty or property [can] be forfeited as criminal punishment” without a fair procedure “free of prejudice, passion, excitement and tyrannical power.”

379. *Id.* at 192.

380. *See Quintero*, 125 S. Ct. at 2240 (citing *Cronic*, 466 U.S. at 658-59).

381. *Wright v. Van Patten*, 552 U.S. 120, 124 (2008) (alteration in original) (quoting *Cronic*, 466 U.S. at 659-60).

382. *See id.* at 124-25 (citing *Cronic*, 466 U.S. at 659 n.25).

383. *See Bell v. Cone*, 535 U.S. 685, 617 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

384. *See Powell v. Alabama*, 287 U.S. 45, 53 (1932).

385. *See id.* at 71.

386. *Id.* at 72.

387. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

388. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (first quote), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969); *Chambers v. Florida*, 309 U.S. 227, 236 (1940) (second quote).

obeying strictly the “procedural safeguards of due process.”³⁸⁹ So the stage was set, and the sacred right to counsel became firmly rooted in our fundamental freedoms.

Apparently, the Supreme Court, by first applying “effective” to the right to counsel, felt a need to force the lower courts into giving more than lip service to this fundamental right.³⁹⁰ It was not good enough that counsel should not be allowed the opportunity to fairly represent the accused.³⁹¹ The Court continually emphasized how important “the guiding hand of counsel” was in the protection of the accused.³⁹² The complications of the Fourteenth Amendment into the culture of the judiciary led the Supreme Court to place duties on trial judges and prosecutors as officers of the court to protect due process and the rights secured by the Bill of Rights.³⁹³ The Supreme Court has long defined the duty of the judiciary in protecting these rights, whether it was (1) upholding the right of Congress to prosecute state judiciary for violations of federal law;³⁹⁴ (2) requiring the duty of a state trial judge to appoint defense counsel so as to allow them the opportunity to be effective;³⁹⁵ (3) confirming the duty of the judiciary to protect the Due Process and Equal Protection Clauses;³⁹⁶ (4) deciding once and for all that the denial of appointed counsel by the courts for indigent defendants violates the Due Process Clause of the Fourteenth Amendment;³⁹⁷ (5) placing the burden on the trial courts to maintain the quality of representation in their courts;³⁹⁸ or (6) confirming the long established constitutional duty of the trial court to protect the accused’s right to a fair trial by enforcing the right to effective, adequate assistance of counsel at all critical stages of the prosecution.³⁹⁹

389. See *Chambers*, 309 U.S. at 236-37 (footnotes omitted).

390. See *Powell*, 287 U.S. at 71.

391. See *id.*

392. See *id.* at 69; cf. *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972).

393. See *Argersinger v. Hamlin*, 407 U.S. 25, 32 (2006).

394. See *Ex parte Virginia*, 100 U.S. 339, 344 (1879) (stating that any officer or other person charged with any duty in the selection or summoning of jurors may be subject to prosecution for discrimination).

395. See *Powell*, 287 U.S. at 71. The Supreme Court placed a duty upon the trial court to assign counsel “as a necessary requisite of due process of law” and said that failure to do so “if carried into execution, would be little short of judicial murder.” *Id.* at 71-72. The refusal to hear a party by counsel “would be a denial of a hearing and, therefore, of due process in the constitutional sense.” *Id.* at 69.

396. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.”).

397. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

398. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Supreme Court placed the burden on the judges to “strive to maintain proper standards of performance” of the attorneys in their courts so that the attorneys could maintain reasonable competence. *Id.*

399. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

The political reality is that those convicted keyed in on *Powell*'s use of the word effective and began to flood the courts with litigation claiming that their trial counsel was ineffective in violation of their fundamental right to counsel.⁴⁰⁰ Even though the Supreme Court stressed for over a century that it is the trial court's duty to protect and enforce fundamental rights (i.e., the right to counsel), the lower courts allowed themselves, facing a barrage of writs, to be redirected away from a focus on the trial courts' duties.⁴⁰¹ The development of the concept of effective counsel should have stayed a function of the proper role of the judiciary in the administration of justice. The lower courts observed that whenever a trial became a farce and a mockery of justice and the proceedings shocked the conscience, it was the "presence or absence of judicial character in the proceedings as a whole" that set the limits of the fundamental right to counsel in habeas.⁴⁰² The courts should have held fast to measuring rights as a function of judicial character. Making trial counsel the potential target of the complaint places the accused and his counsel in an untenable position when the total focus of counsel should be providing assistance to such a degree to meet constitutional expectations. The modern effect too often places these two players at odds from the beginning.

As the courts entered the 1940s, the mere formal appointment of counsel no longer satisfied the Sixth Amendment,⁴⁰³ and the courts shifted to an analysis of the actual performance of counsel as the measure of effectiveness.⁴⁰⁴ The difficulty in determining the prejudice to the defendant for ineffective assistance was acknowledged, and the courts warned that a liberal interpretation of effectiveness would lend itself to abuse by the convicted.⁴⁰⁵ As the courts presumed regularity of the proceedings—including the performance of the defendant's lawyer—the reviewing courts were forced to look to the record for

400. See *Diggs v. Welch*, 148 F.2d 667, 669-70 (D.C. Cir. 1945).

401. *Id.* ("We are aware that if that word [effective] be construed in a broad and liberal sense it would follow that on habeas corpus the court would have to review the entire trial and consider all the alleged mistakes, failures to object to the introduction of evidence and errors in advice which the ingenuity of a convict could set down on paper during the enforced leisure of his confinement. . . . It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear.")

402. *Id.*

403. See *id.* at 669 (citing *Avery v. Alabama*, 308 U.S. 444 (1940), and *Powell v. Alabama*, 287 U.S. 45 (1932)).

404. *Id.* (citing *Glasser v. United States*, 315 U.S. 60, 76 (1942)) (discussing the appointment of an attorney who represented another defendant with possible conflicting interests was not effective representation); see *Tomkins v. Missouri*, 323 U.S. 485 (1945).

405. See *Glasser*, 315 U.S. at 75; *Diggs*, 148 F.2d at 669-70.

evidence to otherwise find “exceptional circumstances” that pointed to irregularity.⁴⁰⁶ Mere mistakes of counsel were not sufficient, and only the “extreme case” would require relief carrying the farce-and-mockery-of-justice standard into effectiveness analysis.⁴⁰⁷ The farce-and-mockery-of-justice standard is aimed toward the proceeding, not just the performance of counsel:

No doubt in such cases careless representation of the defendant by his attorney may contribute to the lack of due process of the trial as a whole. But if so, it is only one of the factors leading to the violation of petitioner’s constitutional rights. In such a case the court has neglected its duty in failing to give the accused protection. The prosecuting attorneys have violated their duty as officers of the court in obtaining a conviction by proceeding in defiance of the orderly administration of justice. Carelessness of counsel is not the ground for habeas corpus in such a case. If relied on it must be as one of the evidentiary facts which, coupled with others, show a violation of the Fifth Amendment.⁴⁰⁸

At least during this period, the reviewing courts gave lip service to the fact that the trial court and prosecutor had a duty to observe and correct inadequate representation.⁴⁰⁹ After all, if appointed, an attorney was presumed to be competent and in good standing with the bar, meeting the constitutional requirements.⁴¹⁰ Unless, on the whole, the defense counsel’s representation was no representation at all and the trial was reduced to a farce and a mockery of justice that shocked the conscience, mere mistakes were insufficient to render the trial unfair.⁴¹¹ To meet the constitutional standards, effective assistance of counsel had to be more than “pro forma” appointment of counsel, yet less than a “total failure” in representation.⁴¹²

The landmark case of *Gideon v. Wainwright* finally settled the right to appointed counsel for the indigent as a requirement of the Due Process Clause of the Fourteenth Amendment, finding lawyers as necessities, not luxuries, and confirming the fundamental and essential nature of the right to counsel as essential to a fair trial—the denial of which is never harmless error.⁴¹³ The Supreme Court in the early 1970s still placed the burden on the judges to “strive to maintain proper standards of performance.”⁴¹⁴ But the courts were forced to decide “the range of competence demanded of attorneys in criminal

406. See *Strong v. Huff*, 148 F.2d 692, 693 (D.C. Cir. 1945).

407. *Diggs*, 148 F.2d at 669.

408. *Id.* (footnotes omitted).

409. *Id.* at 670.

410. See U.S. *ex rel. Feeley v. Ragen*, 166 F.2d 976, 980 (7th Cir. 1948).

411. *Id.* at 980-81.

412. *Brubaker v. Dickson*, 310 F.2d 30, 37, 39 (9th Cir. 1962).

413. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Chapman v. California*, 386 U.S. 18, 23 (1967).

414. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

cases” consistent with the Sixth Amendment as the test became “reasonable competence.”⁴¹⁵ The “core purpose of the [right to counsel] was to ensure ‘[a]ssistance’ at trial” at all “critical stage[s]” of the proceedings with counsel acting as the accused’s assistant.⁴¹⁶

So the courts began to move away from the sham-farce-and-mockery-of-justice standard to the “normal competency” standard to determine effectiveness of counsel.⁴¹⁷ During this period, the possible prejudice caused by counsel’s errors was not an issue, only the judgment of normal competency.⁴¹⁸ The prejudice came from the failure in performance.⁴¹⁹ And so it was for more than a decade.⁴²⁰ Then, just before *Strickland v. Washington*, the final circuit—the Second Circuit—joined all the other circuit courts and defined “effective assistance” as “reasonably competent assistance,” moving away from the definition of a fair trial in the Due Process Clause of Fifth Amendment, refusing to allow the mere presence of counsel to satisfy the Sixth Amendment’s fundamental requirement of the right to counsel, and leaving the farce-and-mockery-of-justice standard to the ages.⁴²¹

XXI. *STRICKLAND V. WASHINGTON*: THE HOLY GRAIL OF INEFFECTIVE COUNSEL

In 1984, the Supreme Court decided *Strickland v. Washington*, establishing its now famous two-prong test: the performance standard, judging whether counsel is acting within an objective standard of reasonableness and competence while practicing criminal law under prevailing professional norms; and the prejudice standard, in which counsel’s professional errors are “so serious as to deprive the defendant of a fair trial,” showing “a breakdown in the adversary process that renders the result unreliable.”⁴²² In *Strickland*, the language “actual ineffective assistance of counsel” is found as the standard by which a criminal judgment is to be overturned.⁴²³

Remember, the benchmark under *Strickland* is “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.”⁴²⁴ Is this the same standard used originally in *Patton v. United States* that the accused must

415. *Id.* at 771-72.

416. *United States v. Ash*, 413 U.S. 300, 308-11 (1973).

417. *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970).

418. *Id.*

419. *Id.*

420. *Compare Moore*, 232 F.2d at 730, with *Trapnell v. United States*, 725 F.2d 149, 151-51 (2d Cir. 1983).

421. *See Trapnell*, 725 F.2d at 153.

422. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

423. *Id.* at 684.

424. *Id.* at 686.

have the means to “effectively” make a defense, or in *Powell v. Alabama* that the accused should have the “effective and substantial aid” of an attorney, or in *Glasser v. United States* that the “effective assistance” of counsel defines the proper role of counsel under the Sixth Amendment?⁴²⁵ The benchmark in *Strickland* actually more resembles the farce-and-mockery-of-justice standard adopted by the circuits.⁴²⁶ If one cannot rely on the result of a trial as being just, is this not a farce and sham? Does this not make a mockery of justice?

A. The Performance Standard: Great Expectations

The *Strickland* performance standard says “counsel’s performance was deficient . . . , [with] errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”⁴²⁷ The “minimal quality of representation” was the starting point.⁴²⁸ It can be argued that this measure of reasonably competent assistance assumed a minimum level of competency at least as good as half of those practicing criminal law.⁴²⁹ How could the standard be greater?

If 60%, 70%, 80%, or 90% is the accepted level of competence, then only 40%, 30%, 20%, or 10% of cases would *not* qualify under the first prong to be reversed for ineffective assistance. This, of course, is impossible. Even if reasonably competent assistance meant at least as good as the average practitioner, then at least half of all cases would qualify under this first prong for reversal because their performance would be below the normal competence of lawyers practicing criminal law. This also is too heavy a burden for the courts to approve. Perhaps the courts would approve a very small number as being below normal competence. What if that figure is only 1%? Is that saying 99% of all lawyers perform at or above the normal competency level? Certainly not.

425. *Glasser v. United States*, 315 U.S. 60, 76 (1942), *superseded by statute*, FED. R. EVID. 104(a); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Patton v. United States*, 281 U.S. 276, 308 (1930).

426. *See, e.g., Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir. 1945).

427. *Strickland*, 466 U.S. at 687.

428. *Trapnell v. United States*, 725 F.2d 149, 154 (2d Cir 1983).

For example, the Court has stated that a guilty plea can be challenged if counsel did not provide defendant with advice that was “within the range of competence demanded of attorneys in criminal cases.” *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). Similarly, in *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980), the Court said that “[a] guilty plea is open to attack on the ground that counsel did not provide the defendant with ‘reasonably competent advice.’” See also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (defendant may attack plea by showing that counsel’s advice did not meet the *McMann* standards). And recently, speaking about assistance at trial, Justice O’Connor, writing for the Court, stated that “the Constitution guarantees criminal defendants . . . a competent attorney.” *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

Id. (alterations in original).

429. *Id.*

But this is exactly the problem of which I complain below. If only 1% of cases in which ineffective assistance is alleged would meet the first prong, this would show that 99% of all attorneys perform at greater or equal to reasonable competence. If our profession is so competent that 99% of criminal practitioners are of normal competence, I fail to understand statistics. Normal means the average, and the average in any large sample is 50%.⁴³⁰ Normal competency in an attorney practicing criminal law is an attorney practicing with more competence than half of the attorneys practicing criminal law and with less competence than the other half. Even if the reviewing court sees a counsel's performance is below normal—by whatever measure one uses—then *Strickland* places its second prong in the way of constitutional relief.

B. The Prejudice Standard: The Impossible Dream

As to the second prong, the prejudice standard, how does a court know if the result would have been different but for counsel's errors? The defendant must (1) affirmatively prove prejudice in "actual ineffectiveness claims alleging a deficiency in attorney performance," (2) "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and (3) "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt . . . [or] whether . . . the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."⁴³¹ "[T]he ultimate focus of inquiry" is the "fundamental fairness" of the challenged proceeding and "whether . . . 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."⁴³²

So how exactly does the reviewing court begin this inquiry and how does a defendant show a reasonable probability? In *Payne v. Arkansas*, for example, the Supreme Court refused to use a balancing test to determine the effect of a coerced confession on the result of a trial.⁴³³ "[N]o one can say what credit and weight the jury gave to the [coerced] confession."⁴³⁴ The violation of the Fourteenth Amendment for a fair trial was sufficient to justify relief.⁴³⁵ If a denial of a fundamental right does not rely on harmless error analysis, then why

430. See *Normal*, DICTIONARY.COM, <http://dictionary.reference.com/browse/normal> (last visited Nov. 7, 2012) ("Normal" is defined as follows: "noun . . . the average or mean: *Production may fall below normal* . . . the standard or type.").

431. *Strickland*, 466 U.S. at 693-95 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

432. *Id.* at 696.

433. *Payne v. Arkansas*, 356 U.S. 560, 568 (1958).

434. *Id.*

435. See *id.*

should the violation of a fundamental right depend on this second prong of the *Strickland* analysis?⁴³⁶

Certainly the test of “actual ineffectiveness” means nothing. What is actual ineffectiveness? As I have recently written in regard to “actual innocence,”

In my lifetime, appellate courts all too often have used procedure and perverted legal reasoning to uphold convictions. This must stop. Why use this actual innocence moniker? If the state had to prove the accused actually guilty then the burden of proof would be greater than beyond a reasonable doubt.⁴³⁷

One can never be actually ineffective, and the State could never rebut claims of ineffectiveness by showing the defendant “actually effective.” Counsel is either effective or not. If a defendant is denied counsel and counsel is not present during a critical stage of a criminal proceeding, there is no prejudice requirement.⁴³⁸ So, why is there a prejudice requirement when counsel is effectively absent? Does counsel have to be “actually absent” to defy prejudice analysis?

When *Strickland* says the prejudice prong finds its roots in the materiality rules affecting exculpatory evidence, this just is not logical.⁴³⁹ Certainly unrevealed exculpatory evidence must be material and favorable to the defense because by definition that is what exculpatory evidence is.⁴⁴⁰ However, to prove ineffective assistance, the convicted must show prejudice by showing “but for” counsel’s errors, his performance would be material or favorable in foreseeing whether a result at trial would have been different.⁴⁴¹ This compares apples and oranges. The term “exculpatory evidence” is a well-defined legal term, easy to perceive and apply.⁴⁴² “Effective assistance” requires a subjective analysis of the trial and a pure guess as to whether, without such errors, the result would have been different.⁴⁴³ Although the Court says there is a correlation, none exists.

436. See *Chapman v. California*, 386 U.S. 18, 23 (1967).

437. Patrick S. Metzger, *Troy Davis, Lawrence Brewer & Timothy McVeigh Should Still Be Alive: Certainty, Innocence, and the High Cost of Death and Immorality*, 6 CHARLESTON L. REV. 333, 340 n.32 (2012) (“Actually guilty would imply guilt beyond all doubt, as actual innocence requires proof of innocence beyond all doubt. Are children born actually innocent with the burden of proving themselves so?”).

438. See *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984) (“The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.”).

439. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

440. See BLACK’S LAW DICTIONARY 281 (4th pocket ed. 2011) (defining exculpatory evidence as “[e]vidence tending to establish a criminal defendant’s innocence”).

441. See *Strickland*, 466 U.S. at 694.

442. See BLACK’S LAW DICTIONARY, *supra* note 440, at 281 (defining “exculpatory evidence”).

443. See *Strickland*, 466 U.S. at 689, 695-96.

The prejudice prong is pure fiction with its genesis in the effort to protect jury verdicts. Nothing more, nothing less. It is an effort to be able to say we still believe in the sacred nature of the right to counsel and the right to effective counsel, while only rarely having to set aside a verdict. It is a rule that is now thirty years old and meaningless, creating a vast amount of litigation that only on rare occasions finds relief. The Supreme Court has found that “[c]ounsel cannot be ‘ineffective’ unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not ‘complete’ until the defendant is prejudiced.”⁴⁴⁴ There, the Court defined prejudice as harm, not the *Strickland* “but for” test.⁴⁴⁵ Perhaps the Supreme Court recognized the second prong of *Strickland* places impossible burdens on the courts to predict.

As Justice Marshall said in his dissent in *Strickland*, with the prejudice standard it is hard to tell if a convicted person “would have fared better if his lawyer had been competent.”⁴⁴⁶ Also, the purpose of the right to effective counsel is not so much to ensure the innocent are not convicted but to guarantee “convictions are obtained only through fundamentally fair procedures.”⁴⁴⁷ Unless the defendant receives “meaningful assistance in meeting the forces of the State,” there is a violation of due process.⁴⁴⁸

Therefore, the actual test of ineffectiveness is not the two-prong test of *Strickland*—used to deny claims of ineffectiveness—but whether the reviewing court feels the trial was fair and whether the defense counsel held the court to its burden of applying the rules and the law to obtain a “fair trial” through the eye of the beholder.⁴⁴⁹ There is no real right to effective assistance of counsel beyond that which would still shock the conscience of the observer. The application of *Strickland* is an example of pure results-oriented appellate oversight.

XXII. RURAL TEXAS: *GIDEON* UNREALIZED

To prove my point, an explanation of the practical application of this right to counsel will illustrate. Almost two years ago, our University was approached by those who monitor indigent defense in Texas.⁴⁵⁰ Statistics are kept in Texas monitoring the rate by which counties file cases and the number of those cases

444. United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (citing *Strickland*, 466 U.S. at 685).

445. *Id.*; see *Strickland*, 466 U.S. at 702-03.

446. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

447. *Id.* at 711.

448. *Id.*

449. See *id.* at 686 (majority opinion).

450. See Press Release, Tex. Indigent Defense Comm’n, Governor Appoints Members to Indigent Defense Commission (June 21, 2012), available at <http://www.txcourts.gov/tidc/pdf/PRESS%20RELEASE%20-%20GOVERNOR%20APPOINTS%20MEMBERS%20TO%20INDIGENT%20DEFENSE%20COMMISSION.pdf>.

that have court-appointed counsel appointed to them. In Texas, in 2010, the number of misdemeanor cases filed was 586,389, and the appointment rate for indigent defendants was 38.71%, or 226,961 persons receiving court-appointed counsel.⁴⁵¹

In a region mostly east of Lubbock, Texas, a region twice the size of the State of New Hampshire, the average appointment rate was about 10% with several counties having no appointments in years, even though cases were being filed every year.⁴⁵² To address this underserved population, Texas Tech University, through the School of Law Clinical Programs, formed the Caprock Regional Public Defender's Office (Caprock) for this region.⁴⁵³ The counties formed a co-op whereby they could contract with the University for legal services aimed at helping the poor of their counties charged with crimes.⁴⁵⁴ The office would be staffed with the help of twelve clinical students and three full-time instructors/attorneys working for the Public Defender's Office.⁴⁵⁵

We began the process of contracting with the counties in November, 2010, and in January, 2011, we started taking cases with one full-time attorney and a legal assistant.⁴⁵⁶ During 2011, we employed three students full-time in the summer to assist in the representation of clients, and in August, 2011, twelve students began a year-long clinical experience to represent the poor in what is now a sixteen county region.⁴⁵⁷ As the distances in the region are vast, we have installed a video-conferencing network throughout the region with video-conferencing computers in every courthouse and in every jail or detention facility that serves the counties.⁴⁵⁸ With the push of a button, the students and their supervisors can provide secure contact with clients, wherever in the region the clients may be, by using state-of-the-art computer facilities at the Texas Tech University School of Law.

We expected a year into this project to see the counties begin to increase their appointment rates to at least the state average. What we have discovered, however, is that only a few counties have taken advantage of the program and many continue to fail to appoint counsel at all. We have struggled with this problem and have a hypothesis.

451. See *County Indigent Defense Expenditures*, TEX. INDIGENT DEF. COMMISSION [hereinafter *County Indigent Defense Expenditures*], available at <http://tidc.tamu.edu/public.net/Reports/ExpenditureReportResults.aspx>; *Combined Statewide Indigent Defense Expenditure Report*, TEX. INDIGENT DEF. COMMISSION (on file with author), available at <http://tidc.tamu.edu/public.net/Reports/StateFinancialReport.aspx?fy=2011>.

452. See *County Indigent Defense Expenditures*, *supra* note 451. The three-year average number of cases for the sixteen original proposed counties was 1,825 cases per year total for the region, with average appointments of 194 cases per year, yielding an effective appointment average of 10.6%. *Id.*

453. See *About the Caprock Regional Public Defender Office*, TEX. TECH U. SCH. LAW, <http://www.law.ttu.edu/acp/programs/clinical/crpd/about/> (last updated Nov. 1, 2012).

454. See *id.*

455. See *id.*

456. See *id.*

457. See *id.*

458. See *id.*

In rural West Texas, the judges handling misdemeanor cases are constitutional county judges elected by the citizens of a county. This means under the Texas Constitution these judges have few qualifications other than residence within the county.⁴⁵⁹ Therefore, the judiciary overseeing misdemeanor cases are non-law-trained judges. This area, like much of Texas, is a primarily white, conservative culture with those elected to office holding similar political and philosophical views to the base of the conservative political party to which they mostly belong.

The poor in these counties are not landowners or those in political power, for the most part. Every county has a sheriff's department, most have offices of the Texas Department of Public Safety, and some have city police departments. All these counties have elected professional prosecutors or contract with prosecutors pro tem for prosecution services. The infrastructure for law enforcement is well-developed and modern for the most part. Local law enforcement is not as well-trained as their counterparts in the urban areas, but the state law enforcement officers are very well-trained and educated. The

459. See TEX. CONST. art. V, § 15 (“There shall be established in each county in this State a County Court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for four years, and until his successor shall be elected and qualified. He shall receive as compensation for his services such fees and perquisites as may be prescribed by law.”). This is the only provision within the Texas Constitution discussing the qualifications to be a county judge. See *id.* Under the Texas Election Code § 141.001,

(a) To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must:

- (1) be a United States citizen;
- (2) be 18 years of age or older on the first day of the term to be filled at the election or on the date of appointment, as applicable;
- (3) have not been determined by a final judgment of a court exercising probate jurisdiction to be:
 - (A) totally mentally incapacitated; or
 - (B) partially mentally incapacitated without the right to vote;
- (4) have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities;
- (5) have resided continuously in the state for 12 months and in the territory from which the office is elected for six months immediately preceding the following date:
 - (A) for a candidate whose name is to appear on a general primary election ballot, the date of the regular filing deadline for a candidate's application for a place on the ballot;
 - (B) for an independent candidate, the date of the regular filing deadline for a candidate's application for a place on the ballot;
 - (C) for a write-in candidate, the date of the election at which the candidate's name is written in;
 - (D) for a party nominee who is nominated by any method other than by primary election, the date the nomination is made; and
 - (E) for an appointee to an office, the date the appointment is made; and
- (6) satisfy any other eligibility requirements prescribed by law for the office . . .

(c) Subsection (a) does not apply to an office for which the federal or state constitution or a statute outside this code prescribes exclusive eligibility requirements.

counties are poor and small with some having less than 1,500 residents in a 900 square mile county. The tax base is low and the availability of natural resources is limited. There has been virtually no growth in population over the last thirty years in these counties, and government spending on tax-based projects is virtually non-existent. So, it is no wonder paying attorney's fees out of tax revenues to provide a constitutionally mandated right to the poor is seen as unnecessary.⁴⁶⁰

To quote one judge who was contemplating bringing his county into the region, "I didn't give them the money to buy the beer to get drunk, I didn't buy them the marijuana to smoke, I didn't buy them a knife to stick somebody, so why should I give them the money to get out of trouble?"⁴⁶¹ Other attitudes have included, "Yes, sure we appoint lawyers. If someone is not guilty, they get a lawyer." How about, "We really don't need defense lawyers. Mr. Jones, the county attorney, has always been fair with everyone and treats everyone right." And my favorite, "If we join this group, and our people get used to having a lawyer, and y'all go away, then they are going to expect it."

Philosophically, these counties have had a paternalistic attitude toward their poor for generations. Although I believe they act in what they believe is the best interests of their "people," they fail to understand our system was not designed as a feudal system where the working class people depend upon the good wishes of the lord of the manor to see that their needs are met and that they are treated fairly. We had a student who received two dismissals this year from a county attorney and when the orders for dismissal were presented to the county judge, he quipped that they were the first dismissals he had signed in a decade. The dismissal rate for Caprock and for our criminal defense clinic working strictly within the urban area of Lubbock, Texas, is usually between 40-45%. By our calculations, four or five of every ten cases filed in this region before our existence should have been dismissed. This is the benefit of the right of counsel in real numbers. Without the efforts of this office, vast areas of our state, and all those who live there, are subject to the good nature of law enforcement and the courts of the region instead of being subject to the rule of law and the protections of the Constitution.

One would think surely, on a regional scale, when dealing with law-trained judges those numbers should improve. Yes, in fact, they do. The felonies of the region are filed in district courts with lawyer-judges. The average appointment rate of felonies in the region is at, or slightly higher than, the state average.⁴⁶² But because of *Strickland v. Washington*, we have a system that refuses to monitor effective assistance of counsel. By the use of the

460. See *supra* Parts I, XI.

461. This is based on the author's personal experience.

462. During 2010, the Texas Indigent Defense Commission reported 277,254 new felony cases statewide with 192,076 appointments, yielding an appointment rate of 69.28%. The region's felony appointment rate was over 70%, indicating a poor population.

two *Strickland* prongs, the trial and reviewing courts can ignore problems with trial counsel.⁴⁶³ The courts can claim either counsel's performance was satisfactory under the first prong or, somehow, magically know that the mistakes at trial made no difference in the outcome of the trial and that the trial would have had the same result without the errors.⁴⁶⁴ The following section shows the real effect of such a rule.

XXIII. THE PRACTICAL EFFECT OF *STRICKLAND*

I examined all the cases in the Seventh Court of Appeals of Texas that have cited, even in passing, *Strickland v. Washington* since 1984, or have ruled on effectiveness of counsel as an issue.⁴⁶⁵ The Seventh Court of Appeals is the primary appellate court for forty-six counties of northwest Texas, which includes most of the rural counties of the region serviced by the Caprock Regional Public Defender Office and the larger urban areas of Amarillo and Lubbock, with a combined population of over 860,000 residents.⁴⁶⁶ Since 1984, 292 criminal cases, which have at least one citation reference to *Strickland v. Washington*, have been decided by the Seventh Court of Appeals.⁴⁶⁷ In the same court, a total of 556 cases since 1984 contain the phrase "ineffective assistance" and 593 cases have used the phrase "effective assistance."⁴⁶⁸ Interestingly, the court will often address this issue without reference to *Strickland*, often using other phrases and state case authority.⁴⁶⁹ I have carefully looked at these cases and have excluded those cases that do not

463. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

464. *Id.*

465. *Strickland* was decided by the United States Supreme Court on May 14, 1984. *Id.*

466. See *Welcome to the Seventh Court of Appeals*, SEVENTH CT. OF APPEALS, <http://www.7thcoa.courts.state.tx.us/> (last updated Oct. 15, 2012) (listing the counties served by the Seventh Court of Appeals); see also *About Counties*, NAT'L ASS'N OF COUNTIES, <http://cic.naco.org/live/EitLanding.aspx> (last visited Nov. 3, 2012) (providing demographics and populations of each county and state and showing that, in 2010, this represented a population of less than 4% of the total population of Texas of 25,145,511). *But see 2010 Interactive Population Map*, 2010 U.S. CENSUS, <http://2010.census.gov/2010census/popmap/> (providing statistics that demonstrate that forty-six of Texas's 254 counties contain 18% of the state's population).

467. Statewide, I found over 9,000 cases that reference *Strickland* and the reversal rate is surely higher than that of the Seventh Court of Appeals, as this figure contains habeas and discretionary review, in addition to direct appeals to the fourteen Courts of Appeal. A specific analysis of the statewide application of *Strickland* is beyond the scope of this paper. Further study should be done. I fear what happens in Amarillo, Texas, is standard operating procedure throughout the state. To their defense, the courts of appeal complain they often lack the discretion to grant relief. My argument is that the zone of reasonable disagreement used by the appellate courts in interpreting a trial court's discretion and the two-prong standards of *Strickland* are of such a subjective nature that relief is easily within the eye of the appellate beholder. Should the appellate courts choose to do so, they could do more to protect the rights of the accused and the convicted by more frequently exercising their supervisory powers over the trial courts, the prosecutors, and all the lower courts under their supervision, instead of avoiding granting the often politically difficult relief requested.

468. Search criteria and data available from the author.

469. See *Anders v. California*, 386 U.S. 738 (1967); *Stafford v. State*, 813 S.W.2d (Tex. Crim. App. 1991) (en banc).

address my concerns—eliminating cases that abate and remand a case to examine ineffectiveness, deleting cases that do not have an ineffectiveness claim but contain the language for some other purpose, ignoring civil cases, and excluding cases that include an *Ander*'s brief with the issue of ineffectiveness not being raised by the appellant pro se.⁴⁷⁰

Since 1984, out of the Seventh Court of Appeals of Texas, there are only sixteen criminal cases that have been reversed and either contain the subject language as described above or cite *Strickland*. Of these sixteen cases, nine involved trial errors by someone other than defendant's counsel;⁴⁷¹ three

470. See *Anders*, 386 U.S. at 738. *Anders* sets out the procedure for court-appointed counsel to notify the appellate court that the appeal to which he has been assigned is without merit. *Id.* The court instructs the attorney to file a motion to withdraw, together with a brief certifying that, after diligently searching the record, he has concluded appellant's appeal has no merit. *Id.* It is customary in the brief for appellate counsel to discuss potential points of error giving a reason why each point reveals no reversible error. *Id.* The appellate court must on its own review the record and assess the accuracy of appellate counsel's conclusions to uncover any reversible error. *Id.* In Texas, the *Anders* equivalent is *Stafford*. Additionally, appellate counsel, to meet the requirements of *Anders*, must file or certify giving notice to appellant of counsel's belief that there is no reversible error. *Anders*, 386 U.S. at 738. Appellant must be told of his right to file a response pro se. *Id.* Often, pro se responses are filed. *Id.*

471. *Hyer v. State*, 335 S.W.3d 859 (Tex. App.—Amarillo 2011, no pet.) (discussing a case in which a new punishment hearing was ordered and the judgment of the trial court was reversed because the trial attorney was denied his constitutional right to make a final argument by the trial court); *Castaneda v. State*, No. 07-07-0122-CR, 2009 WL 2225821, at *1 (Tex. App.—Amarillo 2009, no pet.) (reversing the case because the trial court failed to admonish the appellant on the pitfalls of self-representation); *Pena v. State*, No. 07-04-0522-CR, 2005 WL 1865531, at *3-4 (Tex. App.—Amarillo 2005, pet. ref'd) (discussing a case in which appellant's conviction was reversed and an acquittal was rendered due to an insufficiency of the evidence without a ruling on the IAC claim). Upon appeal, the court reporter could not produce a statement of facts of appellant's original plea of guilty. *Jackson v. State*, 743 S.W.2d 239, 239-40 (Tex. App.—Amarillo 1985, no writ). This was deemed by the court to be a violation of appellant's rights to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. *Id.* at 239-41. The court reversed the prior judgment and remanded for a new trial. *Id.* at 241; see *Webb v. State*, No. 07-98-0015-CR, 1999 WL 74581, at *1 (Tex. App.—Amarillo 1999, no pet.). Appellate counsel filed a motion to withdraw and an *Ander* brief, which included several potential points of error. *Webb*, 1999 WL 74581, at *1. The court of appeals overruled any of these potential errors, including an IAC claim, and allowed counsel to withdraw. *Id.* In performing its own review of the record, however, the court reversed the conviction because the trial court failed to give all the admonishments prior to appellant's plea of guilty required under Article 26.13 of the Texas Code of Criminal Procedure. *Id.* at *2-3. "That is, the court was obligated to inform appellant that a plea of guilty could result in deportation if he were not a citizen." *Id.* at *2 (citing TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989)); see *Medley v. State*, 47 S.W.3d 17, 20 (Tex. App.—Amarillo 2000, no pet.). Appellant requested, prior to trial, to withdraw his waiver of counsel. *Medley*, 47 S.W.3d at 20. The trial court refused the withdrawal and put appellant to trial which resulted in a reversal. *Id.* at 21; *Lary v. State*, 15 S.W.3d 581 (Tex. App.—Amarillo 2000, pet. ref'd) (discussing an appellant's conviction that was reversed on the trial court's failure to disclose the informant without ruling on the IAC claim); *Jackson*, 743 S.W.2d at 240-41. The trial court erred in failing to grant appellant's motion to quash the charging information for failing to give proper notice. *Jackson*, 743 S.W.2d at 240-41. The conviction was reversed and the information was dismissed. *Id.* The court ruled, inter alia, that if the information was allowed to stand, appellant's "right to the effective assistance of counsel, guaranteed by the Sixth Amendment to the U.S. Constitution; Article I, Section 10 of the Texas Constitution; and Article 1.05 of the Code of Criminal Procedure" would be violated. *Id.* at 239-40; *Martinez v. State*, 802 S.W.2d 105, 108 (Tex. App.—Amarillo 1990, no writ); *Madden v. State*, 630 S.W.2d 380, 382 (Tex. App.—Amarillo 1982), *aff'd*, 644 S.W.2d 735 (Tex. Crim. App. 1983). Without ruling on the IAC claim, the judgment of conviction was reversed and the matter remanded because appellant's confession should "have been excluded from evidence because it was

findings of ineffectiveness were reversed by the court of criminal appeals;⁴⁷² one was reversed by the court of criminal appeals with instructions to the court of appeals to rule on the IAC claim—which was never done,⁴⁷³ and only three were reversed for trial attorney ineffectiveness.⁴⁷⁴ I have combined and compared lists of cases, and during this time while reversing three cases, the court of appeals affirmed 425 cases that included an IAC claim.⁴⁷⁵ This is a reversal rate of 0.7 of 1% (0.007) in twenty-eight years. Many of the cases involved violations of the first prong of *Strickland*, but only two of the three reversed cases found a violation sufficient to grant relief on that basis.⁴⁷⁶

obtained through exploitation of his illegal arrest.” *Madden*, 630 S.W.2d at 382. None of these cases involved wrongdoing in any measure by trial counsel.

472. *Yzaguirre v. State*, 938 S.W.2d 129 (Tex. App.—Amarillo 1996), *rev'd*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997) (en banc) (judgment of the court of appeals reversed and judgment of trial court affirmed); *Freeman v. State*, No. 07-97-0347-CR, 1999 WL 1212702, at *5 (Tex. App.—Amarillo 1999, pet. granted, judgment vacated w.r.m.), *vacataroughed*, *Freeman v. State*, 74 S.W.3d 913 (Tex. App.—Amarillo 2002, pet. ref'd) (affirming Freeman’s conviction). In *Freeman*, the court of appeals abated Freeman’s appeal and remanded to the trial court because Freeman failed to file his appellate brief timely. *Freeman v. State*, No. 07-97-0347-CR, 1998 WL 406074, at *1 (Tex. App.—Amarillo 1998, no pet.). Appeal was once again abated and remanded for the same purpose in *Freeman*. *Freeman v. State*, No. 07-97-0347-CR, 1999 WL 525468, at *1 (Tex. App.—Amarillo 1999, no pet.). After remand, the court of appeals reversed the conviction finding trial counsel was rendered ineffective due to the trial court refusing to permit specific questions on voir dire. *Freeman*, 1999 WL 1212702, at *5. Upon review, this matter was remanded by the court of criminal appeals to the court of appeals and the conviction finally affirmed in accordance with the remand in *Freeman* and *Menefield*. *Freeman*, 74 S.W.3d at 913; *Menefield v. State*, 343 S.W.3d 553 (Tex. App.—Amarillo 2011), *rev'd*, 363 S.W.3d 591 (Tex. Crim. App. 2012). This case was reversed by the Amarillo Court of Appeals for ineffective assistance of counsel for failure of the trial attorney to make a confrontation objection to the admission of a laboratory report without proper predicate or authentication. *Menefield*, 343 S.W.3d at 556. The court of criminal appeals recently found the court of appeals erred in its determination that the record on direct appeal was sufficient to find trial counsel ineffective when counsel’s actions could have been based on reasonable strategy. *Id.* Without the record containing counsel’s reasons for not objecting and without the record establishing whether the laboratory analyst could or would have testified had counsel objected, trial counsel was not shown to be ineffective under *Strickland*. *See id.*

473. *Sneed v. State*, 625 S.W.2d 761 (Tex. App.—Amarillo 1981), *rev'd and remanded*, 670 S.W.2d 262 (Tex. Crim. App. 1984). Court of appeals never ruled on IAC claim on remand. *See Sneed*, 670 S.W.2d at 263-70.

474. *See Ramirez v. State*, 65 S.W.3d 156, 156 (Tex. App.—Amarillo 2001, pet. ref'd) (reversing the conviction for ineffective assistance of counsel for trial attorney in summation using the pejorative term “drunk Mexican” and then failing to object to the prosecution’s improper exponential use of the term); *Smith v. State*, 894 S.W.2d 876, 876 (Tex. App.—Amarillo 1995, writ ref'd) (holding that trial counsel’s failure to interview witnesses or investigate facts was ineffective assistance of counsel undermining confidence in the outcome of trial); *Salazar v. State*, 222 S.W.3d 7, 7 (Tex. App.—Amarillo 2005, pet. ref'd) (holding that trial counsel was ineffective for failing to file a motion for new trial to protect client’s rights to appeal). Appeal was abated, and on remand, the trial court found trial counsel ineffective, new counsel was appointed, and eventually Salazar’s conviction was affirmed. *See Salazar v. State*, No. 07-04-0090-CR, 2004 WL 2608303, at *2 (Tex. App.—Amarillo 2004, pet. ref'd); *Salazar v. State*, 222 S.W.3d 10, 10 (Tex. App.—Amarillo 2006, pet. ref'd). As the *Salazar* case is not a trial effectiveness case but an error after conviction in regard to the motion for new trial, great latitude is given by including *Salazar* as one of the three cases where the court granted effectiveness relief. *See Salazar*, 222 S.W.3d at 18. If the cases reversed only numbered two, the reversal rate would be a miserly 0.47%.

475. List of cases affirmed is on file with author.

476. The court concluded there existed a probability, sufficient to undermine its confidence in the outcome, that trial counsel’s deficiencies prejudiced appellant. *Ramirez*, 65 S.W.3d at 160. In the second

Plainly, *Strickland* provides a remedy for a problem that either does not occur, or the problem occurs and *Strickland* provides a method for sidestepping the issue.

Some say that ineffectiveness is better suited for habeas collateral relief as it is limited in application to the record and often the record is insufficient to justify a finding of ineffectiveness.⁴⁷⁷ Nonsense. This is just another reason for the courts to not grant relief. The members of the appellate courts are all lawyers and, in many cases, are perfectly capable of making a decision on the two prongs of *Strickland* from the record.⁴⁷⁸ After all, the court of criminal appeals “is not the only court in the state possessed of the legal acumen necessary to understanding *Strickland v. Washington*.”⁴⁷⁹

The forcing of ineffective claims into habeas has another, hopefully unintended, consequence. In Texas, there is no right to counsel in habeas proceedings, so the defendants are generally on their own.⁴⁸⁰ This means that the habeas petitions are most often written by writ writers in the penitentiary who focus mainly on felonies, while errors in misdemeanor cases go unchallenged. With the increase in collateral consequences, many misdemeanors carry serious consequences, and most indigent people are foreclosed from considering the filing of a habeas petition because of the denial of counsel. Also, some warn that the court of criminal appeals incorrectly interprets claims of ineffectiveness brought on direct appeal, consequently barring further claims of ineffectiveness.⁴⁸¹ I can attest that the fear of foreclosing collateral attack has a chilling effect on appellate lawyers contemplating ineffective claims on direct appeal.⁴⁸² The appellate process in

case, the court found trial counsel’s unprofessional errors by failing to interview witnesses or investigating facts undermined confidence in the outcome of the trial. *Smith*, 894 S.W.2d at 879-80. The third case was not a trial error but a post-conviction error. *Salazar*, 222 S.W.3d at 9. In all three cases, the court specifically discussed neither *Strickland*’s prong one (whether counsel’s representation fell below an objective standard of reasonableness) nor whether the court believed under prong two that but for counsel’s unprofessional errors the result of the proceeding would have been different. *Id.*; *Smith*, 894 S.W.2d at 879-80; *Ramirez*, 65 S.W.3d at 160. Even though in the two trial cases, *Ramirez* and *Smith*, the court found a probability sufficient to undermine confidence in the outcome, the court granted relief under *Strickland* without specifically finding the results of the trial would have been different. *Smith*, 894 S.W.2d at 879-80; *Ramirez*, 65 S.W.3d at 160. This I believe to be a conscious decision not to get into the business of reading the tea leaves of what might have been.

477. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (“In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel’s actions.”).

478. *See Strickland v. Washington*, 466 U.S. 668, 699-700 (1984).

479. *Id.* at 69 (Meyers, J., dissenting).

480. *See Ex parte Graves*, 70 S.W.3d 103, 111 (Tex. Crim. App. 2002).

481. *Mallett*, 65 S.W.3d at 70 (Meyers, J., dissenting).

482. Justice Meyers in the *Mallett* dissent gave the proper way for the court to rule in these cases, to wit, “that the record was insufficient to evaluate counsel’s performance,” overruling “the Sixth Amendment claim without prejudice to the appellant’s ability to dispute counsel’s effectiveness collaterally.” *Id.* Sadly, the majority in that case said, “[I]t is not our job to preserve Mallett’s habeas rights.” *Id.* at 66. This goes to the heart of my argument. It is the job of the judiciary to protect the rights of the accused and convicted. It is not

Texas is broken and of no real benefit except to the civil bar—and members of the plaintiff’s bar would argue that.

XXIV. CONCLUSION

The citizens of Texas are no better served than they were over a century ago. Rural Texas is virtually without representation as few lawyers work in these areas and fewer live there. The lawyers who do work or live in the rural areas are generally the prosecutors. Are the lawyers of this region, including both rural and urban areas, performing at 99% of the professional norm—that objective standard of reasonable effectiveness? *Strickland* is as benign as Justice Marshall predicted it would be.⁴⁸³ The performance standard “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.”⁴⁸⁴ Judges have “to advert to their own intuitions regarding what constitutes ‘professional’ representation.”⁴⁸⁵ And the “objective standard of reasonableness” suffers from “debilitating ambiguity.”⁴⁸⁶ Judges, both at the trial level and the appellate level, are not going to grant relief under *Strickland* unless there is a serious, extreme case. The courts have long established they will not tamper with the verdicts of the trial courts unless the error is so grievous that justice demands.

Let me dare to speak truth to power.⁴⁸⁷ As long as the appellate courts continue to invent concepts such as harmless error, apply waiver whenever possible, invent standards that are virtually impossible to understand, and refuse to implement these standards except to deny relief to the appellant, (such as they do when applying the *Strickland* standards and the abuse of discretion standard); as long as prosecutors are allowed to violate their duties by seeking convictions at all costs; and as long as trial judges make their rulings based on political expediency, there will be no improvement. The reason: we have fewer

the judiciary’s job to constantly look for ways to deny relief. What does it say of our profession when the defense bar refers to the court of appeals as the court of affirmance?

483. See *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting).

484. *Id.*

485. *Id.* at 708.

486. *Id.*

487. SPEAK TRUTH TO POWER was coined as the title to a study of International Conflict subtitled A QUAKER SEARCH FOR AN ALTERNATIVE TO VIOLENCE prepared for the American Friends Service Committee, March 2, 1955. The study is a plea for reason, peace, love, and pacifism in a world constantly on the verge of violence. AM. FRIENDS SERV. COMM., SPEAK TRUTH TO POWER: A QUAKER SEARCH FOR AN ALTERNATIVE TO VIOLENCE 59 (1955), available at <http://afsc.org/document/speak-truth-power>.

This does not mean that men in government should not be challenged with the full weight of a program for peace. On the contrary, Quakers have always believed it was necessary to speak truth to power. Our concern is to reach all men, the great and the humble, and though power in America ultimately rests with the humble, the great wield it, and must, therefore, carry peculiar responsibility.

Id.

appellate judges today with the backbone to ensure that trial courts provide fair trials with all guaranteed constitutional protections for the accused. In our history, we had appellate courts and jurists who thoughtfully applied the Constitution without political consideration. I wonder what would Justice Fortus or Justice Black think of the progeny of *Gideon v. Wainwright*?

During the past ten years, in the capital arena, we have seen great improvements in defense capabilities and many more Texas trial courts adhering to the dictates of the Supreme Court. Unfortunately, however, even when the stakes are the highest, I have seen district judges perform with only their self-interest in mind. And when the crimes are of a lower profile, the judges often appear to rule without conscience to the rights of the accused. The judges of our constitutional county courts try to do what they feel is the right thing, but often, they are simply ill-prepared to face the realities of a courtroom or the harsh realities of leadership when the budget of their county should be less important than the rights of the citizens.

Even the abuses that exist in some of the district courts will never be corrected as long as the appellate courts continue to protect them and the federal courts allow almost unfettered immunity.⁴⁸⁸ Where does it say in the law that only counsel for the defense must know the law, conform to the rules, and perform his duties to such a high level or be subject to ridicule and professional embarrassment by being threatened and occasionally found ineffective?⁴⁸⁹ With judicial and prosecutorial immunity and the tendency of the appellate courts to protect the trial judges and the prosecutors, our system has moved away from requiring all officers of the court to adhere to their duties. All officers of the court have a duty to the Constitution and a duty to the defendant—to protect the defendant and his right to a fair trial by enforcing the fundamental rights of freedom.⁴⁹⁰ The elected officials should feel less concerned with their jobs and more concerned with their profession and the oaths they took upon entering that profession.

When I was a baby lawyer, district judges and district attorneys in rural areas of Texas made \$35,000 a year, served many counties on a circuit, had no

488. I cannot remember how many times I have heard a trial judge say, “I guess those boys in Amarillo are going to have to tell me I’m wrong.” With the complete lack of neutrality in some courts, with ex parte conversations with prosecutors being common place, and with the basic design of courthouses making the prosecutors’ offices as prominently designated as the clerks and courts—with space for public defenders often in out-of-the-way locations or not provided at all—it is no wonder the accused is at a disadvantage. The many abuses in the current system need study and reform. Compensation for indigent defense must come into line with reasonable comparable professional fees, and costs for investigation and experts must be brought to parity with the prosecutors.

489. I was instructed in 1996—during the swell of death penalty habeas petitions following the implementation of the Federal Antiterrorism and Effective Death Penalty Act (AEDPA)—by a then member of the Texas Court of Criminal Appeals that if I wanted to expect any relief at all in habeas that I had to couch my claims under the banner of ineffective assistance of counsel, as this was the only realistic avenue to success.

490. See *Strickland*, 466 U.S. at 711-12 (Marshall, J., dissenting).

coordinators, administrators, or secretaries, and often rode together with the court reporter to each rural county as little as once a month to service the needs of the citizens of the county. Being an elected official at that time was a calling. Now, it takes little time in a courtroom in Texas to determine that the political well-being of the politician is the primary concern. We should once again put the responsibility on the courts and prosecutors to help ensure a fair trial by requiring all officers of the court to protect the accused citizen. After all, wasn't the sleeping lawyer in the courtroom with other officers of the court all sharing the same duty? We must all protect the Constitution by our recommitment to doing the right thing to protect our rights and, in particular, the right to counsel. Lest we may find the words of Justice Brown, writing for the Supreme Court in 1898, describing a criminal justice system lost to history:

The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But, to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.⁴⁹¹

Or has it?

491. *Holden v. Hardy*, 169 U.S. 366, 386 (1898).