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THE RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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I. INTRODUCTION

In *Strickland v. Washington*,[1] the Supreme Court articulated a two-part standard for evaluating a defendant's Sixth Amendment claim that he did not receive the effective assistance of counsel at his criminal trial. To establish constitutional ineffectiveness of trial counsel under *Strickland*, a defendant must prove first that he did not receive reasonably competent assistance, and second, that but for the deficient performance of counsel, there is a reasonable probability that the result of the proceeding would have been different.[2]

The Supreme Court has also held that there is a constitutional right to effective assistance of counsel on appeal in criminal cases.[3] However, that right arises out of the Due Process Clause, not the Sixth

1. 466 U.S. 668 (1984).
2. *Id.* at 687.
3. Evitts v. Lucey, 469 U.S. 387 (1985).

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Amendment.[4] The Court has yet to determine the standard for evaluating claims that the right to effective assistance of appellate counsel has been denied. Should the *Strickland v. Washington* Sixth Amendment test be applied to appellate counsel, or should some other test be applied, for example, a traditional due process test? If *Strickland* is applied, should it be applied in the same way to appellate counsel as it is to trial counsel? Every United States Circuit Court of Appeals has applied the *Strickland* test to appellate counsel,[5] but none has carefully analyzed the problem.[6]

Clearly there are significant differences between the functions performed by trial and appellate counsel that might call for a different standard.[7] Additionally, the difference between the trial and appellate

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4. *Id.* at 402-05. *See* discussion *infra* Part III.A.

5. United States v. Victoria, 876 F.2d 1009 (1st Cir. 1989); Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990); Diggs v. Owens, 833 F.2d 439 (3d Cir. 1987); Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985); Schwander v. Blackburn, 750 F.2d 494, 501-02 (5th Cir. 1985); Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986); Gray v. Greer, 800 F.2d 644 (7th Cir. 1986); Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987); United States v. Birtle, 792 F.2d 846 (9th Cir. 1986); Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987); Morgan v. Zant, 743 F.2d 775, 780 (11th Cir. 1984).

6. The Ninth Circuit is the only court to offer any reason for applying the *Strickland* standard to appellate counsel. Miller v. Keeney, 882 F.2d 1428 (9th Cir. 1989). However, it offered no analysis of the very complex issue. Thus, in *Miller*, the court's entire statement on the subject is as follows:

> We review claims of ineffective assistance of appellate counsel according to the standard set out in Strickland v. Washington [citation omitted]. United States v. Birtle [citation omitted]. *See also* Penson v. Ohio [citation omitted] (holding that where a defendant has been actually or constructively denied the assistance of appellate counsel altogether, the *Strickland* standard does not apply and prejudice is presumed; the implication is that *Strickland* does apply where counsel is present but ineffective).

Miller, 882 F.2d at 1434. In United States v. Birtle, 792 F.2d 846 (9th Cir. 1986), the same court offered a different, but equally conclusory and inadequate statement of its reasons. There, it interpreted the *Strickland* Court's statement that its "principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial" (*Strickland*, 466 U.S. at 697) to mean that Strickland's analysis applied to counsel's performance in each of these forums. *Birtle*, 792 F.2d at 847. It seems clear that this is a misinterpretation, and that the Court was in reality indicating that its *Strickland* standard was applicable regardless of which forum was being used to entertain the claim of ineffective assistance. Whether correct or not, however, the Ninth Circuit did not fully analyze the issue.

7. *See infra* Parts IV.A.1. and IV.A.2.

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forums might require a different standard.[8] For example, the more important role played by the facts and by the client at trial might call for a more deferential inquiry into trial counsel's performance than the inquiry into appellate counsel's performance.[9] Moreover, a finding of ineffectiveness of trial counsel has a substantially greater impact on finality than does a finding of ineffectiveness of appellate counsel because of the greater factual complexity of trial ineffectiveness claims, the more extensive procedures required to resolve those claims, and the drastic remedy — reversal of a criminal conviction — required for ineffectiveness of trial counsel but not for ineffectiveness of appellate counsel.[10]

As this article concludes, under a due process analysis, *Strickland*'s "reasonable competence" standard[11] should apply to appellate counsel. However, the application of that standard in evaluating the performance of appellate counsel should be substantially different from its application to trial counsel. Thus, from a functional analysis of the role of appellate counsel,[12] "reasonable competence" should require counsel to perform several basic appellate functions. These include taking appropriate steps to gain access to the appellate court, securing and reviewing the record in the lower court, and performing legal research.[13]

With respect to appellate counsel's duty to select effectively the issues to be raised on appeal, we conclude that *Strickland*'s "reasonable competence" standard should be applied with much less deference to

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8. *See* discussion *infra* Part IV.B.

9. *See* discussion *infra* Part IV.B.

10. *See* discussion *infra* Part IV.B.

11. *Strickland*, 466 U.S. at 688. This standard is not without its critics. *See, e.g.*, Vivian Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths - a Dead End?*, 86 COLUM. L. REV. 9 (1986); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

However, critique of that standard is beyond the scope of this article. This article does not take issue with the reasonable competence standard formulated by the Supreme Court for evaluating the constitutional effectiveness of trial counsel; it analyzes the application of that standard to appellate counsel.

12. *See* Bruce A. Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053 (1980) (applying a functional analysis to the right to effective assistance of trial counsel).

13. *See infra* Part V.A.

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counsel than that mandated by the *Strickland* Court. Moreover, because virtually all federal constitutional evaluation of appellate counsel's performance occurs in the context of federal habeas corpus review of state appellate counsel, *Strickland*'s requirement of a showing of prejudice should not be applicable to claims of appellate ineffectiveness.[14] The current practice of finding ineffectiveness only where an omitted issue would have succeeded in the state appellate courts requires the federal courts to predict the reviewability and probable disposition of state law issues in the state courts, a gross federal intrusion into state process beyond that ordinarily permitted in the operation of the federal courts' corrective role. This same intrusion could be avoided without the expenditure of substantial additional judicial resources by remanding a case to the state courts once the federal court determines that the omitted issue is of sufficient merit to warrant the state court's consideration. Requiring the reviewing federal court to determine whether there was prejudice in the state courts would conflict with the Supreme Court's now well-established, restrictive view of the habeaus corpus court's role in reviewing state convictions.[15]

Part II of this article closely examines the Supreme Court's decision in *Strickland v. Washington*, as it applies to effective assistance of trial counsel. Part III analyzes the constitutional origin and current status of the right to effective assistance of counsel on appeal. Part IV discusses the functional differences between trial and appellate counsel, the differences in the two forums, and the different effect that a finding of ineffectiveness of counsel at trial or on appeal has on finality. Part V formulates a standard to govern ineffectiveness of appellate counsel claims that incorporates *Strickland*'s "reasonable competence" standard, but applies that standard differently with respect to appellate counsel. It also rejects *Strickland*'s prejudice requirement.

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14. *See infra* Part V.B.

15. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853, 860 (1993); Brecht v. Abrahamson, 113 S. Ct. 1710, 1717-19 (1993).

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II. EFFECTIVE ASSISTANCE OF TRIAL COUNSEL: *STRICKLAND V. WASHINGTON*

A. Factual Background

In *Strickland v. Washington,*[16] the Court reviewed a claim of ineffectiveness of trial counsel during the sentencing phase of a death penalty case. Washington had gone on a crime spree that included three murders and several robberies.[17] He surrendered, confessed to one of the murders, and then, against his lawyer's advice, confessed to the two others.[18] He pled guilty to all charges and rejected his lawyer's advice to request an advisory sentencing jury at the sentencing phase of the proceeding.[19]

Counsel did little to prepare for sentencing. He decided instead to appeal to the sentencing court's well-known favorable disposition toward those defendants who plead guilty.[20] Counsel met with Washington and spoke by telephone with Washington's wife and mother. However, he did not follow up on this one unsuccessful attempt to meet with them in person.[21] Furthermore, he did not seek out any character witnesses because of his sense of "hopelessness" about the case and because he believed it would be better tactically to rely on the plea colloquy for facts about Washington's character.[22] In essence, counsel's strategy was to avoid exposing Washington to negative rebuttal proof by declining to put on any proof. Using similar strategy, he also did not request a probation report because he believed it would

16. 466 U.S. 668 (1984).
17. *Id.* at 671-62.
18. *Id.* at 672.
19. *Id.*
20. *Id.*
21. *Id.* at 672-73.
22. *Id.* at 673. According to the Court, "[t]hat decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* It also reflected counsel's decision to rely on the plea colloquy for such evidence; the colloquy had been sufficient and the decision to forgo the presentation of additional evidence prevented the State from cross-examining respondent and putting on psychiatric proof of its own. *Id.*

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prove more detrimental than helpful.[23] However, counsel did succeed in having some evidence excluded that he thought was damaging, including the defendant's criminal record.[24]

Counsel's sentencing strategy was thus to rely on the trial judge's remarks at the plea proceeding where the judge said that he had great respect for defendants who own up to their crimes.[25] Counsel argued: (1) that Washington's remorse and acceptance of responsibility justified sparing him from the death penalty; (2) that he had no significant criminal history; and (3) that he committed the crimes under extreme mental or emotional stress due to his inability to support his family.[26] Nevertheless, the trial judge found several aggravating circumstances for each of the three murders and no mitigating circumstances. Therefore, the judge sentenced Washington to death on each of the three counts of murder.[27]

B. State Appellate and Collateral Proceedings

The Florida Supreme Court upheld the convictions and sentences on direct appeal.[28] Washington then sought state collateral relief claiming, *inter alia*, that he had been deprived of the effective assistance of counsel based on counsel's failure to investigate and develop character evidence in mitigation of his sentence.[29] The Circuit Court of Dade County denied relief, and the Florida Supreme Court af-

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 673-74.
27. *Id.* at 675.
28. Washington v. State, 362 So. 2d 658 (Fla. 1978).
29. *Strickland*, 466 U.S. at 675. This claim was based on counsel's failure to (1) move for a continuance to prepare for sentence; (2) request a psychiatric report; (3) investigate and present character witnesses; (4) seek a presentencing investigation report; (5) present meaningful arguments to the sentencing judge; and (6) investigate the medical examiner's reports or cross-examine the medical experts concerning the causes of deaths. *Id.* at 675. The respondent submitted fourteen affidavits from friends, neighbors and relatives stating that they would have testified if asked; and a psychiatric report and a psychologist's report stating that he was "chronically frustrated and depressed because of his economic dilemma." *Id.* at 675-76.

HeinOnline -- 97 W. Va. L. Rev. 7 1994-1995

firmed,[30] holding that Washington had "failed . . . to make a prima facie showing of [either] substantial deficiency or possible prejudice . . . ."[31]

C. *Habeas Corpus Proceedings*

A petition for a federal writ of habeas corpus based on ineffective representation was denied.[32] The district court held that although trial counsel had made errors in failing to investigate mitigating evidence further, Washington had suffered no prejudice since he would have received a death sentence in any event.[33] The Fifth Circuit affirmed in part and vacated in part.[34] It formulated a different analysis and standard for judging ineffectiveness claims and remanded the case to the district court with instructions to apply that standard to the facts.[35] Rehearing *en banc* was granted.[36]

On rehearing *en banc*, the Eleventh Circuit[37] analyzed the case under an entirely different standard.[38] It held that the Sixth Amendment right to counsel entitles a criminal defendant to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances."[39] The court explicitly recognized a duty to investigate and noted that "the amount of pretrial investigation that is reasonable defies precise measurement."[40] Nevertheless, the court attempted to establish some guidelines for measuring the scope of that duty. Thus, the court held that where there is only one plausible defense, counsel must conduct a "reasonably substantial investigation" that includes "an independent examination of the facts, circumstances,

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30. Washington v. State, 397 So. 2d 285 (Fla. 1981).
31. *Strickland*, 466 U.S. at 676, 678.
32. *Id.* at 679.
33. *Id.* at 678-79.
34. Washington v. Strickland, 673 F.2d 879 (5th Cir. Unit B 1982).
35. *Id.*
36. Washington v. Strickland, 679 F.2d 23 (5th Cir. Unit B 1982).
37. Between the issuance of the panel decision and rehearing *en banc*, the Eleventh Circuit was created and retained jurisdiction of the case.
38. Washington v. Strickland, 693 F.2d 1243 (Former 5th Cir. 1982).
39. *Id.* at 1250.
40. *Id.* at 1251.

HeinOnline -- 97 W. Va. L. Rev. 8 1994-1995

pleadings and laws involved."[41] If there is more than one plausible line of defense, counsel should substantially investigate each one before choosing which one to rely on.[42] Strategic choices based on such investigation "will seldom if ever" be found ineffective.[43]

Failure substantially to investigate each plausible line of defense may not necessarily be ineffective, although counsel may not exclude defenses for other than strategic reasons. Limitations of time and money, information from the client, and the strength of the prosecution's case are all relevant considerations.[44]

Under the Eleventh Circuit's scheme, reasonable assumptions and reasonable choices made after considering the totality of the circumstances are entitled to substantial deference.[45] Factors relevant to determining "reasonableness" include: (1) the attorney's experience; (2) the inconsistency of pursued and abandoned lines of defense; and (3) the potential for prejudice from taking an abandoned line of defense.[46]

With respect to prejudice, the court held that a defendant must demonstrate that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense."[47] Upon such a showing, reversal would be required unless the prosecution demonstrated beyond a reasonable doubt that counsel's deficient performance was harmless.[48] After articulating this standard, the Eleventh Circuit reversed and remanded the case to the district court for application of this standard.[49] The State petitioned for certiorari to the Supreme Court to review the Eleventh Circuit's decision, and the petition was granted.[50]

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41. *Id.* at 1252-53.
42. *Id.* at 1254.
43. *Id.*
44. *Id.* at 1257-58.
45. *Id.* at 1255.
46. *Id.* at 1256-57 n.23.
47. *Id.* at 1262.
48. *Id.* at 1260-62.
49. *Id.* at 1243.
50. 462 U.S. 1103 (1983).

HeinOnline -- 97 W. Va. L. Rev. 9 1994-1995

D. The Supreme Court Decision

1. The Majority Opinion

In an opinion written by Justice O'Connor,[51] the Supreme Court reversed.[52] It held that Washington's right to effective assistance of counsel had not been violated.[53] Emphasizing that the underlying purpose of the Sixth Amendment requirement of effective assistance is "to insure a fair trial,"[54] the Court explained that, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[55]

Rejecting the Eleventh Circuit's formulation of elaborate guidelines to cover all cases, the Court articulated a simple two-part test for ineffectiveness claims.[56] First, the defendant must demonstrate that his attorney's performance "fell below an objective standard of reasonableness."[57] Second, there must be a showing that there existed a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[58]

As to the first prong,[59] the Court held that the standard for determining an attorney's performance is that of reasonably effective assistance under "prevailing professional norms."[60] A defendant must show

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51. Justice O'Connor's majority opinion was joined by six justices, including Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens. In a separate opinion, Justice Brennan joined the Court's opinion, but dissented from its judgment on the ground that "the death penalty is in all circumstances cruel and unusual punishment." *Strickland*, 466 U.S. at 701. Justice Marshall dissented in a separate opinion. *Id.* at 706. *See* discussion *infra* Part II.D.2.

52. *Strickland*, 466 U.S. at 701.

53. *Id.* at 700-01.

54. *Id.* at 686.

55. *Id.*

56. *Id.* at 687.

57. *Id.* at 688.

58. *Id.* at 694.

59. In adopting this standard, the Court relied on its own prior decision in McMann v. Richardson, 397 U.S. 759 (1970), as well as the consensus of the federal courts.

60. 466 U.S. at 688.

HeinOnline -- 97 W. Va. L. Rev. 10 1994-1995

specific acts or omissions by counsel which, viewed from the perspective of counsel at trial, fall below the standard of reasonable professional assistance.[61]

Unlike the Eleventh Circuit, the Supreme Court explicitly refused to enumerate specific guidelines, or to compose a checklist for judging attorney competence.[62] The Court held that, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[63] Moreover, such a set of rules would interfere with the independence of counsel and could distract counsel from vigorous advocacy.[64] Instead, the Court relied on "the legal profession's maintenance of a standard sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions."[65]

Central to the Court's holding was a strong presumption of reasonably competent assistance — decisions or actions taken by counsel should be presumed to have been strategic.[66] Such a presumption is required since "there are countless ways to provide effective assistance in any given case."[67] Moreover, according to the Court, the absence of such a presumption would inevitably lead to "intrusive post-trial inquiry"[68] into the quality of representation, which would in turn encourage proliferation of ineffectiveness claims, require an increased number of second trials, result in a diminution in counsel's willingness to serve, and "undermine the trust between attorney and client."[69]

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61. *Id.* at 690.
62. *Id.* at 688.
63. *Id.* at 688-89.
64. *Id.* at 689.
65. *Id.* at 688.
66. *Id.* at 689.
67. *Id.* Nevertheless, the Court recognized certain basic duties: the duty of loyalty, the duty to advocate the defendant's cause, the duty to consult with the defendant, the duty to inform, the duty to avoid conflicts of interest, and the duty "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.
68. *Id.* at 690.
69. *Id.* Not all commentators are convinced that these results are really likely to occur. *See, e.g.*, Berger, *supra* note 11, at 82. Indeed, the unrealistically low fees paid to assigned

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As to the requirement of prejudice, the Court distinguished prior decisions dealing with the deprivation of counsel, where no showing of prejudice is required.[70] According to the Court, in ineffectiveness cases, a showing of prejudice is necessary because (1) the government is not responsible for and hence not able to prevent attorney errors;[71] (2) attorney errors come in an infinite variety and are just as likely to be harmless as prejudicial; and (3) representation is an art, and an act or omission that is considered unprofessional in one setting may be "sound or even brilliant" in another.[72]

Finally, the Court advised that the lower courts need not evaluate counsel's performance before addressing the question of prejudice. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[73]

2. *The Other Opinions*

Justice Brennan concurred in part and dissented in part.[74] He agreed with the Court's articulation of the standard for judging ineffectiveness claims because he believed that that standard "will both pro-

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counsel are more likely to impact on the diligence of the defense bar than accurate prescriptions about the basic components of effective criminal representation. On the other hand, O'Connor's refusal to formulate a checklist may not have been wrong. Because of the vast importance of the facts at trial, the kind of checklist that could have been adopted by the Court, such as the ABA's *Standards Relating to the Defense Function,* that could be applicable to all criminal cases, would likely be so general as to be barely helpful.

70. *Strickland,* 466 U.S. at 692.

71. *But see* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 65-74 (1991) (arguing that the prosecutor's obligation to do justice requires that he or she assist in preventing errors by defense counsel).

72. *Strickland,* 466 U.S. at 693.

73. *Id.* at 697. This focus on outcome is consistent with the Court's harmless error jurisprudence, in which it has increasingly focused on the reliability of the determination of guilt rather than on procedural fairness. *See, e.g., Brecht,* 113 S. Ct. 1710 (1993). The importance of this announcement by the Supreme Court cannot be overstated; the absence of prejudice is the most frequent basis for dismissing claims of ineffectiveness of trial counsel. *See infra* text accompanying notes 185-86.

74. *See supra* note 51.

HeinOnline -- 97 W. Va. L. Rev. 12 1994-1995

vide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law."[75] He also stated his belief that the standards "are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind."[76]

Justice Marshall dissented, disagreeing with both the performance standard and the prejudice requirement.[77] According to Justice Marshall, the standard of "reasonable competence" is so vague that it is either meaningless or would permit too much variation in the courts.[78] For example, he questioned whether "reasonable competence" referred to a reasonably competent retained or assigned lawyer and whether the standard of performance would change to reflect different standards in different parts of the country.[79] He also disagreed with the majority's assertion that uniform standards were impossible to formulate. Accepting counsel's "wide latitude" for strategic decision-making, Justice Marshall suggested that much of the work involved in trial preparation — bail applications, client communication, objecting at trial, and filing a notice of appeal — could be the subject of uniform standards.[80] Finally, Justice Marshall predicted that the court's refusal to formulate such standards "will stunt the development of constitutional doctrine in this area."[81]

With respect to the requirement of prejudice, Justice Marshall stressed the difficulty of making an evaluation of prejudice from a record created by ineffective counsel.[82] In addition, he rejected the

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75. *Strickland*, 466 U.S. at 702.

76. *Id.* at 703.

77. *Id.* at 707.

78. *Id.* Justice Marshall stated, "[t]o tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney,'. . . is to tell them nothing." *Id.* at 707-08 (citation omitted).

79. *Id.* at 708.

80. *Id.* at 709.

81. *Id.*

82. As Justice Marshall explained:

HeinOnline -- 97 W. Va. L. Rev. 13 1994-1995

majority's attempt to interpret the Sixth Amendment guarantee of effective assistance as a protection only against conviction of the innocent, stressing that the guarantee "also functions to ensure that convictions are obtained only through fundamentally fair procedures":

> The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.[83]

Accordingly, Justice Marshall would have held that, "a showing that the performance of a defendant's lawyer departed from professionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."[84] Finally, Justice Marshall rejected the majority's presumption of reasonable competence, characterizing it as merely an attempt to avoid having to resolve ineffectiveness claims.[85]

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Id. at 710.

83. *Id.* at 711.

84. *Id.* at 712.

85. *Id.* Justice Marshall also rejected what he viewed as the majority's attempt to avoid relitigation of claims rejected under other, previously formulated standards, by suggesting that its standard was not different from other, earlier standards. As he concluded: "Nothing the majority says can relieve lower courts that hitherto have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today." *Id.* at 714-15.

HeinOnline -- 97 W. Va. L. Rev. 14 1994-1995

III. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. Constitutional Foundation

There has been longstanding confusion about the constitutional source for the rights afforded an appellant in a criminal case. The right to appeal is not mentioned in the Constitution. And, although the issue is far from clear, the Court has never explicitly held that the Due Process Clause requires or does not require appellate review in criminal cases.[86]

These complexities have been reflected in the Supreme Court's decisions addressing the scope of the right to counsel on appeal. Beginning in 1963, in *Douglas v. California,*[87] without any discussion of whether or not there is a Constitutional right to appeal, the Supreme Court held that there is a right to counsel on an appeal as of right guaranteed by the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.[88]

In *Douglas*, the Court examined a California rule of criminal procedure authorizing state appellate courts to review a trial record to determine whether appointment of appellate counsel would be advantageous to the defendant or the court itself.[89] If appointment would not

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86. *See, e.g.*, Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (suggesting that it is time to re-evaluate the constitutional status of the right to appeal); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 377-78 (1991) (arguing that there is a constitutional right to appeal); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 UNIV. CHI. L. REV. 1, 9 (1994) (expressing "some sympathy" for the argument that there is a right to appeal, but doubting that the current Supreme Court would so hold).

Resolution of the issue of whether there is a constitutional right to appeal in criminal cases is beyond the scope of this article. In any event, the Supreme Court has clearly held that where a state has created a right to appeal, an appellant has certain due process rights, including the right to counsel (Douglas v. California, 372 U.S. 353 (1963)), the right to the effective assistance of counsel (Evitts v. Lucey, 469 U.S. 387 (1985)), and the right to equal protection of the laws (*Id.* at 403). In none of these decisions has the Court addressed the constitutional status of a criminal appeal.

87. 372 U.S. 353 (1963).

88. *Id.* at 357. *See Evitts*, 469 U.S. at 402-03.

89. *Douglas*, 372 U.S. at 355.

HeinOnline -- 97 W. Va. L. Rev. 15 1994-1995

be beneficial to either of them, no counsel would be appointed.[90] Speaking implicitly in the fundamental fairness language of due process analysis, the Court held that if a state afforded a statutory right to appeal, it was required to appoint counsel for all indigent appellants to "make that appeal more than a 'meaningless ritual.'"[91]

Writing for the majority, Justice Douglas compared the right to a free transcript on appeal, which was established in *Griffin v. Ilinois*,[92] to the right to assistance of counsel and concluded that the denial of either was the same — "discrimination against the indigent."[93] Justice Harlan, relying on due process grounds rather than equal protection, dissented and concluded that California's practice was not fundamentally unfair.[94]

Three years later, in *Anders v. California*,[95] the Court outlined the procedure required for appointed counsel wishing to withdraw from a frivolous appeal.[96] In doing so, the Court refused to uphold California's procedures, which permitted assigned counsel to withdraw simply by advising the court that the appeal had no merit; that is, without requiring the *court* to conclude that the appeal was indeed frivolous. In its holding, the Court employed both equal protection and due process language.[97]

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90. *Id.*
91. *Id.* at 358.
92. 351 U.S. 12 (1956).
93. *Douglas*, 372 U.S. at 355.
94. *Id.* at 361 (Harlan, J., dissenting).
95. 386 U.S. 738 (1967).
96. The Court defined the procedure as follows:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Id. at 744.

97. The Court stated: "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." *Id.* at 744.

HeinOnline -- 97 W. Va. L. Rev. 16 1994-1995

Next, in *Ross v. Moffitt*,[98] the Court upheld a state's denial of appointment of counsel on discretionary review. The Court held that fundamental fairness did not require counsel at that stage of a criminal case.[99]

Finally, in *Evitts v. Lucey*,[100] decided in 1984, the Court extended the right to counsel on appeal to include the right to effective assistance of counsel.[101] In doing so, it confronted directly the "seeming ambiguity" about whether *Douglas, Anders,* and *Ross* were based on equal protection or on fundamental fairness principles.[102]

In *Evitts*, the Court affirmed the reversal of an order dismissing an appeal for counsel's failure to file a "statement of appeal," as required by Kentucky's court rules.[103] The Court began its decision by noting that the case presented the "intersection of two lines of cases"[104] — those cases holding that the Fourteenth Amendment guarantees a criminal appellant certain minimum safeguards necessary to make the appeal "'adequate and effective,'"[105] and those cases holding that the Sixth Amendment right to counsel at trial comprehends the right to effective assistance of counsel.[106]

In recognizing the right to effective assistance of counsel on appeal, however, the Court emphasized that the right is a due process right; that is, one based on fundamental fairness secured entirely and directly by the Due Process Clause of the Fourteenth Amendment, rather than through the Equal Protection Clause or by incorporation of the Sixth Amendment.[107] The Court relied on its prior statement in

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98. 417 U.S. 600 (1974).

99. *Id.* at 605.

100. 469 U.S. 387 (1984).

101. *Id.* at 405.

102. *Id.* at 402.

103. *Id.* at 405. The state rule required that appellants serve with the record on appeal a "statement of appeal" that contained the names of appellants and appellees, counsel, the trial judge, the date of judgment, the date of notice of appeal, and other miscellaneous information. *Id.* at 389.

104. *Id.* at 392.

105. *Id.* (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)).

106. *Evitts*, 469 U.S. at 392 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)).

107. After citing a long list of cases addressing "the standards used to judge ineffectiveness, the remedy ordered, and the rationale used," the Court held: "We express no opin-

HeinOnline -- 97 W. Va. L. Rev. 17 1994-1995

Ross v. Moffitt[108] that "the precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment,"[109] and on *Bearden v. Georgia*,[110] where it held that "[d]ue process and equal protection principles converge in the Court's analysis in these cases."[111] The Court noted that its "rather clear statement in *Ross* that the Due Process Clause played a significant role in prior decisions is well supported by the cases themselves."[112]

Thus, the Court interpreted *Griffin*, where it had reversed a dismissal of an appeal because the petitioner could not afford a transcript,[113] as protecting a state's determination that, "it was unwilling to curtail drastically a defendant's liberty unless a second judicial decision-maker, the appellate court, was convinced that the conviction was in accord with law."[114] Having made that determination, the state would have "violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved."[115]

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ion as to the merits of any of these decisions." *Evitts*, 469 U.S. at 398 n.9.

It is true that *Strickland* has been construed to interpret the Sixth Amendment right to counsel as requiring no more than a fair trial. *See* Richard L. 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, 1266 (1986). Under such an interpretation, the right to counsel, and the other rights enumerated in the Sixth Amendment, are no more than guarantees of a fair trial. The right to a fair trial is also a significant aspect of the Due Process protection. While it thus could be argued that the *Strickland* standard is fully applicable to the due process right to effective assistance of appellate counsel as well as the Sixth Amendment right to effective assistance of counsel, such an argument proves too much. If valid, it would do away with the Sixth Amendment and its discrete analysis by making it co-extensive with the Fourteenth Amendment. The Court has never carried its Sixth Amendment analysis that far.

108. 417 U.S. 600 (1974).
109. *Evitts*, 469 U.S. at 403 (quoting *Ross*, 417 U.S. at 608-09).
110. 461 U.S. 660 (1983).
111. *Evitts*, 469 U.S. at 403 (quoting *Bearden*, 461 U.S. at 665).
112. *Id.*
113. *Griffin*, 351 U.S. at 20.
114. *Evitts*, 469 U.S. at 403-04.
115. *Id.* at 404.

HeinOnline -- 97 W. Va. L. Rev. 18 1994-1995

Rejecting the state's contention that all rights enjoyed by criminal appellants arise only from the equal protection clause, the *Evitts* Court explained that if the right to effective assistance of counsel on appeal were simply an equal protection right, which would be measured by the rights of nonindigents, nonindigents would themselves have no right to effective assistance.[116] In conclusion, the Court explained:

> In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants — indigent ones — differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court.[117]

Although it has recognized the importance of counsel on an appeal as of right, the Supreme Court clearly stated in *Evitts* that since the State did not challenge the finding of counsel's deficiency, it "need not decide the content of appropriate standards for judging claims of ineffective assistance of appellant counsel. *Cf. Strickland v. Washington* [citation omitted]."[118] As at least one judge has noted, "[a]rguably, the 'cf.' cite to *Strickland* implies that the appellate standard might be different."[119]

Additionally, as noted above, the Court's holding that the right to effective assistance arises directly out of the due process clause rather than from the Sixth Amendment indicates that the Court's analysis of the issue of ineffectiveness on appeal may not be the same as its Sixth Amendment analysis of ineffectiveness at trial. Thus, *Strickland*'s interpretation of the Sixth Amendment right to counsel at trial does not necessarily define the standard for appellate-counsel ineffectiveness.

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116. *Id.* at 404-05.

117. *Id.* at 405. Justice Rehnquist, joined by then-Chief Justice Berger dissented on the ground that the Court's prior decisions had been based on Equal Protection principles and that there was no due process right to effective appellate counsel. *Id.* at 405, 408.

118. *Id.* at 398.

119. Claudio v. Scully, 982 F.2d 798, 808 (2d Cir. 1992) (Newman, J., dissenting). *See infra* Parts V.A. and V.B.

HeinOnline -- 97 W. Va. L. Rev. 19 1994-1995

B. *The Nature of the Right to Effective Assistance of Appellate Counsel: The Application of* Strickland *by U.S. Circuit Courts of Appeal*

Faced with the Supreme Court's silence, all of the Circuit Courts of Appeal have applied the *Strickland* standard to claims of ineffectiveness of appellate counsel.[120] Most have done so without analysis.[121] The Ninth Circuit is the only court to have even attempted an articulated rationale supporting application of the *Strickland* standard on appeal.

In *United States v. Birtle*,[122] the Ninth Circuit relied on the *Strickland* Court's statement that "the principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial"[123] as support for the proposition that *Strickland*'s analysis of the performance of trial counsel applies as well to appellate counsel.[124] However, the quoted statement does not support that conclusion. Rather, a fair reading of this language in context indicates that the Court was talking about application of its principles not to *performance of counsel* in each of these three forums but rather *to review of ineffectiveness claims* brought in these three forums: collateral proceedings, direct appeal, or motions for a new trial based on ineffectiveness of trial counsel. The relevant language appears in Section IV of the *Strickland* opinion, which addresses the application of the newly announced standards.[125] The entire para-

120. United States v. Victoria, 876 F.2d 1009 (1st Cir. 1989); Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990); Diggs v. Owens, 833 F.2d 439 (3d Cir. 1987); Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985); Schwander v. Blackburn, 750 F.2d 494, 501-02 (5th Cir. 1985); Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986); Gray v. Greer, 800 F.2d 644 (7th Cir. 1986); Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987); United States v. Birtle, 792 F.2d 846 (9th Cir. 1986); Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987); Morgan v. Zant, 743 F.2d 775, 780 (11th Cir. 1984), *overruled on other grounds by* Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986).

121. *See, e.g.*, People v. Santos, 741 F.2d 1167 (9th Cir. 1984); Morgan v. Zant, 743 F.2d at 780.

122. 792 F.2d 846 (9th Cir. 1986).

123. *Strickland*, 466 U.S. at 697.

124. *Birtle*, 792 F.2d at 847.

125. Section IV of the opinion begins: "A number of practical considerations . . . im-

HeinOnline -- 97 W. Va. L. Rev. 20 1994-1995

graph in which the relevant language appears is about habeas review; indeed, the paragraph concludes that, "no special standards ought to apply to ineffectiveness claims made in habeas proceedings."[126]

Three years later, and perhaps reflecting the court's uncertainty about its statement in *Birtle*, the Ninth Circuit offered an entirely different reason for relying on *Strickland* in assessing claims of ineffectiveness of appellate counsel. In *Miller v. Keeney*,[127] the court relied on language in *Penson v. Ohio*,[128] where the Supreme Court held that cases in which a defendant has been actually or constructively denied assistance of appellate counsel are not subject to the *Strickland* standard.[129] According to the Ninth Circuit, this language implied that *Strickland would* apply where the claim is not that counsel was denied, but that counsel was ineffective.[130] This, conclusion, however, is fallacious. The fact that *Strickland*'s prejudice requirement may not apply where there is a total deprivation of counsel does not mean that the requirement does apply to a claim of deficient performance on appeal.

C. *Categories of Appellate Ineffectiveness Claims*

Applying *Strickland*, federal decisions evaluating claims of ineffectiveness of appellate counsel have focused on three major categories of ineffectiveness:

> (1) failure to gain or protect access to the appeal, such as failure to file a notice of appeal or some other jurisdictional

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portant for the application of the standards we have outlined." *Strickland*, 466 U.S. at 696.

126. *Id.* at 698.

127. 882 F.2d 1428 (9th Cir. 1989).

128. 488 U.S. 75 (1988).

129. *Id.* at 88-89. The Ninth Circuit's entire analysis is as follows:

> We review claims of ineffective assistance of appellate counsel according to the standard set out in Strickland v. Washington [citation omitted]. United States v. Birtle [citation omitted]. *See also* Penson v. Ohio [citation omitted] (holding that where a defendant has been actually or constructively denied the assistance of appellate counsel altogether, the Strickland standard does not apply and prejudice is presumed; the implication is that Strickland does apply where counsel is present but ineffective).

Miller, 882 F.2d at 1434.

130. *Id.*

HeinOnline -- 97 W. Va. L. Rev. 21 1994-1995

document, or the failure to advise the client concerning his right to appeal;[131]

(2) deficient perfection of the appeal, such as deficient briefing, failure to appear at oral argument or to file a reply brief;[132] and

(3) deficient selection of appellate issues.[133]

1. Securing Access to Appeal

Findings of ineffectiveness most frequently arise in this first category of cases. Here, either from attorney nonfeasance or malfeasance, a defendant is deprived entirely of his right to appellate review. That was the case in *Evitts v. Lucey*,[134] where the Supreme Court reversed an order dismissing an appeal for failure to file a required "statement of appeal" containing procedural details.[135] Another example is *United States v. Gipson*.[136] In *Gipson*, the court vacated an order denying a motion to set aside a sentence, where the defendant lost his right to appeal by his attorney's failure to inform him about the time limit for filing a notice of appeal.[137] In a similar case, *Bell v. Lockhart*,[138] the court vacated an order denying a writ of habeas corpus, where a state prisoner had been denied effective assistance of counsel when he lost the right to appeal based on incorrect advice concerning the risks of appeal.[139]

131. *E.g.*, Evitts v. Lucey, 469 U.S. 387 (1985).

132. *E.g.*, Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990), discussed *infra* text accompanying notes 143-45.

133. *E.g.*, Jones v. Barnes, 463 U.S. 745 (1983), discussed *infra* text accompanying notes 164-68.

134. 469 U.S. 387 (1985).

135. *See supra* text accompanying notes 100-18.

136. 985 F.2d 212 (5th Cir. 1993).

137. *Id.* at 217.

138. 795 F.2d 655 (8th Cir. 1986).

139. *Id.* at 658. In *Bell*, the defendant's attorney had erroneously advised him that he would again face the death penalty if he were successful on appeal, even though the death sentence had not been imposed following the first trial. *Id.* at 656.

HeinOnline -- 97 W. Va. L. Rev. 22 1994-1995

It is easy to see why this type of claim produces the most frequent finding of ineffectiveness. In these cases, the deficient performance prong of the *Strickland* standard was either uncontested (as in *Evitts* and *Bell*) or extremely clear (as in *Gipson*). There simply is no strategic reason for failing to preserve a client's right to appeal.

Most importantly, the courts have held that in this context a defendant who loses access to the appellate court need not show that he has been prejudiced, the most prevalent ground for denying ineffectiveness of counsel claims.[140] The courts have concluded that a defendant who loses his right to appeal because he relies on his attorney's jurisdictional error suffers prejudice *per se*.[141] That is, as long as the appellant establishes (1) an intention to appeal; and (2) a reliance on the attorney to preserve the right to do so, the appellant need not show that she had some chance of success on appeal. Thus, having determined that the defendants in *Gipson* and *Bell* did not otherwise waive their rights to appeal, the courts found that they were prejudiced by counsel's deficient performance and granted the requested relief.[142]

2. Perfection of Appeal

The second category of cases — where, although the appeal was heard on the merits, counsel's preparation or presentation was deficient — is the rarest. Moreover, claims of outright deficient briefing, in the sense of the failure to persuasively present the facts, to research the law, or to apply relevant law to the facts, are almost always unsuccessful. An exception is *Lofton v. Whitley*,[143] where the court held that state appellate counsel's submission of a two-page brief raising no issues and merely invoking the court's statutorily prescribed review "for errors patent"[144] from the record was deficient performance that

140. *See supra* note 73; *see also infra* text accompanying notes 184-86.

141. *Evitts*, 469 U.S. at 389-90.

142. *Bell*, 795 F.2d at 658; *Gipson*, 985 F.2d at 217. In fact, an attorney's failure to protect a client's access to the appellate court is equivalent to the absence of counsel on appeal; that is, counsel does nothing for the client on appeal. Thus, the same *per se* standard applicable to the absence of counsel is applicable here.

143. 905 F.2d 885.

144. *Id.* at 885.

HeinOnline -- 97 W. Va. L. Rev. 23 1994-1995

was presumptively prejudicial and required relief.[145] This gross failure to press a client's case, in the words of the *Evitts* Court, to "make the adversarial system work,"[146] is the only type of deficient performance that is likely to establish ineffectiveness.[147]

A recurring claim in this category is that counsel was deficient in failing to notice and therefore to correct the absence of portions of the trial transcript. For example, in *Bransford v. Brown*,[148] petitioner sought a writ of habeas corpus based on the absence of jury instruction transcripts in the appellate record and his appellate counsel's failure to notice and correct that absence.[149] The court held that counsel's performance was deficient[150] by reasoning that, "appellate counsel's duty cannot be discharged unless he has a transcript of the court's charge to the jury."[151]

Nonetheless, the court refused to grant the writ because the petitioner failed to satisfy *Strickland*'s prejudice prong.[152] The court held that he had not established prejudice, reasoning that (1) there was no showing that the charge could have been located or reconstructed;[153] and (2) there was no evidence that, even if available, the transcripts would have revealed reversible error.[154] Indeed, the only evidence in this regard was that the trial attorney had "never expressed a belief that the instructions were important to an appeal."[155] On this basis, the court concluded that the petitioner had failed to establish prejudice.[156]

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145. *Id.* at 888, 890.

146. *See Evitts*, 469 U.S. at 394 ("[t]he attorney must . . . play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim").

147. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 659 (1984); Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991); Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989).

148. 806 F.2d 83 (6th Cir. 1986).

149. *Id.* at 84.

150. *Id.* at 86.

151. *Id.* (citing Hardy v. United States, 375 U.S. 277, 282 (1964)).

152. *Bransford*, 806 F.2d at 87.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id. See also* Julius v. Johnson, 840 F.2d 1533 (no prejudice established based on

HeinOnline -- 97 W. Va. L. Rev. 24 1994-1995

Similarly, in *Schwander v. Blackburn*,[157] transcripts of the jury voir dire, openings and summations, jury instructions, and jury questions were all missing from the record, and counsel failed to obtain them.[158] The court held that because there was no showing that any objections were made during any of the missing proceedings, no error had been preserved for review under Louisiana's criminal code.[159] According to the court, the absence of any preserved error was sufficient to establish that no prejudice resulted from the incomplete transcript.[160] The court thus concluded, quoting *Strickland*, that even if there were error, the failure to raise it on appeal "does not warrant setting aside the judgment of a criminal proceeding [because] the error had no effect on the judgment."[161]

3. Selection of Issues

The overwhelming majority of federal decisions regarding ineffectiveness of appellate counsel concern the third category of claims — the failure to raise a specified issue on appeal. Most of these cases occur on habeas review of state court convictions, as in *Evitts*, *Schwander*, *Bell*, and *Bransford*.[162] In this third type of case, the failure to raise a specified issue or issues on direct appeal is alleged either to constitute a due process violation requiring habeas relief or to establish cause for procedural default of that issue in the state court, permitting federal habeas review.[163] Ineffectiveness is very rarely found in these cases.

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failure to include voir dire in record since there was no suggestion of any constitutional violation during that proceeding), *reh'g denied*, 854 F.2d 400 (11th Cir. 1988).

157. 750 F.2d 494 (5th Cir. 1985).

158. *Id.* at 497.

159. *Id.* at 502.

160. *Id.*

161. *Id.* (quoting *Strickland*, 466 U.S. at 691).

162. *See* discussion *supra* Parts III.C.1. and III.C.2.

163. The proliferation of these claims is the natural result of the Supreme Court's decision in Murray v. Carrier, 477 U.S. 478 (1986), which established that ineffectiveness under *Strickland* would constitute cause under the "cause and prejudice" standard for procedural default. *Id.* at 488-89. These cases generally involve the failure to raise an issue, rather than other types of deficient performance (for example, an inadequate brief), or failure to appeal at all.

HeinOnline -- 97 W. Va. L. Rev. 25 1994-1995

There are several reasons for this result. As the Supreme Court made clear in *Jones v. Barnes*,[164] the decision concerning what issues to raise on appeal is firmly committed to counsel's judgment.[165] In *Jones*, the Court held that appellate counsel has no constitutional duty to raise every nonfrivolous issue on appeal if counsel, as a matter of professional judgment, decides not to raise such an issue.[166] In so holding, the Court recognized that the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.[167] The Court determined that counsel must be able to exercise his reasonable professional judgment in selecting the most promising issues for review and specifically advised that "a brief that raises every colorable issue runs the risk of burying good arguments."[168] Under *Strickland*, of course, as a question of strategy, the decision about what issues to raise and which ones to omit is subject to tremendous deference on appeal.[169] Thus, reversal has been extremely rare.

The central focus of the courts in these cases is the merit or lack of merit of the unraised issue. However, the courts' definitions of prejudice have not been consistent. In one set of cases, the courts have held that the failure to raise an issue that is "without merit" is not ineffectiveness.[170] Another way of saying this is that the failure to raise an issue that "would not result in reversal" is not ineffectiveness.[171] In another set of cases, the failure to raise an unpreserved issue has been rejected as not ineffective.[172] Although the precise basis

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164. 463 U.S. 745 (1983).

165. *Id.*

166. *Id.* at 754.

167. *Id.* at 752. In reality, such a decision reflects several strategic judgments: (1) whether to reject an issue of lesser merit in favor of one of merit; (2) whether to reject an issue of lesser merit that might impact badly on issues of greater merit; and (3) to raise as few issues as possible, so as not to detract from issues of merit.

168. *Jones*, 463 U.S. at 753.

169. *See supra* text accompanying notes 66-69.

170. *See, e.g.*, Meyer v. Sargent, 854 F.2d 1110 (8th Cir. 1988); Kitt v. Clarke, 931 F.2d 1246 (8th Cir. 1991); United States v. Moore, 921 F.2d 207 (9th Cir. 1990); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); White v. Florida, 939 F.2d 912 (11th Cir. 1991).

171. *See, e.g.*, Coe v. Thurman, 922 F.2d 528 (9th Cir. 1991).

172. *See, e.g.*, Featherstone v. Estelle, 948 F.2d 1497 (9th Cir. 1989); Richburg v. Hood, 794 F. Supp. 75 (E.D.N.Y. 1992).

HeinOnline -- 97 W. Va. L. Rev. 26 1994-1995

for the finding of no ineffectiveness in these cases is not clear, it most likely rests on the perception that unpreserved error is not sufficiently clear from the record so that failure to discover it is not ineffectiveness. Moreover, reversal rarely is based on unpreserved error so that it is a reasonable strategic judgment not to raise it. Another reason for a finding of no ineffectiveness may be that because the unpreserved error would not have resulted in reversal, the failure to raise it was not prejudicial.[173]

A third set of cases do not articulate any degree of merit, noting simply that a sufficiently meritorious issue would not have been overlooked or omitted by competent counsel. In *Claudio v. Scully*,[174] the Second Circuit found that the failure to raise a state constitutional claim of denial of counsel established deficient performance because "[n]o reasonably competent attorney should have missed [it]."[175] Therefore, the attorney's decision "cannot be viewed reasonably as a strategic decision."[176]

In a fourth set of cases, rather than look simply at the merit of the unraised claim, as the courts do in reviewing trial counsel's decisions, the courts treat the issue as one of the *relative merit* between raised and unraised claims. For example, in *Gray v. Greer*,[177] the court stated:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.[178]

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173. While it clearly is more difficult to establish prejudice and thus ineffectiveness where the omitted issue is unpreserved, it would be possible to establish ineffectiveness where the federal court concludes that the state court would have entertained the issue under the state court's plain error standard of review. *See* Claudio v. Scully, 982 F.2d 798 (2d Cir. 1992).

174. *Id.*

175. *Id.* at 805.

176. *Id.*

177. 800 F.2d 644 (7th Cir. 1986).

178. *Id.* at 646. *See also Freeman*, 962 F.2d 1252 (7th Cir. 1992) (no strategic reason

HeinOnline -- 97 W. Va. L. Rev. 27 1994-1995

The court remanded the case to the district court:

> [T]o review the trial court record and determine whether the issues which petitioner claims appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were so obvious from the trial record that the failure to present such issues amounted to ineffective assistance of appellate counsel.[179]

Similarly, in *Mayo v. Henderson,*[180] the court found ineffectiveness in appellate counsel's failure to raise as an appellate issue the prosecutor's failure to turn over prior statements of witnesses.[181] That issue had been preserved; indeed at trial the court had castigated the prosecutor for her conduct. Moreover, the state's highest court had established, in another case, that the failure to turn over such prior statements was reversible *per se*. In finding ineffectiveness, the *Mayo* court noted that appellate counsel had raised significantly weaker issues, such as a challenge to credibility determinations by a pretrial hearing court and a challenge to the sufficiency of the evidence where there was eyewitness identification proof.[182]

Case law indicates that only where counsel fails to raise a clear, preserved, and meritorious issue will that failure be held to constitute ineffectiveness.[183] That is, despite the *Strickland* performance standard of *reasonable* competence, courts generally refuse to find ineffectiveness unless counsel overlooked a clearly winning issue.[184] Indeed,

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exists for failing to raise strongest issue in case).

179. *Gray*, 800 F.2d at 647.

180. 13 F.3d 528 (2d Cir. 1994).

181. Such statements are denominated *Rosario* material in New York pursuant to People v. Rosario, 173 N.E.2d 881 (N.Y. 1961).

182. *Mayo*, 13 F.3d at 536. Echoing the Seventh Circuit's language in *Gray*, the court held that, on review of the record:

> [S]ignificant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance be overcome.

Id. at 533 (quoting *Gray*, 800 F.2d at 646).

183. Claudio v. Scully, 982 F.2d 798 (2d Cir. 1992); Daniel v. Thigpen, 742 F. Supp. 1535 (M.D. Ala. 1990); Gray v. Greer, 800 F.2d 644 (7th Cir. 1986).

184. This is a result of importing the prejudice prong into the performance prong. *See infra* text accompanying note 278.

HeinOnline -- 97 W. Va. L. Rev. 28 1994-1995

most appellate courts have resolved these claims by taking advantage of the *Strickland* Court's permission to proceed directly to the prejudice prong of *Strickland*,[185] holding that even if counsel's decision about what issues to raise was unreasonable, the defendant was not prejudiced by that decision.[186]

Judicial focus on the merit of unraised claims — that is, on *Strickland*'s prejudice prong — causes several problems in the context of reviewing claims of ineffective appellate counsel. First, confusion exists about whether the degree of merit is relevant to the performance prong of the *Strickland* test, the prejudice prong, or both. Thus, for example, in *United States v. Victoria*,[187] the First Circuit held that counsel's failure to raise "meritless points" would not have affected the outcome of the trial, clearly focusing on the failure to establish prejudice.[188] In *Beavers v. Lockhart*,[189] the court held that the failure to argue several issues did not establish ineffectiveness of counsel. However, the court failed entirely to specify whether that failure constituted deficient performance, lack of prejudice, or both.[190] Finally, in *Miller v. Keeney*,[191] the Ninth Circuit explicitly held that the two prongs of *Strickland* "partially overlap"[192] because appellate counsel will choose not to raise an issue because counsel foresees little or no success and because the failure to raise that issue will not amount to prejudice.[193] However, while the relative merit of a course of action is to some extent involved in evaluating whether reasonably competent counsel would have pursued it, the *Strickland* Court explicitly formulated the

185. *See supra* text accompanying note 73.

186. *See, e.g.*, Holland v. Scully, 797 F.2d 57, 69 (2d Cir. 1986); Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir. 1986) (citing *Strickland*, 466 U.S. at 697)); Willie v. Maggio, 737 F.2d 1372, 1392 (5th Cir. 1984), United States v. Fakhoury, 819 F.2d 1415, 1419 (7th Cir. 1987).

187. 876 F.2d 1009 (1st Cir. 1989).

188. *Id.* at 1013.

189. 755 F.2d 657 (8th Cir. 1985).

190. *Id.* at 663.

191. 882 F.2d 1428 (9th Cir. 1989).

192. *Id.* at 1434.

193. As the court stated: "Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason — because she declined to raise a weak issue. Such is the case here." *Id.*

HeinOnline -- 97 W. Va. L. Rev. 29 1994-1995

"reasonable probability" of success standard solely for evaluation of prejudice — the second part of its test.[194] It did not suggest that the likelihood of success was relevant to determining competence.[195] Indeed, its express grant of permission to the courts to proceed directly to the prejudice test[196] is additional evidence that the two are separate. To the extent that courts have evaluated appellate counsel competence by focusing on the likely success of omitted issues, they are "altering the first prong" of *Strickland* without authority.[197]

Aside from generating confusion between the two prongs of the *Strickland* test, the focus on the merits of omitted claims has created another significant problem. Many issue-omission cases are adjudicated on federal habeas review of state convictions, either in the context of procedural default or on the merits. In those cases, the omitted issue was never presented to a state court.[198] Thus, as discussed more fully below,[199] on habeas review, the federal court must predict the resolution of unraised issues under state constitutional and common law where the state has not addressed those issues. In cases in which the omitted issue was not preserved, the federal court must also predict whether a state appellate court would be willing to entertain an unpreserved issue as plain or fundamental error.[200]

Traditionally, the federal habeas courts sit to *correct* federal constitutional errors by the state courts, not to *predict* state court interpretations of state law.[201] The extent to which the simple corrective

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194. *See supra* text accompanying note 42.

195. *See* Claudio v. Scully, 982 F.2d at 810 (Newman, J., dissenting) ("[s]ince *Strickland* used 'reasonable probability' to measure the likelihood that a trial outcome would have been different [in order to assess prejudice from lawyering already determined to be deficient], it is ill-advised to press this same standard into service for the different task of determining whether counsel's performance was deficient").

196. *See supra* text accompanying note 73.

197. *See supra* note 195.

198. *See, e.g., id.* (where the omitted issue was a state constitutional claim). The failure to raise the claim of ineffectiveness of appellate counsel in the state courts has not been found to constitute procedural default in such cases.

199. *See infra* Part IV.B.

200. *See, e.g.*, Claudio v. Scully, 982 F.2d 798 (2d Cir. 1993), *cert. denied,* 113 S. Ct. 2347 (1993); Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994), *cert. denied,* No. 93-9353, 1994 WL 245420 (U.S. Oct. 3, 1994).

201. *See generally* Rachel A. Van Cleave, *When is an Error Not an "Error"? Habeas*

HeinOnline -- 97 W. Va. L. Rev. 30 1994-1995

function intrudes on the concept of federalism has generated substantial concern and resulted in substantial Supreme Court limitation on habeas review.[202] Federal interpretation of state law and prediction of state court results are major additional intrusions beyond the appropriate corrective role of the habeas courts.[203]

IV. THE APPLICATION OF *STRICKLAND* TO APPELLATE COUNSEL

As noted above, all of the Circuit Courts of Appeals are currently applying the *Strickland* standard to evaluate the effectiveness of appellate counsel.[204] This section analyzes the applicability of *Strickland* to appellate counsel in light of the functional differences between trial and appellate counsel and the differences in the trial and appellate forums. It also surveys the way in which the courts of appeals are applying *Strickland* to appellate counsel.

Corpus and Cumulative Error Analysis, 46 BAYLOR L. REV. 59 (1993).

202. *See supra* note 15.

203. *Claudio*, 982 F.2d at 810 (Newman, J., dissenting). In *Claudio*, this federal "star gazing" resulted in a grant of a writ of habeas corpus where counsel had failed to raise an issue in the New York Court of Appeals after it had been rejected by the Appellate Division. *Id.* at 806. To grant the writ, the Second Circuit analyzed New York law and determined that the issue had a reasonable probability of success in the Court of Appeals under Court of Appeals case law. *Id.* at 805. In fact, when the case was later decided by the New York Court of Appeals on remand, the conviction was affirmed. People v. Claudio, 629 N.E.2d 384 (N.Y. 1993).

Parenthetically, where ineffectiveness of appellate counsel is reviewed in the state courts, such as New York, the appellate court that determines the ineffectiveness claim is the same court that entertained the ineffectively presented appeal, and the same court that would entertain the merits of the properly presented appeal if relief is granted. *See* People v. Bachert, 516 N.Y.S.2d 623 (Ct. App. 1987). That court knows whether it would have reversed or would reverse based on the performance of an effective attorney. Because of this, the concept of "probability" that fits ineffectiveness in the trial context — where the outcome — the verdict — cannot be reconstructed (so that some speculation will always be required), or can only be reconstructed after the expense and effort of an entirely new trial — is not appropriate on appeal.

204. *See supra* Part III.B.

HeinOnline -- 97 W. Va. L. Rev. 31 1994-1995

A. Functional Differences between Trial and Appellate Counsel

1. Trial Counsel

Chronologically, trial counsel's first duty is to inform herself about the facts. In doing so, counsel must interview the defendant and his witnesses; formulate a theory of the case; evaluate the relevant law; determine the scope of the investigation; advise the client of his rights; determine what if any pretrial motions to make; draft, file, and litigate those motions; determine whether to and if so how to plea bargain, and, if no bargain results, determine how to try the case. If there is a trial, counsel must advise the client about the advantages of a bench trial or a jury trial; if a jury trial is selected, counsel must participate in voir dire, decide whether to give an opening statement; decide whether to present a defense, and if so, what witnesses to call; determine how and to what extent to conduct cross-examination; determine what trial motions to make and when to object; decide what charges to request; sum up; decide whether, and if so, what to argue in post-trial motions; and determine what to argue in mitigation of sentence. This list, modeled after the ABA *Standards for Criminal Justice*,[205] includes only the most basic functions of trial counsel.

Several considerations arguably support the Supreme Court's refusal in *Strickland* to formulate a checklist of defense duties and to defer almost entirely to counsel's decisions. While it may seem obvious, evaluating the quality of trial counsel's performance depends largely on the facts of the case.[206] For example, the decision to spend time and money investigating an alibi may be good strategy in one case; howev-

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205. STANDARDS FOR CRIMINAL JUSTICE §§ 4-3.2(a), 4-3.8 (2d ed. 1980).

206. As the court in *DeCoster* stated:

> The defense attorney's function consists, in large part, of the application of professional judgment to an infinite variety of decisions in the development and prosecution of the case. A determination whether any given action or omission by counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel's judgment. In this fact-laden atmosphere, categorical rules are not appropriate.

United States v. Decoster, 624 F.2d 196, 203 (D.C. Cir. 1976).

HeinOnline -- 97 W. Va. L. Rev. 32 1994-1995

er, where stronger defenses exist, that decision may appear strategically questionable. Similarly, the extent of cross-examination depends almost entirely on what has occurred on direct examination and on the other evidence in the case. Plea bargaining strategy is also heavily fact-based.

Moreover, most of the facts upon which counsel will formulate her strategy are revealed during counsel's investigation and, because of rules of confidentiality or otherwise, will never be exposed to judicial scrutiny. The inevitable absence of such essential information for the reviewing court may underlie the *Strickland* Court's determination that substantial deference must be given to counsel's decisions as reasonably strategic choices.[207]

Similarly, much of the information that affects trial counsel's decisions necessarily comes from the client.[208] The appropriately extensive involvement of the client has several legally significant consequences. First, counsel's conduct and decisions may represent or be influenced by the client's own desires about the course of the representation itself.[209] The involvement of the client in certain strategic decisions al-

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207. The *DeCoster* court stated:

> Realistically, a defense attorney develops his case in large part from information supplied by his client. As the Third Circuit indicated in *Green*, choices based on such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others. Judicial intervention to require that a lawyer run beyond, or around, his client, would raise ticklish questions of intrusion into the attorney/client relationship, and should be reserved from extreme cases where an effect on the outcome can be demonstrated.

DeCoster, 624 F.2d at 209-10. *See, e.g.*, United States v. Moreno Morales, 815 F.2d 725 (1st Cir. 1987) (failure to cross-examine three incriminating witnesses was reasonable trial strategy since it might have reinforced direct and there was no showing that cross-examination would have revealed anything that might have changed the verdict).

208. *See, e.g.*, Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985) (failure to call sister as witness was not ineffectiveness where there was no evidence that the defendant mentioned to counsel that his sister could corroborate his alibi); United States v. Gray, 878 F.2d 702 (3d Cir. 1989) (no ineffectiveness since reasonableness of counsel's actions in investigation may be affected by the client's actions and choices).

209. As the *Strickland* Court noted:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions

HeinOnline -- 97 W. Va. L. Rev. 33 1994-1995

so may raise questions of waiver. It may well be that counsel's decision to forego a line of defense or a course of representation resulted from the client's own decision.

Finally, many of the decisions for which trial counsel is responsible, particularly those during trial, must be made quickly. Strict and invasive judicial scrutiny of these decisions would interfere with the need for prompt action.[210] Accordingly, counsel's decisions must be entitled to deference.

These principles have resulted in a substantial body of case law establishing few principles about the components of reasonably competent assistance, except that no decision by counsel that can fairly be deemed strategic will constitute ineffectiveness.[211] Examples of legitimate strategic decisions include failure to cross-examine prosecution witnesses,[212] failure to object at all or to fully object,[213] and waiver of closing argument.[214]

On the other hand, those aspects of representation that have been the basis for findings of ineffectiveness are those that cannot readily be

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are reasonable depends critically on such information.

Strickland, 466 U.S. at 691. *See also Strickland*, 466 U.S. at 691 (a reviewing court must scrutinize those instances where the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful"); Bainter v. Trickey, 932 F.2d 713 (8th Cir. 1991) (no ineffectiveness for failure to file motion for new trial where client initially indicated he did not wish to appeal his convictions).

210. *See, e.g.*, United States v. Natanel, 938 F.2d 302, 309 (1st Cir. 1991) ("[t]he performance standard is to be applied not in hindsight, but based on what the lawyer knew, or should have known, at the time his tactical choices were made and implemented") (citing United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978)), *cert. denied*, 112 S. Ct. 986 (1992); Campell v. Wood, 18 F.3d 662, 673 (9th Cir. 1984) (holding that judicial review of trial counsel's performance is highly deferential), *cert. denied*, 114 S. Ct. 2125 (1994); United States v. Sands, 968 F.2d 1058, 1065 (10th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 987 (1993).

211. *See* discussion *supra* Part III.C.3.

212. *See, e.g.*, United States v. Michaud, 925 F.2d 37 (1st Cir. 1991); United States v. Moreno Morales, 815 F.2d 725 (1st Cir. 1987) (no ineffectiveness since cross-examination might have reinforced direct examination and thus was reasonable trial strategy).

213. *See, e.g.*, United States v. Jackson, 918 F.2d 236 (1st Cir. 1990) (failure to object during opening statement); Wicker v. McCotter, 783 F.2d 487, 495 (5th Cir. 1986) (failure to fully object to prosecutor's summation), *cert. denied*, 478 U.S. 1010 (1986).

214. *See, e.g.*, United States v. Natanel, 938 F.2d 302 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 986 (1992).

HeinOnline -- 97 W. Va. L. Rev. 34 1994-1995

justified as strategic. They include, for example, lack of awareness or understanding of essential legal principles;[215] failure to conduct any pretrial investigation;[216] failure to conduct discovery;[217] failure to contact a potential alibi witness or to locate other corroborating or other disinterested witnesses;[218] the decision to forgo the only available defense;[219] or, in a capital case, to fail to investigate all possible lines of defense;[220] failure to investigate mitigating family and medical evidence in mitigation of death sentence and to be otherwise unprepared to argue in mitigation of sentence;[221] failure to obtain a transcript of a prior trial to impeach key witnesses;[222] failure to object to the court's refusal to conduct an *ex parte* inquiry before denying a request for psychiatric expert assistance;[223] and failure to properly and timely raise an issue of lack of corroborating evidence in a murder prosecution.[224]

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215. *See, e.g.*, Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991) (failure to recognize change in law that resulted in defendant's failure to be aware that if he prevailed on appeal to withdraw guilty plea to second degree murder he could again be charged with first degree murder).

216. The failure adequately to investigate cases exists because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when counsel has not yet obtained the facts on which such a decision could be made. *See, e.g.*, *Sullivan*, 819 F.2d 1391, 1391-92 (perfunctory attempts to contact witnesses); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel interviewed only one witness); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) (reiterating duty to make independent investigation); Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984) (same), *cert. denied*, 469 U.S. 1226 (1985).

217. *See, e.g.*, Morrison v. Kimmelman, 752 F.2d 918 (3d Cir. 1985).

218. *See, e.g.*, Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985); Sullivan v. Fairman, 819 F.2d 1382, 1391 (7th Cir. 1987); Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988); Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) (failure to contact two witnesses defendant was with during events leading to his arrest, whose testimony would have directly contradicted arresting officers).

219. *See, e.g.*, Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983).

220. *See, e.g.*, Osborn v. Shillinger, 861 F.2d 612, 627 (10th Cir. 1988).

221. *Id.*

222. *See, e.g.*, Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988).

223. *See, e.g.*, United States v. Pofahl, 990 F.2d 1456 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 266 (1993) & 114 S. Ct. 560 (1993).

224. *See, e.g.*, Summit v. Blackburn, 795 F.2d 1237 (5th Cir. 1986).

HeinOnline -- 97 W. Va. L. Rev. 35 1994-1995

2. Appellate Counsel

Representation of a defendant on appeal is very different from trial representation. *Anders v. California*[225] requires that an accused have "counsel acting in the role of an advocate." But what must that advocate do?

In *Evitts v. Lucey*,[226] the Court outlined the general scope of the due process right to effective assistance of counsel on appeal:

> This right to counsel is limited to the first appeal as of right [citation omitted] and the attorney need not advance every argument, regardless of merit, urged by the appellant [citation omitted]. But the attorney must be available to assist in preparing and submitting a brief to the appellate court [citation omitted] and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. [citation omitted].[227]

The *Evitts* Court articulated two dimensions to the role of effective appellate counsel: the ability to obtain a favorable decision by making the adversary system work, and "that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all — much

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225. 386 U.S. 738, 743 (1967).

226. 469 U.S. 387 (1984).

227. *Evitts*, 469 U.S. at 394. It is important to emphasize the Supreme Court's recognition — which is perhaps contrary to the common perception—that appellate counsel has an important role to play as an adversary. The commonly held perception that an appeal involves no more than the objective application of established law to record facts has repeatedly been rejected by the Court. *See, e.g.*, Anders v. California, 386 U.S. 738, 743 (1967) (appellate counsel must be an "active advocate" rather than a detached evaluator); Penson v. Ohio, 488 U.S. 75 (1988) (once the court determines that there are nonfrivolous issues, it must appoint counsel, and may not rely on its own review of the record or on the briefs of a co-appellant). As discussed *infra*, Part V.B., the fact that some courts claim to conduct an independent review of the record in every case is not relevant to establishing a standard for appellate counsel's performance. Indeed, the presence of appellate judges is no more relevant than the presence of a trial judge, which was, of course, never even mentioned by the *Strickland* Court.

HeinOnline -- 97 W. Va. L. Rev. 36 1994-1995

less a favorable decision — on the merits of the case."[228] These dimensions exist regardless of the facts of the case.

To fulfill this role, counsel must perform several specific duties. First, counsel must be familiar with and follow the court's rules for protecting the defendant's right to appeal, such as the rules of procedure for filing the notice of appeal and any related statements and for ordering the transcript. Second, counsel must review the record for possible appellate issues. Third, counsel must determine what issues to raise in light of the facts, the law, the standard of review, and the scope of review. Fourth, counsel must decide how to formulate those issues. Fifth, counsel must find and use the most persuasive authority available. And sixth, counsel must write persuasively — including marshalling the facts, analyzing the law, and applying it to the facts.[229]

B. Forum Differences and Their Effect on Finality

In addition to functional differences between trial and appellate counsel, several differences between the trial and appellate forums affect the courts' review of the effectiveness of trial and appellate

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228. As the Court explained:

> To prosecute the appeal a criminal appellant must face an adversary proceeding that — like a trial — is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant — like an unrepresented defendant at trial — is unable to protect the vital interests at stake . . . . In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal — like the promise of *Gideon* that a criminal defendant has a right to counsel at trial — would be a futile gesture unless it comprehended the right to the effective assistance of counsel.

Evitts, 469 U.S. at 396-97.

229. I have not included the ability to orally argue as an essential skill of appellate counsel. While it is an important skill, oral argument has been held not to be a critical stage of the criminal process [U.S. v. Birtle, 792 F.2d 846 (9th Cir 1986)]; moreover, the action of some courts in either granting oral argument only in the court's discretion (*See, e.g.*, 1ST CIR. R. 34(a); 4TH CIR. R. 34(a); 7TH CIR. R. 34(f)), limiting oral argument to very short periods of time (*See, e.g.*, 2D CIR. R. 34(b) (10-15 minutes); 3D CIR. R. I.O.P. 2.1 (usually 15 minutes); 6TH CIR. R. I.O.P. 19.4.1 (15 minutes)), or abolishing it entirely for some variety of cases (*See, e.g.*, 8TH CIR. R. 34-4) indicates, objectively, that oral argument is only rarely as significant as the written brief. The subjective, anecdotal reports of appellate judges confirm this.

HeinOnline -- 97 W. Va. L. Rev. 37 1994-1995

counsel. These differences make the wholesale adoption of the *Strickland* standard on appeal inappropriate.

First, unlike trial representation, which is focused on development of the facts, an appeal must be based on the record of proceedings below. As a result, the input from the client is much more limited than it is at trial. In addition, at least as compared with trial counsel, none of appellate counsel's duties need be performed under time pressure and thus are not entitled to the same amount of deference as those decisions of trial counsel that must necessarily be made quickly.

Moreover, unlike the relief sought based on ineffectiveness of trial counsel — reversal of a conviction (or habeas grant) and a new trial — the relief sought for ineffectiveness of appellate counsel is a re-opening of a previously decided appeal or the granting of an appeal that was improperly forfeited initially.[230] That relief requires substantially fewer judicial resources and is substantially less damaging to the finality of criminal judgments.

In addition, because in many cases the facts upon which appellate counsel's decisions are made appear in the trial record, claims of ineffectiveness of appellate counsel can be, and frequently are, resolved without hearings or with abbreviated hearings.[231] Even where the claimed ineffectiveness arises from failure to raise an issue, or where a claim is litigated on federal habeas in the district court, courts generally do not hold extensive hearings to determine why counsel did not raise an omitted issue because the reason is obvious from the record itself and from examination of the relative merits of the raised and unraised issues.[232] Again, this is a function of the lesser importance

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230. Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984), *cert. denied*, 486 U.S. 1009 (1988), *overruled on other grounds by* Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986).

231. *See, e.g.*, Luke v. Iowa, 465 N.W.2d 898 (Iowa 1990) (all issues resolved on record, including failure to raise issue); Abdurrahman v. Henderson, 897 F.2d 71 (2d Cir. 1990) (issue of failure to raise issue resolved on the record); Diggs v. Owens, 833 F.2d 439 (3d Cir. 1987) (issue of prejudice resolved on the record), *cert. denied*, 485 U.S. 979 (1988); Gray v. Greer, 800 F.2d 644 (7th Cir. 1986).

232. Gray v. Greer, 800 F.2d 644, 646 (district court was not required to hold hearing to determine why appellate counsel did not raise a specific issue, but must examine the trial record and the appellate brief). Even if a hearing is required, given the intrinsic irrelevance

HeinOnline -- 97 W. Va. L. Rev. 38 1994-1995

of the facts on appeal than at trial. Thus, resolution of a claim of ineffective appellate counsel is easier and more efficient than resolution of a claim of ineffective trial counsel.

Moreover, when a court reviews a claim of ineffectiveness of trial counsel, it must determine the effect of lawyer incompetence on a jury that is no longer available. Such a court must speak in terms of probabilities, as the *Strickland* standard requires.[233] This fact, combined with the sanctity of jury verdicts, means that convictions are reversed only when it is sufficiently likely that the result is unreliable.[234] Where ineffectiveness of appellate counsel is concerned, however, the probability of unreliability is not as important because the state appellate court that would have considered the effectively presented appeal remains available to do so on remand and without disturbing the underlying criminal conviction.

Moreover, as noted above,[235] where ineffectiveness of appellate counsel claims are adjudicated on federal habeas corpus, the probability analysis forces the federal court to predict or second-guess the state court's evaluation of the merits of an appeal. This is an inappropriately intrusive role under our system of federalism and one that is entirely unnecessary because the state appellate court is fully available to consider the merits of the case.

Indeed, the resolution of ineffectiveness of appellate counsel claims requires fewer judicial resources than resolution of ineffectiveness of trial counsel claims. In support of an application for relief based on

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of the facts of a given case to appellate counsel's representation (*see supra* Part IV.A.2. (the focus being on the record and existing state law)), such a hearing would still be less burdensome than one involving ineffectiveness of trial counsel.

233. *Strickland,* 466 U.S. at 694. *See supra* text accompanying note 58.

234. Indeed, it is simply unrealistic to pretend that the appellate court does not do precisely that in determining the ineffectiveness claim itself. Analysis of the case law makes clear that the merit of the issues left unraised or treated deficiently is the linchpin of every effectiveness question. *See* Parton v. Wyrick, 704 F.2d 415, 416 (8th Cir. 1983) (no ineffectiveness unless the issue omitted by appellate counsel "had arguable merit"); Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986) (failure to notice missing jury instructions and other proceedings not ineffectiveness under *Strickland* because no showing that transcripts would have revealed reversible error and where trial counsel apparently never indicated they would reveal error), *cert. denied,* 481 U.S. 1056 (1987).

235. *See supra* text accompanying notes 198-203.

HeinOnline -- 97 W. Va. L. Rev. 39 1994-1995

ineffectiveness of appellate counsel, the applicant generally submits a brief that cures the deficiency that occurred when the appeal was originally heard. For example, if the claim is that an issue was ignored, that issue will be fully briefed; if the claim is that the brief was deficient, a competent brief will be filed. By doing this, the applicant can show the court not only what kind of job effective counsel would have performed (and compare it to what had been filed before); she can also establish the merit of the appeal and can convince the court that little time and expense will be required to resolve the case on the merits. Thus, as far as remedy is concerned, all that a court need do to cure the deprivation of effective counsel is to vacate the appellate judgment, reopen the appeal, permit the virtually completed briefs to be filed, and allow the case to be decided, or even decide the case on the merits.[236] This takes very little additional time or effort and conserves valuable judicial resources.[237]

Similarly, the appropriate remedy for denial of effective assistance of counsel on appeal that results in the total loss of the right to appeal is to remand the case for resentencing so that a timely notice of appeal can be filed[238] or to permit the filing of an untimely notice of appeal.[239] After the notice of appeal is filed, the case is placed back on the appellate court's calendar for full briefing and argument.[240]

Thus, a finding of ineffectiveness of appellate counsel does not have the dire consequences for finality that so concerned the *Strickland* Court. A criminal conviction is not necessarily overturned, as it must always be when trial counsel is found to have been constitutionally ineffective. The prosecution is not put to the difficult task of proving

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236. *See, e.g.*, People v. Rutter, 1994 WL 521923 (N.Y. App. Div. First Dep't, Sept. 22, 1994) (on *coram nobis* application in the intermediate appellate court, conviction reversed and case remanded for a new trial).

237. Gray v. Greer, 800 F.2d at 646 (in determining whether decision not to raise a given issue was strategic, the "district court should be guided by defendant's careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record").

238. *See, e.g.*, Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); United States v. Gipson, 985 F.2d 212 (5th Cir. 1993).

239. *See, e.g.*, Bell v. Lockhart, 795 F.2d 655 (6th Cir. 1986); Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990).

240. *See, e.g.*, Bell v. State, 757 S.W.2d 937, 938 (Ark. 1988).

HeinOnline -- 97 W. Va. L. Rev. 40 1994-1995

guilt again, perhaps years after the crime. Rather, the prosecution must simply respond to a brief filed by a constitutionally adequate attorney, and the state courts must entertain a properly perfected appeal.

V. THE APPROPRIATE STANDARD

A. Defining Reasonable Competence of Appellate Counsel

1. Securing Access to Appeal

As discussed above, in cases where an ineffectiveness of appellate counsel claim arises out of counsel's failure to protect a defendant's access to an appeal as of right, the courts have employed *Strickland's* reasonable competence standard but have not required a showing of prejudice.[241] This is the proper standard. As in other right to counsel cases in which prejudice is presumed — cases involving absence of counsel[242] or conflicts of interest[243] — the difficult burden of determining prejudice from denial of appeal justifies a finding of prejudice *per se*. Moreover, because a defendant seeking relief in such a case must establish that he intended to appeal and relied on his attorney to do so, there is no case in which the failure to take an appeal will be strategic. In addition, the remedy for deprivation of access to appeal is simple and efficient — an appeal is granted, either by ordering a *pro forma* resentence to start the time to appeal running anew[244] or by granting permission to file a late notice of appeal.[245] No unfairness is created for the prosecution since the appeal is based entirely on the

241. *See supra* Part III.B.

242. *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605 (1972); Hamilton v. Alabama, 368 U.S. 52 (1961).

243. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (prejudice presumed under *Strickland* if defendant demonstrates (1) actual conflict, and (2) that such conflict adversely affected his lawyer's performance); Burger v. Kemp, 483 U.S. 776, 783 (1987) (same).

244. *See supra* note 238.

245. *See supra* notes 239-40.

HeinOnline -- 97 W. Va. L. Rev. 41 1994-1995

transcript.[246] In denial-of-access cases, therefore, the courts need not review counsel's performance with deference.

2. Perfection of Appeal

As to claims of ineffectiveness based on inadequate preparation of the appellate briefs, *Strickland*'s "reasonable competence" standard[247] is appropriate but must be defined to require the reasonable performance of appellate skills. That is, in addition to protecting the defendant's right to appeal, every appellate lawyer must (1) secure and read essential portions of the record; (2) accurately set out the facts with supporting citations to the record; (3) research the applicable law; (4) use relevant and persuasive authority; (5) select strategically among the issues presented, considering the strength of authority, the facts, and the standard and scope of review;[248] and (6) apply the law to the facts of the case.

Although the *Strickland* court declined to formulate a "checklist for judicial evaluation of attorney performance,"[249] the functional differences between trial and appellate counsel justify such an approach here.[250] Moreover, there is no justification for *Strickland's* highly deferential standard of review when applied to appellate counsel's performance. Like the failure to protect a client's access to the appellate courts, the failure to perform the above basic duties can never be considered a strategic decision.[251]

The reasons underlying *Strickland*'s reluctance to formulate a checklist simply do not apply in the appellate context. First, unlike the

246. In the rare case in which the transcript may be unavailable, proceedings can be held to reconstruct what occurred, as they would be in any case in which essential portions of the record are missing.

247. *See supra* text accompanying notes 56-58.

248. *See* discussion *infra* Part V.A.3.

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

250. *See* discussion *supra* Part IV.A.

251. As demonstrated above, while many courts have noted that the involvement of the appellate court in reviewing the record and in inquiring into possible issues might justify a more relaxed performance standard for ineffectiveness of appellate counsel claims, analytically and realistically, such judicial involvement is irrelevant.

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trial context, as to which the *Strickland* Court held that, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant,"[252] the range of legitimate strategic possibilities on appeal is limited. Again, unlike trial decisions, changes in the facts only marginally affect the necessity or scope of appellate counsel's decisions.

Nor would mandating the performance of these skills "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions"[253] or "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[254] There is simply no conceivable appellate context in which the listed skills are not required, and consequently, "there can be no strategic choice that renders such [skills] unnecessary."[255] These requirements are not likely to create a minimum standard that would become the norm or to result in a "proliferation of ineffectiveness challenges."[256] Simply put, most lawyers perform these basic functions.

Moreover, in marked contrast to trial counsel's performance, the context and record on which all of these decisions are made is fully available to a court reviewing appellate counsel's performance. Thus, appellate attorney performance is not entitled to the same deference as trial counsel performance, and the litigation of appellate ineffectiveness claims should be considerably less complicated and more efficient than trial ineffectiveness claims. As the Seventh Circuit noted in *Gray v. Greer*,[257] an appeal is based on the record and the case law. All of the facts that inform counsel's decisions are contained in the trial record; all of the law upon which counsel's decisions are based is avail-

252. *Strickland*, 466 U.S. at 688-89.

253. *Id.* at 689.

254. *Id.*

255. *Strickland*, 466 U.S. at 680. Because of this, there is no danger of creating a minimum standard that would become the norm. Every appeal must be handled in this way. In fact, if every appellate lawyer were required to undertake the above enumerated steps, the standard of representation would improve.

256. *Id.* at 690.

257. Gray v. Greer, 800 F.2d 644 (7th Cir. 1986).

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able to the court.[258] Thus, there is no reason to defer to trial counsel, to presume reasonable competence, or to hold extensive hearings.

It also is relevant that appellate counsel's duties are not significantly affected in any way by the client's participation. Unlike the client's central role at trial,[259] the role of the client in perfecting the appeal typically is limited. Indeed, while retained appellate lawyers may solicit the client's input or review in drafting the brief, few expect substantial input from non-lawyer clients. Ordinarily, assigned or legal aid lawyers, who have large caseloads, do not ask their clients to review drafts of their briefs, give them little time to review a draft sent largely as a courtesy, or simply send the client the final version of the brief when it is filed with the court.[260] Indeed, assigned counsel plans may not authorize funds to have the transcript copied for a client's review. This may or may not foster good attorney-client relations, but it reflects two realities of the appellate forum: clients rarely have anything helpful to contribute to brief writing. In light of that, allowing time and money to insure their input can substantially delay the hearing of the appeal[261] and contribute substantially — but unnecessarily — to an appellate lawyer's workload. Again, a hearing addressed to the client's contribution is likely to be brief, if any is required, and no substantial appellate deference is warranted.

3. Selection of Issues

While the selection of issues is clearly strategic,[262] that consideration should not completely insulate the process from review.[263] As in

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258. *Id.*

259. *See* discussion *supra* Part IV.A.1.

260. This information comes from seventeen years of appellate practice, including representing criminal defendants on appeal, screening applications for admission to an indigent defendant's appellate panel, and teaching criminal appellate practice to law students.

261. In cases where an indigent defendant-appellant requests a copy of his trial transcript, appellate counsel must forward her copy after the brief is completed. If the client wishes to file a supplemental brief he must request court permission to do so. However, the case will not be calendared for argument until the supplemental brief and transcript are filed.

262. Jones v. Barnes, 463 U.S. 745 (1983).

263. The court in *Gray*, 800 F.2d at 646, stated: "Were it legitimate to dismiss a claim

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Strickland, "[i]nformed decision[s] based on reasonable professional judgment[s][264] will not support a claim of ineffectiveness." In determining whether a reasonable professional judgment is involved in the selection of issues on appeal, the standard should be whether the neglected issue has sufficient merit, in light of the other available issues, that reasonably competent counsel would have pursued it. Sufficient merit should be determined in light of the strength of authority, the facts, the standard of review, and the scope of review. The standard should not be the standard currently applied in reality by the courts, *i.e.*, whether counsel omitted a clear and winning issue.[265]

Several courts presently do require a comparative analysis of the issues that were raised and the issues that were not raised.[266] If the reviewing court determines that the omitted issue or issues are of sufficient merit that a reasonably competent lawyer would have raised them either in addition to or rather than the issues raised, the presumption of effectiveness of counsel should be overcome.[267]

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of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless."

264. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985), *cert. denied*, 478 U.S. 1007 (1986).

265. *See supra* text accompanying notes 183-86.

266. *See, e.g.*, Mayo v. Henderson, 13 F.3d 528 (2d Cir. 1994), *cert. denied*, No. 93-2007, 1994 WL 273742 (U.S. Oct. 3, 1994).

267. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). As the court in *Gray* explained:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, "will" the presumption of effective assistance of counsel be overcome.

Gray, 800 F.2d at 646. This standard would avoid the problem of habeas corpus review of claims of ineffectiveness of state appellate counsel. It may well be that a federal court will reach a different conclusion on the merits of an unraised state law claim than would a state appellate court considering that same claim on appeal. Thus, meritorious state law claims would never be entertained because of the federal court's perception of its strength. That sort of federal interference in state law proceedings should be avoided.

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Again, as with the duty to protect access to appeal and the duty to effectively perfect the appeal, there is no reason for appellate deference. All of the reasons for non-deferential review discussed above with respect to appellate counsel's other duties apply here. Whether a defendant-appellant has retained his lawyer or had a lawyer assigned to him, he has little role in selecting the issues in practice.[268] And under *Jones v. Barnes*,[269] indigent clients who are assigned counsel have no constitutional right to decide which issues should be raised.[270]

Finally, the assertion that an appellate court's independent review of the record ought to result in a relaxed performance standard for appellate counsel has properly been rejected in several contexts. Most fundamentally, the Supreme Court in *Anders v. California*[271] explained that once an appellate court finds nonfrivolous issues on appeal it must appoint an attorney.[272] Later, in *Evitts v. Lucey*,[273] the Court acknowledged:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that — like a trial — is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant — like an unrepresented defendant at trial — is unable to protect the vital interests at stake.[274]

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268. It is certainly almost impossible to imagine any case in which a client would request that an issue identified by his lawyer not be raised.

269. 463 U.S. 745 (1983).

270. *Id.* at 754.

271. 386 U.S. 738 (1966).

272. *Id.* at 744.

273. 469 U.S. 387 (1985).

274. *Id.* at 396. *See also* Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), where the court found counsel's representation on appeal in a death penalty case to be ineffective. There, the court stated:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Wilson, 474 So. 2d at 1165.

HeinOnline -- 97 W. Va. L. Rev. 46 1994-1995

Most recently, in *Penson v. Ohio*,[275] the Court held that a court's independent review of the record after counsel's motion to withdraw had been granted was not sufficient to focus the court's attention on the arguable claims, even though the court's review included the briefs filed by the co-defendants and actually resulted in reversal in part of the defendant's conviction.[276] In so holding, the Court stated:

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over . . . . [T]he fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . .[277]

B. No Prejudice Requirement

Our major departure from the *Strickland* standard is the rejection of a requirement of prejudice. There is simply no justification for a separate prejudice requirement in evaluating ineffectiveness of appellate counsel claims.

First, as previously discussed,[278] requiring an independent showing of prejudice alters the evaluation of the attorney's performance by "importing into the assessment of competency the 'reasonable probability' language of the prejudice inquiry."[279] Also, as noted above, the question of reasonable competence depends largely on

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275. 488 U.S. 75 (1988).

276. *Id.* at 89.

277. *Id.* at 85, 88. The Eleventh Circuit has also noted:

> A brief sets forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically found in a brief.

Mylar v. Alabama, 671 F.2d 1299, 1302 (11th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983).

278. *See supra* text accompanying notes 187-97.

279. Claudio v. Scully, 982 F.2d at 810 (Newman, J., dissenting). *See supra* notes 187-97 and accompanying text.

HeinOnline -- 97 W. Va. L. Rev. 47 1994-1995

whether an ignored issue had sufficient merit, in light of the other available issues, so that reasonably competent counsel would have pursued it.[280] The presence of an actual prejudice requirement distorts the evaluation of performance so that the standard is no longer *Strickland's* "reasonable competence."[281]

Moreover, when ineffectiveness of state appellate counsel is litigated on federal habeas corpus, the presence of a "reasonable probability" of success requirement requires a federal habeas court to second guess or predict the outcome of state issues allegedly omitted by state appellate counsel, allowing too much federal intrusion into the state courts.[282] To the extent that ineffectiveness of appellate counsel claims are litigated on direct appeal or by motion in an appellate court, the "reasonable probability" of success standard is at least unnecessary, because the appellate court considering the claim is present to resolve the issues on appeal. The concept of "reasonable probability" of a different result makes sense only when a reviewing court is trying to determine the effect of attorney incompetence on a jury that is no longer available. There is no need to engage in this type of probability analysis when one appellate panel of a given court is determining the effect of attorney incompetence on another of its panels. Moreover, as discussed above,[283] many claims of ineffectiveness based on failure to raise an issue are presented on habeas corpus. There, the federal court must determine de novo the merits of state law issues, an intrusive practice that clearly runs counter to the Court's current conception of federalism.[284]

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280. *See* discussion *supra* Part III.C.3.

281. As Judge Newman stated:

> Since *Strickland* used "reasonable probability" to measure the likelihood that a trial outcome would have been different (in order to assess prejudice from lawyering already determined to be deficient) it is ill-advised to press this same standard into service for the different task of determining whether counsel's performance was deficient.

Claudio, 982 F.2d at 810 (Newman, J., dissenting).

282. *See supra* notes 198-203.

283. *See supra* notes 198-203.

284. Again, in the words of Judge Newman:

> By invoking in the appellate context the "reasonable probability of affecting the outcome" standard from the trial context, the majority creates the risk, no doubt

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The adjudication of a claim of ineffectiveness of trial counsel is also more burdensome and expensive than adjudication of a claim of ineffectiveness of appellate counsel. Largely because it is so fact-bound and involves so many decisions that are presumptively strategic, challenges to the effectiveness of trial counsel are held in a trial level forum, require hearings and findings of fact to determine what counsel knew, what facts he relied on, and what the client told him. Such proceedings can be extensive and costly.

In contrast, constitutional claims of ineffectiveness of appellate counsel are generally litigated on federal habeas corpus[285] and generally do not involve hearings.[286] If a hearing is required, it is likely to be relatively brief and to involve relatively clean-cut issues.

The remedy for denial of effective assistance of appellate counsel — a new appeal — has a much less substantial effect on the finality of judgments than the remedy for denial of effective assistance of trial counsel — a new trial. Much of the reluctance to vacate a jury verdict that underlies the "reasonable probability" standard stems in large measure from the expensive and burdensome result — a new trial. A finding of appellate ineffectiveness requires no more than an additional brief, and generally not even that. Most applications for relief based on ineffectiveness of appellate counsel are accompanied by precisely the

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> inadvertently, that some defendants will be denied an opportunity to have presented to state courts some state law issues that reasonably competent counsel would have asserted and that might, after issuance of a conditional writ, prove successful in state court, but that might not be thought by a federal habeas court to have a "reasonable probability of affecting the outcome." In other words, appellate counsel might, in some instances, be found to have performed below the level of reasonable competence, even though the habeas court is not persuaded that the omitted issue is a likely winner. In a case like the pending one, where the omitted claim is based on state law, the test should be simply whether the claim had sufficient merit, in view of the other available issues, that reasonably competent counsel would pursue it; the habeas court's prediction that the state law claim would probably be meritorious in state court is wholly unnecessary and, indeed, inappropriate for a federal court.

Claudio, 982 F.2d at 810.

285. *See, e.g.*, Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985); Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986); Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 116 (1991).

286. *See supra* notes 235-40.

HeinOnline -- 97 W. Va. L. Rev. 49 1994-1995

kind of brief that properly should have been filed initially.[287] Indeed, it is hard to imagine how such an application could succeed without the applicant pointing out precisely what issues should have been raised or precisely how an effective brief would have been written. To the extent that this practice is not followed in a given court, it could be required by local rule or case law, as it has been in the *Anders* context.[288]

Finally, our proposed standard would not open the floodgates of ineffectiveness of appellate counsel claims. The re-defined reasonable competence test by definition reflects what most appellate attorneys already do. Strategic decisions, properly and reasonably made, will continue to be upheld. And the absence of a prejudice requirement will both return the habeas courts to their proper, less intrusive role and restore the "reasonableness" to *Strickland*'s reasonable competence standard as applied in the appellate context. Finally, to the extent that any additional claims do result, the quick and efficient resolution of such claims should not impose a substantial burden on the courts.

VI. CONCLUSION

The Supreme Court has yet to articulate the standard for judging claims of ineffectiveness of appellate counsel. In that vacuum, the United States Circuit Courts of Appeals have adopted the standard set forth in *Strickland v. Washington*[289] for judging claims of ineffectiveness of trial counsel. All but one of the courts of appeals adopted *Strickland* without discussion or analysis.[290] The only articulated rea-

287. *Gray*, 800 F.2d at 646. In *Gray*, the court advised that:

> [T]he determination of whether the decision [not to raise certain issues on appeal] was strategic requires an examination of the trial record. In conducting such an examination, the district court should be guided by defendant's careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record.

Id.

288. 1ST CIR. R. 46.4(A); 2D CIR. R. 4(B); 4TH CIR. I.O.P. 46.2; 5TH CIR. APP. III(3); 6TH CIR. R. 12(D); 7TH CIR. R. 4; 8TH CIR. APP. II(II)(1); 10TH CIR. R. 46.4.2; 11TH CIR. R. 46-1(D).

289. 466 U.S. 668 (1984).

290. *See* discussion *supra* Part III.B.

HeinOnline -- 97 W. Va. L. Rev. 50 1994-1995

soning on the subject — from the Ninth Circuit — is both inadequate and wrong. The Supreme Court should define the standard for judging ineffectiveness of appellate counsel claims. In the process, it should state definitively whether its *Strickland* standard applies, and if so, how it applies. In doing so, the Court must identify the relevant differences between the role of trial counsel and the trial forum from the role of appellate counsel and the appellate forum. The Court must also analyze the full scope of the right to effective assistance of appellate counsel, including the constitutional, common law, procedural, and practical issues discussed in this article. No court has yet taken either of these steps. As we have done here, the Court should provide a uniform standard for judging ineffectiveness of appellate counsel claims that adopts but redefines *Strickland's* "reasonable competence" standard to fit the role of appellate counsel and the appellate forum, and that rejects *Strickland*'s prejudice requirement.

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