Promises to Keep: The Right to Effective Assistance of Counsel— *Anderson* v. *Butler*

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Claims of ineffective assistance of counsel have been brought with increasing frequency in recent years, as courts have attempted to honor the constitutional guarantee of the right to counsel for criminal defendants.[2] Such claims are inherently controversial since they bring the potentially "distorting effects of hindsight" to bear on the performance of the defendant's trial counsel and implicitly pit the defendant against her previous attorney.[3] Both courts and commentators have noted the reluctance of judges to rule that the performance of attorneys practicing before them is inadequate.[4] In addition, some courts have expressed the concern that exposing the work of trial counsel to "intensive scrutiny"[5] will discourage lawyers from taking certain cases—particularly capital cases—where subsequent ineffective assistance claims have become almost routine.[6] Judicial concern about the increasing number of ineffective assistance claims also reflects the courts' understandable desire to achieve finality in their resolution of judicial matters.

For all of these reasons, ineffective assistance claims generally face stiff headwinds in court,[7] even where counsel's performance was woefully inadequate.[8] Yet in its recent decision in *Anderson* v. *Butler*,[9] the U.S. Court of Appeals for the First Circuit upheld a claim of ineffective assistance of counsel, in a case involving defense counsel's failure to introduce evidence that he had promised in his opening statement to the jury. The First Circuit's response to Mr. Anderson's claim illustrates emerging differences in the treatment of ineffective assistance claims under state and federal law, and reveals sharply divergent views concerning the constitutional promise that defendants are entitled to a zealous and diligent advocate.

I. "Like a Robot Programmed on Destruction."

No one would describe the job of defending Bruce Anderson, who repeatedly and fatally stabbed his estranged wife, as an easy one.[10] Mr. Anderson had

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2. *See generally* Berger, "The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End," 86 *Colum. L. Rev.* 9 (1986); Klein, "The Emperor *Gideon* Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel," 13 *Hastings Const. L. Q.* 625 (1986); Fong, "Ineffective Assistance of Counsel at Capital Sentencing," 39 *Stan. L. Rev.* 461 (1987); Colloquium, "Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled," 14 *N.Y.U. Rev. of L. & Soc. Change* 1 (1986); Gabriel, "The *Strickland* Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process," 134 *U. Pa. L. Rev.* 1259 (1986).

3. *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). If trial counsel is called as a witness in a hearing on such a claim, she faces the painful dilemma of either vindicating her own performance (and thereby harming her former client's chance of overturning the conviction and/or sentence) or testifying that her performance did not meet professional standards. *See Kuhl* v. *United States*, 370 F.2d 20, 27 (9th Cir. 1966).

4. *See, e.g.*, Klein, *supra* note 2, at 634 (quoting *Rodriguez* v. *State*, 170 Tex. Crim. 295, 340 S.W.2d 61 (Tex. Crim. App. 1960)). This reluctance can also be seen in the fact that, in cases involving claims of ineffective assistance of counsel, courts seldom refer by name to the attorney whose performance has been challenged. Klein, *supra* note 2, at 636 & n.71.

5. *Strickland*, *supra*, 466 U.S. at 690.

6. See *Burger* v. *Kemp*, 107 S. Ct. 3114, 3118 n.2 (1987), in which an ineffective assistance claim was "emphatically rejected" and the following remarks of the district court are quoted: "[T]he raising of such unfounded charges must have a significant 'chilling effect' on the willingness of experienced attorneys...to undertake the defense of capital cases. Petitioner's attorneys might do well to reconsider their apparent policy of *routinely attacking the performance of defense counsel* in light of this fact" (emphasis added). *See also Strickland*, *supra*, 466 U.S. at 690; Klein, *supra* note 1 at 635 (citing cases).

7. *See infra* note 60 and accompanying text.

8. *See infra* note 58 .

9. 858 F.2d 16 (1988).

10. The facts are set forth in *Commonwealth* v. *Anderson*, 398 Mass. 838 (1986).

forced his way into her apartment approximately six weeks after she had given birth to their child. There he found a partially clothed man in her bedroom. After chasing the man out of the building, Anderson followed his wife to a neighbor's third-floor apartment, where she telephoned the police. He forced his way in, slashed one occupant of the third floor apartment and assaulted another. He repeatedly stabbed his wife, while the occupants of the third floor apartment helplessly watched. The police recorded part of the conversation between the defendant and the victim [over the phone]. The defendant left the apartment, but approximately thirty seconds later he returned, stabbed her several more times, and fled. He turned himself in to the police later that morning.[11]

Anderson's confession to the police and the numerous witnesses to this homicide obviously limited the type of defense available to him at trial. He did not seek acquittal. Instead, his court-appointed counsel argued that Mr. Anderson's crime was, at most, voluntary manslaughter.[12] Defense counsel obtained the services of a psychiatrist and a psychologist, each of whom evaluated Mr. Anderson, prepared a report, and stood ready to testify that, while he was neither incompetent nor insane, he had stabbed his wife in the heat of passion, without premeditation.

Defense counsel had prepared the jury for the testimony of these two experts. During voir dire, the prospective jurors were asked whether they could accept expert testimony from a psychologist and psychiatrist concerning Mr. Anderson's state of mind. In his opening remarks to the jury, delivered after the prosecution rested, defense counsel informed the jury that he would present the testimony of the psychiatrist and psychologist. He said that this testimony would show that, on the night of the stabbing, the defendant was "walking unconsciously toward a psychological no exit...[w]ithout feeling, without any appreciation for the enormity of what was happening,...*like a robot programmed on destruction*."[13]

Yet, after presenting several fact witnesses, who testified about the Andersons' stormy relationship, the defense rested, without presenting either the psychiatrist or the psychologist whose testimony had been promised only the day before. Both the prosecutor and judge expressed surprise,[14] but defense counsel explained to the jury in summation that he had changed his mind about using the expert testimony:

> I had intended to try and persuade you with fancy medical and clinical terminology. But there is no account of psychiatric and psychological evaluations that were going to present a better picture of what you have already heard.[15]

The jury, apparently unpersuaded, convicted Mr. Anderson of first degree murder.

With new counsel representing him, Mr. Anderson moved for a new trial, alleging that he was denied effective assistance of counsel because his trial counsel mishandled the doctors' testimony—i.e., by telling the jury that they would testify in support of Mr. Anderson and then deciding not to put them on the witness stand.[16] The Superior Court declined to overturn his conviction[17] and the Supreme Judicial Court affirmed.[18]

The SJC measured the performance of trial counsel against the standard it had announced in *Common-*

11. *Id.*, 398 Mass. at 839.

12. The prosecution, which sought a first-degree murder conviction, argued that Mr. Anderson's offense was premeditated and committed with extreme atrocity or cruelty.

13. *Anderson* v. *Butler, supra,* 858 F.2d at 17 (emphasis added).

14. 398 Mass. at 841.

15. *Id.*, 398 Mass. at 838.

16. In his motion for a new trial, Mr. Anderson did not ask for an evidentiary hearing concerning defense counsel's performance, but instead filed copies of the psychiatrist's and psychologist's reports and a transcript of the trial.

17. The Superior Court was not troubled by counsel's failure to introduce the testimony promised in his opening. The Superior Court judge stated: "I do feel that it would have been preferable had counsel refrained from referring to prepared psychiatric testimony. But...I do not see great harm to the client." 858 F.2d at 18, quoting Superior Court opinion.

18. In affirming the conviction, the SJC performed the plenary review required by G.L. c.276, §33E.

wealth v. *Saferian*[19] and *Commonwealth* v. *Satterfield*,[20] which requires the defendant to show:

> both (a) a serious incompetency, inefficiency, or inattention of counsel; and (b) that counsel's conduct deprived the defendant of something substantial that was likely to have made a difference in the result.[21]

The SJC also noted that where, "as here, trial tactics are challenged, a defendant must show that the choice made by counsel was 'manifestly unreasonable.' "[22] Applying this test, the SJC concluded that Mr. Anderson had not been denied effective assistance of counsel.

The SJC brushed aside the question of whether defense counsel had erred by referring to the expert testimony in his opening: "Defense counsel might have been better advised not to have announced that he was going to present expert testimony, but his explanation to the jury as to why he changed his mind...has a plausible ring to it."[23] The SJC focused on whether defense counsel's subsequent decision to omit the experts' testimony was a defensible trial strategy. The Court noted that the experts' testimony could have opened the door for introduction of their written reports, and thus, on balance, might have done Mr. Anderson more harm than good. These reports described his personal history, which included taking drugs, selling drugs, involvement with motorcycle club members, and a previous beating incident involving his first wife. Finding that the expert testimony not presented to the jury "would not have significantly helped the defendant, and probably would have hurt him," the Court concluded that defense counsel's decision was therefore not "manifestly unreasonable."[24]

Anderson further pursued his ineffective assistance claim by filing a habeas corpus petition in federal district court, relying on the state court record, which included the experts' reports. The district court held that Anderson's trial counsel was not ineffective.

The First Circuit reversed. Unlike the SJC, which essentially bifurcated its analysis of defense counsel's performance (looking first at his decision to mention the expert testimony in his opening, and then taking a separate look at his decision not to use that testimony), the First Circuit examined these two decisions as a "totality."[25] Writing for a 2–1 majority, Senior Circuit Judge Aldrich found the two decisions to be fatally inconsistent: if the ultimate decision not to use the experts' testimony was within acceptable strategy, then the first one was "inexcusable."[26] Accordingly the Court held that defense counsel's decisions failed to pass muster under the sixth amendment test enunciated in *Strickland* v. *Washington*, which requires the defendant to show that they were unreasonable under "prevailing professional norms"[27] and prejudiced the outcome of the trial.[28]

The majority had no difficulty determining that defense counsel's decisions were prejudicial to the outcome of the trial. The Court stated that "little is more damaging than to fail to produce important evidence that [has] been promised in an opening."[29] Indeed, the Court held that the harm entailed in such a failure is so substantial that it is "prejudicial as a matter of law."[30] Thus, the Court ruled that Mr. Anderson was entitled to a new trial.

In a lengthy and detailed dissent, Judge Breyer criticized the majority for failing to adhere to the admonition of *Strickland* that "strategic choices [of defense counsel]...*are virtually unchallengeable*."[31] The dissent analyzed the decision not to call the doctors as witnesses in two ways. First, the dissent posed the stark possibility that defense counsel may have realized he had made a mistake in promising the doctors' testimony:

> Must counsel perpetuate the mistake?...Consider the pressure that such a view places upon a criminal defense attorney ...to call that witness, *even if doing so will hurt his client*. Surely, counsel need not, in order to render "effective assistance," produce a previously mentioned witness at all costs.[32]

Second, the dissent analyzed the original decision to tell the jury about the expected testimony of the doctors.

19. 366 Mass. 89 (1974).

20. 373 Mass. 109 (1977).

21. 398 Mass. at 839 (citations omitted). This test is similar, but not identical, to the United States Supreme Court's test for establishing ineffective assistance of counsel, announced in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See infra* notes 27–28 and accompanying text. The Massachusetts Constitution guarantees the right to counsel in criminal matters in art. 12 of the Declaration of Rights, which protects the right "to be fully heard in his defence by himself, or his counsel."

22. 398 Mass. at 839 (citations omitted).

23. 398 Mass. at 844.

24. 398 Mass. at 844. Since the Court did not find counsel's handling of the case to have fallen below the reasonable norm expected of him, there was no need to consider the "prejudice" prong of its two-part test. Indeed, the two prongs essentially collapse into one in a case like this, where the reasonableness of counsel's decision to introduce, or not introduce, testimony requires analysis of the likely effect of that testimony—i.e., the extent to which the defendant was prejudiced by his or her lawyer's failure to introduce it. In other cases, the two prongs cannot be collapsed. For example, if defense counsel failed to investigate a case properly—one of the most common ineffective assistance of counsel claims—the SJC test arguably would bar relief even in cases of egregious neglect unless the defendant could show that a proper investigation would have led to the introduction of evidence substantially helpful to the defense.

25. 858 F.2d at 17.

26. 858 F.2d at 18.

27. 466 U.S. at 688.

28. 466 U.S. at 691–92. Under *Strickland*, the defendant need only establish a "reasonable probability" that the outcome would have been different. *Id.* The Supreme Court has defined this standard to mean more than a mere possibility but *less* than a preponderance of the evidence—i.e., a standard of proof somewhere between those two benchmarks. *Id.* at 693–94. "A reasonable probability is a probability sufficient to undermine confidence on the outcome." *Id.*

29. 858 F.2d at 17.

30. 858 F.2d at 19.

31. 858 F.2d at 19 (quoting *Strickland*) (emphasis added in dissent).

32. 858 F.2d at 20 (emphasis in original).

However wrongheaded this decision may have been, argues the dissent, there is not enough in the record to establish ineffective assistance of counsel. Judge Breyer noted that the federal district court did not conduct an evidentiary hearing at which defense counsel's reasons for making such a promise could have been examined. Without an exploration of those reasons, "one cannot say that petitioner has met his burden of proving that it was not a 'plausible option' to mention the witnesses in the opening, though hindsight may have led counsel to regret it."[33]

The dissent also notes the lack of precedent for overturning an assertedly strategic decision by defense counsel. According to Judge Breyer's tally of ineffective assistance cases decided in the federal courts of appeals, 157 such cases were decided in 1986 and 1987, and ineffective assistance was found in only 20. Moreover, of these, none involved "a strategic decision of the sort here at issue."[34] Moreover, the dissent points to two cases in which courts have *rejected* ineffective assistance claims where defense counsel made an assertedly strategic decision to change direction in the course of a trial.[35]

Finally, the dissent criticizes the majority's failure to follow *Strickland*'s requirement that the petitioner establish that his case was "prejudiced" by defense counsel's mistakes. The dissent asks "how the majority can *deduce* prejudice" without a fuller examination of the trial record.[36] According to the dissent, the "strong evidence of cruelty" in the commission of this homicide suggests the possibility that no strategy could have saved the defendant from a first-degree murder conviction.

II. Analysis of the SJC and First Circuit Decisions

One of the noteworthy features of the *Anderson* litigation is the way in which it provides an opportunity to compare the state and federal standards for ineffective assistance. This comparison reveals a paradox: the SJC claims that its ineffectiveness standard is at least as demanding as the federal standard, and yet the SJC denied relief that the First Circuit granted.[37]

The reason for this paradox can be found in the SJC's failure to consider fully the impact of defense counsel's opening statement.[38] As the First Circuit majority points out,

> *the promise was dramatic*, and strikingly significant. The first thing that the ultimately disappointed jurors would conclude...would be that the doctors were unwilling, viz., unable, to live up to their billing. *This they would not forget.*[39]

Neither the SJC nor the First Circuit dissent comments on the powerful negative inference that arose from the doctors' failure to testify after their dramatic billing.[40]

The First Circuit majority's emphasis on counsel's opening remarks as important to the success of his case is well supported in the literature concerning litigation strategy.[41] Studies have shown that 85–90 percent of jurors make up their minds about a case after hearing opening statements.[42] In addition, social science studies have demonstrated that "the crucial segment in any statement, the only period during which the speaker can count on the complete attention of the full audience, is the first four minutes."[43]

Professional standards for opening statements, in civil or criminal matters, dictate caution in making promises that counsel cannot fulfill. For example, Prof. Amsterdam's treatise on criminal practice warns that "defense counsel's opening statements should be *scrupulously limited* to what the defense will be able to prove."[44] The American Law Institute treatise on civil practice is equally explicit about counsel's obligation in an opening statement:

> *Counsel should never...overstate his case to the jury.* The jury will take a decidedly dim view of counsel's tactics if many of the things that he promises to prove in an opening statement are not proved during the course of the trial.[45]

33. 858 F.2d at 21 (quoting *Strickland*, 466 U.S. at 689).

34. 858 F.2d at 21.

35. *Howard* v. *Davis*, 815 F.2d 1429 (11th Cir.), *cert. denied*, 108 S. Ct. 184 (1987); *State* v. *Eby*, 342 So.2d 1087 (Fla. App. Ct.), *cert. dism'd*, 346 So.2d 1248 (Fla. 1977).

36. 858 F.2d at 22 (emphasis added). The dissent points out that the record on appeal did not include a trial transcript or a federal district court evidentiary hearing. 858 F.2d at 22.

37. The SJC has repeatedly asserted that if defense counsel's performance passes muster under its "*Saferian* test," *see supra* note 21, "the Federal test is met as well." *Commonwealth* v. *Hagerty*, 400 Mass. 437, 438 n.2 (1987) (noting that "we continue to leave open the question of what differences, if any, exist, between the State and Federal standards").

38. It is not entirely surprising that the SJC would fail to emphasize defense counsel's failure to live up to the promise of his opening remarks. As Judge Breyer points out in his dissent, the *legal* issue on which the litigants focused almost exclusively in the federal district court and in the state post-conviction proceedings was the failure to call the experts as witnesses, not the decision to tell the jury that they would be called. 858 F.2d at 21. However, an examination of the briefs filed by Anderson's post-conviction counsel shows that the "opening remarks" issue was prominently raised and argued as a factor compounding the error of not calling the experts to the stand.

39. 858 F.2d at 17 (emphasis added).

40. *See supra* note 13 and accompanying text (noting defense counsel's opening statement that expert testimony would show defendant was "like a robot programmed on destruction").

41. *See, e.g.*, A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* 352 (1977); R. McCullough & J. Underwood, *Civil Trial Manual II* 580 (1980).

42. Marcotte, "Useful Trial Tips," *A.B.A.J.* 39, 39 (Oct. 1988) (citing research by Litigation Sciences, Inc.).

43. *BNA Criminal Practice Manual*, 91:101 (1987 ed.).

44. A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* 352 (1977) (emphasis added). Prof. Amsterdam goes on to state that "[o]verstatement of a case will reflect badly on the defendant and may undermine whatever merit there is to his defense. When uncertain how the proof will shape up, counsel should be cautious and conservative in opening."

45. R. McCullough & J. Underwood, *Civil Trial Manual* 580 (1980) (emphasis added). *See also BNA Criminal Practice Manual supra*, at 91:105 (noting that "promising results which the evidence will not deliver is a *sure-fire way to lose the jury*" (emphasis added).

In *Anderson*, the record does not disclose why defense counsel "overstated his case" with respect to the experts' testimony, but a plausible explanation can be derived from the record by considering the impact that the experts' reports might have had on the outcome.[46] The psychiatrist's report, which is quite lengthy, contains a detailed narrative of the events leading up to the stabbing, including Mr. Anderson's startling admission that, before entering his estranged wife's apartment, he moved her car from the front of the apartment to a location around the block. The report also notes that after forcing his way into her apartment, but before discovering her partially clad male guest, he immediately unplugged her phone. Both of these details severely undercut Mr. Anderson's manslaughter defense by suggesting (as the dissent notes) that his crime was to some degree premeditated. (The psychologist's report is less damaging but nevertheless mentions Mr. Anderson's involvement with motorcycle club members and with marijuana, hashish, PCP, cocaine, amphetamines, valium, and alcohol.) Given the likelihood that the information in these reports would have become available to the jury if these experts had testified, it seems highly unlikely that defense counsel would have wanted either expert to testify unless it was absolutely necessary. Thus, if the testimony offered by defense counsel went unexpectedly well, it may have suddenly appeared unwise to offer the experts' testimony.[47]

Nothing in the record, however, suggests the reasons for defense counsel's change of strategy, because neither the prosecution nor Mr. Anderson called on defense counsel to testify. The burden of establishing a "strategic" reason for what otherwise appears to be negligence or inadvertence to duty clearly should be borne by the prosecution. (This point is discussed more fully in Section III, below.) In the absence of such an explanation, it was not unreasonable for the First Circuit majority to assume that none exists and therefore overturn Mr. Anderson's conviction.

Although the logic of the First Circuit majority's view is sound, Judge Breyer's approach may, at first blush, appear to be more in keeping with *Strickland* and its progeny. In cases cited by Judge Breyer[48] and others,[49] it is apparent that courts often consider an assertedly "strategic" decision to abandon plans laid out in an opening statement to be virtually unchallengeable. Yet in *Anderson*, the Court was faced with an unusual situation—not one strategy, but two (i.e., a plan to call the experts as witnesses, then a plan not to call them). And, in this case, it is certainly fair to say that two strategies were not better than one.

Moreover, an overly deferential approach to defense counsel's alleged "strategy" does not adequately protect the sixth amendment rights at stake. Just as it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence,"[50] it is equally easy for defense counsel to devise post hoc "strategies" that justify otherwise inexplicable lapses of judgment or attention to duty. As Justice Marshall noted in a recent habeas corpus case, defense counsel's testimony concerning his or her decisions must be taken with a grain of salt because of the risk that those explanations will be self-serving.[51] Thus, it is fair to say that *Strickland*'s caution about Monday-morning quarterbacking should cut in both directions—i.e., courts should critically assess both defendant's claims of ineffectiveness *and* defense counsel's asserted "strategies."

Given the inevitable uncertainty involved in attempting to reconstruct what actually transpired in defense counsel's handling of the case, Judge Breyer understandably focused on the question of who has the burden of establishing that counsel's assistance was either effective or ineffective. Judge Breyer stated that the defendant failed to shoulder the burden of establishing prejudice. It is worth noting, however, that in some cases (as in *Anderson*) courts have dispensed with the requirement of establishing prejudice because of defense counsel's egregiously inadequate performance.[52]

In the more typical case, however, in which courts have held that the defendant must establish prejudice, courts often dismiss counsel's failures as insignificant—or at least non-prejudicial—when the defendant is charged with a particularly brutal offense.[53] For example, in *Anderson*, the dissent suggests that, because of the brutal nature of Mr. Anderson's crime, he might have been convicted of murder in any event. But measuring the cruelty of an offense and its likely impact on the outcome of the trial involves a considerable degree of guesswork, and it is often an irrelevant and inappropriate gauge of prejudice. This is especially true in a case like *Anderson*, where the essence of the ineffective assistance claim is defense counsel's failure to mitigate

46. The psychiatrist's and psychologist's reports appear in Appendices A and B of the First Circuit's opinion issued on May 3, 1988. After the Commonwealth filed a petition for rehearing, the Court issued a substituted opinion on June 22, 1988, which does not contain these appendices.

47. As the First Circuit majority notes, however, defense counsel was under no legal or ethical obligation to identify in his opening the witnesses that he planned to call. 858 F.2d at 18.

48. *See, e.g., Howard* v. *Davis* and *State* v. *Eby, supra* note 35.

49. *See, e.g., United States* v. *Bari*, 750 F.2d 1169 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985); *Mulligan* v. *Kemp*, 771 F.2d 1436 (11th Cir. 1985), *reh'g denied*, 804 F.2d 681 (1986); *see also State* v. *Berry*, 430 So.2d 1005, 1011 (La. 1983).

50. *Strickland, supra*, 466 U.S. at 689.

51. *Amadeo* v. *Zant*, 108 S.Ct. 1771, 1779 (1988).

52. *See, e.g., House* v. *Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984); *Douglas* v. *Wainwright*, 714 F.2d 1532 (11th Cir. 1983), *vacated*, 468 U.S. 1212, *aff'd on remand*, 739 F.2d 531 (1984) (per curiam); *Magill* v. *Dugger*, 824 F.2d 879 (11th Cir. 1987). *See also Cuyler* v. *Sullivan*, 446 U.S. 335, 349–50 (1980) (no showing of prejudice necessary where defendant shows that defense counsel engaged in unconstitutional multiple representation).

53. *See, e.g., Martin* v. *Maggio*, 739 F.2d 184, 186–87 (5th Cir. 1984) (denying ineffective assistance of counsel claim because totality of circumstances, including proof of a brutal, premeditated murder, did not establish prejudice).

the perceived harshness of the offense by introducing expert testimony to explain the defendant's state of mind (or by refraining from inadvertently suggesting to the jury that such testimony would not be offered because it would be adverse).

As far as evidentiary burdens are concerned, clearly the defendant must shoulder the initial burden of showing that he did not receive reasonably effective assistance. But how much farther must the defendant go in order to establish ineffectiveness? Must he rule out every conceivable trial strategy that would arguably explain defense counsel's conduct? How much "prejudice" must the defendant show and how can that prejudice be weighed?

III. The Need for Reform

An answer to these questions was proposed in *Commonwealth* v. *Garvin*,[54] in which Judge Spaeth suggested the following standard for deciding ineffective assistance claims: "[I]f the defendant shows that counsel did not conduct the case in a reasonably competent manner, relief must be granted, unless the prosecution shows beyond a reasonable doubt that counsel's conduct had no effect on the outcome of the case." Such an approach incorporates familiar harmless-error analysis, and appropriately shifts the burden to the government to show that, in spite of the ineffective assistance, the defendant's conviction or sentence should stand.[55] Moreover, such a standard is warranted whenever a criminal defendant meets an initial burden of establishing that the government obtained his conviction or sentence in proceedings where he was deprived of constitutional safeguards. A violation of the right to counsel is, after all, no less serious than denial of the right to be present at trial, admission of evidence in violation of the fourth amendment, denial of the right to be presumed innocent until proven guilty, or improper comment on a defendant's failure to testify—all of which would warrant a new trial unless the government satisfied its burden of establishing that the error was harmless beyond a reasonable doubt.[56]

A rethinking of the appropriate standard for establishing ineffective assistance claims, under state constitutional law, is both timely and much needed for two reasons.[57] First, notwithstanding Mr. Anderson's success in overturning his conviction, recent decisions by the United States Supreme Court—most notably, the Court's seminal decision in *Strickland* v. *Washington*—have made ineffective assistance of counsel claims far more difficult to win under federal law.[58] Under *Strickland*, federal courts "must be highly deferential" in their scrutiny of counsel's performance, and they "must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance."[59] Applying *Strickland*'s deferential approach, courts have allowed convictions and sentences to stand despite egregiously incompetent representation of the defendant.[60]

At the same time, because of inadequate funding, the work of representing indigent criminal defendants

54. 335 Pa. Super. 560, 567, 485 A.2d 36, 39 (1984) (Spaeth, J., concurring). A similar standard was employed, until *Strickland*, by a majority of the Circuits. *See United States* v. *Decoster*, 624 F.2d 196, 208 & n.74 (D.C. Cir. 1976) (en banc), *cert. denied*, 444 U.S. 944 (1979); *United States* v. *Baynes*, 687 F.2d 659, 673 (3d Cir. 1982); *Wood* v. *Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978); *Wade* v. *Frantzen*, 678 F.2d 56, 59 (7th Cir. 1982); *United States* v. *Tucker*, 716 F.2d 576, 588 (9th Cir. 1983) (opinion of Judge Alarcon) (as corrected); *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir. 1980). A minority of the Circuits had held, prior to *Strickland*, that harmless error analysis could *not* be used in ineffective assistance of counsel cases and that automatic reversal of the conviction was necessary. *See Moore* v. *United States*, 432 F.2d 730, 737 (3d Cir. 1970) (en banc); *Gilbert* v. *Sowders*, 646 F.2d 1146, 1150 (6th Cir. 1981).

It is worth noting that the United States Supreme Court has recently begun employing harmless error analysis in some cases where a defendant has been denied the assistance of counsel during only part of the proceedings against him. *Compare Satterwhite* v. *Texas*, 108 S. Ct. 1792 (1988) (harmless error analysis applies to deprivation of right to consult counsel before submitting to psychiatric examination) *with Chapman* v. *California*, 386 U.S. 18, 23, n.8 (1967) (citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (harmless error analysis not applicable where there has been total deprivation of counsel throughout entire proceedings).

55. *See* Colloquium, *supra* note 2, at 103 n.14 (discussing *Chapman* v. *California*, 386 U.S. 18 (1967) and harmless error standard).

56. *See Pope* v. *Illinois*, 107 S. Ct. 1918 (1987); *Rose* v. *Clark*, 106 S. Ct. 3101, 3105 (1986) (citing cases).

57. This is true with respect to both the question of apportioning burdens of proof and production, *see supra* notes 54–55 and accompanying text, and the specific standards against which professional performance is measured, *see infra* note 72 and accompanying text.

58. According to one study, only 3.9% of ineffective assistance claims succeed. Klein, *supra* note 2, 13 *Hastings Const. L. Q.* at 632 (citing ABA-sponsored study of 4000 cases between 1970 and 1983). Yet, according to some estimates, as many as half of the cases reviewed on appeal demonstrate that trial counsel rendered ineffective assistance. *See* Bazelon, "The Defective Assistance of Counsel," 42 *U. Cinn. L. Rev.* 1, 22, 23 (1973). Former Chief Justice Burger has also noted the serious problem of criminal trial attorney incompetence. *See*, Burger, "The Special Skills of Advocacy," 52 *Fordham L. Rev.* 227, 234 (1973) (suggesting that between one-third and one-half of trial attorneys "are not really qualified to render fully adequate representation").

59. 466 U.S. 689 (emphasis added); *see also id.* at 691 (courts should apply a "heavy measure of deference to counsel's judgments"); *Kimmelman* v. *Morrison*, 106 S. Ct. 2574, 2587 (1986) (describing *Strickland* standard for establishing ineffective assistance as "highly demanding").

60. *See, e.g., Burger* v. *Kemp*, 107 S.Ct. 3114, 3126, 3134 (1987) (Blackmun, J., dissenting) (noting defense counsel's failure "to investigate mitigating evidence and fail[ure] to present *any* evidence at the sentencing hearing despite the fact that the petitioner was an adolescent with psychological problems and apparent diminished mental capabilities") (emphasis added); *Mitchell* v. *Kemp*, 107 S. Ct. 3248, 3249 (1987) (Marshall, J., dissenting from denial of certiorari) ("appointed counsel made *no* attempt to interview *any* potential mitigating witnesses" despite the fact that his client, a capital defendant, had been active in church choir, boy scouts, glee club, and student council, and captain of his high school football team) (emphasis in original); *Glass* v. *Blackburn*, 791 F.2d 1165 (5th Cir. 1986) (finding no ineffectiveness despite counsel's candid admission that failure to call potential witnesses "was not the result of a strategic choice but was, rather, the result of mental and physical fatigue").

has generally fallen on the shoulders of overworked, underpaid public defenders and assigned counsel. Studies of the public defender and appointed counsel systems of providing representation for criminal defendants have repeatedly shown the inadequacy of the resources devoted to such clients.[61] A 1973 study by the National Legal Aid and Defender Association described those services as "grossly deficient" and the attorneys as "overburdened, undertrained, and underpaid."[62] A 1979 study by the ABA Standing Committee on Legal Aid and Indigent Defendants concluded that "millions of [indigent criminal defendants] are denied effective legal representation."[63] This ABA committee reexamined the problem in 1982 and again found public defenders and appointed counsel handling too many cases with inadequate compensation.[64] In a 1984 Arizona case, an en banc state Supreme Court found the system for providing counsel for indigent defendants in an entire county to be so inadequate that it held the defendant would be entitled to a presumption that "the adequacy of representation [was] adversely affected by the system."[65]

In *Anderson*, where defense counsel was court appointed, the record does not indicate whether counsel was handicapped in this way.[66] Yet in fashioning rules of general applicability for determining whether defendants have received effective assistance, courts should bear in mind the institutional setting in which such assistance is rendered, and be particularly careful not to employ a lowered standard of professional duty because that is all indigent defendants can expect under present circumstances.

There is certainly no question that the resources available to a defendant and his counsel affect the quality of representation that the defendant receives.[67] It is equally clear that indigent defendants face a greater risk of receiving ineffective assistance than those who can afford private counsel.[68] Courts should therefore set standards which prevent the diminished expectations of the services available to indigent defendants under "prevailing professional norms"[69] from infecting the analysis of whether a defendant has received reasonably effective assistance.[70] For if courts do not guard against erosion of those expectations, the definition of "reasonableness" becomes circular and ultimately meaningless.[71]

The increasing attention paid to *state* constitutional protections affords an opportunity for reexamination of the right to effective assistance of counsel and for setting more explicit standards.[72] Justice Brennan, long a champion of state constitutional rights,[73] has recently described this increased attention as "probably the most important development in constitutional jurisprudence of our times."[74] In Massachusetts courts, the proposition that state constitutional protections are often broader than the protections afforded by cognate provisions of

61. In addition to inadequate compensation for the attorneys who handle such cases, public defenders lack sufficient resources to hire investigators, expert witnesses, and support staff.

62. Klein, *supra* note 2, at 657.

63. *Id.*, at 659.

64. *Id.*, at 658. *See also* Lefstein, "Financing the Right to Counsel: A National Perspective," 19 *Loyola of L.A. L.Rev.* 391, 392 (1985) ("defense counsel are routinely asked to work for what is oftentimes patently inadequate compensation").

65. *See State* v. *Smith*, 140 Ariz. 355, 681 P.2d 1374, 1381 (1984) (en banc).

66. Mr. Anderson's trial counsel was paid at the rate of $25 per hour for out-of-court time and $35 per hour for in-court time. These reimbursement rates have been in effect for the last ten years, except for murder cases, in which the rate was raised to $50 per hour in 1985. Telephone conversation with Nancy Gist, Esq., Deputy Chief Counsel, Massachusetts Committee for Public Counsel Services, October 28, 1988. (Mr. Anderson was tried in 1984.) Massachusetts' rates are similar to those available in other states, where the average compensation for appointed counsel is $20–40 per hour. *See* Colloquium, *supra* note 2, at 7 (citing 1984 study by U.S. Justice Department). *See also* 18 U.S.C. §3006A (setting rates for appointed counsel in federal cases at $40–75 per hour, with a maximum, subject to exceptions, of $2,500 for felony cases).

67. *See Morris* v. *Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring) (describing this disparity as a "harsh reality" of our criminal justice system).

68. *See* Colloquium, *supra* note 2, at 75 (describing the unequal treatment caused by "wealth discrimination and criminal defense funding problems [as] endemic to the criminal justice system").

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

70. *See, e.g., Washington* v. *Strickland*, 693 F.2d 1243, 1255–58 (5th Cir. 1982) (describing "limitations of time and money" as factors which may be taken into account when determining whether counsel rendered effective assistance under all the circumstances).

71. *See* Colloquium, *supra* note 2, at 77. This phenomenon can also be seen in the U.S. Supreme Court's fourth amendment analysis, which under *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) defines the "reasonable expectation of privacy" protected by the U.S. Constitution as that which "society is prepared to recognize as 'reasonable.' " *See, e.g., California* v. *Greenwood*, 108 S. Ct. 1625 (1988) (holding that defendants did not have "reasonable expectation of privacy" in garbage which they placed in opaque bags outside their house for trash collection).

72. Although in *Strickland* the U.S. Supreme Court chose not to adopt explicit performance standards for defense counsel, 466 U.S. at 688–89, the adoption of such standards has been widely urged by courts and commentators. *See, e.g., Strickland*, 466 U.S. at 706, 709 & n.3 (Marshall, J., dissenting) (citing cases and noting that many of those decisions look to ABA Standards for Criminal Justice as a guide); Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 *N.Y.U. L. Rev.* 299, 344–45, 362 (outlining proposed standards for defense counsel); Klein, *supra* note 2, at 654–55 (discussing the need for standards).

It is worth noting that, while the ABA Standards provide a useful starting point for developing such standards, they cannot be assumed to provide a complete statement of the relevant duties of defense counsel. *See* Tague, "The Attempt to Improve Criminal Defense Representation," 15 *Am. Crim. L. Rev.* 109, 131, 136 (1977) (ABA Standards not sufficiently inclusive). For example, Standard 4-7.4, which deals with opening statements, does not address the type of ineffectiveness at issue in *Anderson*.

73. *See, e.g.*, Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489 (1977).

74. Klein, *supra* note 2, at 645 n.123.

the federal constitution is already well established.[75] By developing independent state standards for ineffective assistance, state courts can ensure that *Strickland* and its federal progeny become merely a floor, not a ceiling, for the protection of the right to counsel.[76] Such state development of the law in this area can in turn provide the laboratory from which a reconsideration of federal standards may emerge.

75. *See generally* Wilkins, "Judicial Treatment of the Massachusetts Declaration of Rights in Relation to the Cognate Provisions of the United States Constitution," 14 *Suffolk L. Rev.* 887 (1980); *see, e.g., Commonwealth* v. *Blood*, 400 Mass. 61 (1987) (search and seizure); *Commonwealth* v. *Upton*, 394 Mass. 363 (1985) (probable cause); *Commonwealth* v. *Sees*, 374 Mass. 532 (1978) (free expression); *District Attorney for the Suffolk County District* v. *Watson*, 381 Mass. 648 (1980) (constitutionality of the death penalty); *Moe* v. *Secretary of Administration and Finance*, 382 Mass. 629 (1981) (funding of medically necessary abortions); *Dane* v. *Board of Registrars of Voters of Concord*, 374 Mass. 152 (1978) (voting rights).

76. In Massachusetts, ineffective assistance claims have been upheld in a number of cases. *See, e.g., Commonwealth* v. *Hagerty*, 400 Mass. 437, 441 (1987) (counsel failed to investigate and pursue "the only realistic defense the defendant had"); *Commonwealth* v. *Westmoreland*, 388 Mass. 269 (1983) (counsel abandoned viable defenses in closing argument); *Commonwealth* v. *Street*, 388 Mass. 281 (1983) (same); *Commonwealth* v. *Rondeau*, 378 Mass. 408 (1979) (counsel failed to withdraw when it became apparent that his own testimony was needed for proper defense of his client); *Commonwealth* v. *Rossi*, 19 Mass. App. Ct. 257 (1985) (counsel failed to object to inadmissible evidence of prior convictions); *Commonwealth* v. *Frisino*, 21 Mass. App. Ct. 551 (1986) (defense failed to object to highly damaging hearsay, without which defendant would have been entitled to required finding of not guilty); *Commonwealth* v. *Kane*, 19 Mass. App. Ct. 129, 142 (1984) (counsel failed to object to obvious errors in jury instructions).

The right to counsel in other states is also well established. *See* Stern & Hoffman, "Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform," 136 *U. Pa. L. Rev.* 1783, 1825 & n.201 (1988) (noting that right to counsel in criminal matters is guaranteed in every state constitution except Virginia, where it is protected by statute).