TRULY INEFFECTIVE ASSISTANCE: A COMPARISON OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

I. INTRODUCTION

Both the United States of America and the United Kingdom[1] have adopted standards to curb miscarriages of justice resulting from ineffective assistance of counsel.[2] Yet, both countries'[3] efforts have fallen short of solving

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1. *See* U.S. Department of State: Background Note: United Kingdom, *available at* http://www.state.gov/r/pa/ei/bgn/3846.htm (last visited Aug. 11, 2002) [hereinafter United Kingdom]. Official name: The United Kingdom of Great Britain and Northern Ireland. *See id.* The United Kingdom consists of Great Britain, Northern Ireland, Scotland, and Wales. *See, e.g.*, Sarah Carter, *Update to A Guide of the UK Legal System, at* http://www.llrx.com/features/uk2.htm (last visited Aug. 11, 2002) [hereinafter *Update*]. The government is a constitutional monarchy. *See* United Kingdom. Originally, Scotland and Wales were independent kingdoms that resisted British rule. *See id.* Wales was conquered in 1282, but it was not until 1536 that an act completed its political and administrative union with England. *See id.* Beginning in 1603, England and Scotland were ruled under one crown, but kept separate parliaments. *See id.* It was not until 1707 that England and Scotland were unified as Great Britain. *See id.* A legislative union between Ireland and Great Britain was completed in 1801. *See id.* The union had been preceded by centuries of battles between England and the Irish for control of Ireland. *See* United Kingdom. The Anglo-Irish Treaty of 1921 established the Irish Free State, in which part of Ireland left the United Kingdom and became a republic after World War II. *See id.* However, six northern counties have remained part of the United Kingdom. *See id.*

2. The United States' standard for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*, 467 U.S. 1267 (1984); The United Kingdom's standard is set out in both *R. v. Clinton*, [1993] 1 WLR 1181, and *Anderson v. H.M. Advocate*, 1996 S.L.T. 155. The United Kingdom's standard for ineffective assistance of counsel was further refined by the Human Rights Act of 1998. *See* Human Rights Act of 1998, *at* http://www.legislation.hmso.gov.uk/acts/acts1998/80042--a.htm (last visited Aug. 11, 2002) [hereinafter Act]. All three of the cases and the Act will be discussed in subsequent sections of this note. Although the United States of America and the United Kingdom are the focus of this Note, other nations also have established standards for ineffective assistance of counsel. *See* Neil Gow, *"Flagrant Incompetency" of Counsel*, NEW L.J. 146, 153 (1996). In Canada, the standard is that a court can intervene if it finds that there was "a real possibility that any miscarriage of justice had occurred due to the flagrant incompetency of counsel." *Id.* at 153, *quoting* R. v. Garofolio (1988) 91 CCC (3rd) 103. (1988) 91 CCC (3rd) 103. In Jamaica, the standard is "whether the effect of the failure to put the defendant's case was such as to render the conviction unsafe and unsatisfactory." *Id. quoting* Mills v. Queen, [1995] 3 All ER 865. Argentina has not established a standard for determining ineffective assistance of counsel, however, it does have a constitutional right to an "effective defense." *See* CRAIG BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 49 (1999). In Russia, everyone has the "right to qualified legal counsel." *Id.* at 317. Ineffective assistance of counsel has become a problem because people with no formal legal training are allowed to act as defense counsel. *See id.* There are no recorded instances of a Russian defendant lodging an appeal claiming that defense counsel was incompetent. *See id.* However, people are increasingly lodging complaints with the Chairman of the local Court, the Russian Supreme Court, or one of the Collegia of Advocates regarding the professional conduct of defense counsel. *See id.* The Collegia of

the problem of ineffective assistance of counsel. In fact, each respective standard has been insufficient from an overall perspective, leaving room for improvement on both sides of the Atlantic.

Given the nature of the problem, defense counsel[4] are the easiest to blame for the standards' deficiencies. However, it is the United States' and United Kingdom's legal systems as a whole, that have ultimately allowed for such failure. The amount of deference that each system provides counsel's tactical and strategic decisions has allowed inept counsel to go unpunished for ineffective representation and lowered the bar by which each system's counsel is measured.[5] This disregards what each standard should be accomplishing. Both systems should be establishing what constitutes effective assistance of counsel, rather than contributing to each standards' decline.[6]

At their extremes, what passes for effective assistance of counsel in both the United States and the United Kingdom is baffling. Two such examples are *Smith v. Ylst*,[7] a United States case and *Egan v. Normand*,[8] a United Kingdom case.

In *Smith*, the United States Court of Appeals for the Ninth Circuit held that a per se ineffective assistance of counsel rule should not be applied where counsel is found to be mentally ill.[9] Instead, the court found that the

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Advocates has the authority to investigate and dictate the proper penalty to a member attorney. *See id.* at 317.

3. *See* United Kingdom, *supra* note 1. The United States and the United Kingdom are close allies. *See id.* British foreign policy calls for close coordination with the United States. *See id.* The countries' cooperation is evident in their "common language, ideals, and democratic practices . . . ." *Id.* The United Kingdom is the United States' fourth largest market after Canada, Japan, and Mexico. *See id.* Both continually consult one another on foreign policy issues and share foreign and security policy objectives. *See id.* The United States and the United Kingdom also share the world's largest investment partnership. *See* United Kingdom.

4. For the purposes of this paper, United States' defense attorneys and United Kingdom's barristers and solicitors will be referred to as "counsel," except in certain circumstances in order to provide uniformity throughout the Note. Counsel is defined as "one or more lawyers who represent a client." BLACK'S LAW DICTIONARY 284 (7th ed. 2000). In the United Kingdom, solicitors and barristers make up the two branches of the legal profession. *See Update*, *supra* note 1. Solicitors are defined as "a legal adviser who consults with clients and prepares legal documents but is not generally heard in High Court or (in Scotland) Court of Session unless specifically licensed." BLACK'S at 1124. A barrister is defined as "a lawyer who is admitted to plead at the bar and who may argue cases in superior courts." *See id.* at 117.

5. *See Strickland*, 466 U.S. at 689-90 (1984). *See also* Gow, *supra* note 2.

6. *See* Paul J. Kelly, *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089 (2001).

7. Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 480 US 829 (1988).

8. Egan v. Normand, 1997 S.L.T. 1166.

9. *See Smith*, 826 F.2d at 876. The defendant was convicted of first degree murder for shooting and killing his wife two days after their marriage ended. *See id.* at 874. The defendant's contentions focused mostly on his counsel's out of court statements. *See id.* Counsel believed that Smith was the target of a murder conspiracy involving the victim's lover and relatives. *See id.* Counsel introduced this conspiracy in his opening statements but did not develop the theory at trial. *See id.* Also, counsel's secretary stated that counsel told her he was

Strickland test[10] was sufficient to determine if mentally ill counsel was ineffective.[11] The court found that "mental illness is too varied in its symptoms and effects" to warrant a per se ineffective assistance of counsel rule for mental illness without evidence that counsel's performance was below constitutional standards.[12] Rather, the court believed it would be better to "evaluate the attorney's actual conduct . . . in light of allegations of mental incompetence."[13]

In *Egan*, the defendant appealed his conviction for breach of peace because his trial counsel was defective.[14] The defendant obtained new counsel for his appeal, but the defendant's appellate counsel also made a critical mistake.[15] While in front of the High Court of Justiciary,[16] appellate counsel admitted to not preparing for the hearing despite having eight months time to prepare.[17] Moreover, counsel could not provide an explanation for her lack of preparation.[18] The High Court held that the appeal could not proceed because counsel had not prepared for the appeal.[19] It appears, unfortunately, that the defendant lost at both the trial and appellate levels due to the ineptitude of his respective counsel.[20]

While the above cases do not represent the absolute norm regarding both standards, they are fair representations of the logic of the legal systems and of counsel's conduct regarding ineffective assistance of counsel. Given this, it is clear that both standards are in need of reforms. From a broad perspective,

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crazy and wanted to go to an asylum. *See id.* Counsel was also concerned that people were out to kill him. *See Smith*, 826 F.2d at 874.

10. *See Strickland*, 466 U.S. at 668. The *Strickland* test will discussed in depth in Part I(A) of this note.

11. *See Smith*, 826 F.2d at 876.

12. *See id.*

13. *Id.* The Ninth Circuit concluded that "if a mental illness or defect indeed has some impact on the attorney's professional judgment it should be manifested in his courtroom behavior and conduct of the trial." *Id.* at 876. For a more detailed examination of cases of this type see Jeffery Kirchmeier, *Drink, Drugs, and Drowiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996). Kirchmeier noted that, at the time of his article, courts applying the *Strickland* test to attorneys who were mentally impaired by drugs, alcohol, or psychological ailments had yet to find any of them constitutionally ineffective. *See id.* at 460.

14. *See Egan*, 1997 S.L.T. at 1167. The defendant alleged that his trial counsel did not present a defense, acted contrary to defendant's instructions, failed to challenge evidence properly, and failed to discover evidence that provided a legitimate explanation of the defendant's actions. *See id.*

15. *See id.*

16. *See Update*, *supra* note 1.

17. *See Egan*, 1997 S.L.T. at 1167.

18. *See id.* at 1166. Counsel stated that her firm recently instructed her to represent the defendant and that her firm advised her that she would have to take certain steps, obtain information, and obtain statements in order to support the appeal. *See id.*

19. *See id.* at 1167-68. The Court stated that had counsel taken the appropriate steps when it had time, a successful presentation on appeal would have likely led to the Court setting aside the verdict. *See id.* at 1168.

20. *See id.*

neither standard is truly effective. Simply put, the standards for ineffective assistance of counsel in both the United States and the United Kingdom are themselves ineffective.[21]

At this point, two questions emerge; why are both systems' standards ineffective and what can be done to improve both standards? This Note will examine the United States' standard and the United Kingdom's standard separately to fully answer both questions.

Part II of the Note will examine the United States' standard of ineffective assistance of counsel. Subsection I(A) will explore the history and development of right to counsel, the test for ineffective assistance of counsel, and subsequent relevant case law addressing that test. Subsection I(B) will address the different areas in American case law where ineffective assistance of counsel is prevalent, as well as illustrate the inconsistency of the *Strickland* test.[22] Finally, subsection I(C) will address criticisms of the United States' standard.

Part III will examine the United Kingdom's standard for ineffective assistance of counsel and will follow the preceding section's format. Subsection II(A) will explore the history and development of ineffective assistance of counsel in the United Kingdom. Subsection II(B) will address and compare United Kingdom case law concerning ineffective assistance of counsel. Subsection II(C) will address criticisms of the United Kingdom standard, with particular focus on the actions of solicitors.[23]

Part IV will provide some general suggestions to make each standard more efficient and effective. New rules and policy considerations will be suggested to eliminate the problems that plague both standards. The Note will conclude with an overview of the essential problems inherent in each standard and suggest remedies to those problems.

II. INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED STATES

The United States legal system[24] is based on the adversarial process.[25]

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21. *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1259 (2001). "Unfortunately, both [the United Kingdom's and the United States' adversarial processes] suffer from endemic, inadequate performance by the defense." *Id.* (emphasis added).

22. *See Strickland*, 466 U.S. at 687.

23. *See* BLACK'S, *supra* note 4, at 1124.

24. The United States of America has the largest legal profession in the world. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 267 (2nd ed. 1998). Technically, there is no such thing as an "American lawyer" since each state admits its own lawyers. *See id.* Each state has its own separate court system, with no two exactly alike. *See id.* at 75. Above the state courts is the federal court system; at least one federal court sits in each state. *See id.* Most state courts operate through a three-tier system: trial courts, appellate courts, and supreme courts. *See id.* at 79. However, some states, such as South Dakota, only have a two-tier system. *See id.* Federal courts also have a three tiered system. *See* FRIEDMAN at 79-80. Those three tiers consist of district courts, courts of appeal, and finally the Supreme

The emphasis on the adversarial process denotes counsel's importance in shaping the law and advocating a client's position.[26] The United States recently, in terms of legal history, created the standard for ineffective assistance of counsel.[27] Despite the standard's relatively recent development, concern over the effective assistance of counsel dates back decades before the standard's establishment.

A. History of the American Standard

The Sixth Amendment of the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[28] This seminal rule established by the Framers of the United States Constitution remained rather undeveloped until the early part of last century.[29] In 1932, the Supreme Court of the United States began expanding the scope of right to counsel and subsequently the right to effective counsel, with *Powell v. Alabama*.[30] In *Powell*, the Supreme Court held that indigent defendants[31] had a right to effective assistance of

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Court of the United States. *See id.* at 80-81. The Court of Appeals is the end of the line for most cases. *See id.* The Supreme Court has almost complete control over their docket and only hears a small percentage of cases. *See id.* at 81.

25. *See* Griffin, *supra* note 21, at 1244.

26. *See generally* Kimmelman v. Morrison, 477 U.S. 365 (1986). In the United States, the right to counsel is a fundamental right assuring fairness in, and legitimizing the adversarial process. *See id.* at 374. "Vigorous representation by effective counsel is central to the legitimacy and premises of the adversary system. Because the theory upon which the adversary systems rests is that the 'truth' is 'best discovered by powerful statements on both sides of the question . . . .'" ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE: A CRITICAL PERSPECTIVE 30 (1992), *quoting* Powell v. Alabama, 287 U.S. 45, 53 (1932).

27. *See Strickland*, 466 U.S. at 668.

28. U.S. CONST. amend. VI. For a full and detailed examination of the Sixth Amendment see GARCIA, *supra* note 26. Common opinion finds that the Sixth Amendment only vests rights in the accused and not the prosecution, victim, or community. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 167 (1995). However, the prosecution also enjoys Sixth Amendment rights as well. *See id.* The prosecution enjoys a right to a speedy trial and to challenge the jurors, among other powers. *See id.*

29. *See* Bruce A. Green, *Lethal Fiction: The Meaning of Counsel in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-39 (1993). The Framers' purpose behind this right to assistance of counsel was to ensure that laws such as those in England, where the criminal defendant was required to represent himself, would not be enacted in the United States. *See id.* at 57.

30. Powell v. Alabama, 287 U.S. 45 (1932). The defendants, all African-Americans, were charged with the rape of two white girls. *See id.* at 49. At arraignment the defendants were not asked whether they had or could obtain counsel. *See id.* at 52. Though an attorney volunteered to appear with whomever the court appointed counsel, the trial court refused to appoint specific counsel. *See id.* at 53. Rather, the trial judge appointed "all the members of the bar for the purpose of arraigning the defendants," and anticipated those members to continue representing the defendants during trial. *See id.*

31. An indigent defendant is "[a] person who is too poor to hire a lawyer and who, upon indictment, becomes eligible to receive aid from a court-appointed attorney and a waiver of court costs." BLACK'S, *supra* note 4, at 620.

counsel in capital cases.[32] The Court furthered this stance nearly thirty years later in *Gideon v. Wainwright*,[33] holding that due process requires that counsel be appointed for an indigent defendant charged with a felony.[34] In 1970, the Supreme Court continued expanding the right to counsel in *McMann v. Richardson*,[35] holding that effective assistance of counsel must be reasonable.[36]

By the middle of the 1980's, the Supreme Court had greatly broadened a defendant's right to counsel and, more specifically, to a defendant's right to effective assistance of counsel. However, the Supreme Court had not yet established a standard to determine what constituted ineffective assistance of counsel, and as a result, lower courts struggled to make any such a determination.[37] In 1984, the Court finally established a definitive standard in *Strickland v. Washington*.[38]

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32. *See Powell*, 287 U.S. at 73. The Court stated that:

> The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to more serious crimes, and in a very limited number, to capital cases.

Id. Justice Sutherland said, "[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.* at 68-69. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938) (The Sixth Amendment compels the assistance of counsel in all prosecutions, unless the accused waives counsel). *But see* Betts v. Brady, 316 U.S. 455 (1942) (The Fourteenth Amendment does not command that a defendant be represented by counsel in a state court. However, the Court did find that every court has the power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness).

33. Gideon v. Wainwright, 372 U.S. 335 (1963).

34. *See id.* at 349. "The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' . . . there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." *Id.* Interestingly, despite being denied counsel, Gideon conducted a decently thorough case given his abilities and the hostile position that he had been placed in. *See id. See also* Jeffery Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 153 (2001). Gideon made an opening statement, cross-examined State witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument that emphasized his innocence. *See Gideon*, 372 U.S. at 337.

35. McMann v. Richardson, 397 U.S. 759 (1970).

36. *See id.* at 770-71. "Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter . . . on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id. See also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (Indigent misdemeanor defendants who could be sentenced to imprisonment can have access to counsel).

37. *See* Amy R. Murphy, Note, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 SUM LAW & CONTEMP. PROBS. 179, 189 (2000).

38. *See Strickland*, 466 U.S. at 668. The defendant pled guilty to three first-degree murder charges. *See id.* at 672. The defendant requested his counsel look at his background, however, counsel only talked with the defendant's wife and mother and did not follow up on the matter. *See id.* at 672-73. The defendant also requested a psychiatric examination, however counsel did not request an examination since the defendant gave no indication that the

In *Strickland*, the Supreme Court created a two-prong test [hereinafter the *Strickland* test] for determining ineffective assistance of counsel.[39] First, a court must determine whether counsel's performance was deficient.[40] Secondly, a court must determine whether counsel's deficiency was prejudicial to the defendant's defense.[41]

To determine whether counsel was deficient, the proper inquiry is whether the counsel's conduct fell below an objective standard of reasonableness.[42] In order to satisfy the prejudice prong, 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."[43] The Court noted that a court, in determining the prejudice prong, "must consider the totality of the evidence [that was] before the judge or jury."[44] Ultimately, the defendant wants to "undermine [the] confidence in the outcome [of the trial]."[45]

The Supreme Court elaborated on the prejudice prong in *Lockhart v. Fretwell*.[46] The Court held that overall fairness should be considered[47] rather than focusing "solely on mere outcome determination."[48] However, *Lockhart's* "fundamental fairness" holding was limited soon after in *Williams v. Taylor*.[49] In *Williams*, the Court re-characterized the analysis of

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defendant had psychological problems. *See id.* at 673. The defendant appealed on the ground that counsel was ineffective for not presenting character evidence and failed to request the psychiatric report, among other complaints. *See id.* at 675.

39. *See Strickland*, 466 U.S. at 668.

40. *See id.* at 687.

41. *See id.*

42. *See id.* at 688.

43. *Id.* at 694. To prove the prejudice prong in ineffective assistance of counsel cases involving guilty pleas, the defendant must show that there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

44. *Strickland*, 466 U.S. at 695. *But see*, Murray v. Carrier, 477 U.S. 478, 496 (1986) (An isolated error may be enough to find counsel ineffective if that error is sufficiently egregious and prejudicial).

45. *Strickland*, 466 U.S. at 694 (emphasis added).

46. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant was convicted for felony murder after killing a person during a robbery. *See id.* at 366. The defendant argued that his counsel was ineffective for failing to argue that since "an aggravating factor that duplicates an element of the underlying felony . . . " his death sentence is unconstitutional. *Id.* at 367. The Supreme Court found that counsel was not ineffective. *See id.*

47. *See id.* at 374.

48. *Id.* at 369. Justice O'Connor in her concurrence stated that "[T]oday's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under [the *Strickland* test]." *Lockhart*, 506 U.S. at 373 (O'Connor, concurring) (emphasis added). "This case . . . concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373.

49. Williams v. Taylor, 529 U.S. 362 (2000). The defendant was convicted of robbery and capital murder. *See id.* at 368. The defendant argued that his counsel was ineffective for failing to investigate and present mitigating evidence during the sentencing phase of the defendant's trial. *See id.* at 390. The Supreme Court held that the defendant's right to effective

"fundamental fairness" as a concern for both the substantive and procedural rights of a defendant.[50]

It should be noted that both prongs of the *Strickland* test do not have to be present in order to determine whether counsel was ineffective.[51] Moreover, the Court recognized that in certain contexts prejudice is presumed.[52] Such instances include "[a]ctual or constructive denial of the assistance of counsel"[53] and "various kinds of state interference with counsel's assistance."[54] The Court found that a case by case inquiry into the above instances is not worth the cost since such prejudicial impairments are easily identifiable.[55]

In addition to establishing the test for ineffective assistance of counsel in *Strickland*, the Supreme Court also set out additional parameters for a court to take into consideration when determining if counsel was ineffective.[56] The Court found that there is a strong presumption that counsel rendered adequate assistance.[57] The Court also noted that no "particular set of detailed rules . . . can satisfactorily take account [for] the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a [client]."[58] Moreover, and most significantly, the Court stressed that courts should be deferential to counsel's strategic and tactical decisions.[59]

As a result of these additional parameters, defendants have to overcome many presumptions by the court that are in counsel's favor and have difficulty in simply getting an ineffective assistance of counsel claim heard on appeal.[60]

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counsel was violated. *See id.* at 399.

50. *See id.* at 393. Fretwell's ineffective counsel did not deny him any substantive or procedural rights, thus he did not satisfy the prejudice prong of the *Strickland* test. *See Williams*, 529 U.S. at 392-93.

51. *See* Strouse v. Leonardo, 928 F.2d 548, 556 (2nd Cir. 1991) (The prejudice prong of *Strickland* could not be satisfied because the evidence adduced at trial overwhelmingly pointed to the defendant's guilt).

52. *See Strickland*, 446 U.S. at 692.

53. *Id.*

54. *Id.* One such instance of denial of effective assistance of counsel is counsel sleeping during trial. *See* Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001). However, it is interesting to note that the Fifth Circuit, upon hearing this matter for the first time, held that it was impossible to determine whether counsel's sleeping, in this case, was at a critical stage of the trial, thus prejudice could not be presumed. *See* Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000), *reh'g granted*, 234 F.3d 1339 (5th Cir. 2000).

55. *See Strickland*, 466 U.S. at 692.

56. *See id.*

57. *See id.* at 690. The Court went on to say that it should be presumed that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.*

58. *Id.* at 688-89 (emphasis added).

59. *See id.* at 689. The Supreme Court noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The Court also found that the mere mention of "strategy" alone is not enough if the attorney did not conduct a reasonable investigation that would allow the attorney to make an informed decision. *See id.*

60. *See* Jeffery Rosenfeld, et. al., *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: III. Trial: Right to Counsel.* 89 GEO. L.J. 1485, 1509 (May 2001).

Generally, ineffective assistance of counsel claims are limited to collateral review and usually will not be considered on direct appeal.[61] In state cases, the defendant must first exhaust all state remedies before a federal court will even hear an ineffective assistance of counsel claim on habeas corpus review.[62]

B. American Case Law and Authority

Ineffective assistance claims are raised in many different respects, such as: challenges to professional qualifications, performance before trial, actions in jury selection, performance during trial, actions concerning jury instructions, assistance during sentencing, and performance on appeal.[63]

i. Counsel's Performance During Trial

Defendants often attack defense counsel's performance during trial. Generally, however, invoking strategy or tactic has allowed counsel to escape the clutches of the *Strickland* test.[64] One such example is *Matthews v. Rakiey*.[65] In *Matthews*, the defendant contended that his counsel's decision to employ the "dreadlocks defense"[66] was ineffective assistance of counsel.[67] The defendant thought that counsel should have attacked the victim's inconsistent identification statements.[68] The Court of Appeals for the First Circuit held that, even though counsel employed a losing strategy,[69] counsel's use of such

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61. *See id.* However, a defendant can immediately appeal on the ground of ineffective assistance of counsel if the defendant raises an objection at trial or when the record indicates counsel's conflict of interest. *See* United States v. Gambino, 788 F.2d 938, 950 (3rd Cir. 1986), *cert denied*, 479 U.S. 825 (1986), *aff'd*, 864 F.2d 1064 (3rd Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

62. *See* Rosenfield, *supra* note 60, at 1509. Habeas corpus means "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." BLACK'S, *supra* note 4, at 569.

63. *See Twenty-Fifth Annual Review of Criminal Procedure: III. Trial.* 84 GEO. L.J. 1115, 1130-32. (April 1996).

64. *See Strickland*, 466 U.S. at 690-91.

65. Matthews v. Raikey, 54 F.3d 908 (1st Cir. 1995), *aff'd*, 132 F.3d 30 (1st Cir. 1997).

66. *See id.* The "dreadlocks defense" refers to counsel's decision to use the defendant's dreadlocks as the only reason the victim identified him as her attacker. *See id.* at 916. The defendant felt that counsel should have focused on the victim's power of observation because of discrepancies by the victim in the police report, and during her testimony as to how she was alerted that a man was in her home. *See id.*

67. *See id.* at 915.

68. *See id.*

69. *See Matthews*, 54 F.3d at 916-17. *quoting* United States v. Natanel, 938 F.2d 302, 310 (1st Cir. 1991), *cert. denied*, 502 U.S. 1079 (1992). "That [the strategy] was not ultimately a winning strategy is of no moment in assessing its reasonableness." *See Matthews*, 54 F.3d at 917.

a strategy was not professionally unreasonable.[70] The court noted, in this instance, that the strategy used by counsel was much safer than attacking the victim's character.[71]

On the opposite side of the spectrum is *Genius v. Pepe Jr.*[72] In *Genius*, the defendant claimed that his counsel was ineffective for not pursuing an insanity defense when, initially, the defendant was found incompetent to stand trial.[73] Counsel argued that his decision was a tactical one since an insanity defense might have weakened counsel's partial defense based on expert testimony.[74] The Court of Appeals for the First Circuit noted that "[w]hile incompetency to stand trial is not equivalent to insanity, it is a serious condition, that should have flagged the possibility [of using it to show insanity]."[75] The court held that counsel was ineffective for not taking the defendant's initial incompetence into consideration.[76] The court noted that counsel's decision to forego a complete defense because it may weaken a partial one was "an extraordinarily unbalanced choice."[77]

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70. *See id.* at 917. The court found that counsel did not have much to work with because of the persuasive power of the victim's testimony and the weakness of the defendant's alibi. *See id.*

71. *See id.* The court noted that choosing to attack the discrepancies in the victim's testimony would have involved attacks on her credibility and character, which "would have carried with it a far greater risk of offending the jury." *Id.*

72. Genius v. Pepe Jr., 50 F.3d 60 (1st Cir. 1995), *aff'd*, 147 F.3d 64 (1st Cir. 1998), *cert denied* 526 U.S. 1121 (1999). The defendant was charged with first degree murder for killing his girlfriend. *See id.*

73. *See id.* at 60. After an initial finding of incompetency, the defendant was found competent months later. *See id.* The District Court held that counsel's decision was a reasonable tactical choice since an expert testified that the defendant was criminally responsible for the murder of his girlfriend. *See id.* at 61.

74. *See id.*

75. *Genius*, 50 F.3d at 61 (emphasis added).

76. *See id.*

77. *Id.* "Where insanity would have been a complete defense, it was inexcusable not to pursue it." *Id.* at 61. For a more extensive examination of invocation of strategy and tactics to combat ineffective assistance of counsel, compare *Waters v. Thomas*, 46 F.3d 1506, 1518-19 (11th Cir. 1995), *cert denied*, 516 U.S. 856 (1995), *reh'g denied*, 516 U.S. 982 (1995) (Counsel's tactical choice to rely on mental illness evidence during penalty stage was reasonable); *Nielsen v. Hopkins*, 58 F.3d 1331, 1335 (8th Cir. 1995) (Counsel's tactical decision to establish defendant's intoxication at time of shooting to negate intent requirement of first-degree murder is reasonable); *United States v. Romero*, 54 F.3d 56, 59-60 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996) (Counsel's tactical decisions to initially not move for severance of counts and read a witness' statement rather than call the witness to the stand was reasonable); with *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358-59 (4th Cir. 1994) (Counsel's failure to contact alibi witness was ineffective because there was no reasonable excuse for not doing so); *Berryman v. Morton*, 100 F.3d 1089, 1102 (3rd Cir. 1996) (Counsel's failure to cross examine witness about inconsistent testimony to impeach identification and eliciting damaging testimony about defendant constituted ineffective assistance of counsel); *DeLuca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996), *cert. denied*, 519 U.S. 824 (1996) (Counsel's failure to preserve and prepare for extreme emotional disturbance defense constituted ineffective assistance of counsel).

ii. Counsel's Performance Before Trial

Claims of ineffective assistance of counsel during guilty pleas are also very common. The seminal case in this area is *Hill v. Lockhart*.[78] In *Hill*, the Supreme Court of the United States held that the *Strickland* test applied to guilty plea challenges "based on ineffective assistance of counsel."[79] Cases in the same vein as *Hill* demonstrate that the courts have found for both sides on the argument.

In *Lane v. Singletary*,[80] the defendant claimed his counsel was ineffective for failing to advise him of the consequences of pleading guilty to his state charges.[81] Counsel failed to advise the defendant that the conduct that led to his state convictions also allowed the federal court to prosecute him as well.[82] The Court of Appeals for the Eleventh Circuit found that counsel was not ineffective for failing to inform the defendant of the federal charges.[83] The court took into account that counsel knew the United States District Attorney's policy at the time was to not seek federal indictments for the criminal acts that formed the basis for the defendant's state court conviction.[84] Due to counsel's knowledge of the policy, the court found that counsel did not have to advise the client on the potential for federal prosecution.[85]

In *Dickerson v. Vaughn*,[86] the defendant argued that his counsel was ineffective for misrepresenting applicable law in a murder case, making the defendant's nolo contendere[87] plea involuntary.[88] The United States Court of Appeals for the Third Circuit found that counsel was ineffective.[89] Counsel incorrectly told the defendant that the double jeopardy issue that went against

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78. Hill v. Lockhart, 474 U.S. 52 (1985).

79. *Id.* at 58.

80. Lane v. Singletary, 44 F.3d 943 (11th Cir. 1995), *cert. denied*, 515 U.S. 1163 (1995).

81. *See id.* at 944. Pursuant to a plea bargain the defendant pled guilty to possessing and trafficking crack cocaine. *See id.* After the defendant was convicted in state court he was indicted in federal District Court for the same conduct and was subsequently sentenced to life in prison. *See id.*

82. *See id.* at 944. The federal court could also take into account his state convictions in fashioning his federal sentence. *See id.*

83. *See Lane*, 44 F.3d at 944. The court did find that there may be instances where counsel might have to inform the defendant that he/she could be prosecuted in another jurisdiction; however, the court reiterated that the defendant's instant case, was not one of those instances. *See id.*

84. *See id.*

85. *See id.* At the time, counsel was the chairman of the Criminal Law Section of the Manatee County Bar Association, and for that reason, counsel would have known of the United States Attorney's policy. *See id.*

86. Dickerson v. Vaughn, 90 F.3d 87 (3rd Cir. 1996).

87. Nolo contendere is Latin for "I do not wish to contend." BLACK'S, *supra* note 4, at 857. It is also commonly referred to as "NO CONTEST." *Id.*

88. *See Dickerson*, 90 F.3d at 92. Counsel mistakenly told the defendant that the double jeopardy issue that went against them could be appealed. *See id.*

89. *See id.* The court reasoned that but for counsel's errors, the defendant would have not pled guilty and instead gone to trial. *See id.*

him could be appealed.[90] The court noted the trial judge's sentencing instruction to both counsel and the defendant that said that a nolo contendere plea was the same as pleading guilty.[91] The court found that the judge's limitation on the scope of the nolo contendere plea and later reference to appeal rights being restricted should have left no doubt in counsel or the defendant as to the correct legal principle.[92]

Counsel is often found to have provided effective assistance of counsel despite failing to warn a defendant of the collateral consequences resulting from pleading guilty to a charge.[93] This is a troublesome issue, particularly when counsel fails to warn immigrant defendants of potential deportation as a result of their pleading guilty to a crime.[94]

Most courts follow the same line of reasoning illustrated in *United States v. Banda*.[95] In *Banda*, counsel failed to inform the defendant that he might be deported if he pled guilty to a drug charge.[96] The United States Court of Appeals for the Fifth Circuit held that counsel's failure to warn the defendant that his conviction could result in possible deportation was not ineffective assistance of counsel.[97] The court noted that a defendant "must be 'fully aware of the direct consequences' of a guilty plea."[98]

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90. *See id.*

91. *See id.* at 92.

92. *See Dickerson*, 90 F.3d at 92. For a more extensive examination of ineffective assistance of counsel claims during guilty plea challenges compare *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 852 (1993) (Nothing to suggest defendant would have succeeded at trial given the overwhelming evidence, thus suggesting defendant's choice to plead guilty was a rational one); *United States v. Raineri*, 42 F.3d 36 (1st Cir. 1994), *cert. denied*, 515 U.S. 1126 (1995) (No prejudice by counsel for failing to inform defendant of minimum penalty on a count that was already dismissed) with *United States v. Gordon*, 156 F.3d 376, (2nd Cir. 1998) (Defendant's guilty plea invalid after relying on counsel's gross under-estimation of sentencing exposure); *Meyers v. Gillis*, 142 F.3d 664, 667 (3rd Cir. 1998) (Counsel's advice that defendant would be eligible for parole, despite mandatory life sentence for the crime, was ineffective and prejudicial to the defendant).

93. *See* Lea McDermid, Note, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 750 (2001). Courts consistently find that counsel was not ineffective for failing to report these collateral consequences. *See id.*

94. *See id.* at 753.

95. *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993).

96. *See id.* at 355. The defendant plead guilty to possession with intent to distribute dimentane containing ninety-nine grams of codeine. *See id.*

97. *See id.*

98. *Id.* at 356, *quoting* Brady v. United States, 397 U.S. 742, 755 (1970). However, the court went on to say that counsel should advise a defendant of possible deportation, but failure to do so, though disapproved, does not satisfy the deficient performance prong of the *Strickland* test. *See Banda*, 1 F.3d at 356. The following cases follow the collateral consequences rule: *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1995), *cert. denied*, 507 U.S. 1039 (1993); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 942 (1990). "Deportation is a harsh collateral consequence, but many other collateral consequences are also harsh . . . '[but] deportation [is not] so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of guilty plea.'" *See Del Rosario*, 902 F.2d at 59, *quoting United*

iii. Counsel's Assistance at Sentencing Phase

The *Strickland* test was actually borne out of an ineffective assistance of counsel claim during the penalty phase of a capital case.[99] In *Strickland*, the Supreme Court determined that counsel was not ineffective during the penalty phase of defendant's trial.[100] Since *Strickland*, many other cases have discussed ineffective assistance of counsel during the penalty phase of a trial with differing results.

In *Wright v. Angelone*,[101] the defendant alleged that his counsel was ineffective for failing to present potentially mitigating medical reports regarding the defendant's mental capacity into evidence during the penalty phase of the defendant's trial.[102] To rebut the defendant's claim, counsel presented the reports of three experts, all of which found that the defendant did not suffer from mental retardation or brain damage.[103] The Court of Appeals for the Fourth Circuit held that the three doctor's consistent evaluations showed that the defendant was neither brain damaged or mentally retarded.[104] Thus, the court found that counsel was not deficient for not using the evaluations.[105]

In *Kubat v. Thieret*,[106] counsel's strategy was to plead for mercy[107] rather than calling character witnesses on the defendant's behalf during the penalty phase of the trial.[108] The United States Court of Appeals for the Seventh Circuit noted that pleading for mercy on a capital defendant can be a reasonable strategy.[109] Despite this, the court found that counsel's "rambling"

States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985).

99. *See generally Strickland*, 466, U.S. at 668.

100. *See id.* at 699-700. The Supreme Court found that counsel's decision to argue extreme emotional distress as a mitigating circumstance was a reasonable strategic decision. *See id.* at 699. Even if counsel was unreasonably deficient, there was insufficient prejudice. *See id.* at 700.

101. Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998), *stay denied*, 525 U.S. 925 (1998). The defendant, only seventeen years old, was convicted for several crimes including murder, robbery, and attempted rape. *See id.* at 154-55.

102. *See id.* The defendant contended that his past psychiatric reports were "significant mitigation evidence." *Id.* at 160.

103. *See id.* at 162.

104. *See id.*

105. *See Wright*, 151 F.3d at 162. Before deciding whether counsel was ineffective, the Court of Appeals first noted that mental health evidence such as the defendant's could either "[condemn] [him] to death [or] [excuse] his actions." *Id.* (emphasis added).

106. Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), *reh'g denied*, 1989 U.S. App. LEXIS 4042 (7th Cir. 1989), *cert. denied* 493 U.S. 874 (1989).

107. When counsel pleads for mercy, counsel is asking for "[c]ompassionate treatment, as of criminal offenders or of those in distress; esp., imprisonment, rather than death, imposed as punishment for capital murder." BLACK'S, *supra* note 4, at 801.

108. *See Kubat*, 867 F.2d at 368.

109. *See id.* "[I]n some cases counsel might reasonably make a decision to omit evidence in mitigation and rely instead on an alternative strategy . . . ." *Id.*

and "incoherent" closing argument could not be considered a plea for mercy.[110] The court held that counsel effectively presented no defense and found counsel ineffective because the closing argument was so poor.[111]

C. *Criticisms of the American Standard*

The *Strickland* test has been criticized for many different reasons.[112] In his dissent in *Strickland*,[113] Justice Marshall stated that the test 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."[114] Years later, Justice Blackmun said, "[t]he *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'"[115]

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110. *See id.* The court noted that counsel's poor closing argument "may actually have strengthened the jury's resolve to impose a death sentence." *Id.* Counsel admitted that he was "not going to convince the jury" that the defendant did not deserve to be executed and asked the jury to "decide the way you feel." *Id.*

111. *See Kubat*, 867 F.2d at 369. For further examination of the ineffective assistance of counsel during the sentencing phase compare *McQueen v. Scroggy*, 99 F.3d 1302, 1314-15 (6th Cir. 1996), *reh'g denied*, 1996 U.S. App. LEXIS 34031 (6th Cir. 1996) (Counsel's decision not to call defendant's family at penalty phase not ineffective assistance of counsel since all of the family had testified in an earlier hearing and none had rendered testimony that would make not calling them ineffective); *Powell v. Bowersox*, 112 F.3d 966, 969 (8th Cir. 1997), *reh'g denied*, 1997 U.S. App. LEXIS 15012 (8th Cir. 1997), *cert. denied*, 522 U.S. 1055 (1998) (Counsel not ineffective for prohibiting the defendant to testify about the effects of his own substance abuse during penalty phase of trial for fear that he would look more competent than argued previously); *Trice v. Ward*, 196 F.3d 1151, 1163 (10th Cir. 1999), *cert denied*, 531 U.S. 835 (2000) (Even if counsel's investigation was deficient, defendant could not show result of death would have been different in penalty phase) with *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997), *reh'g denied*, 1997 U.S. App. LEXIS 4735 (7th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997) (Counsel was deficient for failing to make contact with defendant before capital sentencing hearing, failing to present mitigation witnesses, and failing to offer any reason in closing argument other than disregard of state law to spare defendant's life); *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (Counsel's failure to request downward sentence adjustment under the Sentencing Guidelines was ineffective assistance of counsel); *Arredondo v. United States*, 178 F.3d 778, 785 (6th Cir. 1999) (Counsel's failure to object to findings in a pre-sentence report that made defendant responsible for more than one kilogram of cocaine constituted ineffective assistance of counsel).

112. *See* Kirchmeier, *supra* note 13, at 438-39.

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

114. *Id.* Marshall was concerned that the *Strickland* test would increase inconsistency and inject arbitrariness into death penalty decisions. *See* Murphy, *supra* note 37, at 193.

115. McFarland v. Scott, 512 U.S. 1256, 1259 (1994). Blackmun went on to note that the "impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have been denied." *Id.* at 1259-60.

i. The Inconsistency of the Strickland Test

The Supreme Court believed that the *Strickland* test would provide consistency in appellate decisions.[116] However, the *Strickland* test has been criticized for inconsistent application, leading to a new level of arbitrariness.[117] Allowing lower courts to interpret reasonableness according to this test "has resulted in generally low performance standards, varying dramatically from state to state."[118] The tactical choice theory[119] allows appellate courts to ignore gross incompetence on counsel's part if a mistake can be framed as a tactical decision.[120]

Also, counsel's errors are analyzed without context.[121] Such isolated analysis ignores the importance of having an overall, competent strategy.[122] "Each independent choice can be understood as reasonable, but together, [those] choices can be illogical or completely unreasonable."[123] Part of the problem is that reasonableness is measured under prevailing professional norms[124] and "the circumstances at the time of trial,"[125] which is a slippery notion.[126] This notion is exemplified through the "[p]revailing norms of practice as reflected in American Bar Association standards . . . [which] are guides to determining what is reasonable, but they are only guides."[127]

Moreover, the prejudice prong of the *Strickland* test often makes it impossible to conclude whether there was a reasonable probability that the outcome of the proceeding would have been different.[128] Justice Marshall stated, "[o]n the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments

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116. *See* Murphy, *supra* note 37, at 199.

117. *See id.* "There are numerous examples of cases that failed the Strickland test, as well as examples of cases that survived it." *Id.* According to Murphy,

> Strickland did little more than assent to the practice of appellate judges disposing of [ineffective assistance of counsel] claims based on their personal view of the mitigating evidence [that they never heard or saw because] there does not seem to be any pattern to what type of information will pass muster and what will not.

Id. (emphasis added).

118. McDermid, *supra* note 93, at 750. "[C]apital defendants in Texas are more likely to lose an ineffective-assistance claim than capital defendants in California." *Id.*

119. *See Strickland*, 466 U.S. at 690-91.

120. *See* Levinson, *supra* note 34, at 166.

121. *See id.* at 165. Counsel's errors are analyzed in isolation, rather than analyzing the totality of the circumstances. *See id.*

122. *See id.* "Once each alleged error is broken down and isolated, it readily can be seen as a tactical choice. This ignores the pattern of incompetence that can affect a trial." *Id.* at 166.

123. *See id.* at 166 (emphasis added).

124. *See* Murphy, *supra* note 37, at 191.

125. *Id.*

126. *See id.*

127. *Id. quoting Strickland*, 466 U.S. at 688.

128. *See* Levinson, *supra* note 34, at 169. "[A]n appellate judge [must] determine the effect of errors on . . . subjective decision[s], . . . removed from the context of the decision." *Id.* (emphasis added).

would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."[129] The prejudice prong "eludes any true comprehension or predictability"[130] and has been a "difficult hurdle to clear in many jurisdictions."[131] This is especially true during the sentencing phase of a capital trial,[132] where many times the outcome in such instances will turn on subjective facts.[133]

ii. Failure to Investigate Collateral Consequences

The failure of counsel to properly investigate the collateral consequences of a conviction is another problematic area.[134] Generally, under the collateral consequences doctrine, counsel has no duty to investigate or advise clients of collateral consequences to the penalty imposed by the court.[135]

The collateral consequences doctrine, as it pertains to counsel, is problematic because the doctrine was derived from the Federal Rules of Criminal Procedure, Rule 11 [hereinafter Rule 11].[136] Rule 11 requires that

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

130. Murphy, *supra* note 37, at 192.

131. *Id.* "This variation between jurisdictions in [determining] how much prejudice is enough makes an unclear test even more inconsistent in application." *Id.*

132. *See* Levinson, *supra* note 34, at 169.

133. *See id.* A difficult childhood or the fact that the defendant is a good citizen that made a bad decision are two examples of subjective facts that provide a basis for decisions during the sentencing phase of a trial. *See id.* Other examples include social history, school records, prison records, health records, and mental health records. *See id.*

134. *See* McDermid, *supra* note 93, at 751-54.

135. *See id.* at 745. Direct consequences are consequences that have a "definite immediate and largely automatic effect on the range of the defendant's punishment." United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (quoting Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988)). A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence." BLACK'S, *supra* note 4, at 209. Examples of other collateral consequences include "the loss of the right to vote, to work as a civil servant, to drive, to travel freely abroad, to receive an honorable discharge from the military, and to possess firearms." *See* McDermid, *supra* note 93, at 752. The loss of a professional license is another example of a collateral consequence. *See* BLACK'S, *supra* note 4, at 209.

136. The relevant portion of the Rule 11 is:

> (c) Advice to Defendant
>
> Before accepting a plea guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

"courts . . . insure that a guilty plea is entered voluntarily."[137] Originally, courts interpreted Rule 11 to mean that trial courts only need to inform defendants of the direct consequences of the plea.[138] Over time, though, the collateral consequences doctrine was also applied to counsel.[139]

Yet, by extending this line of thinking to include counsel, a majority of courts have effectively relieved counsel of the duty to investigate.[140] The courts have provided counsel with power that should only be reserved for judges.[141] In doing so, counsel ignore their responsibilities to investigate mitigating factors, research relevant case law, and advocate the least harmful arrangement for a client, all of which are necessary for counsel to present a proper case.[142]

There are several different types of collateral consequences,[143] deportation being one of the most prominent and troublesome.[144] As a general rule,[145] counsel has no duty to tell an immigrant defendant that pleading guilty

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(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contedere the defendant waives his right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

FED. R. CRIM. P. 11(c)(1-6) (2001).

137. McDermid, *supra* note 93, at 751.

138. *See id.* at 752. "The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence . . . would impose an unmanageable burden on the trial judge . . . ." Frutchman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976).

139. *See* McDermid, *supra* note 93, at 753.

140. *See id.* "[E]quating the duties of defense counsel with the courts ignores the fact that defense counsel's representation clearly involves unique responsibilities." *Id.* at 754.

141. *See id.* at 754.

142. *See id.* "Defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger. [Rule 11] . . . was not intended to relieve counsel of his responsibilities to his client." Michel v. United States, 507 F.2d 461, 466 (2nd Cir. 1974).

143. *See* McDermid, *supra* note 93, at 745.

144. *See id.* The problem of inconsistency rears its head in this issue as well. *See id.*

145. *See id.* Courts can apply one of three rules to determine if counsel was ineffective for not informing the noncitizen client of potential deportation: "(1) [A]ttorneys need not address immigration consequences at all because they are 'collateral'; (2) [D]efense attorneys must affirmatively investigate and advise clients of immigration consequences; or (3) [A]ttorneys must refrain from misinforming clients of the immigration consequences of a guilty plea." *Id.* at 751. *See also* United States v. Banda, 1 F.3d 354 (5th Cir. 1993).

may result in deportation.[146] However, immigrant defendants should be able to rely on their counsel to inform them that they could be deported or suffer from other collateral consequences.[147] This allows defendants to make an intelligent decision as to whether to plead guilty or not.[148]

iii. Emphasis on Efficiency Rather Than Fairness

The *Strickland* test emphasizes efficiency over fairness.[149] The Supreme Court, with the establishment of the *Strickland* test, sought a "narrow conception of effective assistance [of counsel]."[150] The Court was concerned with broadening "the reasonably competent model" and, as a result, created a "'highly demanding' standard of competency."[151] The Court's elevated concern with efficiency stems from "the Court's result-oriented perspective."[152] The Court found that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance [from counsel] necessary to justify reliance on the outcome of the proceeding."[153]

The Court's deference toward defense counsel reflects its goal of efficiency.[154] However, that does not entitle the defendant to a "dynamic, strong defense."[155] Rather, it only provides the defendant with "minimally effective assistance of counsel."[156] As a result, valuing efficiency over justice

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146. *See* McDermid, *supra* note 93, at 753.

147. *See id.* at 745-46.

148. *See id.* at 746. Such reliance on the part of the immigrant is justified since it is relatively easy for an attorney to determine the consequences of a plea. *See id.* Counsel should be able to consult with an immigration attorney or an immigration handbook to find out if a plea bargain will result in deportation. *See id.*

149. *See* GARCIA, *supra* note 26, at 31. "In striking the proper balance between efficiency and fair process, it seems clear that, for normative and functional purposes, a dynamic, forceful view of effective assistance is critical . . . the defendant must be afforded an effective sword to pierce the prosecution's heavy armor." *Id.* "[T]he Court has constrained the ability of criminal defendants to choose counsel who will assiduously contest the prosecution's case. This trend runs counter to the essence of the adversary process, whose ideal is an evenly matched battle between skilled opponents." *Id.*

150. *Id.* (emphasis added).

151. *See id.* at 33. The *Strickland* majority stated 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." *Strickland*, 466 U.S. at 690.

152. GARCIA, *supra* note 26, at 33. Though the Court's language suggests concern with "fair process," the overreaching theme of the decision is efficiency and "just results." *Id. See also* Murphy, *supra* note 37, at 191. "Apparently, the [Supreme] Court decided that controlling the deluge of appeals by convicted defendants was preferable to holding attorneys accountable for anything but the most blatant sort of negligent practice." *Id.* (emphasis added). *But see* Levinson, *supra* note 34, at 147. "While [the prejudice prong] may cheat defendants out of procedural fairness, it can be viewed as a necessary evil in the name of judicial economy." *Id.* at 163 (emphasis added).

153. *Strickland*, 466 U.S. at 691-92 (emphasis added).

154. *See* GARCIA, *supra* note 26, at 33.

155. *Id.*

156. *Id.* at 34.

neglects both the purpose and spirit of *Gideon*.[157] The perception created by the Supreme Court's concern over "minimally effective" counsel in *Strickland* "hardly inspires confidence in the promise fostered by *Gideon*."[158]

iv. Strickland's Applicability in Capital Cases

Another area of concern over the *Strickland* test stems from its applicability in capital cases, especially the sentencing phase.[159] The Supreme Court in *Strickland* found that the sentencing phase in a capital trial was "sufficiently" similar to the sentencing phase of an ordinary trial and, thus the *Strickland* standard could apply to both stages.[160]

However, in making this determination, the Supreme Court erred in three respects: (1) Defense counsel had fewer "big picture" strategic decisions to make in a capital trial penalty phase;[161] (2) the appeals process is different;[162] and (3) there are only two choices with a capital crime - death or life imprisonment.[163]

The *Strickland* test allows judges to determine whether counsel's performance was deficient and prejudicial to a defendant in a capital trial.[164] As a result, the "discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied [and feed] prejudices against the accused . . . ."[165]

Also, capital defendants who bring ineffective assistance of counsel claims "live or die on the unguided determination of an appellate court that was never intended to be the only hearer of the evidence ineffective counsel

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157. *See id.* at 35. "[T]he *Gideon* Court deemed the right to counsel to be . . . 'essential to fair trials' . . . ." *Id.*

158. *Id.*

159. *See* Levinson, *supra* note 34, at 163. "Considering all the reasons that 'death is different' . . . the Strickland standard should not be used to judge performance during the sentencing phase of a capital trial." *Id.*

160. *See Strickland*, 466 U.S. at 686.

161. *See* Levinson, *supra* note 34, at 163-64. "[C]apital sentencing trials are now more about painting the defendant as a human being worthy of compassion rather than obtaining the defendant's innocence through the crafty use of legal maneuvers and arguments." *Id.* at 164. Because the sentencing phase is less complex than the trial phase, "there are fewer potential errors and strategic decisions to make." *Id.*

162. *See id.* at 165. Death penalty sentences are automatically appealed, thus having higher standards would not mean more appeals. *See id.* A stricter standard would shorten the appeals process. *See id.*

163. *See* Levinson, *supra* note 34, at 165. In a life or death situation, only few of counsel's errors are tolerable. Under the Strickland test, courts are allowed to find that a person can be executed despite serious errors by counsel. *See id.*

164. *See* Murphy, *supra* note 37, at 195.

165. *Id. quoting* Furman v. Georgia, 408 U.S. 238, 255 (1972), (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1972) (emphasis added).

failed to present."[166] Capital defendants are left with, and must rely upon, a standard that "does little more than state what effective counsel should be," leaving appellate courts to decide what effective counsel actually was in a particular case.[167]

v. The Strickland Test and the Sixth Amendment

The overall view of ineffective assistance of counsel by the public and legal profession blurs the meaning of the Sixth Amendment.[168] Both the lay public and legal profession confuse the Constitutional right to counsel with whether counsel does an adequate job.[169] The Sixth Amendment was never meant to be a "performance benchmark" or define acceptable professional standards.[170]

The problem this creates, especially in the public's perception, is that each time an ineffective assistance of counsel claim is improperly resolved in counsel's favor, the minimum expectations for effectiveness of counsel have been lowered.[171] As a result, this lowered benchmark is what counsel is measured by rather than the established *Strickland* test.[172]

III. INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED KINGDOM

Similar to the United States' legal system,[173] the United Kingdom's legal system[174] is based on the adversarial process.[175] Given the United Kingdom's

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166. *See id.* at 194-95. "All Strickland did was shift the unguided discretion up a level." *Id.* The questions the Strickland test leaves appellate courts are questions "too big to provide the controls required by the Eighth Amendment." *Id.* at 195.

167. Murphy, *supra* note 37, at 195. "[T]he judges and juries who made their decision based on an incomplete story are foreclosed from expressing the opinion that the whole story would have meant everything, especially to the defendant." *Id.*

168. *See generally* Kelly, *supra* note 6, at 1089.

169. *See id.* at 1091.

170. *Id.* The number of ineffective assistance claims handled by the courts may be contributing to the public's perception as to why the Sixth Amendment is treated this way. *See id.*

171. *See id.*

172. *See id.* at 1093. *Strickland's* forgiving standard and the evidentiary obstacles that it has established makes the "class of cases in which relief will be afforded to defendants who suffer at the hands of unqualified lawyers is . . . fairly small." Green, *supra* note at 29, at 504.

173. *See generally* FRIEDMAN, *supra* note 24.

174. *See generally Update supra*, note 1. The four countries that make up the United Kingdom form three distinct jurisdictions, England and Wales, Scotland, and Northern Ireland, each of which have their own court system and legal profession. *See id.* In England and Wales, the lowest criminal courts are the Magistrates Courts. *See id.* The Crown Court hears the more serious cases, including cases appealed from the Magistrates Court on factual points. *See id.* Appeals on points of law go to the High Court, Queen's Bench Division. *See id.* The Court of Appeal, Criminal Division hears appeals against conviction and sentencing. *See id.* The House of Lords is the supreme court of appeal. *See Update*, *supra* note 1. In trials there are three classes of offenses, "those triable only on indictment, those triable only summarily, and those

adherence to this process, counsel plays a significant role in advocating their client's position. Furthermore, the United Kingdom has recently, in terms of legal history, developed a standard for ineffective assistance of counsel.[176] However, as in the United States, ineffective assistance of counsel has been an issue for quite some time in the United Kingdom's history.[177]

A. History of the United Kingdom's Standard

The United Kingdom has neither a written constitution[178] nor a constitutional Bill of Rights.[179] However, with the adoption of the Human Rights Act of 1998,[180] the United Kingdom now recognizes such rights as the enjoyment of property,[181] the enjoyment of liberty and security,[182] the right to a fair trial,[183] and the right to privacy.[184] Generally, legal advice and legal

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triable either way." *See* JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE 2 (1995). However, a majority of the defendants are tried summarily, meaning that most defendants are tried in magistrates court. *See* John Jackson, *Due Process*, *in* INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 115 (Christopher McCrudden and Gerald Chambers eds., 1994). European Community Law also applies in Britain, but mostly to economic and social matters. *See* United Kingdom-"Constitution," *available at* http://www.uni-wuerzburg.de/law/uk00000_.html (last visited Aug. 11, 2002) [hereinafter Constitution]. However, it rarely takes precedence over British domestic law. *See id.* The Scottish legal system is separate from the legal system of England and Wales. *See Update*, *supra* note 1. The principal law officer is the Lord Advocate and the Court of Session is the supreme civil court, subject to appeal by the House of Lords. *See id.* The High Court of Justiciary is the supreme criminal court. *See id.* The lower criminal courts are the sheriff courts and district courts. *See id.* Northern Ireland has its own court structure that replicates England and Wales court structure. *See id.*

175. *See* SPRACK, *supra* note 174, at 117. It is the prosecution's duty to present the case and the defense must represent the accused. *See id.* In the English, Scottish, and Northern Irish systems the prosecution has to prove the defendant's guilt beyond a reasonable doubt. *See* Jackson, *supra* note 174, at 114.

176. *See R. v. Clinton*, [1993] 1 WLR 1181. *See also* Anderson v. H.M. Advocate, 1996 S.L.T. 155. The United Kingdom's standard will be discussed in detail in the section below.

177. MICHAEL MANSFIELD, PRESUMED GUILTY: THE BRITISH LEGAL SYSTEM EXPOSED, ix (1993). Miscarriage of justice "has been an integral part of [the British] criminal justice system for centuries." *Id.* (emphasis added).

178. The equivalent body of law to a constitution is based on statutes, common law, and "traditional rights." *See* Constitution, *supra* note 174. New law can also come from conventions and customs. *See id.* Changes may also come from new acts of Parliament or informally through the acceptance of new practices, uses, or by judicial precedents. *See* United Kingdom, *supra* note 1.

179. See BRADLEY, *supra* note 2, at 49. The United Kingdom does have an act called the Bill of Rights 1689. *See* Constitution, *supra* note 174. However, it's focus is on the exercise of royal prerogative and succession to the Crown. *See id.*

180. *See* Act, *supra* note 2.

181. *See id.*

182. *See id.*

183. *See* Andrew J. Ashworth, *Criminal Proceedings After the Human Rights Act: The First Year*, CRIM. L. REV. 855, 863 (2001). A majority of the significant decisions under the Act in criminal proceedings concern the right to a fair trial. *See id.* at 863.

184. *See* Act, *supra* note 2.

assistance is available only if the defendant can afford to pay for it.[185] The State will only bear the expense through legal aid in limited situations.[186] Full legal aid is granted by the court if the court finds that it is "desirable to do so in the interests of justice."[187]

The United Kingdom ineffective assistance standard originated from case law.[188] Initially, courts in the United Kingdom were concerned with the "extent of counsel's alleged ineptitude."[189] Presently, the courts in the United Kingdom are primarily concerned with whether a miscarriage of justice[190] resulted from the counsel's conduct.[191] More specifically, the courts are concerned with whether counsel's conduct was so prejudicial to the accused that it establishes that the accused did not have a fair trial.[192]

Particularly, in England and Wales, the question is whether the conviction was unsafe.[193] Flagrant incompetency must be considered, however, the more accurate assessment concerns the effect of counsel's behavior on the conviction, rather than on counsel's behavior alone.[194] In Scotland, the question is whether there has been a miscarriage of justice.[195] Scottish courts focus on the effect of counsel's behavior on the conviction, rather than focusing on the counsel.[196]

In 1998, the United Kingdom adopted the European Convention on Human Rights[197] [hereinafter the Convention] with the passing of the Human

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185. *See* BRADLEY, *supra* note 2, at 125.

186. *See id.* at 124-25. The Legal Aid Fund pays a solicitor for a small amount of preparatory advice and assistance. *See id.* at 125. However, the accused may have to make a "means-tested contribution" to the cost. *See id.*

The court takes into account a number of factors including:

> [T]he seriousness of the consequences which the accused could face if convicted, the significance and complexity of any issues of law, the difficulties which are likely to be faced in investigating the case on his behalf, the ability of the defendant to represent himself, and the risk that a witness might be seriously distressed if forced to be cross-examined by the defendant in person.

Id.

187. *Id.* at 125.

188. *See* R. v. Clinton, [1993] 1 WLR 1181. *See also* Anderson v. H.M. Advocate, 1996 S.L.T. 155.

189. *See* SPRACK, *supra* note 174, at 323.

190. *See* BLACK'S, *supra* note 4, at 811. Miscarriage of justice means "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." *Id.*

191. *See* Robert Shiels, *Blaming the Lawyer*, CRIM. L. REV. 740, 742 (1997).

192. See *generally* id.

193. *See id.*

194. *See id.* at 743.

195. *See id.*

196. *See* Shiels, *supra* note 191, at 743.

197. *See Update*, *supra* note 1. The United Kingdom is a signatory of the European Convention for Human Rights. *See id.* The Act allows for the Convention's provisions to be directly applied by the United Kingdom courts. *See id.*

Rights Act of 1998 [hereinafter Act].[198] The courts of the United Kingdom adopted Article 6[199] of the Convention. In *R. v. Allen*,[200] the Court of Appeal, Criminal Division found that Article 6 required that the "hearing of the charges against an accused shall be fair."[201] The court found that if counsel's conduct results in the accused not receiving a fair trial, then a court might be compelled to intervene.[202] The Court noted that because of Article 6's findings, flagrant

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198. *See* Act, *supra* note 2. It has been found that there are three principal strengths of rights under the Convention. *See* Ashworth, *supra* note 183, at 863. First, there are the absolute rights in Article 2 and Article 3. *See id.* Second, there are the qualified rights under Articles 8-11. *See id.* at 864. Finally, there are Articles 5-6, which lie in between the absolute rights and qualified rights in terms of strength. *See id.* Article 5 and Article 6 contain the rights most frequently raised in criminal proceedings. *See id.* Despite having the ability, under the Convention, to draw from the constitutional decisions in other European jurisdictions, there is very little reference that the United Kingdom has done so. *See* Ashworth, *supra* note 183, at 870.

199. The European Convention on Human Rights and its Five Protocols, *available at* http://www.hri.org/docs/ECHR50.html (last visited Aug. 11, 2002) [hereinafter Convention]. Article 6 states in full:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defence [sic];
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Y.B. Eur. Conv. on H.R.(6).

200. R v. Allen, 2001 WL 753441.

201. *Id.* Article 6 applies at the pretrial stage as well. *See* BRADLEY, *supra* note 2, at 436. Article 6 not only calls for the right to counsel it also calls for the right to effective counsel. *See id.* Article 6 is designed to handle "procedural irregularities in the administration of justice and is not concerned with whether the domestic courts have correctly assessed the evidence." Jackson, *supra* note 174, at 139. As a result, Article 6 does not provide a per se miscarriage of justice rule. *See id.*

202. See *Allen*, 2001 WL 753441.

incompetence is not the appropriate measure of when a court will quash a conviction.[203]

Before the advent of the Act, the leading English case for determining ineffective assistance of counsel was *R. v. Clinton.*[204] In *Clinton*, the Court of Appeal, Criminal Division held that "where it [is] shown that defence [sic] counsel's decision . . . was taken either in defiance of or without proper instructions [from the defendant], or when all the promptings of reason and good sense pointed the other way, [a conviction might be] open to the appellate court to set aside the verdict . . . ."[205] The court also found that "[i]t is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualtitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict . . . ."[206]

In the leading Scottish case, *Anderson v. HM Advocate,*[207] the High Court of Justiciary established four points defining what constitutes miscarriage of justice in Scotland, and also contributed to the definition of ineffective assistance of counsel in the United Kingdom.[208] First, the accused has the right to a fair trial and to have his or her defense presented to the court.[209] If counsel's conduct deprived the accused of those rights, a miscarriage of justice could result.[210] Second, counsel must abide by the

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203. *See id.* The court should "approach the matter simply upon the basis of the safety or otherwise of the conviction and repeating the observations . . . in *R. v. Clinton*." *Id.*

204. R. v. Clinton, [1993] 1 WLR 1181. *R. v. Clinton* is still relevant; however, the Act has slightly refined the standard that *Clinton* set out. By no means should *R. v. Clinton* be considered overruled by the Act.

205. *Id.* (emphasis added). The Court also found that where defense counsel made such decisions in good faith after proper consideration of the competing arguments and after discussion with the client, "his decisions could not render a guilty verdict unsafe or unsatisfactory nor could allegations of incompetence on counsel's part amount to a material irregularity." *Id.*

206. *See id. Clinton* "puts the . . . errors by counsel in a proper perspective." SPRACK, *supra* note 174, at 324. It is better to concentrate on how trial was affected than the "standard of advocacy." *Id.*

207. Anderson v. H.M. Advocate, 1996 S.L.T. 155. The defendant was found guilty of two counts of assault. *See id.* at 156. The defendant argued that his counsel misrepresented him. *See id.* The defendant claimed that his counsel ignored tactics stipulated to and agreed to between the defendant and counsel during consultation. *See id.* The defendant wanted the alleged victim's character attacked. *See id.* Because the victim's character was not attacked the defendant believed that he was prejudiced. *See id.* at 155.

208. *See* Shiels, *supra* note 191, at 743. *Anderson* reversed two earlier Scottish decisions, and reviewed the law in the United Kingdom, Commonwealth, and other jurisdictions on the question of whether the alleged incompetency of counsel could be a proper ground of appeal in a criminal case. *See* Gow, *supra* note 2.

209. *See Anderson*, 1996 S.L.T. at 163.

210. *See* Shiels, *supra* note 191, at 743. "[*Anderson*] draws a distinction between a failure by an advocate to present the defence [sic] that the accused instructs him to present and the making of a judgment by the advocate as to the manner in which that defence [sic] should be presented . . . ." E. v. H.M. Advocate, 2002 S.L.T. 715, 716 (emphasis added).

client's instructions, and not disregard those instructions.[211] However, counsel must conduct the case as he or she thinks best.[212] Third, counsel determines how the defense is presented, and the accused is bound by counsel's decision.[213] Finally, counsel, not the accused, decides whether or not to attack the character of a Crown witness.[214] The High Court[215] also found it was essential for counsel to be given a fair opportunity to respond to the appellant's allegations in writing, though counsel is under no obligation to do so.[216]

Traditionally, in England, the Criminal Division of the Court of Appeals has been reluctant to accept ineffective assistance of counsel claims.[217] Under British law, a conviction should not be set aside because counsel's decisions or actions during trial later appeared to be "mistaken or unwise."[218] In *R. v. Welling*,[219] the court held that the fact counsel may have made "a . . . decision . . . which in retrospect [is] shown to be mistaken . . . is seldom proper ground for appeal."[220] Rather, "it is only when counsel's conduct . . . can be described as flagrantly incompetent advocacy that this court will be minded to intervene."[221] The court relaxed the *Welling* standard in *R. v. Swain*.[222] In *Swain*, the court held that if a court had "any lurking doubt" that the defendant suffered some injustice because of counsel's "flagrantly incompetent advocacy" then the court would quash the conviction.[223]

Generally, despite this limited relaxation, ineffective assistance of counsel is not usually grounds for appeal in English law.[224] There may be grounds for appeal if counsel's conduct made a conviction unsafe.[225] Ineffective assistance of counsel may also be remedied by competent

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211. *See Anderson*, 1996 S.L.T. at 163-64.

212. *See id.*

213. *See id.* at 164.

214. *See id.* at 165.

215. *See* Gow, *supra* note 2. One reason that the decision in *Anderson* was important because it was a Full Bench decision. *See id.* "The Full Bench is a peculiarly Scottish procedure, which arises out of the fact that there is no appeal to the House of Lords on criminal matters from the Justiciary Appeal Court." *Id.* In order to overrule a previous appellate court precedent, "it is necessary to convene a full bench of five, seven or even nine judges." *Id.* A Full Bench is very rare event, only occurring four or five times a decade. *See id.*

216. *See Anderson*, 1996 S.L.T. at 164.

217. *See* SPRACK, *supra* note 174, at 323.

218. Shiels, *supra* note 191, at 742.

219. *See id. R. v. Welling* is an unreported case that is referred to in *R. v. Clinton*, [1993] 1 WLR 1181.

220. *See Clinton*, 1 WLR 1181, *quoting* R. v. Welling.

221. *See* Shiels, *supra* note 191, at 742.

222. *See* Gow, *supra* note 2, *citing Swain*, 1998 CRIM. L. REP. 109.

223. *See id.*

224. *See* BRADLEY, *supra* note 2, at 136-37.

225. *See id.* The test for whether a conviction is unsafe is subjective. *See* SPRACK, *supra* note 178, at 322. A member of the Court of Appeal must ask: "Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory?" *Id.* If the member has a doubt, then the member should allow the appeal, if not then the member should not allow the appeal. *See id.*

representation in an appeal through rehearing to the Crown Court.[226]

Courts in the United Kingdom are highly deferential to counsel's decisions.[227] Also, there is a strong presumption that counsel's conduct will fall within the wide range of reasonable effective assistance.[228] Additionally, courts in the United Kingdom will make allowances for the "distorting effect of hindsight."[229] As the result of such discretion, "[c]onducting the trial without, or even contrary to, the instructions of the client, mere errors of judgment or even negligence, may not be sufficient to set up an inference of an unfair trial."[230]

B. United Kingdom Case Law and Authority

There are at least six generally recognized types of complaints of ineffective assistance of counsel in the United Kingdom.[231] The first complaint concerns insufficient protection by the judiciary of the accused from the defendant's counsel.[232] The second complaint concerns inadequate preparation of counsel.[233] The third complaint concerns failure to give proper legal advice.[234] The fourth complaint concerns providing legal advice that does not satisfy the client.[235] The fifth complaint concerns failure to call witnesses at trial.[236] Finally, and most common, are complaints about the standard of presentation.[237]

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226. *See* BRADLEY, *supra* note 2, at 136-37. If counsel's failure results from the court's refusing to adjourn so that the defense has inadequate time to prepare, the decision may be quashed. *See id.* at 137, (referring to R. V. Thames Magistrates' Court, *ex parte* Polemis, [1974] 2 All E.R. 1219, D.C.)

227. *See* Gow, *supra* note 2. There may be circumstances where a court could find that the counsel's conduct "was such as to deny the accused a fair trial." E. v. H.M. Advocate, 2002 S.L.T. 715, 717.

228. *See* Gow, *supra* note 2. "A decision made by counsel in the conduct of the defence [sic] at the trial is, for the most part, a matter for his professional discretion and judgment." E. v. H.M. Advocate, 2002 S.L.T. 715, 717. "The soundness of such a decision cannot normally be the subject of an appeal, even if that question is one on which views might reasonably differ." *Id.* at 717.

229. *See* Gow, *supra* note 2.

230. *Id.*

231. *See* Shiels, *supra* note 191, at 740-741. "Allegations of professional ineptitude require [close examination] because they may turn out to be correct and because of the repercussions for the lawyer involved." Robert Shiels, *Blaming the Lawyer – Again*, CRIM. L. REP. 2000, 828 (emphasis added).

232. *See* Shiels, *supra* note 191, at 740. It is a longstanding principle that judges should protect the accused. *See id.* One example being, conflict of interest by the accused's counsel which is ground for a successful appeal. *See id.*

233. *See id.* The concern is that inadequate preparation by the solicitor has deprived counsel of material need to present a complete defense of the defendant. *See id.*

234. *See id.*

235. *See* Shiels, *supra* note 191, at 741. The client does not believe that the advice provided by counsel was not as full as it could have been. *See id.*

236. *See id.*

237. *See id.*

i. Inadequate Preparation of Counsel

Inadequate preparation of counsel is a major issue in the United Kingdom. In *McIntosh v. H.M. Advocate*,[238] the defendant was found guilty of conspiracy.[239] The defendant argued that his solicitor was inexperienced, did not prepare the case properly, and that his solicitor did not adequately identify Crown witnesses or elicit information from the defendant.[240] The Court held that the effect of counsel's conduct did not deprive the defendant of his right to a fair trial.[241]

Another example, albeit with differing results, is *Hemphill v. H.M. Advocate*.[242] In *Hemphill*, the defendant argued that his solicitor failed to investigate the timing of the victim's death, consult or consider pathologist reports about the victim's time of death, and failed to question expert or forensic witnesses.[243] Rather than relying on information from experts, the solicitor cross-examined the Crown's pathologist based on the solicitor's own hypotheses.[244] The High Court of Justiciary held that there had been a miscarriage of justice since counsel failed to investigate important forensic and pathological evidence.[245] The Court found that if counsel had taken the appropriate steps, the defendant's defense would have been "significantly reinforced."[246]

The counsel in *E v. H.M. Advocate*[247] acted similarly to the counsel in *Hemphill*. In *E v. H.M. Advocate*, the defendant argued that his counsel did not adequately present his defense because counsel failed to pursue supportive medical evidence that could have led to reasonable doubt that the defendant

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238. McIntosh v. H.M. Advocate, 1997 S.L.T. 1315.

239. *See id.* The defendant was found guilty of conspiring with persons possibly associated with the Scottish National Liberation Army to coerce the British government into setting up a separate government in Scotland and retaining firearms, ammunition, explosives, and detonators. *See id.*

240. *See id.*

241. *See id.*

242. Hemphill v. H.M. Advocate, 2001 S.C.C.R. 361.

243. *See id.* The defendant was found guilty of murder. *See id.* The basis of this conviction was blood spotting found on the defendant's shirt, and testimony of a pathologist stating that the victim could not have been breathing at the time that the defendant got the victim's blood on his shirt, as the defendant claimed, contradicting what the defendant stated in a police interview. *See id.*

244. *See id.* Counsel's hypotheses were not substantiated by any evidence. *See id.* The hypotheses revolved around the time of death and the blood spots that landed on the defendant's clothes. *See Hemphill*, 2001 S.C.C.R. 361.

245. *See id.* The Court noted that counsel has some discretion in its method of cross-examination, but in this case, it was a "substantial failure" to not investigate such evidence. *See id.*

246. *See id.* The court failed to say that the jury would reach another verdict with this forensic evidence. *See id.*

247. E. v. H.M. Advocate, 2002 S.L.T. 715.

did not rape his daughters.[248] During trial, defendant's counsel decided not to attack the credibility of the daughter's claim or their mother's role in instigating their claim.[249] The High Court of Justiciary held that defendant's counsel was inadequate and that the defendant did not receive a fair trial.[250] The Court found that counsel's decision not to follow a certain line of defense suggested by the defendant left the entire defense in peril.[251] The Court noted that the defendant's counsel had not presented his defense as the defendant wished and as a result the defendant received an unfair trial.[252]

ii. Failure to Call Witnesses

Counsel in the United Kingdom is also attacked for failing to call witnesses. In *Townsley v. Her Majesty's Advocate*,[253] both defendants argued that their counsel failed to present their defense to the jury.[254] One defendant told counsel that another person had sex with one of the girls and assumed that counsel would call that person to testify, but counsel did not call the person as a witness.[255] Counsel argued that the defendant did not rape the woman, but did see another person having sex with her to the jury.[256] The High Court of Justiciary held that there was no basis for the appeal.[257] The Court stated that counsel's actions or advice was "contrary to the promptings of reason and good sense."[258] The Court also held that both defendants' defenses were clearly presented in cross-examination.[259]

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248. *See id.* at 715. The defendant denied the charges and claimed that his wife manipulated the girls into claiming that he sexually abused them. *See id.*

249. *See id.* Counsel focused on the inconsistencies in the girls' story and the absence of direct evidence. *See id.* The defendant was subsequently convicted. *See id.*

250. *See id.* The defendant's "consistent denials of any sexual interference with [the girls] left the defence [sic] no alternative but to challenge the girls' credibility in relation to identity of the abuser, which would have necessitated a thorough investigation into the medical evidence [and] the possible manipulation by the mother . . . ." *E. v. H.M. Advocate*, 2002 S.L.T. at 715 (emphasis added).

251. *See id.* at 717. "The consequence of [counsel's] decision was that senior counsel perilled [sic] the whole defence [sic] on the high risk strategy of bringing out contradictions and inconsistencies in the evidence and prior statements of the girls . . . ." *Id.* (emphasis added). Because of the defendant's counsel's limited attack, many prosecution weaknesses were not "brought out thoroughly or were passed over altogether." *Id.* at 717.

252. *See id.* at 718.

253. Townsley v. H.M. Advocate, 1999 S.L.T. 374. The defendant in question was convicted of rape and indecent assault against another woman. *See id.* At the time of the incident the defendant was fifteen years old. *See id.*

254. *See id.* at 375.

255. *See id.* Before trial the defendant received new counsel and admitted that he had not talked specifically to counsel about who he wanted as defense witnesses. *See id.* The defendant thought the person was among the witnesses. *See Townsley*, 1999 S.L.T. at 374.

256. *See id.* at 374.

257. *See id.* at 375.

258. *Id.* at 379.

259. *See id.* at 379-80.

iii. Standard of Presentation

As noted, the standard of counsel's presentation is the most common complaint in the United Kingdom.[260] In *R. v. Allen*,[261] the defendant argued that his counsel was inept for failing to exclude the defendant's alleged admission to the police.[262] When questioned, counsel could not remember if he submitted an application for such exclusion, but did argue that it would have been unlikely that such an exclusion would have been granted by the trial judge.[263] The Court of Appeal, Criminal Division, found counsel's explanation inadequate.[264] The court found that, due to the misjudgment of counsel, it could not be determined whether the jury would have decided the case differently had the admission been excluded, thus the verdict was unsafe.[265]

In *R. v. Ullah*,[266] the defendant argued that his counsel was inept for failing to bring an exculpatory telephone conversation of the victim into evidence.[267] The defendant argued that the victim's bugged conversation showed the victim was concocting a false story.[268] The Court of Appeal, Criminal Division, noted that "wanting safety in a conviction cannot be based on a decision by counsel merely because other counsel might not have made that decision."[269] However, the court held that each member of the bench, in this case, would have used the tapes and that the conviction was unsafe.[270]

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260. *See* Shiels, *supra* note 191, at 741.

261. *R. v. Allen*, 2001 WL 753441. Witnesses saw three men rob a postal employee of his mailbag and escape in a blue car. *See id.* The police located the car and found two men with the contents of the bag. *See id.* The defendant argued that he had just arrived at the suspect's home when the police arrived and was not involved in the robbery. *See id.* The defendant was convicted of robbery. *See id.*

262. *See id.* The detective questioning the defendant taped a conversation that the defendant had with another inmate in the neighboring cell. *See Allen*, 2001 WL 753441. The defendant made inculpatory statements during that conversation. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. R. v. Ullah, 1999 WL 982443. Defendant was convicted of indecent assault of a female. *See id.*

267. *See id.*

268. *See id.*

269. *Id.* "Counsel is not on trial." Case Comment: *R. v. Ullah*, CRIM L.R. 2000, Feb., 108-09, 109. "A minor slip by [counsel] might render a conviction unsafe and a major blunder as to a collateral matter may leave the safety of the conviction in no doubt, . . . the more blameworthy the error, the more likely it is that safety will be affected . . . ." *Id.*(emphasis added).

270. *See Ullah*, 1999 WL 982443. The Court said that they would use the tapes "despite the possible ambiguities, despite the slight possible risk of a retrial being ordered, and despite other possible down side aspects . . . ." *Id.* The Court found that counsel "did not behave reasonably and sensibly" and that counsel's "failure to use [the] tapes was not just a mistake or understandable tactical decision . . . ." *Id.*

In *R. v. Dann*,[271] the defendant, who was on trial for bank robbery, argued that his counsel was inept for failing to ask a crucial question to a witness regarding the existence of a moneybag carried by one of the men involved in the robbery.[272] The defendant argued that eliciting this testimony would have corroborated his account of the events.[273] Counsel admitted to mistakenly not asking the witness about the moneybags.[274] The Court of Appeal, Criminal Division, held that the conviction was safe despite counsel's admitted mistake.[275] The Court noted that even though counsel should have asked the witness about the moneybags.[276] The extra evidence would not have persuaded the jury to find that the defendant's story was the truth.[277]

B. Criticisms of the United Kingdom Standard

The United Kingdom's ineffective assistance of counsel standard is subject to many of the same criticisms as the *Strickland* test.[278] As mentioned, courts in the United Kingdom place more emphasis on whether the client's verdict was prejudiced than whether counsel was deficient.[279] However, a review of authorities has shown that courts have difficulty "defining a formula which adequately and accurately specifies the [type of] case in which the court will intervene."[280]

Before addressing any issues concerning the respective standards adopted by the various jurisdictions of the United Kingdom, an examination of the actions of counsel is necessary. It is the actions of solicitors in particular that provide the foundation for many of the ineffective assistance of counsel problems presently facing the United Kingdom.[281]

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271. R. v. Dann, 2000 WL 571266.

272. *See id.* The defendant was convicted of bank robbery. *See id.* He had driven a friend and another person to the bank and claims that he was completely unaware that the robbery was going to take place. *See id.* Rather, he thought his friends were making a normal transaction because one of the other robbers had a moneybag filled with coins with him and said he needed to make a transaction. *See id.*

273. *See id.* During defendant's trial, the jury, while deliberating, returned to inquire about whether the moneybags were ever recovered by the police. *See Dann*, 2000 WL 571266. The judge told the jury that the bags had not been found. *See id.* The defendant contended that the jury's inquiry showed how important eliciting the information about the moneybags was. *See id.* The Court disagreed, finding that the jury's inquiry would have been answered the same way whether or not the witness had been asked the question or not. *See id.*

274. *See id.*

275. *See id.*

276. *See Dann*, 2000 WL 571266. The Court thought such question would have established the existence of the moneybags. *See id.*

277. *See id.* The Court noted that there was ample evidence in front of the jury for them to still find the defendant guilty despite the testimony that was not elicited. *See id.*

278. *See infra* section. II(C).

279. *See* Gow, *supra* note 2.

280. *Id.* (emphasis added).

281. *See* Griffin, *supra* note 21, at 1260. Studies have shown that "many solicitors have a negative attitude about their role as defense counsel." *Id.*

i. Solicitor-Client Contact

One major concern is solicitor-client contact.[282] In many firms, a solicitor spending time with a client is not even contemplated.[283] There are documented instances in which the solicitor does not even recognize their client or know any details of the client's case when they arrive at the courtroom.[284] After a cursory meeting, generally, solicitors have little contact with clients while both are in court.[285] In an effort to mask the effects of having little or no contact with their client, solicitors employ strategies that involve neither case preparation nor case-related work.[286] Solicitors often blame the system, rather than their own poor preparation, for losing a case.[287]

Thus, solicitors tend to rely more on their own perceptions and assumptions about the client rather than investigating their client's case and gathering evidence.[288] In order to deflect blame from themselves, many solicitors claim that client unreliability impairs their research and preparation, often leaving the solicitor to argue a piecemeal defense with information gathered the day of the client's hearing.[289] However, studies have shown that

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282. *See* MIKE MCCONVILLE ET AL., STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN 168 (1994).

283. *See id.* Solicitors would rather spend a half-hour speaking with colleagues over coffee than be with their client. *See id.* While there are some solicitors that believe there should be more contact with the client, others accept that there is no contact. *See id.* "You can't spend the time with people on legal aid, certainly the way [this firm] works, everybody is a factory, all the legal aid is only profitable because it is a factory." *Id.* at 67 (emphasis added). During an interview, one attorney stated "[t]hey [the clients] can't possibly get the same service [as private citizens]." *Id.* One excuse that solicitors use to justify minimal contact with clients is the heavy case volume they have to handle each day. *See* MCCONVILLE, *supra* note 282, at 168. Some solicitors, despite only handling one or two cases, still do not meet with clients. *See id.* Thus, heavy case load cannot fully explain the lack of client contact. *See id.*

284. *See* MCCONVILLE, *supra* note 282, at 168. Solicitors do many things to compensate for this unfamiliarity with their client and his or her case. *See id.* at 167-70. They make jokes and give their clients nicknames to make the client assume that they care about the case. *See id.* at 168. They bring up general facts about the client's life, like commenting on the client's job or a general fact about the offense. *See id.* In other instances they treat the client's problems as their own. *See id.* at 169.

285. *See id.* at 167.

286. *See id.* What case preparation that does get done is usually done by unqualified clerks. *See id.* at 166. Also, many times investigation is left to the client. *See id.* Solicitors also have clerks provide "substantial legal advice." *See* Griffin, *supra* note 21, at 1261.

287. *See* MCCONVILLE, *supra* note 282, at 169. Clients are told that there is nothing they can do to disrupt the court process. *See id.* The solicitor alleges to have considered all the options and was advising on the right option. *See id.* This strategy both lowers the expectations of clients and induces them to blame the system for any case failure. *See id.* Throughout all of this, the client is not told about the actual court process or the decisions to be made. *See id.*

288. *See id.* at 68. It is this lack of investigation that provides the foundation for many guilty pleas. *See* MCCONVILLE, *supra* note 282, at 169.

289. *See id.* at 279.

client unreliability is a result of solicitor conduct.[290] The unreliability of clients is often just a reflection of the behavior of their solicitor.[291]

ii. Presumption of Guilt

Solicitors often presume their clients are guilty.[292] This presumption by solicitors is applied to all clients without thought and barely concealed.[293] It is "transparent and available rather than opaque and hidden."[294] Solicitors, skewed by their own preconceptions of their client's wrong-doing, are "over-ready to interpret ambiguous information against the client [and] equate compliance with guilt . . . ."[295] Such presumptions undermine the client's ability to reach "autonomous decisions" about their case.[296] Moreover, clients are more apt to plead guilty, blurring the line between voluntary and involuntary guilty pleas.[297] Even more disturbing, solicitors often are not even aware of their role in the production of those pleas.[298]

iii. Deference to Counsel

Courts in the United Kingdom are highly deferential to counsel.[299] This deference allows for "minimally effective assistance of counsel."[300] As a result, many criminal defendants are slighted. Examples of such minimally effective assistance of counsel include solicitors not meeting with their clients[301] and counsel preparing a client's case upon arriving at the

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290. *See id.*

291. *See id.* "[T]he most immediate source from which defendants learn about the unpredictability of the criminal justice process is from the work done on their behalf by the own 'representatives.'" *Id.*

292. *See id.* at 140.

293. *See* MCCONVILLE, *supra* note 282, at 140-41.

294. *Id.* at 141. This presumption makes it difficult to determine which clients have a defense and which do not. *See id.* It also is difficult to tell the innocent from the guilty. *See id.*

295. *Id.* (emphasis added).

296. *See id.* at 141.

297. *See* MCCONVILLE, *supra* note 282, at 141. *But see* SPRACK, *supra* note 174, at 119. "[D]efense counsel's duty is to . . . 'fearlessly and without regard to his personal interests'" present to the court the defense of the accused. *See id.* at 119-20. Counsel's personal opinion about the accused should not matter. *See id.* at 119. "[T]hat is a cardinal rule of the Bar, and it would be a grave matter in any free society were it not." *Id.* 120 (quoting Chairman of the Bar, § 2 Cr.App.R. 193).

298. *See* MCCONVILLE, *supra* note 282, at 141.

299. *See* Gow, *supra* note 2.

300. GARCIA, *supra* note 26, at 34, *quoting* Caplin & Drysdale v. United States, 109 S.Ct. 2646, 2672 (1989) (Blackmun, J., dissenting).

301. *See* MCCONVILLE, *supra* note 282, at 167. Counsel often avoid clients by having all their cases transferred to one court. *See id.* This allows counsel to sit in the courtroom all day and not speak to clients. *See id.*

courtroom.[302] This deference also allows counsel to employ strategies that do not require investigation, research, or case-related work.[303] This deference also allows counsel to get away with having unskilled clerks do a majority of their research and investigation.[304]

iv. Presumption of Reasonable Conduct

Courts in the United Kingdom hold the strong presumption that counsel's actions fall within the range of reasonable conduct, until proven otherwise.[305] The presumption of reasonable conduct invites the same inconsistency that plagues the application of the *Strickland* test in the United States.[306]

As studies indicate, a major, contributing factor as to whether counsel has acted reasonably[307] is that prevailing professional norms determine what is reasonable in the United Kingdom, just as they do in the United States.[308] Also, counsel in the United Kingdom can escape punishment for their ineptitude and ineffectiveness by hiding behind the guise of tactical and strategic decisions.[309]

Courts in the United Kingdom are not overly concerned with counsel's conduct.[310] Rather, the United Kingdom is more concerned with whether the conviction is unsafe.[311] This narrow view strongly contributes to the difficulty in formulating an adequate and accurate formula to specify when counsel has acted ineffectively.[312] As noted, this could mean that counsel's failure to follow the client's instructions, errors in judgment, and even negligence, may not fall under the scope of the United Kingdom's ineffective assistance standard.[313]

Because an accurate formula cannot be specified for determining ineffective assistance of counsel, counsel's conduct remains unchecked.[314] This means that counsel in the United Kingdom can continue to not meet with clients, presume their guilt, and use unsound strategy.[315] By focusing solely on whether the conviction was unsafe, the courts in the United Kingdom are ignoring the extent of counsel's contribution to the problem. Eventually, the

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302. *See id.* at 168.
303. *See id.*
304. *See id* at 166.
305. *See* Gow, *supra* note 2.
306. *See* Murphy, *supra* note 37, at 199.
307. *See* MCCONVILLE, *supra* note 282, at 168
308. *See* Murphy, *supra* note 37, at 191.
309. *See* Gow, *supra* note 2.
310. *See* Shiels, *supra* note 191, at 742.
311. *See id.* at 743.
312. *See* Gow, *supra* note 2.
313. *See id.*
314. *See id.*
315. *See id.*

courts will be forced narrow the standard because, if counsel is allowed to continually act in the same manner, an ever-increasing number of unsafe convictions will be presented before them.

IV. SUGGESTIONS FOR STRENGTHENING BOTH STANDARDS

A. More Emphasis on Investigation

As noted above, counsel in the United States and counsel in the United Kingdom have shown serious deficiencies in investigating on client's cases.[316] Investigation and research are fundamental principles in the practice of law. These principles are universal regardless where counsel may reside. Neither investigation nor research should be ignored or treated lightly due to time constraints or a heavy caseload. Yet, as noted above,[317] counsel is willing to forego research and fail to pursue an investigation to its fullest extent. Such instances permeate both the United Kingdom and the United States. In the United Kingdom, solicitors do not even bother meeting with the client to discuss the client's case.[318] In the United States, defense counsel often fails to investigate the collateral consequences of a client's conviction.[319] Such disregard for the fundamental principles of investigation and research illustrates that counsel's failure to investigate is a serious problem in both countries.

The laws in both countries should be amended to rectify the issue. It is in the best interest of both the courts of the United States and the courts of the United Kingdom to implement more severe sanctions on counsel who do not properly investigate matters involving a client. Too many defendants lose the opportunity to mitigate their sentences as a result of counsel's poor research and investigation. If courts imposed harsher sanctions on counsel for not investigating their client's cases, those defendants would have a better opportunity to mitigate.

A crackdown on ineffective counsel will benefit those defendants who have received harsher sentences due to their counsel's lack of investigation and research. Also, it will benefit both the United States' and United Kingdom's legal professions. More thorough investigation by counsel into their client's cases is likely to result in fewer cases of ineffective assistance of counsel, and as a result the public will likely perceive a higher benchmark for counsel's performance.[320]

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316. *See* MCCONNVILLE, *supra* note 282, at 167-68.
317. *See id.*
318. *See id.*
319. *See* McDermid, *supra* note 93, at 751-54.
320. *See* Kelly, *supra* note 6, at 1093.

B. Less Deference to Counsel

As it currently stands, the deference that courts give to counsel on both sides of the Atlantic is tantamount to the inmates running the asylum. With the court's permission, counsel can avoid charges of ineffective assistance by hiding behind tactics or strategy.[321] This deference permits counsel to concoct a reasonable explanation for their actions. As a result, counsel can continue poor representation under the guise that it is their theory of the case. Such actions only punish that client further. Such deference also allows opportunities for counsel to employ strategies that omit research and case related work, all to the detriment of the client.[322]

It is dutifully noted that counsel should be afforded some deference. Greatly minimizing the deference to counsel would potentially be more damaging to the client than providing too much deference. If counsel did not have room to determine strategy and tactics, a client would have fewer options in order to present a defense. That being said, a middle ground could likely be found. There still should be a reasonable limit to the deference given counsel. A possible suggestion is an objective test to determine whether such strategic or tactical decisions were reasonable in terms of its effect on the client. Such a test would go a long way in determining whether that counsel has prejudiced his or her client by the actions that counsel has taken.

V. CONCLUSION

A comparison of both the United States' and the United Kingdom's standards for ineffective assistance of counsel demonstrates the arbitrariness engulfing both standards. Each standard relies too much on the subjective interpretation of appellate judges. As a result, a definable standard for what conduct constitutes ineffective assistance of counsel is nearly impossible to determine.

Egregious conduct is obviously simple to detect, but many times even that conduct goes unpunished, as seen in *Smith v. Ylst*[323] and *Egan v. Formand*.[324] However, such conduct is not the problem. Egregious conduct is much easier to remedy given its rarity. It is conduct by counsel, such as failure to fully investigate a client's case, which more often than not slips through the cracks because of the inconsistencies and subjectivity of both country's standards.

Courts in both the United States and the United Kingdom are concerned with whether counsel's conduct affected the verdict. Thus, each court system is willing to find counsel deficient. However, more often than not, the courts

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321. *See Strickland*, 466 U.S. at 690-91.
322. *See* MCCONVILLE, *supra* note 282, at 167.
323. *See Smith*, 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 480 US 829 (1988).
324. *See Egan*, 1997 S.L.T. 1166.

find that such deficiency did not affect the verdict. Defendants who find themselves on the losing side of a verdict must come to terms with the fact that not only was their representation defective, but that they have no recourse for being provided the best defense possible.

The United States and the United Kingdom should reexamine their standards. Both standards are arbitrary in nature and are too subjective to provide a firm basis for what constitutes ineffective assistance of counsel. The elements necessary to create a new, stronger, standard already exist. In fact, the current standards established by the United States and the United Kingdom are adequate foundations to reinforce those new standards. It is now up to the both countries' legal systems to realize that each standard is inadequate and that changes must be made. The voice of dissent is present, as of yet, though, it is not being heard. If that voice is heard, the result of such actions could provide the true justice one would think of coming from effective assistance of counsel.

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